

State-by-State Summaries of the Uniform Trust Decanting Act

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SUMMARIES OF STATE DECANTING STATUTES

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SUMMARIES OF STATE DECANTING STATUTES

As of January 1, 2020
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DISCLAIMER. The attached summaries of state decanting statutes have been prepared by Susan T. Bart, a partner in Schiff Hardin LLP's Private Clients, Trusts & Estates Group. These summaries are only for broad informational purposes and may not be accurate in all respects. Although in many cases an attorney practicing in the particular state has reviewed the summary or a prior version of the summary, inaccuracies may still be present. Further, the summaries may oversimplify the complexity of these states and may or may not reflect how a particular statute is construed under the particular state law. In addition, the summaries, prepared and revised at different times, may not be completely consistent summary to summary in how particular questions are answered (for example, with similar statutory language one summary might state that the statute is "silent" while another summary might state "presumably yes" or "presumably no").

OTHER STATE TRUST LAW. A state's decanting statute must be construed in the context of the state's other trust laws. These summaries do not contain references to all of the other trust laws in a state that may affect the construction or application of the decanting statute. For example, terms used in the decanting statute may be defined in other trust statutes. Other trust statutes may place restrictions on the powers of an interested trustee, address fiduciary duties, define standards for fiduciary liability, or prescribe a beneficiary's remedy for a breach of fiduciary duty. A state's rule against perpetuities or restraint on alienation statute may also be relevant.

TERMINOLOGY. The term "new trust" is used to mean the trust into which the old trust (sometimes called the first trust) is being decanted. The term "second trust" is interchangeable with "new trust." The "new trust" may in fact be a pre-existing trust or in some states may even be a restatement of the old trust.

STATUTORY HISTORY. The section on statutory history is self-explanatory. It does not attempt to describe completely the effective date rules and applicability of the statute and any amendments.

ABILITY TO DECANT

1. *Discretionary distribution authority to decant?* This question looks at whether authority to invade principal, or authority to invade income, is required to decant, and whether the authority to invade must be "absolute" or may be limited authority (such as an ascertainable standard). Different statutes may define "absolute" discretion in different ways, or may use

different terms such as “unlimited” discretion. Some states have different provisions for decanting when there is unlimited discretion and decanting when there is limited discretion.

2. *Limitation on trustee who may decant?* This question looks at whether certain trustees, such as trustees who are also beneficiaries, are entirely prohibited from participating in decanting. Other questions address whether interested trustees may be subject to additional restrictions in exercising a decanting power.

CHANGES PERMITTED

3. *May new trust eliminate beneficiary’s mandatory distribution rights?* This question looks at whether the second trust may eliminate a mandatory distribution right, such as a right to income, an annuity payment or a unitrust payment, that is already in existence with respect to a beneficiary.

4. *May new trust eliminate beneficiary’s mandatory withdrawal rights?* This question looks at whether the second trust may eliminate a mandatory withdrawal right, such as a right to withdraw the trust at a particular age, that is already in existence with respect to a beneficiary.

5. *Must new and old trust beneficiaries be identical?* This question looks at whether the beneficiaries of the second trust must be the same as the beneficiaries of the first trust, without any additions or eliminations. For some states the answer depends on whether the trustee decanting has limited or unlimited discretion to make distributions.

6. *Are beneficiaries of new trusts limited to current beneficiaries of old trust?* This question looks at whether the new trust may benefit only beneficiaries who are currently eligible to receive distributions. In other words, must the new trust eliminate the interests of remainder beneficiaries? Some states limit the beneficiaries of the new trust to current beneficiaries, but permit the new trust to state that at some point in time the terms of the trust revert to what they were before the decanting (a “boomerang provision”).

7. *May remainder beneficiaries’ interests be accelerated?* This question solely looks at whether a remainder beneficiary immediately may become a current beneficiary by decanting. It does not address whether the decanting might result in the remainder beneficiary’s interest taking effect sooner under the new trust than it would under the old trust.

8. *New and old trust require same distribution standard?* This question looks at whether the new and old trust must use the same standard for discretionary distributions. In some states the answer depends on whether the trustee decanting has limited or unlimited discretion to make distributions.

9. *May trustee grant a power of appointment in new trust?* This question looks at whether the trustee may grant a power of appointment to a beneficiary in the new trust. In some states the answer depends on whether the trustee decanting has limited or unlimited discretion to make distributions. Some states may place limits on the type of power of appointment that may be granted.

10. *Must trustee grant identical power of appointment as old trust?* This question looks at whether, if there is a power of appointment in the old trust, the new trust must grant the identical power of appointment. In some states the answer depends on whether the trustee decanting has limited or unlimited discretion to make distributions.

11. *Supplemental needs trust exception?* In a few states that generally prohibit a trustee with limited discretion from changing beneficial interests, an exception may permit a trustee to create a special needs trust for a special needs beneficiary.

TAX RESTRICTIONS

12. *Marital deduction savings provision?* This question asks whether the statute expressly prohibits decanting in a manner that would cause the old trust not to qualify for an intended marital deduction. Even absent an express restriction the marital deduction for the old trust may be protected by a general tax savings provision in the statute or by provisions in the statute that require that any decanting be in furtherance of the purposes of the first trust.

13. *Charitable deduction savings provision?* This question asks whether the statute expressly prohibits decanting in a manner that would cause the old trust not to qualify for an intended charitable deduction. Even absent an express restriction the charitable deduction for the old trust may be protected by a general tax savings provision in the statute or by provisions in the statute that require that any decanting be in furtherance of the purposes of the first trust.

14. *Beneficiary/trustee savings provision?* This question asks whether the statute contains a provision prohibiting a beneficiary who is acting as a trustee from decanting in a manner that might cause adverse gift or estate tax consequences to the beneficiary/trustee. (In contrast, Question 2 considers whether such a beneficiary/trustee is completely prohibited from decanting.) In some states statutes other than the decanting statute may prohibit a beneficiary/trustee from exercising fiduciary powers in a manner that results in adverse gift or estate tax consequences. The preparer of these summaries did not check all of the states for such statutes.

15. *Other tax savings provisions?* Some statutes expressly prohibit decanting in a manner that would cause the old trust not to qualify for certain other intended tax benefits such as the gift tax annual exclusion (Section 2503) and the GST annual exclusion (Section 2642(c)). Some statutes contain general provisions prohibiting a decanting if the possession of the power to decant would have disqualified the old trust for any intended tax benefit (a “catch-all” provision). This question also notes whether the statute contains any special protections in decanting a trust that owns S corporation stock to prevent a decanting to a trust that would not qualify to own S corporation stock. This question also notes whether the statute contains any special protections in decanting a trust that is intended to be a beneficiary of retirement benefits and that is designed to permit a beneficiary’s life expectancy to be used in determining required minimum distributions.

16. *Non-grantor trust to grantor trust conversion permitted?* This question looks at whether a statute expressly permits or prohibits decanting a non-grantor trust to a grantor trust. Other considerations, such as whether such a conversion is in furtherance of the trust purposes or inconsistent with the grantor's intent, or unfairly imposes a financial burden on the grantor, should be considered before undertaking such a conversion.

OTHER RESTRICTIONS

17. *Rule against perpetuities savings provision?* This question asks whether the statute contains an express provision governing the rule against perpetuities period (or restriction on power of alienation) of the old trust. The state's rule against perpetuities statute may contain provisions that place certain limits on the decanting power, especially if the decanting statute states that the decanting power shall be considered the exercise of a power of appointment. The preparer of these summaries did not check all of the state rule against perpetuities statutes or consider their impact.

18. *May trustee increase trustee commission?* This question looks at whether there is an express prohibition or restriction on a trustee decanting to increase the trustee's fee or commission.

19. *Other restrictions?* This question looks at whether there are other express restrictions on decanting, such as on limiting a trustee's liability, exonerating a trustee or eliminating a trustee remover. The absence of an express restriction does not necessarily mean that the trustee could properly decant to make such modifications.

NOTICE, CONSENT & APPROVAL

20. *Notice to interested parties required prior to decanting?* This question looks at whether the statute requires notice to beneficiaries or other persons prior to decanting.

21. *Is decanting prohibited if a beneficiary objects?* This question looks at whether decanting is prohibited (or only permitted with court approval) if a beneficiary notifies the trustee of an objection to the proposed decanting. Presumably a beneficiary can always file a court action to block a proposed decanting if the beneficiary believes it is an abuse of fiduciary discretion.

22. *Court approval required to decant?* Generally, by definition, court approval is not required for decanting. In certain circumstances, however, court approval may be required. Generally even if court approval is not required, a trustee may seek court approval of a proposed decanting.

FIDUCIARY DUTIES

23. *Provision re: purposes for exercise or explicit fiduciary duty?* This question lumps together both any standard the trustee is to abide by in decanting (such as decanting only in furtherance of the trust purposes, or only in the interests of the beneficiaries) and any fiduciary

duty or standard that applies to an exercise of the decanting power. For example, some statutes state that the trustee has the same fiduciary duty as a trustee has in making a discretionary distribution.

24. *Provision that trustee has no duty to consider decanting?* This question asks whether the statute contains an express statement that the trustee has no duty to consider exercising the trustee's power to decant.

25. *Standard of review?* This question asks whether the decanting statute contains the standard of review that a court should apply in determining whether a decanting, if challenged, is valid. State statutes other than the decanting statute may contain the appropriate standard of review for exercises of discretionary fiduciary powers.

TRUSTS SUBJECT TO STATUTE

26. *Provision on trusts subject to statute?* This question looks at whether the statute expressly states what trusts may use the statute. For example, some statutes apply when the state's law governs the construction and/or administration of the trust, or when the trust is administered in the state, or when certain other conditions are met.

MISCELLANEOUS

27. *Other unique considerations?* This question serves as a place to note any other aspects of the statute that seemed particularly interesting.

ALABAMA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	Ala. Code 1975 § 19-3D-1, et seq.
Effective Date	1/1/19
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, expanded discretion to distribute principal ² <i>Limited discretion:</i> Yes, limited discretion to distribute principal ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁶ <i>Limited discretion:</i> Yes ⁷
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁸ <i>Limited discretion:</i> No ⁹
7. May remainder beneficiaries' interests be accelerated?	No ¹⁰
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> No ¹¹ <i>Limited discretion:</i> Yes ¹²
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹³ <i>Limited discretion:</i> Yes ¹⁴
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁵ <i>Limited discretion:</i> Yes ¹⁶
11. Supplemental needs trust exception?	Yes ¹⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²⁰ ; 2642(c) ²¹ ; Sub S ²² ; 401(a)(9) ²³ ; 672(f)(2)(A) ²⁴ ; Catch-all ²⁵
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits ²⁶
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁷
18. May trustee increase trustee commission?	Sometimes ²⁸

19. Other restrictions?	Decreasing trustee liability ²⁹ or eliminating trustee remover ³⁰
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ³¹
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No ³²
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³³
24. Provision that trustee has no duty to consider decanting?	Act does not create such a duty ³⁴
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁵
MISCELLANEOUS	
27. Other unique considerations?	Reasonable reliance provision ³⁶ ; protection of charitable interests ³⁷ ; saving provision for flawed decantings ³⁸ ; decanting of pet trusts ³⁹ ; provision re identity of settlor ⁴⁰ ; subsequently discovered assets. ⁴¹

ALABAMA STATUTE

ENROLLED, An Act,

To provide for the Alabama Uniform Trust Decanting Act; to give authorized fiduciaries of certain trusts decanting power; to provide for fiduciary duties; to provide procedures for exercising the decanting power; to provide notice requirements; to specify circumstances that would involve the courts or the Attorney General in decanting; to provide limitations and restrictions on the exercise of the decanting power; and to authorize under certain circumstances the decanting of trusts for the care of an animal. BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. SHORT TITLE

This act may be cited as the Alabama Uniform Trust Decanting Act.

Section 2. DEFINITIONS

In this act the following terms have the following meanings:

- (1) **APPOINTIVE PROPERTY.** The property or property interest subject to a power of appointment.
- (2) **ASCERTAINABLE STANDARD.** A standard relating to an individual's health, education, support, or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A), as amended, or 26 U.S.C. Section 2514(c)(1), as amended, and any applicable regulations.

(3) **AUTHORIZED FIDUCIARY.** (A) A trustee or other fiduciary, other than a settlor, that has the discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;

(B) a special fiduciary appointed under Section 9; or

(C) a special-needs fiduciary under Section 13.

(4) **BENEFICIARY.** A person that:

(A) has a present or future, vested or contingent, beneficial interest in a trust;

(B) holds a power of appointment over trust property; or

(C) is an identified charitable organization that will or may receive distributions under the terms of the trust.

(5) **CHARITABLE INTEREST.** An interest in a trust which:

(A) is held by an identified charitable organization and makes the organization a qualified beneficiary;

(B) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or

(C) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

(6) **CHARITABLE ORGANIZATION.** (A) a person, other than an individual, organized and operated exclusively for charitable purposes; or

(B) a government or governmental subdivision, agency, or instrumentality, to the extent it holds funds exclusively for a charitable purpose.

(7) **CHARITABLE PURPOSE.** The relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or another purpose, the achievement of which is beneficial to the community.

(8) **COURT.** The court in this state having jurisdiction in matters relating to trusts.

(9) **CURRENT BENEFICIARY.** A beneficiary that on the date the beneficiary's qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

(10) **DECANTING POWER.** The power of an authorized fiduciary under this act to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

(11) **EXPANDED DISTRIBUTIVE DISCRETION.** A discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

(12) **FIRST TRUST.** A trust over which an authorized fiduciary may exercise the decanting power.

- (13) **FIRST-TRUST INSTRUMENT.** The trust instrument for a first trust.
- (14) **GENERAL POWER OF APPOINTMENT.** A power of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.
- (15) **JURISDICTION.** With respect to a geographic area, includes a state or country.
- (16) **PERSON.** An individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.
- (17) **POWER OF APPOINTMENT.** A power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. The term does not include a power of attorney.
- (18) **POWERHOLDER.** A person in which a donor creates a power of appointment.
- (19) **PRESENTLY EXERCISABLE POWER OF APPOINTMENT.** A power of appointment exercisable by the powerholder at the relevant time. The term:
- (A) includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:
- (i) the occurrence of the specified event;
- (ii) the satisfaction of the ascertainable standard; or
- (iii) the passage of the specified time; and
- (B) does not include a power exercisable only at the powerholder's death.
- (20) **QUALIFIED BENEFICIARY.** A beneficiary that on the date the beneficiary's qualification is determined:
- (A) to be a distributee or permissible distributee of trust income or principal;
- (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date, but the termination of those interests would not cause the trust to terminate; or
- (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
- (21) **REASONABLY DEFINITE STANDARD.** A clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A), as amended, and any applicable regulations.
- (22) **RECORD.** Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (23) **SECOND TRUST.** (A) a first trust after modification under this act; or
- (B) a trust to which a distribution of property from a first trust is or may be made under this act.

(24) **SECOND-TRUST INSTRUMENT.** The trust instrument for a second trust.

(25) **SETTLOR.** Except as otherwise provided in Section 25, a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion.

(26) **SIGN.** With present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(27) **STATE.** A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(28) **TERMS OF THE TRUST.** The manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement.

(29) **TRUST INSTRUMENT.** A record executed by the settlor to create a trust or by any person to create a second trust which contains some or all of the terms of the trust, including any amendments.

Section 3. SCOPE

(a) Except as otherwise provided in subsections (b) and (c), this act applies to an express trust that is irrevocable, or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

(b) This act does not apply to a trust held solely for charitable purposes.

(c) Subject to Section 15, a trust instrument may restrict or prohibit exercise of the decanting power.

(d) This act does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, laws of this state other than this act, common law, a court order, or a nonjudicial settlement agreement.

(e) This act does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

Section 4. FIDUCIARY DUTY

(a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

(b) This act does not create or imply a duty to consider or exercise the decanting power or to inform beneficiaries about the applicability of this act.

(c) Except as otherwise provided in a first-trust instrument, for purposes of this act and Sections 19-3B-801 and 19-3B-802(a) of the Code of Alabama 1975, the terms of the first trust are deemed to include the decanting power.

Section 5. APPLICATION; GOVERNING LAW

This act applies to a trust created before, on, or after the effective date of this act which:

- (1) has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state; or
- (2) provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for the purpose of:
 - (A) administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state;
 - (B) construction of terms of the trust; or
 - (C) determining the meaning or effect of terms of the trust.

Section 6. REASONABLE RELIANCE

A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this act, laws of this state other than this act, or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

Section 7. NOTICE; EXERCISE OF DECANTING POWER

(a) In this section, a notice period begins on the day notice is given under subsection (c) and ends 59 days after the day notice is given.

(b) Except as otherwise provided in this act, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

(c) Except as otherwise provided in subsection (f), an authorized fiduciary shall not exercise the decanting power prior to 60 days after giving record notice of the intended exercise of the decanting power to:

- (1) each settlor of the first trust, if living or then in existence;
- (2) each qualified beneficiary of the first trust;
- (3) each holder of a presently exercisable power of appointment over any part or all of the first trust;
- (4) each person that currently has the right to remove or replace the authorized fiduciary;
- (5) each other fiduciary of the first trust;
- (6) each fiduciary of the second trust; and
- (7) the Attorney General, if Section 14(b) applies.

(d) An authorized fiduciary may give notice under subsection (c) to a qualified beneficiary who is a minor or incapacitated individual by giving notice to such individual's representative. An authorized fiduciary is not required to give notice under subsection (c) to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

(e) A notice under subsection (c) must:

power; (1) specify the manner in which the authorized fiduciary intends to exercise the decanting

(2) specify the proposed effective date for exercise of the power;

(3) include a copy of the first-trust instrument;

(4) include a copy of all second-trust instruments;

notice; and (5) include a statement indicating the capacity in which the intended recipient is being given

from the day notice is given. (6) include a statement that any application under Section 9 must be filed within six months

(f) The decanting power may be exercised before expiration of the notice period under subsection (a) if all persons entitled to receive notice waive the period in a signed record.

(g) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under Section 9.

(h) An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (c) if the authorized fiduciary acted with reasonable care to comply with subsection (c).

Section 8. REPRESENTATION

(a) Notice to a person with authority to represent and bind another person under a first-trust instrument or Chapter 3B (commencing with Section 19-3B-101) of Title 19 of the Code of Alabama 1975, has the same effect as notice given directly to the person represented.

(b) Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or Chapter 3B (commencing with Section 19-3B-101) of Title 19 of the Code of Alabama 1975, is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

(c) A person with authority to represent and bind another person under a first-trust instrument or Chapter 3B (commencing with Section 19-3B-101) of Title 19 of the Code of Alabama 1975, may file an application under Section 9 on behalf of the person represented.

(d) A settlor may not represent or bind a beneficiary under this act.

Section 9. COURT INVOLVEMENT

(a) On application of an authorized fiduciary, a person entitled to notice under Section 7(c), a beneficiary, or with respect to a charitable interest that is not entirely held by or for the benefit of one or more identified and existing charitable organizations, the Attorney General or other person that has standing to enforce the charitable interest, the court may:

(1) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this act and consistent with the fiduciary duties of the authorized fiduciary;

- (2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this act and to exercise the decanting power;
 - (3) approve an exercise of the decanting power;
 - (4) subject to the limitations set forth in subsection (c), determine that a proposed or attempted exercise of the decanting power is ineffective because:
 - (A) after applying Section 22, the proposed or attempted exercise does not or did not comply with this act; or
 - (B) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;
 - (5) determine the extent to which Section 22 applies to a prior exercise of the decanting power;
 - (6) provide instructions to the trustee regarding the application of Section 22 to a prior exercise of the decanting power; or
 - (7) order other relief to carry out the purposes of this act.
- (b) On application of an authorized fiduciary, the court may approve:
- (1) an increase in the fiduciary's compensation under Section 16; or
 - (2) a modification under Section 18 of a provision granting a person the right to remove or replace the fiduciary.
- (c) A proceeding under subsection (a)(4) may not be commenced by a person entitled to notice under Section 7(c), or by a beneficiary, unless such proceeding is commenced within six months from the day notice is given under Section 7(a). Failure to receive notice shall not extend the notice period if the authorized fiduciary acted with reasonable diligence to comply with the requirements of Section 7(c).

Section 10. FORMALITIES

An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must, directly or by reference to the notice required by Section 7, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

Section 11. DECANTING POWER UNDER EXPANDED DISTRIBUTIVE DISCRETION

- (a) In this section the following terms have the following meanings:
- (1) **NONCONTINGENT RIGHT.** A right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.
 - (2) **PRESUMPTIVE REMAINDER BENEFICIARY.** A qualified beneficiary other than a current beneficiary.

(3) **SUCCESSOR BENEFICIARY.** A beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(4) **VESTED INTEREST.** (A) A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

(B) a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property;

(C) a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property;

(D) a presently exercisable general power of appointment; or

(E) a right to receive an ascertainable part of the trust property on the trust's termination which is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(b) Subject to subsection (c) and Section 14:

(1) an authorized fiduciary that has expanded distributive discretion over the entire principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the entire principal of the first trust; and

(2) an authorized fiduciary that has expanded distributive discretion over part but not all of the principal of a first trust may exercise the decanting power over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

(c) Subject to Section 13, in an exercise of the decanting power under this section, a second trust may not:

(1) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection (d);

(2) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection (d); or

(3) reduce or eliminate a vested interest.

(d) Subject to subsection (c)(3) and Section 14, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

(1) retain a power of appointment granted in the first trust;

(2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

(4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

(e) A power of appointment described in subsection (d)(1) through (4) may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

Section 12. DECANTING POWER UNDER LIMITED DISTRIBUTIVE DISCRETION

(a) In this section, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(b) An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust. If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power over that part of the principal over which the authorized fiduciary has limited distributive discretion.

(c) Under this section and subject to Section 14, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(d) A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

- (1) the distribution is applied for the benefit of the beneficiary;
- (2) the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under Chapter 3B (commencing with Section 19-3B-101) of Title 19 of the Code of Alabama 1975; or
- (3) the distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

Section 13. TRUST FOR BENEFICIARY WITH DISABILITY

(a) In this section the following terms have the following meanings:

(1) **BENEFICIARY WITH A DISABILITY.** A beneficiary of a first trust who the authorized fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incompetent or incapacitated.

(2) **GOVERNMENTAL BENEFITS.** Financial aid or services from a state, federal, or other public agency.

(3) **SPECIAL-NEEDS FIDUCIARY.** With respect to a trust that has a beneficiary with a disability:

(A) a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(B) if no trustee or fiduciary has discretion under subparagraph (A), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(C) if no trustee or fiduciary has discretion under subparagraphs (A) and (B), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(4) **SPECIAL-NEEDS TRUST.** A trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(b) A special-needs fiduciary may exercise the decanting power under Section 11 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

- (1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and
- (2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

(c) In an exercise of the decanting power under this section, the following rules apply:

(1) Notwithstanding Section 11(c)(2), the interest in the second trust of a beneficiary with a disability may:

(A) be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. Section 1396p(d)(4)(C), as amended; or

(B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. Section 1396p(d)(4)(A), as amended.

(2) Section 11(c)(3) does not apply to the interests of the beneficiary with a disability.

(3) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.

Section 14. PROTECTION OF CHARITABLE INTEREST

(a) In this section the following terms have the following meanings:

(1) **DETERMINABLE CHARITABLE INTEREST.** A charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time, and which is unconditional or will be held solely for charitable purposes.

(2) **UNCONDITIONAL.** Not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986, as amended, on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

(b) If a first trust contains a determinable charitable interest that is not entirely held by or for the benefit of one or more identified and existing charitable organizations, the Attorney General has the rights of a qualified beneficiary and may represent and bind the charitable interest.

(c) If a first trust contains a charitable interest, the second trust or trusts may not:

- (1) diminish the charitable interest;
- (2) diminish the interest of an identified charitable organization that holds the charitable interest;
- (3) alter any charitable purpose stated in the first-trust instrument; or
- (4) alter any condition or restriction related to the charitable interest.

(d) If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (c).

(e) If a first trust contains a determinable charitable interest that is not entirely held by or for the benefit of one or more identified and existing charitable organizations, the second trust or trusts that include a charitable interest pursuant to subsection (c) must be administered under the law of this state unless:

- (1) the Attorney General, after receiving notice under Section 7, fails to object in a signed record delivered to the authorized fiduciary within the notice period;
- (2) the Attorney General consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or
- (3) the court approves the exercise of the decanting power.

(f) This act does not limit the powers and duties of the Attorney General under laws of this state other than this act.

Section 15. TRUST LIMITATION ON DECANTING

(a) An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:

- (1) the decanting power; or
- (2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(b) Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

- (1) the decanting power; or
- (2) a power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(c) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

(d) Subject to subsections (a) and (b), an authorized fiduciary may exercise the decanting power under this act even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

(e) If a first-trust instrument contains an express prohibition described in subsection (a) or an express restriction described in subsection (b), the provision must be included in the second-trust instrument.

Section 16. CHANGE IN COMPENSATION

(a) If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

- (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
- (2) the increase is approved by the court.

(b) If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by Chapter 3B (commencing with Section 19-3B-101) of Title 19 of the Code of Alabama 1975, unless:

- (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
- (2) the increase is approved by the court.

(c) A change in an authorized fiduciary's compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections (a) and (b).

Section 17. RELIEF FROM LIABILITY AND INDEMNIFICATION

(a) Except as otherwise provided in this section, a second-trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

(b) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(c) A second-trust instrument may not reduce fiduciary liability in the aggregate.

(d) Subject to subsection (c), a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by laws of this state other than this act.

Section 18. REMOVAL OR REPLACEMENT OF AUTHORIZED FIDUCIARY

An authorized fiduciary may not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

(1) the person holding the power consents to the modification in a signed record and the modification applies only to the person;

(2) the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

(3) the court approves the modification and the modification grants a substantially similar power to another person.

Section 19. TAX-RELATED LIMITATIONS

(a) In this section the following terms have the following meanings:

(1) **GRANTOR TRUST.** A trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. Sections 671 through 677, as amended, or 26 U.S.C. Section 679, as amended.

(2) **INTERNAL REVENUE CODE.** The United States Internal Revenue Code of 1986, as amended.

(3) **NONGRANTOR TRUST.** A trust that is not a grantor trust.

(4) **QUALIFIED BENEFITS PROPERTY.** Property subject to the minimum distribution requirements of 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations, or to any similar requirements that refer to 26 U.S.C. Section 401(a)(9) or the regulations.

(b) An exercise of the decanting power is subject to the following limitations:

(1) If a first trust contains property that qualified, or would have qualified but for provisions of this act other than this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

(2) If the first trust contains property that qualified, or would have qualified but for provisions of this act other than this section, for a charitable deduction for purposes of the income, gift, or estate tax under the Internal Revenue Code or a state income, gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

(3) If the first trust contains property that qualified, or would have qualified but for provisions of this act other than this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(b), as amended. If the first trust contains property that qualified, or would have qualified but for provisions of this act other than this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, by application of 26 U.S.C. Section 2503(c), as amended, the second-trust instrument must not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(c), as amended.

(4) If the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. Section 1361, as amended, and the first trust is, or but for provisions of this act other than this section would be, a permitted shareholder under any provision of 26 U.S.C. Section 1361, as amended, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. Section 1361(c)(2), as amended. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this act other than this section would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. Section 1361(d), as amended, the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(5) If the first trust contains property that qualified, or would have qualified but for provisions of this act other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c), as amended, the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. Section 2642(c), as amended.

(6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations, or any similar requirements that refer to 26 U.S.C. Section 401(a)(9), as amended or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and Section 22 applies to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A), as amended, the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. Section 672(f)(2)(A), as amended.

(8) In this paragraph, "tax benefit" means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to paragraph (9), a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(A) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

(B) the transfer of property held by the first trust or the first trust qualified, or but for provisions of this act other than this section, would have qualified for the tax benefit.

(9) Subject to paragraph (4):

(A) except as otherwise provided in paragraph (7), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(B) except as otherwise provided in paragraph (10), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

(10) An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(A) the first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or

(B) the first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:

(i) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(ii) the first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

Section 20. DURATION OF SECOND TRUST

(a) Subject to subsection (b), a second trust may have a duration that is the same as or different from the duration of the first trust.

(b) To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation which apply to property of the first trust.

Section 21. NEED TO DISTRIBUTE NOT REQUIRED

An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

Section 22. SAVING PROVISION

(a) If exercise of the decanting power would be effective under this act except that the second-trust instrument in part does not comply with this act, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) A provision in the second-trust instrument which is not permitted under this act is void to the extent necessary to comply with this act.

(2) A provision required by this act to be in the second-trust instrument which is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this act.

(b) If a trustee or other fiduciary of a second trust determines that subsection (a) applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

Section 23. TRUST FOR CARE OF ANIMAL

(a) In this section the following terms have the following meanings:

(1) **ANIMAL TRUST.** A trust or an interest in a trust created to provide for the care of one or more animals.

(2) **PROTECTOR.** A person appointed in an animal trust to enforce the trust on behalf of the animal or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

(b) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this act if each animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the power.

(c) A protector for an animal has the rights under this act of a qualified beneficiary.

(d) Notwithstanding any other provision of this act, if a first trust is an animal trust, in an exercise of the decanting power, the second trust must provide that trust property may be applied only to its intended purpose for the period the first trust benefitted the animal.

Section 24. TERMS OF SECOND TRUST

A reference in Chapter 3B (commencing with Section 19-3B-101) of Title 19 of the Code of Alabama 1975, to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

Section 25. SETTLOR

(a) For purposes of laws of this state other than this act and subject to subsection (b), a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

(b) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust, and the authorized fiduciary may be considered.

Section 26. LATER-DISCOVERED PROPERTY

(a) Except as otherwise provided in subsection (c), if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

(b) Except as otherwise provided in subsection (c), if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

(c) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

Section 27. OBLIGATIONS

A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

Section 28. UNIFORMITY OF APPLICATION AND CONSTRUCTION

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 29. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Section 30.

This act shall become effective on January 1, 2019, following its passage and approval by the Governor, or its otherwise becoming law.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² §11. See §2(11) for definition of "expanded distributive discretion."

³ §12.

⁴ If there is expanded discretion, no as to a "vested interest." §11(a)(3). "Vested interest" is defined in §11(a)(4). If there is limited discretion, the second trust must grant each beneficiary interests substantially similar to the beneficiary's interests under the first trust. §12(c).

⁵ With respect to expanded discretion, see §11(a)(3). With respect to limited discretion, see §12(c).

⁶ §11(c).

⁷ §12(c).

⁸ §11(c).

⁹ §12.

¹⁰ With respect to expanded discretion, see §11(c)(2). With respect to limited discretion, see §12(c).

¹¹ §11.

¹² §12(c).

¹³ §11(d), (e).

¹⁴ If substantially similar to power granted to beneficiary under first trust. §12(c).

¹⁵ §11(d), (e).

¹⁶ §12(c).

¹⁷ §13.

¹⁸ §19(b)(1).

¹⁹ §19(b)(2).

²⁰ §19(b)(3).

²¹ §19(b)(5).

²² §19(b)(4).

²³ §19(b)(6).

²⁴ §19(b)(7).

²⁵ §19(b)(8).

²⁶ §19(b)(9), (10).

²⁷ §20.

²⁸ §16.

²⁹ §17.

³⁰ §18.

³¹ §7.

³² §9.

³³ §4.

³⁴ §4(b).

³⁵ §5.

³⁶ A trustee may reasonably rely on the validity of a prior attempted decanting. §6.

³⁷ §14.

³⁸ §22.

³⁹ §23.

⁴⁰ §25.

⁴¹ §26.

ALASKA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	ALASKA STAT. § 13.36.157 through § 13.36.159; § 13.36.215 (definitions)
Effective Date	9/15/98
Amendment Date(s)	6/16/06; 3/28/08; 9/9/13
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, unlimited discretion to invade principal ² <i>Limited discretion:</i> Yes, power to invade principal without unlimited discretion ³
2. Limitation on trustee who may decant?	Yes ⁴
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, except with respect to extended trust duration ⁵
4. May new trust eliminate beneficiary's withdrawal rights?	No, except with respect to extended trust duration ⁶
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁷ <i>Limited discretion:</i> Yes ⁸
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> Presumably yes ⁹ <i>Limited discretion:</i> No ¹⁰
7. May remainder beneficiaries' interests be accelerated?	No ¹¹
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> Presumably no <i>Limited discretion:</i> Yes, but not required during extended term when new trust has longer term length than old trust ¹²
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹³ <i>Limited discretion:</i> Only if in invaded trust ¹⁴
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁵ <i>Limited discretion:</i> Yes ¹⁶
11. Supplemental needs trust exception?	Yes ¹⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	Yes ²⁰
15. Other tax savings provisions?	2503(b) ²¹ ; 2642(c) ²² ; S Corp ²³ ; Catch-all ²⁴
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁵

18. May trustee increase trustee commission?	No, unless the court approves ²⁶
19. Other restrictions	Decreasing liability or eliminating remover without court approval ²⁷ ; fixing asset values ²⁸
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes; 30 days to settlor, remover and one of the qualified beneficiaries ²⁹
21. Is decanting prohibited if a beneficiary objects?	No ³⁰
22. Court approval required to decant?	No ³¹
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³²
24. Provision that trustee has no duty to consider decanting?	Yes ³³
25. Standard of review?	Yes ³⁴
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁵
MISCELLANEOUS	
27. Other unique considerations?	Later discovered assets ³⁶

ALASKA STATUTE
AS §§ 13.36.157-159, 13.36.153 and 13.36.215(b)

Sec. 13.36.157. Exercise of power of appointment. (a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of that principal to a trustee of an appointed trust for, and only for the benefit of, one or more current beneficiaries of the invaded trust to the exclusion of other current beneficiaries. A permissible appointee of a power of appointment held by a beneficiary of the appointed trust is not considered a beneficiary of the appointed trust, regardless of whether the permissible appointee is a current beneficiary or a successor and remainder beneficiary.

(b) An authorized trustee exercising the power under (a) of this section may grant a discretionary power of appointment, including a presently exercisable power of appointment, in the appointed trust to one or more of the current beneficiaries of the invaded trust, to the extent that the beneficiary who is granted the power to appoint is authorized to receive the principal outright under the terms of the invaded trust. A permissible appointee is not limited to the beneficiaries of the invaded trust.

(c) Under (a) and (b) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust may include present or future members of that class.

(d) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust if the current beneficiaries of the appointed trust are the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust are the same as the successor and remainder beneficiaries of the invaded trust. The shares of the current beneficiaries of the appointed trust must be the same as the shares of the current beneficiaries of the invaded trust, and the shares of the successor and remainder beneficiaries of the appointed trust must be the same as the shares of the successor and remainder beneficiaries of the invaded trust.

(e) If the authorized trustee exercises the power under (d) of this section, the appointed trust must include the same standard authorizing the trustee to distribute the income or invade the principal of the appointed trust as the standard in the invaded trust. However, the standard authorizing the trustee to distribute the income or invade the principal of the appointed trust may be changed if the trustee appoints to an appointed trust that is a special needs trust, a pooled trust, or a third-party trust.

(f) If an authorized trustee exercises the power under (d) and (e) of this section to extend the duration of the appointed trust beyond the duration of the invaded trust for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust under (e) of this section, may also provide an additional trustee with unlimited discretion to invade the principal of the appointed trust during the extended duration. The trustee with unlimited discretion continues to be subject to the restrictions in (d) - (h) of this section.

(g) Under (d) - (f) of this section, if the beneficiaries of the invaded trust are described by a class, the beneficiaries of the appointed trust include present or future members of that class.

(h) If the authorized trustee exercises the power under (d) - (g) of this section and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust must grant this power of appointment in the appointed trust, and the class of permissible appointees shall be the same as in the invaded trust.

Sec. 13.36.158. Additional provisions relating to exercise of a power of appointment. (a) An exercise of the power to invade trust principal under AS 13.36.157 is the exercise of a special power of appointment.

(b) The appointed trust to which an authorized trustee appoints the assets of the invaded trust under AS 13.36.157 may have a duration that is longer than the duration set out in the invaded trust.

(c) If an authorized trustee has unlimited discretion to invade the principal of a trust and if the same trustee or another trustee has a power, not dependent on unlimited discretion, to invade principal under the trust instrument, the authorized trustee having unlimited discretion may exercise the power of appointment under AS 13.36.157(a) - (c).

(d) An authorized trustee may exercise the power to appoint in favor of an appointed trust under AS 13.36.157 whether or not there is a current need to invade principal under the terms of the invaded trust.

(e) An authorized trustee exercising the power under AS 13.36.157 - 13.36.159 has a fiduciary duty to exercise the power 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 the prevailing circumstances. The authorized trustee may not exercise the power under AS 13.36.157 - 13.36.159 if there is substantial evidence of a contrary intent of the settlor and it cannot be established that the settlor would be likely to have changed this intention under the circumstances existing at the time the trustee exercises the power. The provisions of the invaded trust may not be viewed alone as substantial evidence of a contrary intent of the settlor unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(f) The provisions of AS 13.36.157 - 13.36.159 may not be construed to abridge the right of a trustee to appoint property further in trust under the terms of the governing instrument of a trust, another provision of law, or common law, or as directed by a court having jurisdiction over the trust.

(g) Nothing in AS 13.36.157 - 13.36.159 creates or implies a duty to exercise a power to invade principal. An inference of impropriety may not be made, and liability is not incurred, as a result of an authorized trustee not exercising the power conferred under AS 13.36.157.

(h) A power authorized by AS 13.36.157 may be exercised, subject to the provisions of AS 13.36.159(a), unless expressly prohibited by the terms of the governing instrument. A general prohibition against

amending or revoking the invaded trust and a provision that constitutes a spendthrift clause do not preclude the exercise of a power under AS 13.36.157.

(i) An authorized trustee may not exercise a power authorized by AS 13.36.157 to

(1) reduce, limit, or modify a beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust, or a right to withdraw a specified dollar amount, if the mandatory right has come into effect with respect to the beneficiary, but the mandatory right may be reduced, limited, or modified during any extended duration of the trust; however, notwithstanding the other provisions in this paragraph, but subject to the other limitations in AS 13.36.157 - 13.36.159, an authorized trustee may exercise a power authorized by AS 13.36.157 to appoint to an appointed trust that is a special needs trust, a pooled trust, or a third-party trust;

(2) decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence unless the court having jurisdiction over the trust specifies otherwise;

(3) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under AS 13.36.157 unless a court having jurisdiction over the trust specifies otherwise;

(4) fix as binding and conclusive the value of an asset for purposes of distribution, allocation, or otherwise; or

(5) jeopardize

(A) the deduction or exclusion originally claimed with respect to a contribution to the invaded trust that qualified for the annual exclusion under 26 U.S.C. 2503(b), the marital deduction under 26 U.S.C. 2056(a) or 26 U.S.C. 2523(a), or the charitable deduction under 26 U.S.C. 170(a), 26 U.S.C. 642(c), 26 U.S.C. 2055(a), or 26 U.S.C. 2522(a) (Internal Revenue Code);

(B) the qualification of a transfer as a direct skip under 26 U.S.C. 2642(c) (Internal Revenue Code);

(C) the election to treat a corporation as a subchapter S corporation under 26 U.S.C. 1362 (Internal Revenue Code); or

(D) another specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under 26 U.S.C. (Internal Revenue Code).

(j) Before exercising the power under AS 13.36.157, an authorized trustee shall consider the tax implications of the exercise of the power.

(k) An authorized trustee may not exercise a power described in AS 13.36.157 - 13.36.159 in violation of the limitations on validity in AS 34.27.051 or 34.27.100, or the restrictions on exercising certain powers in AS 13.36.153 by trustees who are not independent. A violation voids the entire exercise of the power unless the exercise is modified to correct the violation.

(l) Unless a court having jurisdiction over the trust directs otherwise, an authorized trustee may not exercise a power authorized by AS 13.36.157 to change the provisions regarding the determination of the compensation of a trustee. The commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as for the invaded trust.

(m) A trustee may not receive a payment, a commission, or other compensation for appointing property from the invaded trust to an appointed trust under AS 13.36.157. However, a trustee may be compensated at a reasonable rate for the time spent considering and implementing the exercise of a power to appoint.

(n) Unless the invaded trust expressly provides otherwise, the provisions in AS 13.36.157 - 13.36.159 apply to

(1) a trust, whether testamentary or inter vivos, governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) a trust that has a trustee who is an individual domiciled in this state, or a trustee that is an entity having an office in this state, if a majority of the trustees select this state as the location for the primary administration of the trust and the selection is made by an instrument in writing that is signed and acknowledged by a majority of the trustees; the instrument exercising this selection shall be kept with the records of the invaded trust.

(o) In this section, "Internal Revenue Code" means the Internal Revenue Code of the United States (26 U.S.C.) as it exists on the effective date of this Act and as it is amended from time to time.

Sec. 13.36.159. Implementation of power of appointment. (a) Unless the authorized trustee provides otherwise, the appointment of

(1) all of the assets making up the principal of the invaded trust to an appointed trust includes subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust;

(2) a part but not all of the assets making up the principal of the invaded trust to an appointed trust may not include subsequently discovered assets belonging to the invaded trust or principal paid to or acquired by the invaded trust after the appointment to the appointed trust; those subsequently discovered assets remain the assets of the invaded trust.

(b) The exercise of the power to appoint to an appointed trust under AS 13.36.157 shall be evidenced by an instrument in writing that is signed, dated, and acknowledged by the authorized trustee. The exercise of the power is effective 30 days after the date of service of the instrument as specified in (d) of this section, unless the persons entitled to notice consent in writing to a sooner effective date.

(c) An authorized trustee may exercise the power authorized by AS 13.36.157 without the consent of the settlor or a person interested in the invaded trust and without court approval. However, an authorized trustee may seek court approval for the exercise. When seeking court approval, notice shall be sent to all qualified beneficiaries.

(d) A copy of the invaded trust, the appointed trust, and the instrument exercising the power shall be delivered to

(1) the settlor, if living, of the invaded trust;

(2) a person having the right, under the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under AS 13.36.157; and

(3) a qualified beneficiary or a person who may represent and bind a qualified beneficiary under AS 13.06.120.

(e) Notice under (d) of this section to a qualified beneficiary is not required if the settlor has exempted the authorized trustee from providing notification or information to beneficiaries under AS 13.36.080(b). Notice under (d) of this section shall be provided under AS 13.06.110.

(f) The instrument exercising the power must state whether the appointment is of all or part of the assets making up the principal of the invaded trust and, if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment. A failure to state whether the appointment is of all or part of the assets creates a presumption that only part of the assets is to be appointed.

(g) A person entitled to notice under (d) of this section may object to the trustee's exercise of the power under AS 13.36.157 - 13.36.159 by serving a written notice of objection on the trustee before the effective date of the exercise of the power. The failure to object does not constitute consent.

(h) The receipt of a copy of the instrument exercising the power does not, before the expiration of the limitation period in AS 13.36.100 with respect to a report disclosing the exercise, affect the right of a qualified beneficiary to object to the exercise of the power under AS 13.36.157 and to request the court to modify or to reverse the exercise.

(i) A copy of the instrument exercising the power shall be kept with the records of the invaded trust.

Section 13.36.153. Restrictions on exercising certain trustee powers.

(a) Notwithstanding AS 13.36.107, a trustee who is not an independent trustee may not exercise a power to make or cause to be made a discretionary distribution of either principal or income

(1) to or for the direct or indirect benefit of the trustee individually or to any person holding a power to remove and replace the trustee, except to the extent that the power is exercised in accordance with an ascertainable standard that relates to the health, education, maintenance, or support of the trustee or person;

(2) to satisfy a legal obligation that is owed by the trustee individually or by any person holding a power to remove and replace this trustee; or

(3) if the distribution would constitute a taxable gift from the trustee individually or from a person holding a power to remove and replace the trustee.

(b) The prohibitions of (a) of this section apply to a trustee even if the governing instrument states that the trustee may make distributions in the trustee's uncontrolled, absolute, or total discretion, or that distributions are not subject to review by a court, or the governing instrument otherwise indicates that distributions by the trustee are not subject to reasonableness when the trustee exercises discretion.

(c) If a trustee is prohibited by (a) of this section from exercising a power and if one or more other trustees are not prohibited by (a) of this section from exercising the power, the other trustees may exercise the power. If there is not a trustee who can exercise a power prohibited under (a) of this section, a party in interest may apply to the superior court to appoint an independent trustee to exercise the power.

(d) The provisions of (a) of this section do not prohibit a trustee from making payments, including reimbursement of and compensation of an independent trustee appointed under (c) of this section, for the protection of the trust or the assets of the trust, or for the expenses, losses, or liabilities incurred in the collection, care, administration, or protection of the trust or the assets of the trust.

(e) Except as provided in (f) of this section, this section applies to

(1) a trust that is created on or after August 9, 2000; or

(2) the decisions and actions of a trust that is in existence on August 9, 2000, if the decisions are made, or the actions occur, on or after August 9, 2000.

(f) The application provisions of (e) of this section do not apply if

(1) the terms of the trust, including the terms as amended, expressly provide that this section does not apply and either specifically refer to this section or otherwise clearly demonstrate the intent that this section does not apply; or

(2) the trust is irrevocable and all parties in interest elect under (g) of this section not to be subject to the application of this section; an election under this paragraph must be made on or before January 1, 2003, or three years after the date on which the trust becomes irrevocable, whichever date is later; however, notwithstanding AS 13.36.080, the trustee does not have a duty to inform the parties in interest of this election.

(g) The election allowed under (f) of this section shall be made by a written declaration that is delivered to the trustee.

(h) The prohibitions of (a) of this section do not apply to a trustee with respect to trust property, including income from the trust property, if the trust property would, upon the death of the trustee, be included, for any reason other than the exercise of a power prohibited by (a) of this section, in the gross estate of the trustee for federal estate tax purposes.

(i) This section does not create a new cause of action, or impair a cause of action existing before August 9, 2000, if the new or existing cause of action relates to the exercise of a power prohibited by (a) of this section that was exercised before August 9, 2000.

(j) In this section, “independent trustee” means a trustee that is not related or subordinate, as defined in 26 U.S.C. 672(c), to the person having the power to remove the trustee or to any beneficiary.

AS 13.36.215(b):

(b) In AS 13.36.157 - 13.36.159,

(1) “appointed trust” means an irrevocable trust that receives principal from an invaded trust under AS 13.36.157, including a new trust created by the settlor of the invaded trust or by the trustees, acting in that capacity, of the invaded trust;

(2) “authorized trustee” means, with regard to an invaded trust, a trustee with the authority to pay trust principal to or for a current beneficiary; in this paragraph, “trustee” does not include a settlor or a beneficiary to whom income or principal must be paid, currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee other than by the exercise of a power of appointment held in a nonfiduciary capacity;

(3) “current beneficiary” means a person or, with regard to a class of persons, a person who is a member of the class, to whom a trustee may distribute principal when exercising a power under AS 13.36.157;

(4) “invade” means pay directly to the beneficiary of a trust or apply to the benefit of a beneficiary;

(5) “invaded trust” means an irrevocable inter vivos or testamentary trust the principal of which is appointed under AS 13.36.157;

(6) “pooled trust” means a trust described in 42 U.S.C. 1396p(d)(4)(C) that meets the requirements for a pooled trust under the regulations of this state relating to the Medicaid treatment of trusts;

(7) “principal” means the assets of a trust, including accrued and accumulated income, but excluding income that is currently required to be distributed;

(8) “special needs trust” means a trust under 42 U.S.C. 1396p(d)(4)(A) that meets the requirements for a special needs trust under the regulations of this state relating to the Medicaid treatment of trusts;

(9) “third-party trust” means a trust that is

(A) established by a third party with the assets of the third party to provide for supplemental needs for a person eligible when the trust is created or at a future time for needs-based public assistance; and

(B) exempt from the provisions of the regulations of this state relating to the Medicaid treatment of trusts;

(10) “unlimited discretion” means the unlimited right to distribute principal if the right is not restricted by an ascertainable standard under 26 C.F.R. 26.2514-1.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² “An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of that principal to a trustee of an appointed trust for, and only for the benefit of, one or more current beneficiaries of the invaded trust to the exclusion of other current beneficiaries.” § 13.36.157(a).

³ “An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust if the current beneficiaries of the appointed trust are the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust are the same as the successor and remainder beneficiaries of the invaded trust.” § 13.36.157(d).

⁴ The term “authorized trustee” excludes the creator of the trust and a beneficiary to whom income or principal must be paid or who is or will become eligible to receive a distribution. § 13.36.215(b)(2).

⁵ § 13.36.158(i)(1).

⁶ § 13.36.158(i)(1).

⁷ The current beneficiaries may be “one or more current beneficiaries of the invaded trust to the exclusion of other current beneficiaries.” § 13.36.157(a).

⁸ § 13.36.157(d).

⁹ Section 13.36.157(a) provides that the appointment may be “only for the benefit of, one or more current beneficiaries of the invaded trust.”

¹⁰ The successor and remainder beneficiaries of the appointed trust must be the same as the successor and remainder beneficiaries of the invaded trust. § 13.36.157(d).

¹¹ Only current beneficiaries of the invaded trust can be current beneficiaries of the appointed trust. § 13.36.157(a); § 13.36.157(d).

¹² The appointed trust must “include the same standard authorizing the trustee to distribute the income or invade the principal of the appointed trust as the standard in the invaded trust.” § 13.36.157(e). If the appointed trust has a longer term than the invaded trust, however, after the invaded trust’s original term, the appointed trust may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term. § 13.36.157(f).

¹³ § 13.36.157(b).

¹⁴ “[I]f the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust must grant this power of appointment in the appointed trust, and the class of permissible appointees shall be the same as in the invaded trust.” § 13.36.157(h).

¹⁵ § 13.36.157(b).

¹⁶ § 13.36.157(h).

¹⁷ The standard for distribution may be changed if the appointed trust is a special needs trust, a pooled trust or a third-party trust. § 13.36.157(e). Further, section 13.36.158(i)(1) creates an exception to the restriction that a trustee not decant in a way that reduces a mandatory distribution right or existing withdrawal right by creating an exception for a special needs trust, a pooled trust, or a third-party trust. These types of trusts are defined in section 13.36.215.

¹⁸ § 13.36.158(i)(5)(A).

¹⁹ § 13.36.158(i)(5)(A).

²⁰ A trustee who is not an independent trustee may not decant in violation of the restrictions in section 13.36.153. § 13.36.158(K). Section 13.36.153 provides that a trustee who is not an independent trustee may not decant to or for the direct or indirect benefit of the trustee or a trustee remover unless the power is exercised in accordance with an ascertainable standard relating to health, education, maintenance or support. The restriction in section 13.36.153 does not apply if the trust would be included in the trustee’s gross estate.

²¹ § 13.36.158(i)(5)(A).

²² § 13.36.158(i)(5)(B).

²³ “An authorized trustee may not exercise a power authorized by AS 13.36.157 to . . . jeopardize . . . the election to treat a corporation as a subchapter S corporation under 26 U.S.C. 1362 (Internal Revenue Code) . . .” § 13.36.157(i)(5)(C).

²⁴ “An authorized trustee may not exercise a power authorized by AS 13.36.157 to . . . jeopardize . . . another specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under 26 U.S.C. (Internal Revenue Code).” § 13.36.157(i)(5)(D).

²⁵ “An authorized trustee may not exercise a power described in AS 13.36.157 – 13.36.159 in violation of the limitations on validity in AS 34.27.051 or 34.27.100 . . . A violation voids the entire exercise of such power unless the exercise is modified to correct the violation.” § 13.36.158(k). Sections AS 34.27.051 and 34.27.100 discuss the statutory rule against perpetuities (1,000 years) and suspension of the power of alienation, respectively.

²⁶ § 13.36.158(l).

²⁷ § 13.36.158(i)(2) and (3).

²⁸ The decanting cannot fix as binding and conclusive the value of an asset for purposes of distribution, allocation or otherwise. § 13.36.158(i)(4).

²⁹ Thirty days’ notice is required to the settlor, if living, to any person having the right to remove or replace the trustee and to one of the qualified beneficiaries. § 13.36.159(b), (d). While notice is not required to all qualified beneficiaries, after receiving a report disclosing the decanting, they would have the right to object to the decanting and to request the court to reverse or modify the decanting. § 13.36.159(h).

³⁰ § 13.36.159(g).

³¹ § 13.36.159(c).

³² “An authorized trustee exercising the power under AS 13.36.157 - 13.36.159 has a fiduciary duty to exercise the power 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 the prevailing circumstances. The authorized trustee may not exercise the power under AS 13.36.157 - 13.36.159 if there is substantial evidence of the contrary intent of the settlor and it cannot be established that the settlor would be likely to have changed this intention under the circumstances existing at the time the trustee exercises the power. The provisions of the invaded trust may not be viewed alone as substantial evidence of a contrary intent of the settlor unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.” § 13.36.158(e). “Before exercising the power under AS 13.36.157, an authorized trustee shall consider the tax implications of the exercise of the power.” § 13.36.158(j).

³³ “Nothing in AS 13.36.157 - 13.36.159 creates or implies a duty to exercise a power to invade principal. An inference of impropriety may not be made, and liability is not incurred, as a result of an authorized trustee not exercising the power conferred under AS 13.36.157.” § 13.36.158(g).

³⁴ § 13.36.158(e).

³⁵ § 13.36.158(n).

³⁶ § 13.36.159(a).

ARIZONA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	ARIZ. REV. STAT. ANN. § 14-10819
Effective Date	9/30/09
Amendment Date(s)	7/20/11; 8/3/18
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion to distribute income or principal ²
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ³
4. May new trust eliminate beneficiary's withdrawal rights?	Silent
5. Must new and old trust beneficiaries be identical?	No ⁴
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Presumably no ⁵
7. May remainder beneficiaries' interests be accelerated?	Silent
8. New and old trust require same distribution standard?	Yes, only when trustee is a possible beneficiary ⁶
9. May trustee grant a power of appointment in new trust?	Silent
10. Must new trust grant identical power of appointment as old trust?	Silent
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	See catch-all
13. Charitable deduction savings provision?	See catch-all
14. Beneficiary/trustee savings provision?	Yes ⁷
15. Other tax savings provisions?	Catch-all ⁸
16. Non-grantor trust to grantor trust conversion permitted?	Presumably no ⁹
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁰

18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Silent ¹¹
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No, but may seek court approval ¹²
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	No
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ¹³
MISCELLANEOUS	
27. Other unique considerations?	Restating trust provision ¹⁴

ARIZONA STATUTE
ARIZ. REV. STAT. ANN. § 14-10819

14-10819. Trustee's special power to appoint to other trust

A. Unless the terms of the trust instrument expressly provide otherwise, a trustee who has the discretion under the terms of a testamentary instrument or irrevocable inter vivos agreement to make distributions, regardless of whether a standard is provided in the trust instrument, to or for the benefit of a beneficiary of the trust may exercise without prior court approval the trustee's discretion by appointing part or all of the trust property in favor of a trustee of another trust if the exercise of this discretion:

1. Does not reduce any fixed nondiscretionary income payment to a beneficiary.
2. Does not alter any nondiscretionary annuity or unitrust payment to a beneficiary.
3. Is in favor of the beneficiaries of the trust.
4. Results in any ascertainable standard applicable for distributions from the trust being the same or more restrictive standard applicable for distributions from the recipient trust when the trustee exercising the power to appoint trust property described in this subsection is a possible beneficiary under the standard.
5. Does not adversely affect the tax treatment of the trust, the trustee, the settlor or the beneficiaries.

6. Does not violate the limitations on validity under sections 14-2901 and 14-2905.

B. This section applies to a trust governed by the laws of this state, including a trust whose governing jurisdiction is transferred to this state.

C. The exercise of the trustee's power to appoint trust property under subsection A of this section is considered to be the exercise of a special power of appointment.

D. The trustee, in the trustee's sole discretion, before or after the exercise of the trustee's power to appoint trust property under subsection A of this section, may request the court to approve the exercise.

E. The trustee may exercise the power to appoint all of the trust property pursuant to subsection A of this section by restating the trust instrument.

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² § 14-10819(A).

³ § 14-10819(A)(1-2).

⁴ A trustee may decant "in favor of the beneficiaries of the trust." § 14-10819(A)(3).

⁵ § 14-10819(A)(3).

⁶ When a trustee is a possible beneficiary, the standard for distributions from the recipient trust must be the same or more restrictive. § 14-10819(A)(4).

⁷ When a trustee is a possible beneficiary, the standard for distributions from the recipient trust must be the same or more restrictive. § 14-10819(A)(4).

⁸ The decanting cannot "adversely affect the tax treatment of the trust, the trustee, the settlor or the beneficiaries." § 14-10819(A)(5).

⁹ § 14-10819(A)(5). Some commentators, however, have suggested that the trust could be converted to a grantor trust prior to decanting by lending the assets to the grantor.

¹⁰ A decanting cannot "violate the limitations on validity under §§ 14-2901 and 14-2905." § 14-10819(A)(6). Section 14-2901 provides a RAP provision for (1) nonvested property interests, (2) general powers of appointment and (3) nongeneral powers of appointment. Section 14-2905 applies to nonvested property interests and powers of appointment created on or after December 31, 1994 and provides for judicial reformation of nonvested property interests and powers of appointment that violate the RAP.

¹¹ If decanting to a newly created trust, other statutory provisions would require notice of the new trust (unless the requirement of notice is negated in the trust agreement). § 14-10813.

¹² § 14-10819(A); § 14-10819(D).

¹³ “This section applies to a trust governed by the laws of this state, including a trust whose governing jurisdiction is transferred to this state.” § 14-10819(B).

¹⁴ “The trustee may exercise the discretion to appoint all of the trust estate pursuant to this section by restating the trust.” § 14-10819(E).

CALIFORNIA

State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	CAL. PROB. CODE §19501 ET SEQ.
Effective Date	1/1/19
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, expanded discretion to distribute principal ² <i>Limited discretion:</i> Yes, limited discretion to distribute principal ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁶ <i>Limited discretion:</i> Yes ⁷
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁸ <i>Limited discretion:</i> No ⁹
7. May remainder beneficiaries' interests be accelerated?	No ¹⁰
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> No ¹¹ <i>Limited discretion:</i> Yes ¹²
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹³ <i>Limited discretion:</i> Yes ¹⁴
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁵ <i>Limited discretion:</i> Yes ¹⁶
11. Supplemental needs trust exception?	Yes ¹⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²⁰ ; 2642(c) ²¹ ; Sub S ²² ; 401(a)(9) ²³ ; 672(f)(2)(A) ²⁴ ; Catch-all ²⁵
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits ²⁶
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁷
18. May trustee increase trustee commission?	Sometimes ²⁸

19. Other restrictions?	Decreasing trustee liability ²⁹ or eliminating trustee remover ³⁰
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ³¹
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No ³²
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³³
24. Provision that trustee has no duty to consider decanting?	Act does not create such a duty ³⁴
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁵
MISCELLANEOUS	
27. Other unique considerations? ³⁶	Protection of charitable interests ³⁷ ; saving provision for flawed decantings ³⁸ ; decanting of pet trusts ³⁹ ; provision re identity of settlor ⁴⁰ ; subsequently discovered assets ⁴¹

**CALIFORNIA STATUTE
SB 909**

SECTION 1. Part 9 (commencing with Section 19501) is added to Division 9 of the Probate Code, to read:

PART 9. Uniform Trust Decanting Act

19501. This part may be cited as the Uniform Trust Decanting Act.

19502. For purposes of this part:

(a) “Appointive property” means the property or property interest subject to a power of appointment.

(b) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code (26 U.S.C. Secs. 2041(b)(1)(A), 2514(c)(1)) and any applicable regulations.

(c) “Authorized fiduciary” means any of the following:

(1) A trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries.

(2) A special fiduciary appointed under Section 19509.

(3) A special-needs fiduciary under Section 19513.

(d) “Beneficiary” means a person that meets one of the following conditions:

(1) Has a present or future, vested or contingent, beneficial interest in a trust.

(2) Holds a power of appointment over trust property.

(3) Is an identified charitable organization that will or may receive distributions under the terms of the trust.

(e) “Charitable interest” means an interest in a trust that meets one of the following conditions:

(1) Is held by an identified charitable organization and makes the organization a qualified beneficiary.

(2) Benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

(3) Is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

(f) “Charitable organization” means either of the following:

(1) A person, other than an individual, organized and operated exclusively for charitable purposes.

(2) A government or governmental subdivision, agency, or instrumentality, to the extent it holds funds exclusively for a charitable purpose.

(g) “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or another purpose the achievement of which is beneficial to the community.

(h) “Court” means the court in this state having jurisdiction in matters relating to trusts.

(i) “Current beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

(j) “Decanting power” or “the decanting power” means the power of an authorized fiduciary under this part to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

(k) “Expanded distributive discretion” means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

(l) “First trust” means a trust over which an authorized fiduciary may exercise the decanting power.

(m) “First trust instrument” means the trust instrument for a first trust.

(n) “General power of appointment” means a power of appointment exercisable in favor of a powerholder, the powerholder’s estate, a creditor of the powerholder, or a creditor of the powerholder’s estate.

(o) “Jurisdiction,” with respect to a geographic area, includes a state or country.

(p) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(q) “Power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in, or another power of appointment over, the appointive property. The term does not include a power of attorney.

(r) “Powerholder” means a person in which a donor creates a power of appointment.

(s) “Presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the relevant time.

(1) The term includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after one of the following, respectively:

- (A) The occurrence of the specified event.
- (B) The satisfaction of the ascertainable standard.
- (C) The passage of the specified time.

(2) The term does not include a power exercisable only at the powerholder's death.

(t) "Qualified beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined, satisfies one of the following conditions:

- (1) Is a distributee or permissible distributee of trust income or principal.
- (2) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (1) terminated on that date without causing the trust to terminate.
- (3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(u) "Reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of Section 674(b)(5)(A) of the Internal Revenue Code (26 U.S.C. Sec. 674(b)(5)(A)) and any applicable regulations.

(v) "Second trust" means either of the following:

- (1) A first trust after modification under this part.
- (2) A trust to which a distribution of property from a first trust is or may be made under this part.

(w) "Second trust instrument" means the trust instrument for a second trust.

(x) "Settlor," except as otherwise provided in Section 19525, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion.

(y) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(z) "Terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement.

(aa) "Trust instrument" means a trust executed by the settlor to create a trust or by any person to create a second trust that contains some or all of the terms of the trust, including any amendments.

19503. (a) Except as otherwise provided in subdivisions (b) and (c), this part applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

(b) This part does not apply to a trust held solely for charitable purposes.

(c) Subject to Section 19515, a trust instrument may restrict or prohibit exercise of the decanting power.

(d) This part does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this state other than this part, common law, a court order, or a nonjudicial settlement agreement.

(e) This part does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

19504. (a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

(b) This part does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this part.

(c) Except as otherwise provided in a first trust instrument, for purposes of this part, the terms of the first trust are deemed to include the decanting power.

19505. This part applies to a trust created before, on, or after January 1, 2019, that satisfies either of the following conditions:

(a) Has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state.

(b) Provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for the purpose of any of the following:

(1) Administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state.

(2) Construction of terms of the trust.

(3) Determining the meaning or effect of terms of the trust.

19507. (a) In this section, a notice period begins on the day notice is given under subdivision (c) and ends 59 days after the day notice is given.

(b) An authorized fiduciary may exercise the decanting power without the consent of any person and without court approval in compliance with this part.

(c) Except as otherwise provided in subdivision (h), an authorized fiduciary shall give notice of the intended exercise of the decanting power not later than 60 days before the exercise to all of the following:

(1) Each settlor of the first trust, if living or then in existence.

(2) Each qualified beneficiary of the first trust.

(3) Each holder of a presently exercisable power of appointment over any part or all of the first trust.

(4) Each person that currently has the right to remove or replace the authorized fiduciary.

(5) Each other fiduciary of the first trust.

(6) Each fiduciary of the second trust.

(7) The Attorney General, if subdivision (b) of Section 19514 applies.

(d) Unless the trust instrument provides otherwise, an authorized fiduciary shall give notice under subdivision (c) to the guardian ad litem for a qualified beneficiary who is a minor and has no representative or who is an unascertained or unborn person. If a guardian ad litem has not been appointed at the time of the notice, the authorized fiduciary shall seek the appointment of one. The court may appoint a guardian ad litem, for purposes of this section, in instances where the only matter before the court is that appointment.

(e) If an authorized fiduciary knows, or has reason to know, that a person entitled to notice under subdivision (c) is substantially unable to manage that person's own financial resources or resist fraud or undue influence, the authorized fiduciary shall give notice under subdivision (c) to that person and to the individual appointed to act on that person's behalf, including, but not limited to, an attorney-in-fact under a power of attorney. If no such individual has been appointed at the time of the notice, the authorized fiduciary shall seek the appointment of such an individual. The court may appoint a guardian ad litem, for purposes of this section, in instances where the only matter before the court is that appointment.

(f) An authorized fiduciary is not required to give notice under subdivision (c) to a person who is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

(g) A notice under subdivision (c) shall include all of the following:

(1) A description of the manner in which the authorized fiduciary intends to exercise the decanting power, which shall include a statement as to the authorized fiduciary's reason for the proposed decanting and an explanation as to the differences between the first trust and the second trust or trusts.

(2) The proposed effective date for exercise of the power.

(3) A copy of the first trust instrument.

(4) A copy of all second trust instruments.

(5) A warning, set out in a separate paragraph in not less than 10-point bold type, or a reasonable equivalent thereof, that states the following:

"If you do not bring a court action to contest the proposed trust decanting (the proposed changes to the trust) within 59 days of this notice, you will lose your right to contest the decanting."

(h) The decanting power may be exercised before expiration of the notice period under subdivision (a) if all persons entitled to receive notice waive the period in a signed waiver.

(i) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under Section 19509 that asserts either of the following:

(1) An attempted exercise of the decanting power is ineffective because it did not comply with this part or was an abuse of discretion or breach of fiduciary duty.

(2) Section 19522 applies to the exercise of the decanting power.

(j) The notice required by this section shall be served by mail to the last known address, pursuant to Section 1215, or by personal delivery.

19508. (a) Notice to a person with authority to represent and bind another person under this code or a first trust instrument has the same effect as notice given directly to the person represented.

(b) Consent of or waiver by a person with authority to represent and bind another person under this code or a first trust instrument is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

(c) A person with authority to represent and bind another person under this code or a first trust instrument may file an application under Section 19509 on behalf of the person represented.

(d) A settlor may not represent or bind a beneficiary under this part.

19509. (a) On application of an authorized fiduciary, a person entitled to notice under subdivision (c) of Section 19507, a beneficiary, or, with respect to a charitable interest, the Attorney General or other person that has standing to enforce the charitable interest, the court may do any of the following:

(1) Provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this part and is consistent with the fiduciary duties of the authorized fiduciary.

(2) Appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this part and to exercise the decanting power.

(3) Approve an exercise of the decanting power.

(4) Determine that a proposed or attempted exercise of the decanting power is ineffective because of either of the following:

(A) After applying Section 19522, the proposed or attempted exercise does not or did not comply with this part.

(B) The proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty.

(5) Determine the extent to which Section 19522 applies to a prior exercise of the decanting power.

(6) Provide instructions to the trustee regarding the application of Section 19522 to a prior exercise of the decanting power.

(7) Order other relief to carry out the purposes of this part.

(b) If an application is made under subdivision (a), the burden is on the authorized fiduciary to establish that notice was given as required by Section 19507 and that the authorized fiduciary may exercise the decanting power.

(c) On application of an authorized fiduciary, the court may approve either or both of the following:

(1) An increase in the fiduciary's compensation under Section 19516.

(2) A modification under Section 19518 of a provision granting a person the right to remove or replace the fiduciary.

19510. An exercise of the decanting power shall be made in a writing signed by an authorized fiduciary. The signed writing shall, directly or by reference to the notice required by Section 19507, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

19511. (a) For purposes of this section:

(1) "Noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.

(2) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

(3) "Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(4) "Vested interest" means any of the following:

(A) A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power.

(B) A current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property.

(C) A current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property.

(D) A presently exercisable general power of appointment.

(E) A right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(b) Subject to subdivision (c) and Section 19514, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(c) Subject to Section 19513, in an exercise of the decanting power under this section, a second trust may not do any of the following:

(1) Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subdivision (d).

(2) Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subdivision (d).

(3) Reduce or eliminate a vested interest.

(d) Subject to paragraph (3) of subdivision (c) and Section 19514, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may do each of the following:

(1) Retain a power of appointment granted in the first trust.

(2) Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment.

(3) Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary.

(4) Create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

(e) A power of appointment described in paragraphs (1) to (4), inclusive, of subdivision (d) may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than, or different from, the beneficiaries of the first trust.

(f) If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

19512. (a) For purposes of this section, “limited distributive discretion” means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(b) An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(c) Under this section and subject to Section 19514, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust. For purposes of this subdivision, “substantially similar” means that there is no material change in a beneficiary’s beneficial interests, except as provided in subdivision (d).

(d) A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if it satisfies any of the following conditions:

(1) The distribution is applied for the benefit of the beneficiary.

(2) The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this code.

(3) The distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary.

(e) If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

19513. (a) For purposes of this section:

(1) “Beneficiary with a disability” means a beneficiary of a first trust who the special needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated legally incompetent.

(2) “Governmental benefits” means financial aid or services from a state, federal, or other public agency.

(3) “Special needs fiduciary” means, with respect to a trust that has a beneficiary with a disability, any of the following:

(A) A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries.

(B) If no trustee or fiduciary has discretion under subparagraph (A), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries.

(C) If no trustee or fiduciary has discretion under subparagraphs (A) and (B), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(4) “Special needs trust” means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(b) A special needs fiduciary may exercise the decanting power under Section 19511 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if both of the following conditions are satisfied:

(1) A second trust is a special needs trust that benefits the beneficiary with a disability.

(2) The special needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

(c) In an exercise of the decanting power under this section, all of the following rules apply:

(1) Notwithstanding paragraph (2) of subdivision (c) of Section 19511, the interest in the second trust of a beneficiary with a disability may fulfill either of the following:

(A) Be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under Section 1396p(d)(4)(C) of the Public Health and Welfare Code (42 U.S.C. Sec. 1396p(d)(4)(C)).

(B) Contain payback provisions complying with reimbursement requirements of Medicaid law under Section 1396p(d)(4)(A) of the Public Health and Welfare Code (42 U.S.C. Sec. 1396p(d)(4)(A)).

(2) Paragraph (3) of subdivision (c) of Section 19511 does not apply to the interests of the beneficiary with a disability.

(3) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary’s beneficial interests in the first trust.

19514.

(a) For purposes of this section:

(1) “Determinable charitable interest” means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and that is unconditional or will be held solely for charitable purposes.

(2) “Unconditional” means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986 on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

(b) If a first trust contains a determinable charitable interest, the Attorney General has the rights of a qualified beneficiary and may represent and bind the charitable interest.

(c) If a first trust contains a charitable interest, the second trust or trusts may not do any of the following:

(1) Diminish the charitable interest.

(2) Diminish the interest of an identified charitable organization that holds the charitable interest.

(3) Alter any charitable purpose stated in the first trust instrument.

(4) Alter any condition or restriction related to the charitable interest.

(d) If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subdivision (c).

(e) If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subdivision (c) shall be administered under the law of this state unless any of the following occur:

(1) The Attorney General, after receiving notice under Section 19507, fails to object in a signed writing delivered to the authorized fiduciary within the notice period.

(2) The Attorney General consents in a signed writing to the second trust or trusts being administered under the law of another jurisdiction.

(3) The court approves the exercise of the decanting power.

(f) This part does not limit the powers and duties of the Attorney General under law of this state other than this part.

19515. (a) An authorized fiduciary may not exercise the decanting power to the extent the first trust instrument expressly prohibits exercise of either of the following:

(1) The decanting power.

(2) A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(b) Exercise of the decanting power is subject to any restriction in the first trust instrument that expressly applies to exercise of either of the following:

(1) The decanting power.

(2) A power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(c) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

(d) Subject to subdivisions (a) and (b), an authorized fiduciary may exercise the decanting power under this part even if the first trust instrument permits the authorized fiduciary or another person to modify the first trust instrument or to distribute part or all of the principal of the first trust to another trust.

(e) If a first trust instrument contains an express prohibition described in subdivision (a) or an express restriction described in subdivision (b), the authorized fiduciary shall include that provision or restriction in the second trust instrument.

19516. (a) If a first trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless either of the following occurs:

(1) All qualified beneficiaries of the second trust consent to the increase in a signed writing.

(2) The increase is approved by the court.

(b) If a first trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by this code unless either of the following occurs:

(1) All qualified beneficiaries of the second trust consent to the increase in a signed writing.

(2) The increase is approved by the court.

(c) (1) A change in an authorized fiduciary's compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subdivisions (a) and (b).

(2) For purposes of this subdivision, an incidental change to an authorized fiduciary's compensation includes, but is not limited to, an increase in the compensation of the authorized fiduciary for either of the following reasons:

(A) The second trust lasts longer than the first trust.

(B) The second trust has a greater value than the first trust.

19517. (a) Except as otherwise provided in this section, a second trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first trust instrument.

(b) A second trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(c) A second trust instrument may not reduce fiduciary liability in the aggregate.

(d) Subject to subdivision (c), a second trust instrument may reallocate fiduciary powers among fiduciaries as permitted by the law of this state other than this part.

19518. An authorized fiduciary may not exercise the decanting power to modify a provision in a first trust instrument granting another person power to remove or replace the fiduciary unless any of the following occurs:

(a) The person holding the power consents to the modification in a signed writing and the modification applies only to the person.

(b) The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed writing and the modification grants a substantially similar power to another person.

(c) The court approves the modification and the modification grants a substantially similar power to another person.

19519.

(a) For purposes of this section:

(1) “Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under Sections 671 to 677, inclusive, or Section 679 of the Internal Revenue Code (26 U.S.C. Secs. 671 to 677, 679).

(2) “Nongrantor trust” means a trust that is not a grantor trust.

(3) “Qualified benefits property” means property subject to the minimum distribution requirements of Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)), and any applicable regulations, or to any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)) or the regulations.

(b) An exercise of the decanting power is subject to all of the following limitations:

(1) If a first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate, or inheritance tax, the second trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

(2) If the first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for a charitable deduction for purposes of the income, gift, or estate tax under the Internal Revenue Code or a state income, gift, estate, or inheritance tax, the second trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

(3) If the first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)), the second trust instrument shall not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)). If the first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)) by application of Section 2503(c) of the Internal Revenue Code (26 U.S.C. Sec. 2503(c)), the second trust instrument shall not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under Section 2503(c) of the Internal Revenue Code (26 U.S.C. Sec. 2503(c)).

(4) If the property of the first trust includes shares of stock in an S-corporation, as defined in Section 1361 of the Internal Revenue Code (26 U.S.C. Sec. 1361) and the first trust is, or but for provisions of this part other than this section would be, a permitted shareholder under any provision of Section 1361 of the Internal Revenue Code (26 U.S.C. Sec. 1361), an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under Section 1361(c)(2) of the Internal Revenue Code (26 U.S.C. Sec. 1361(c)(2)). If the property of the first trust includes shares of stock in an S-corporation and the first trust is, or but for provisions of this part other than this section would be, a qualified subchapter-S trust within the meaning of Section 1361(d) of the Internal Revenue Code (26 U.S.C. Sec. 1361(d)), the second trust instrument shall not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(5) If the first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under Section 2642(c) of the Internal Revenue Code (26 U.S.C. Sec. 2642(c)), the second trust instrument shall not include or omit a term that, if included in or omitted from the first trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under Section 2642(c) of the Internal Revenue Code (26 U.S.C. Sec. 2642(c)).

(6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second trust instrument may not include or omit any term that, if included in or omitted from the first trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)) and any applicable regulations, or any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)) or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and Section 19522 applies to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of Section 672(f)(2)(A) of the Internal Revenue Code (26 U.S.C. Sec. 672(f)(2)(A)), the second trust may not include or omit a term that, if included in or omitted from the first trust instrument, would have prevented the first trust from qualifying under Section 672(f)(2)(A) of the Internal Revenue Code (26 U.S.C. Sec. 672(f)(2)(A)).

(8) In this paragraph, “tax benefit” means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to paragraph (9), a second trust instrument may not include or omit a term that, if included in or omitted from the first trust instrument, would have prevented qualification for a tax benefit if both of the following apply:

(A) The first trust instrument expressly indicates an intent to qualify for the benefit or the first trust instrument clearly is designed to enable the first trust to qualify for the benefit.

(B) The transfer of property held by the first trust or the first trust qualified, or, but for provisions of this part other than this section, would have qualified for the tax benefit.

(9) (A) Subject to paragraph (4), and except as otherwise provided in paragraph (7), the second trust may be a nongrantor trust, even if the first trust is a grantor trust.

(B) Subject to paragraph (4), and except as otherwise provided in paragraph (10), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

(10) An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed writing delivered to the fiduciary within the notice period and either of the following conditions is satisfied:

(A) The first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person.

(B) The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless either of the following apply:

(i) The settlor has the power at all times to cause the second trust to cease to be a grantor trust.

(ii) The first trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second trust instrument contains the same provision.

19520. (a) Subject to subdivision (b), a second trust may have a duration that is the same as, or different from, the duration of the first trust.

(b) To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation that apply to property of the first trust.

19521. An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

19522. (a) If exercise of the decanting power would be effective under this part, except that the second trust instrument in part does not comply with this part, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) A provision in the second trust instrument that is not permitted under this part is void to the extent necessary to comply with this part.

(2) A provision required by this part to be in the second trust instrument, which is not contained in the instrument, is deemed to be included in the instrument to the extent necessary to comply with this part.

(b) If a trustee or other fiduciary of a second trust determines that subdivision (a) applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

19523. (a) For purposes of this section:

(1) "Animal trust" means a trust or an interest in a trust described in Section 15212.

(2) "Protector" means either of the following:

(A) A person appointed in an animal trust to enforce the trust on behalf of the animal as described in subdivision (c) of Section 15212 or, if no person is appointed in the trust for that purpose, a person appointed by the court for that purpose.

(B) A nonprofit charitable corporation described in subdivision (e) of Section 15212 that has requested an accounting in writing.

(b) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this part if each animal that benefits from the trust were an individual, if the protector consents in a signed writing to the exercise of the power.

(c) A protector for an animal has the rights under this part of a qualified beneficiary.

(d) Notwithstanding any other provision of this part, if a first trust is an animal trust, in an exercise of the decanting power, the second trust shall provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

19524. A reference in this code to a trust instrument or terms of the trust includes a second trust instrument and the terms of the second trust.

19525. (a) For purposes of the law of this state other than this part and subject to subdivision (b), a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

(b) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust, and the authorized fiduciary may be considered.

19526. (a) Except as otherwise provided in subdivision (c), if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

(b) Except as otherwise provided in subdivision (c), if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered

property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

(c) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

19527. A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

19529. Nothing in this part limits a trustee's ability to petition for instructions or other approval under a trust pursuant Chapter 3 (commencing with Section 17200) of Part 5 or to petition for modification of a trust pursuant to Chapter 3 (commencing with Section 15400) of Part 2.

19530. The provisions of this part are severable. If any provision of this part or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² § 19511(b). See § 19502(k) for definition of "expanded distributive discretion."

³ § 19512(b).

⁴ If there is expanded discretion, no as to a "vested interest." § 19511(c)(3). "Vested interest" is defined in § 19511(a)(4). If there is limited discretion, the second trust must grant each beneficiary interests substantially similar to the beneficiary's interests under the first trust. § 19511(c).

⁵ With respect to expanded discretion, see § 19511(c)(3). With respect to limited discretion, see § 19512(c).

⁶ § 19511(c).

⁷ § 19512(c).

⁸ § 19511(c)

⁹ § 19512.

¹⁰ With respect to expanded discretion, see § 19511(c). With respect to limited discretion, see § 19512(c).

¹¹ § 19511.

¹² § 19512(c).

¹³ § 19511(d), (e).

¹⁴ If substantially similar to power granted to beneficiary under first trust. § 19512(c).

¹⁵ § 19511(d), (e).

¹⁶ § 19512(c).

¹⁷ § 19513.

¹⁸ § 19519(b)(1).

¹⁹ § 19519(b)(2).

²⁰ § 19519(b)(3).

²¹ § 19519(b)(5).

²² § 19519(b)(4).

²³ § 19519(b)(6).

²⁴ § 19519(b)(7).

²⁵ § 19519(b)(8).

²⁶ § 19519(b)(9), (10).

²⁷ § 19520.

²⁸ § 19516.

²⁹ § 19517.

³⁰ § 19518.

³¹ § 19507. California added subsections 19507(d) and (e). Subsection 19507(d) provides that unless the trust instrument provides otherwise, notice for a qualified beneficiary who is a minor and has no representative should be given to a guardian ad litem, even if it is necessary to have a guardian ad litem appointed for that purpose. The subsection also requires notice to a guardian ad litem in the case of a qualified beneficiary who is an unascertained or unborn person and has no representative. The reference to an unborn person is puzzling, however, because an unborn person would not be a qualified beneficiary.

Subsection 19507(e) requires that notice also be given to a representative of the authorized fiduciary who knows, or has reason to know, that the person is substantially unable to manage that person's own financial resources or resist fraud or undue influence.

The California statute requires that the notice also include the reason for the decanting and an explanation of the differences between the first and second trusts. In addition, the notice must state: "If

you do not bring a court action to contest the proposed trust decanting (the proposed changes to the trust) within 59 days of this notice, you will lose your right to contest the decanting.”

Further, California deleted the provision of the UTDA that provides that an attempted exercise is not ineffective because of the failure to give notice to a person if the authorized fiduciary acted with reasonable care to comply with the notice requirements.

³² § 19509. The California statute provides that in a court action the burden is on the authorized fiduciary to establish that notice was given and that the authorized fiduciary may exercise the decanting power.

³³ § 19504.

³⁴ § 19504(b).

³⁵ § 19505.

³⁶ Unlike the UTDA, the California statute does not include a provision that a trustee may reasonably rely on the validity of a prior attempted decanting.

³⁷ § 19514.

³⁸ § 19522.

³⁹ § 19523.

⁴⁰ § 19525.

⁴¹ § 19526.

COLORADO

State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	C.R.S. 15-16-901 et seq. (2016)
Effective Date	8/10/16
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, expanded discretion to distribute principal ² <i>Limited discretion:</i> Yes, limited discretion to distribute principal ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁶ <i>Limited discretion:</i> Yes ⁷
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁸ <i>Limited discretion:</i> No ⁹
7. May remainder beneficiaries' interests be accelerated?	No ¹⁰
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> No ¹¹ <i>Limited discretion:</i> Yes ¹²
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹³ <i>Limited discretion:</i> Yes ¹⁴
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁵ <i>Limited discretion:</i> Yes ¹⁶
11. Supplemental needs trust exception?	Yes ¹⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²⁰ ; 2642(c) ²¹ ; Sub S ²² ; 401(a)(9) ²³ ; 672(f)(2)(A) ²⁴ ; Catch-all ²⁵
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits ²⁶
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁷
18. May trustee increase trustee commission?	Sometimes ²⁸

19. Other restrictions?	Decreasing trustee liability ²⁹ or eliminating trustee remover ³⁰
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ³¹
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No ³²
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³³
24. Provision that trustee has no duty to consider decanting?	Act does not create such a duty ³⁴
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁵
MISCELLANEOUS	
27. Other unique considerations?	Reasonable reliance provision ³⁶ ; protection of charitable interests ³⁷ ; saving provision for flawed decantings ³⁸ ; decanting of pet trusts ³⁹ ; provision re identity of settlor ⁴⁰ ; subsequently discovered assets ⁴¹ ; relation of divorce and decanting. ⁴²

**COLORADO STATUTE
C.R.S. 15-16-901 et seq.**

15-16-901. Short title

The short title of this part 9 is the “Colorado Uniform Trust Decanting Act”.

15-16-902. Definitions

As used in this part 9, unless the context otherwise requires:

- (1) “Appointive property” means the property or property interest subject to a power of appointment.
- (2) “Ascerttainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of 26 U.S.C. sec. 2041 (b) (1) (A), as amended, or 26 U.S.C. sec. 2514 (c) (1), as amended, and any applicable regulations.
- (3) “Authorized fiduciary” means:
 - (a) A trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;
 - (b) A special fiduciary appointed under section 15-16-909; or
 - (c) A special-needs fiduciary under section 15-16-913.

- (4) “Beneficiary” means a person that:
- (a) Has a present or future, vested or contingent, beneficial interest in a trust;
 - (b) Holds a power of appointment over trust property; or
 - (c) Is an identified charitable organization that will or may receive distributions under the terms of the trust.
- (5) “Charitable interest” means an interest in a trust which:
- (a) Is held by an identified charitable organization and makes the organization a qualified beneficiary;
 - (b) Benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or
 - (c) Is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.
- (6) “Charitable organization” means:
- (a) A person, other than an individual, organized and operated exclusively for charitable purposes; or
 - (b) A government or governmental subdivision, agency, or instrumentality, to the extent it holds funds exclusively for a charitable purpose.
- (7) “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or another purpose, the achievement of which is beneficial to the community.
- (8) “Court” means the court in this state having jurisdiction in matters relating to trusts.
- (9) “Current beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.
- (10) “Decanting power” or “the decanting power” means the power of an authorized fiduciary under this part 9 to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.
- (11) “Expanded distributive discretion” means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.
- (12) “First trust” means a trust over which an authorized fiduciary may exercise the decanting power.
- (13) “First-trust instrument” means the trust instrument for a first trust.
- (14) “General power of appointment” means a power of appointment exercisable in favor of a powerholder, the powerholder’s estate, a creditor of the powerholder, or a creditor of the powerholder’s estate.
- (15) “Jurisdiction”, with respect to a geographic area, includes a state or country.

(16) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(17) “Power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. The term does not include a power of attorney.

(18) “Powerholder” means a person in which a donor creates a power of appointment.

(19) “Presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the relevant time. The term:

(a) Includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

- (I) The occurrence of the specified event;
- (II) The satisfaction of the ascertainable standard; or
- (III) The passage of the specified time; and

(b) Does not include a power exercisable only at the powerholder’s death.

(20) “Qualified beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) of this subsection (20) terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(21) “Reasonably definite standard” means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. sec. 674 (b) (5) (A), as amended, and any applicable regulations.

(22) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(23) “Second trust” means:

(a) A first trust after modification under this part 9; or

(b) A trust to which a distribution of property from a first trust is or may be made under this part 9.

(24) “Second-trust instrument” means the trust instrument for a second trust.

(25) “Settlor”, except as otherwise provided in section 15-16-925, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each

person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion.

(26) "Sign" means, with present intent to authenticate or adopt a record:

- (a) To execute or adopt a tangible symbol; or
- (b) To attach to or logically associate with the record an electronic symbol, sound, or process.

(27) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(28) "Terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement.

(29) "Trust instrument" means a record executed by the settlor to create a trust or by any person to create a second trust which contains some or all of the terms of the trust, including any amendments.

15-16-903. Scope - definitions

(1) Except as otherwise provided in subsections (2) and (3) of this section, this part 9 applies to an express trust that is:

- (a) Irrevocable; or
- (b) Revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

(2) This part 9 does not apply to a trust held solely for charitable purposes.

(3) Subject to section 15-16-915, a trust instrument may restrict or prohibit exercise of the decanting power.

(4) This part 9 does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this state other than this part 9, common law, a court order, or a nonjudicial settlement agreement.

(5) This part 9 does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

(6) (a) Neither this part 9 nor an exercise of the decanting power described in this part 9 affects:

(I) The determination whether a beneficial interest in a first trust or second trust is property or an asset of a spouse for purposes of distribution of property under *section 14-10-113, C.R.S.*; or

(II) The power of a divorce court to fashion remedies between the parties in an action under title 14, C.R.S.

(b) Nothing in this subsection (6) expands or limits the power of a divorce court in law or equity over a first trust or a second trust or any trustee thereof.

(c) As used in this subsection (6), unless the context requires otherwise, “divorce court” means a court in this state having jurisdiction over matters brought pursuant to title 14, C.R.S.

15-16-904. Fiduciary duty

(1) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

(2) This part 9 does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this part 9.

(3) Except as otherwise provided in a first-trust instrument, for purposes of this part 9 the terms of the first trust are deemed to include the decanting power.

15-16-905. Application - governing law

(1) This part 9 applies to a trust created before, on, or after August 10, 2016, which:

(a) Has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state; or

(b) Provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for the purpose of:

(I) Administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state;

(II) Construction of terms of the trust; or

(III) Determining the meaning or effect of terms of the trust.

15-16-906. Reasonable reliance

A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this part 9, law of this state other than this part 9, or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

15-16-907. Notice - exercise of decanting power

(1) In this section, a notice period begins on the day notice is given under subsection (3) of this section and ends sixty-two days after the day notice is given.

(2) Except as otherwise provided in this part 9, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

(3) Except as otherwise provided in subsection (6) of this section, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than sixty-three days before the exercise to:

(a) Each settlor of the first trust, if living or then in existence;

(b) Each qualified beneficiary of the first trust;

first trust;

- (c) Each holder of a presently exercisable power of appointment over any part or all of the

- (d) Each person that currently has the right to remove or replace the authorized fiduciary;

- (e) Each other fiduciary of the first trust;

- (f) Each fiduciary of the second trust; and

- (g) The attorney general, if section 15-16-914 (2) applies.

(4) An authorized fiduciary is not required to give notice under subsection (3) of this section to a qualified beneficiary who is a minor and has no representative or to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

(5) A notice under subsection (3) of this section must:

power;

- (a) Specify the manner in which the authorized fiduciary intends to exercise the decanting

- (b) Specify the proposed effective date for exercise of the power;

- (c) Include a copy of the first-trust instrument; and

- (d) Include a copy of all second-trust instruments.

(6) The decanting power may be exercised before expiration of the notice period under subsection (1) of this section if all persons entitled to receive notice waive the period in a signed record.

(7) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under section 15-16-909 asserting that:

- (a) An attempted exercise of the decanting power is ineffective because it did not comply with this part 9 or was an abuse of discretion or breach of fiduciary duty; or

- (b) Section 15-16-922 applies to the exercise of the decanting power.

(8) An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (3) of this section if the authorized fiduciary acted with reasonable care to comply with subsection (3) of this section.

15-16-908. Representation

(1) Notice to a person with authority to represent and bind another person under a first-trust instrument or this part 9 has the same effect as notice given directly to the person represented.

(2) Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or this part 9 is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

(3) A person with authority to represent and bind another person under a first-trust instrument or this part 9 may file an application under section 15-16-909 on behalf of the person represented.

(4) A settlor may not represent or bind a beneficiary under this part 9.

(5) To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to an exercise of the decanting power, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

(6) To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to an exercise of the decanting power:

(a) A conservator may represent and bind the protected person's estate;

(b) A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed;

(c) An agent having authority to act with respect to the principal's beneficial interest in the trust may represent and bind the principal;

(d) The trustee of a trust that is a beneficiary of the first trust may represent and bind the beneficiaries of that trust, and the trustee of a trust that is a beneficiary of the second trust may represent and bind the beneficiaries of that trust;

(e) A personal representative of a decedent's estate may represent and bind interested persons with respect to the estate; and

(f) A parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed.

(7) Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to an exercise of the decanting power, but only to the extent there is no conflict of interest between the representative and the person represented.

(8) If section 15-16-909 is invoked and the court determines that an interest is not represented under this part 9, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.

(9) A representative may act on behalf of the individual represented with respect to an exercise of the decanting power regardless of whether a judicial proceeding concerning the exercise of the decanting power is pending.

(10) In making decisions, a representative may consider general benefit accruing to the living members of the represented individual's family.

(11) The authority to represent and bind another person under this section applies to the results of the exercise of the decanting power under this part 9, including but not limited to trust division, modification, or reformation, regardless of any other law of the state.

15-16-909. Court involvement

(1) On application of an authorized fiduciary, a person entitled to notice under section 15-16-907 (3), a beneficiary, or with respect to a charitable interest the attorney general or other person that has standing to enforce the charitable interest, the court may:

(a) Provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this part 9 and consistent with the fiduciary duties of the authorized fiduciary;

(b) Appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this part 9 and to exercise the decanting power;

(c) Approve an exercise of the decanting power;

(d) Determine that a proposed or attempted exercise of the decanting power is ineffective because:

(I) After applying section 15-16-922, the proposed or attempted exercise does not or did not comply with this part 9; or

(II) The proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;

(e) Determine the extent to which section 15-16-922 applies to a prior exercise of the decanting power;

(f) Provide instructions to the trustee regarding the application of section 15-16-922 to a prior exercise of the decanting power; or

(g) Order other relief to carry out the purposes of this part 9.

(2) On application of an authorized fiduciary, the court may approve:

(a) An increase in the fiduciary's compensation under section 15-16-916; or

(b) A modification under section 15-16-918 of a provision granting a person the right to remove or replace the fiduciary.

15-16-910. Formalities

An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must, directly or by reference to the notice required by section 15-16-907, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

15-16-911. Decanting power under expanded distributive discretion - definitions

(1) As used in this section, unless the context otherwise requires:

(a) "Noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.

(b) “Presumptive remainder beneficiary” means a qualified beneficiary other than a current beneficiary.

(c) “Successor beneficiary” means a beneficiary that is not a qualified beneficiary on the date the beneficiary’s qualification is determined. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(d) “Vested interest” means:

(I) A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

(II) A current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property;

(III) A current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property;

(IV) A presently exercisable general power of appointment; or

(V) A right to receive an ascertainable part of the trust property on the trust’s termination which is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(2) Subject to subsection (3) of this section and section 15-16-914, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(3) Subject to section 15-16-913, in an exercise of the decanting power under this section, a second trust may not:

(a) Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection (4) of this section;

(b) Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection (4) of this section; or

(c) Reduce or eliminate a vested interest.

(4) Subject to section 15-16-914 and paragraph (c) of subsection (3) of this section, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

(a) Retain a power of appointment granted in the first trust;

(b) Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(c) Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

(d) Create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

(5) A power of appointment described in paragraph (a), (b), (c), or (d) of subsection (4) of this section may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

(6) If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

15-16-912. Decanting power under limited distributive discretion - definitions

(1) As used in this section, unless the context otherwise requires, “limited distributive discretion” means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(2) An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(3) Under this section and subject to section 15-16-914, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(4) A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

(a) The distribution is applied for the benefit of the beneficiary;

(b) The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under other law of this state; or

(c) The distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

(5) If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

15-16-913. Trust for beneficiary with disability - definitions

(1) As used in this section, unless the context otherwise requires:

(a) “Beneficiary with a disability” means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated an incapacitated person.

(b) “Governmental benefits” means financial aid or services from a state, federal, or other public agency.

(c) “Special-needs fiduciary” means, with respect to a trust that has a beneficiary with a disability:

(I) A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(II) If no trustee or fiduciary has discretion under subparagraph (I) of this paragraph (c), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(III) If no trustee or fiduciary has discretion under subparagraph (I) or (II) of this paragraph (c), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(IV) “Special-needs trust” means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(2) A special-needs fiduciary may exercise the decanting power described in section 15-16-911 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

(a) A second trust is a special-needs trust that benefits the beneficiary with a disability; and

(b) The special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

(3) In an exercise of the decanting power under this section, the following rules apply:

(a) Notwithstanding section 15-15-911 (3) (b), the interest in the second trust of a beneficiary with a disability may:

(I) Be a pooled trust as defined by medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. sec. 1396p (d) (4) (C), as amended; or

(II) Contain payback provisions complying with reimbursement requirements of medicaid law under 42 U.S.C. sec. 1396p (d) (4) (A), as amended.

(b) Section 15-16-911 (3) (c) does not apply to the interests of the beneficiary with a disability.

(c) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary’s beneficial interests in the first trust.

15-16-914. Protection of charitable interest - definitions

(1) As used in this section, unless the context otherwise requires:

(a) “Determinable charitable interest” means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and which is unconditional or will be held solely for charitable purposes.

(b) “Unconditional” means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the federal “Internal Revenue Code of 1986”, as amended, on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

(2) If a first trust contains a determinable charitable interest, the attorney general has the rights of a qualified beneficiary and may represent and bind the charitable interest.

(3) If a first trust contains a charitable interest, the second trust or trusts may not:

- (a) Diminish the charitable interest;
- (b) Diminish the interest of an identified charitable organization that holds the charitable interest;
- (c) Alter any charitable purpose stated in the first-trust instrument; or
- (d) Alter any condition or restriction related to the charitable interest.

(4) If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (3) of this section.

(5) If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subsection (3) of this section must be administered under the law of this state unless:

- (a) The attorney general, after receiving notice under section 15-16-907, fails to object in a signed record delivered to the authorized fiduciary within the notice period;
- (b) The attorney general consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or
- (c) The court approves the exercise of the decanting power.

(6) This part 9 does not limit the powers and duties of the attorney general under law of this state other than this part 9.

15-16-915. Trust limitation on decanting

(1) An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:

- (a) The decanting power; or
- (b) A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(2) Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

- (a) The decanting power; or

(b) A power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(3) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

(4) Subject to subsections (1) and (2) of this section, an authorized fiduciary may exercise the decanting power under this part 9 even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

(5) If a first-trust instrument contains an express prohibition described in subsection (1) of this section or an express restriction described in subsection (2) of this section, the provision must be included in the second-trust instrument.

15-16-916. Change in compensation

(1) If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

(a) All qualified beneficiaries of the second trust consent to the increase in a signed record;
or

(b) The increase is approved by the court.

(2) If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by the laws of this state unless:

(a) All qualified beneficiaries of the second trust consent to the increase in a signed record;
or

(b) The increase is approved by the court.

(3) A change in an authorized fiduciary's compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections (1) and (2) of this section.

15-16-917. Relief from liability and indemnification

(1) Except as otherwise provided in this section, a second-trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

(2) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(3) A second-trust instrument may not reduce fiduciary liability in the aggregate.

(4) Subject to subsection (3) of this section, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this state other than this part 9.

15-16-918. Removal or replacement of authorized fiduciary

(1) An authorized fiduciary may not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

(a) The person holding the power consents to the modification in a signed record and the modification applies only to the person;

(b) The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

(c) The court approves the modification and the modification grants a substantially similar power to another person.

15-16-919. Tax-related limitations - definitions

(1) As used in this section, unless the context otherwise requires:

(a) “Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. secs. 671-677, as amended, or 26 U.S.C. sec. 679, as amended.

(b) “Internal revenue code” means the federal “Internal Revenue Code of 1986”, as amended.

(c) “Nongrantor trust” means a trust that is not a grantor trust.

(d) “Qualified benefits property” means property subject to the minimum distribution requirements of 26 U.S.C. sec. 401 (a) (9), as amended, and any applicable regulations, or to any similar requirements that refer to 26 U.S.C. sec. 401 (a) (9) or the regulations.

(2) An exercise of the decanting power is subject to the following limitations:

(a) If a first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for a marital deduction for purposes of the gift or estate tax under the internal revenue code or a state gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the internal revenue code or state law under which the transfer qualified.

(b) If the first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for a charitable deduction for purposes of the income, gift, or estate tax under the internal revenue code or a state income, gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the internal revenue code or state law under which the transfer qualified.

(c) If the first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for the exclusion from the gift tax described in 26 U.S.C. sec. 2503 (b), as amended, the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. sec. 2503 (b), as amended. If the first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for the exclusion from the gift tax described in 26 U.S.C. sec. 2503 (b), as amended, by application of 26 U.S.C. sec. 2503 (c), as amended, the second-trust

instrument must not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. sec. 2503 (c), as amended.

(d) If the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. sec. 1361, as amended, and the first trust is, or but for provisions of this part 9 other than this section would be, a permitted shareholder under any provision of 26 U.S.C. sec. 1361, as amended, an authorized fiduciary may exercise the power with respect to part or all of the S corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. sec. 1361 (c) (2), as amended. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this part 9 other than this section would be, a qualified subchapter S trust within the meaning of 26 U.S.C. sec. 1361 (d), as amended, the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter S trust.

(e) If the first trust contains property that qualified, or would have qualified but for provisions of this part 9 other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. sec. 2642 (c), as amended, the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. sec. 2642 (c), as amended.

(f) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. sec. 401 (a) (9), as amended, and any applicable regulations, or any similar requirements that refer to 26 U.S.C. sec. 401 (a) (9), as amended or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power, and section 15-16-922 applies to the separate share.

(g) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. sec. 672 (f) (2) (A), as amended, the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. sec. 672 (f) (2) (A), as amended.

(h) As used in this paragraph (h), unless the context requires otherwise, “tax benefit” means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to paragraph (i) of this subsection (2), a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(I) The first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

(II) The transfer of property held by the first trust or the first trust qualified, or but for provisions of this part 9 other than this section, would have qualified for the tax benefit.

(i) Subject to paragraph (d) of this subsection (2):

(I) Except as otherwise provided in paragraph (g) of this subsection (2), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(II) Except as otherwise provided in paragraph (j) of this subsection (2), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

(j) An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(I) The first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the second trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or

(II) The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:

(A) The settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(B) The first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

15-16-920. Duration of second trust

(1) Subject to subsection (2) of this section, a second trust may have a duration that is the same as or different from the duration of the first trust.

(2) To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation which apply to property of the first trust.

15-16-921. Need to distribute not required

An authorized fiduciary may exercise the decanting power regardless of whether under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

15-16-922. Saving provision

(1) If exercise of the decanting power would be effective under this part 9 except that the second-trust instrument in part does not comply with this part 9, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(a) A provision in the second-trust instrument which is not permitted under this part 9 is void to the extent necessary to comply with this part 9.

(b) A provision required by this part 9 to be in the second-trust instrument which is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this part 9.

(2) If a trustee or other fiduciary of a second trust determines that subsection (1) of this section applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

15-16-923. Trust for care of animal - definitions

(1) As used in this section, unless the context otherwise requires:

(a) “Animal trust” means a trust or an interest in a trust created to provide for the care of one or more animals.

(b) “Protector” means a person listed under *section 15-11-901 (3) (d)* with authority to enforce the trust on behalf of the animal.

(2) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this part 9 if each animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the power.

(3) A protector for an animal has the rights under this part 9 of a qualified beneficiary.

(4) Notwithstanding any other provision of this part 9, if a first trust is an animal trust, in an exercise of the decanting power, the second trust must provide that trust property may be applied only to its intended purpose for the period the first trust benefitted the animal.

15-16-924. Terms of second trust

A reference in this title 15 to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

15-16-925. Settlor

(1) For purposes of law of this state other than this part 9, and subject to subsection (2) of this section, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

(2) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust, and the authorized fiduciary may be considered.

15-16-926. Later-discovered property

(1) Except as otherwise provided in subsection (3) of this section, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

(2) Except as otherwise provided in subsection (3) of this section, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

(3) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

15-16-927. Obligations

A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

15-16-928. Uniformity of application and construction

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

15-16-929. Relation to electronic signatures in global and national commerce act

This part 9 modifies, limits, or supersedes the “Electronic Signatures in Global and National Commerce Act”, 15 U.S.C. *sec. 7001* et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. *sec. 7001* (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. *sec. 7003* (b).

15-16-930. Severability

If any provision of this part 9 or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part 9 which can be given effect without the invalid provision or application, and to this end the provisions of this part 9 are severable.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² 15-16-911. See 15-16-902(11) for definition of “expanded distributive discretion.”

³ 15-16-912.

⁴ If there is expanded discretion, no as to a “vested interest.” 15-16-911(3)(c). “Vested interest” is defined in §15-16-911(1)(d). If there is limited discretion, the second trust must grant each beneficiary interests substantially similar to the beneficiary's interests under the first trust. 15-16-912(3).

⁵ With respect to expanded discretion, see 15-16-911(c). With respect to limited discretion, see 15-16-912(3).

⁶ 15-16-911(3).

⁷ 15-16-912(3).

⁸ 15-16-911(3).

⁹ 15-16-912.

¹⁰ With respect to expanded discretion, see 15-16-911(3)(a). With respect to limited discretion, see 15-16-912(3).

¹¹ 15-16-911.

¹² 15-16-912(3).

¹³ 15-16-911(4), (5).

¹⁴ If substantially similar to power granted to beneficiary under first trust. 15-16-912(3).

¹⁵ 15-16-911(4), (5).

¹⁶ 15-16-912(3).

¹⁷ 15-16-913.

¹⁸ 15-16-919(2)(a).

¹⁹ 15-16-919(2)(b).

²⁰ 15-16-919(2)(c).

²¹ 15-16-919(2)(e).

²² 15-16-919(2)(d).

²³ 15-16-919(f).

²⁴ 15-16-919(g).

²⁵ 15-16-919(h).

²⁶ 15-16-919(i), (j).

²⁷ 15-16-920.

²⁸ 15-16-916.

²⁹ 15-16-917.

³⁰ 15-16-918.

³¹ 15-16-907.

³² 15-16-909.

³³ 15-16-904.

³⁴ 15-16-904(2).

³⁵ 15-16-905.

³⁶ A trustee may reasonably rely on the validity of a prior attempted decanting. 15-16-906.

³⁷ 15-16-914.

³⁸ 15-16-922.

³⁹ 15-16-923.

⁴⁰ 15-16-925.

⁴¹ 15-16-926.

⁴² The Colorado statute adds 15-16-903(6), which is not part of the Uniform Act. This subsection provides that neither the decanting power nor an exercise of such power affects (1) the determination of whether an interest in a trust is an asset of a spouse or (2) the power of a divorce court to fashion remedies.

DELAWARE
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	DEL. CODE ANN. tit. 12, § 3528
Effective Date	6/30/03
Amendment Date(s)	6/24/04; 6/27/06; 7/5/07; 7/6/09; 7/13/11; 8/6/13; 8/1/15; 8/30/17; 7/11/18; 7/19/19
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, authority to invade principal or income ²
2. Limitation on trustee who may decant?	No, but see DC § 3314 ³
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, except as to marital trusts ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No, for sole beneficiary; yes, for multiple beneficiaries ⁵
5. Must new and old trust beneficiaries be identical?	No ⁶
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Yes, with boomerang provision ⁷ and subject to rules for an open class
7. May remainder beneficiaries' interests be accelerated?	Yes ⁸
8. New and old trust require same distribution standard?	Yes ⁹
9. May trustee grant a power of appointment in new trust?	Yes ¹⁰
10. Must new trust grant identical power of appointment as old trust?	No ¹¹
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹²
13. Charitable deduction savings provision?	No
14. Beneficiary/trustee savings provision?	No, but see DC § 3314 ¹³
15. Other tax savings provisions?	2503(b-c) ¹⁴ ; Delaware tax trap ¹⁵
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁶

18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Silent
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ¹⁷
24. Provision that trustee has no duty to consider decanting?	No
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ¹⁸
MISCELLANEOUS	
27. Other unique considerations?	Applicable to revocable trusts if grantor incapacitated ¹⁹ ; successor trustee has no duty to confirm validity of prior decanting ²⁰ ; §3343 may permit appointment of special fiduciary with power to decant ²¹ .

**DELAWARE STATUTE
DEL. CODE ANN. tit. 12, § 3528**

(a) Unless the terms of the instrument expressly provide otherwise, a trustee who has authority (whether acting at such trustee's discretion or at the direction or with the consent of an adviser), under the terms of a testamentary instrument or irrevocable inter vivos trust agreement (including a trust that, by its terms, is revocable but was created by a settlor who presently lacks the capacity to revoke the trust), to invade the principal or income or both of a trust (the "first trust") to make distributions to, or for the benefit of, 1 or more proper objects of the exercise of the power, may instead exercise such authority (whether acting at such trustee's discretion or at the direction or with the consent of an adviser, as the case may be) by appointing all or part of the [sic] such principal or income or both as is subject to the power in favor of a trustee of a second trust, which may be a separate trust or the first trust as modified after appointment under this section (the "second trust"), under an instrument other than that under which the power to invade is created or under the same instrument, provided, however, that, except as otherwise provided in this subsection (a):

(1) The exercise of such authority is in favor of a second trust having only beneficiaries who are proper objects of the exercise of the power except that the governing instrument of the second trust may provide that, at a time or upon an event specified in the governing instrument, the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary's interest that are substantially identical to the first trust's terms and conditions concerning such beneficial interests;

(2) In the case of any trust, contributions to which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) (26 U.S.C. § 2503(b)) of the Internal

Revenue Code of 1986 (26 U.S.C. § 1 et seq.) (hereinafter referred to in this section as the “I.R.C.”), by reason of the application of I.R.C. § 2503(c) (26 U.S.C. § 2503(c)), the governing instrument for the second trust shall provide that the beneficiary's remainder interest shall vest and become distributable no later than the date upon which such interest would have vested and become distributable under the terms of the governing instrument for the first trust;

(3) The exercise of such authority does not reduce any income or unitrust interest of any beneficiary of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 (26 U.S.C. § 2056 or § 2523) or for state tax purposes under any comparable provision of applicable state law; and

(4) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary who is the only trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions.

Notwithstanding the foregoing provisions of this subsection (a) of this section, the governing instrument for the second trust may grant a power of appointment (including a power to appoint trust property to the powerholder, the powerholder's creditors, the powerholder's estate, the creditors of the powerholder's estate or any other person, whether or not such person is a trust beneficiary) to 1 or more of the trust beneficiaries who are proper objects of the exercise of the power in the first trust. The exercise of a trustee's authority granted under this subsection (a) shall in all respects comply with any standard that limits the trustee's authority to make distributions from the first trust but may be exercised whether or not the trustee would have been permitted to exercise the power to make a current outright distribution of all of the trust assets in compliance with any such standard. For purposes of this subsection (a), an open class of beneficiaries identified in the governing instrument for the first trust (such as, but not limited to, a class comprised of the descendants of a person who is living or who has living descendants) is a proper object of the exercise of a power to make distributions and the exercise of such a power in favor of a second trust having only beneficiaries, including unborn future beneficiaries, who are among the members of the open class satisfies the requirement of paragraph (a)(1) of this section even if, pursuant to the terms of the governing instrument for the second trust, the class remains, or might remain, open beyond the time when the class would have closed pursuant to the terms of the governing instrument for the first trust; provided, however, that the governing instrument for the second trust shall not permit distributions to or among members of the open class sooner than when or in excess of the amounts permitted by the governing instrument for the first trust. A trustee's power, pursuant to this subsection (a), to appoint principal in favor of the trustee of a second trust shall include the power to create the second trust.

(b) The exercise of the power to invade the principal or income or both of the trust under subsection (a) of this section shall be by an instrument in writing, signed by the trustee.

(c) The exercise of the power to invade the principal of the trust under subsection (a) of this section shall be considered the exercise of a power of appointment (other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate) and shall be subject to the provisions of Chapter 5 of Title 25 covering the time at which the permissible period of the rule against perpetuities begins and the law which determines the permissible period of the rule against perpetuities. Consequently, a second trust may have a term that is longer than the term set forth in the governing instrument for the first trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

(d) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust which arises under any other section of this chapter or under another statute or under common law.

(e) When exercising the authority granted under subsection (a) of this section, the trustee and any adviser directing or consenting to the trustee's exercise of such authority shall be held to the standard of care and the standard of liability applicable to the trustee and any such adviser when making outright distributions, free from trust, to or for the benefit of 1 or more permissible distributees. No trustee or adviser shall have a duty to exercise such

authority nor, absent wilful misconduct, any liability to any person for failure to exercise such authority or failure to consider whether to exercise such authority.

(f) This section shall be available to any trust that is administered in this State. Except as otherwise expressly prohibited in the governing instrument for the first trust which granted the trustee the authority to invade the principal or income or both of the first trust to make distributions to, or for the benefit of, 1 or more proper objects of the exercise of the power, the terms of the governing instrument for the first trust are deemed to include the decanting power.

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² DEL. CODE ANN. tit. 12, § 3528(a). The decanting “shall in all respects comply with any standard that limits the trustee's authority to make distributions from the first trust but may be exercised whether or not the trustee would have been permitted to exercise the power to make a current outright distribution of all of the trust assets in compliance with any such standard.” § 3528(a).

³ Section 3314 limits a fiduciary's power to make distributions to himself or herself to avoid unintended gift and estate tax issues. In part, the statute prohibits a fiduciary from exercising: “(1) The power to make discretionary distributions of either principal or income to or for the benefit of the fiduciary, the fiduciary's estate, the creditors of the fiduciary, or the creditors of the fiduciary's estate unless the power is either: a. Limited by an ascertainable standard relating to the fiduciary's health, education, support, or maintenance within the meaning of 26 U.S.C. §§ 2041 (relating to powers of appointment) and 2514 (relating to powers of appointment); or b. Exercisable by the fiduciary only in conjunction with another person having a substantial interest in the property subject to the power which is adverse to the interest of the fiduciary within the meaning of 26 U.S.C. § 2041(b)(1)(C)(ii).” § 3314(c)(1).

⁴ There is no general prohibition on reducing income rights. However the “exercise of such authority does not reduce any income or unitrust interest of any beneficiary of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 (26 U.S.C. § 2056 or § 2523) or for state tax purposes under any comparable provision of applicable state law[.]” § 3528(a)(3).

⁵ § 3528(a)(4).

⁶ A trustee may decant for the benefit of 1 or more proper objects in the old trust. § 3528(a).

⁷ The trustee may decant for the benefit of 1 or more proper objects of the exercise of the power, “except that the governing instrument of the second trust may provide that, at a time or upon an event specified in the governing instrument, the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary's interest that are substantially identical to the first trust's terms and conditions concerning such beneficial interests.” § 3528(a)(1). The statute also permits decanting to an open class. § 3528(a).

⁸ Remainder beneficiaries' interests can not be accelerated because the second trust must be in favor of beneficiaries who are proper objects of the exercise of the power, unless there is an open class of beneficiaries. See § 3528(a).

⁹ “The exercise of a trustee's authority granted under this subsection (a) shall in all respects comply with any standard that limits the trustee's authority to make distributions from the first trust” § 3528(a).

¹⁰ § 3528(a).

¹¹ § 3528(a).

¹² § 3528(a)(3).

¹³ Section 3314 limits a fiduciary's power to make distributions to himself or herself to avoid unintended gift and estate tax issues. In part, the statute prohibits a fiduciary from exercising: “(1) The power to make discretionary distributions of either principal or income to or for the benefit of the fiduciary, the fiduciary's estate, the creditors of the fiduciary, or the creditors of the fiduciary's estate unless the power is either: a. Limited by an ascertainable standard relating to the fiduciary's health, education, support, or maintenance within the meaning of 26 U.S.C. §§ 2041 (relating to powers of appointment) and 2514 (relating to powers of appointment); or b. Exercisable by the fiduciary only in conjunction with another person having a substantial interest in the property subject to the power which is adverse to the interest of the fiduciary within the meaning of 26 U.S.C. § 2041(b)(1)(C)(ii).” § 3314(c)(1).

¹⁴ § 3528(a)(2).

¹⁵ § 3528(c).

¹⁶ § 3528(c).

¹⁷ The trustee is held to the standard of care and the standard of liability applicable to the trustee when making outright distributions. § 3528(e).

¹⁸ “This section shall be available to any trust that is administered in this State.” § 3528(f).

¹⁹ The statute is applicable to “a trust that, by its terms, is revocable but was created by a settlor who presently lacks the capacity to revoke the trust.” § 3528(a).

²⁰ Delaware statute provides: “Unless provided otherwise by the terms of the governing instrument or by order of court, in the absence of actual knowledge of a breach of trust, or information concerning a possible breach of trust that would cause a reasonable person to inquire, a successor trustee... is under no duty to inquire into or confirm the validity of a governing instrument or actions by a predecessor trustee altering or modifying a governing instrument or to inquire into the acts or omissions of its predecessor...” 12 Del. C. § 3544.

²¹ Section 3343 provides, in part: “The power to appoint a successor trustee under a governing instrument shall be deemed to include the power to appoint multiple successor trustees and additional trustees. The power to appoint multiple successor trustees and additional trustees shall be deemed to include the power to allocate various trustee powers exclusively to one or some of the trustees serving from time to time.”... “Notwithstanding the provisions of subsection (b) of this section, in accordance with §3313A of this title, a trustee to whom powers have been exclusively allocated under subsection (a) of this section shall be a fiduciary only with respect to the powers so allocated, and a trustee excluded from exercising powers shall have no liability for, nor any duty to monitor, the actions of any trustee to whom any such powers, duties, and responsibilities are so allocated.” 12 Del. C. § 3343.

FLORIDA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	Fla. Stat. 3736.04117
Effective Date	01/01/07; 03/19/18
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Absolute power:</i> Yes, absolute discretion to distribute principal ² <i>Limited power:</i> Yes, limited discretion to distribute principal ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	<i>Absolute power:</i> No ⁶ <i>Limited power:</i> Yes ⁷
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Absolute power:</i> No ⁸ <i>Limited power:</i> No ⁹
7. May remainder beneficiaries' interests be accelerated?	Yes ¹⁰
8. New and old trust require same distribution standard?	<i>Absolute power:</i> No ¹¹ <i>Limited power:</i> Yes ¹²
9. May trustee grant a power of appointment in new trust?	<i>Absolute power:</i> Yes ¹³ <i>Limited power:</i> Yes ¹⁴
10. Must new trust grant identical power of appointment as old trust?	<i>Absolute power:</i> No ¹⁵ <i>Limited power:</i> Yes ¹⁶
11. Supplemental needs trust exception?	Yes ¹⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²⁰ ; 2642(c) ²¹ ; Sub S ²² ; 401(a)(9) ²³
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits ²⁴
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁵
18. May trustee increase trustee commission?	Sometimes ²⁶

19. Other restrictions?	Decreasing trustee liability ²⁷
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²⁸
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ²⁹
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	

**Florida Statute
Fla. Stat. § 736.04117**

(1) Definitions.--As used in this section, the term:

(a) “Absolute power” means a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, regardless of whether the term “absolute” is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness constitutes an absolute power not limited to specific or ascertainable purposes.

(b) “Authorized trustee” means a trustee, other than the settlor or a beneficiary, who has the power to invade the principal of a trust.

(c) “Beneficiary with a disability” means a beneficiary of the first trust who the authorized trustee believes may qualify for government benefits based on disability, regardless of whether the beneficiary currently receives those benefits or has been adjudicated incapacitated.

(d) “Current beneficiary” means a beneficiary who, on the date his or her qualification is determined, is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person who is a beneficiary only because he or she holds another power of appointment.

(e) “Government benefits” means financial aid or services from any state, federal, or other public agency.

(f) “Internal Revenue Code” means the Internal Revenue Code of 1986, as amended.

(g) “Power of appointment” has the same meaning as provided in s. 731.201.

(h) “Presently exercisable general power of appointment” means a power of appointment exercisable by the power holder at the relevant time. The term:

1. Includes a power of appointment that is exercisable only after the occurrence of a specified event or that is subject to a specified restriction, but only after the event has occurred or the restriction has been satisfied.

2. Does not include a power of appointment that is exercisable only upon the death of the power holder.

(i) “Substantially similar” means that there is no material change in a beneficiary’s beneficial interests or in the power to make distributions and that the power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to the power under the first trust to make a distribution directly to the beneficiary. A distribution is deemed to be for the benefit of a beneficiary if:

1. The distribution is applied for the benefit of a beneficiary;
2. The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this code; or
3. The distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary.

(j) “Supplemental needs trust” means a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for government benefits.

(k) “Vested interest” means a current unconditional right to receive a mandatory distribution of income, a specified dollar amount, or a percentage of value of a trust, or a current unconditional right to withdraw income, a specified dollar amount, or a percentage of value of a trust, which right is not subject to the occurrence of a specified event, the passage of a specified time, or the exercise of discretion.

1. The term includes a presently exercisable general power of appointment.
2. The term does not include a beneficiary’s interest in a trust if the trustee has discretion to make a distribution of trust property to a person other than such beneficiary.

(2) Distribution from first trust to second trust when authorized trustee has absolute power to invade.—

(a) Unless a trust instrument expressly provides otherwise, an authorized trustee who has absolute power under the terms of the trust to invade its principal, referred to in this section as the “first trust,” to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the trust subject to such power in favor of a trustee of one or more other trusts, whether created under the same trust instrument as the first trust or a different trust instrument, including a trust instrument created for the purposes of exercising the power granted by this section, each referred to in this section as the “second trust,” for the current benefit of one or more of such beneficiaries only if:

1. The beneficiaries of the second trust include only beneficiaries of the first trust; and
 2. The second trust does not reduce any vested interest.
- (b) In an exercise of absolute power, the second trust may:
1. Retain a power of appointment granted in the first trust;
 2. Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;
 3. Create or modify a power of appointment if the power holder is a current beneficiary of the first trust;
 4. Create or modify a power of appointment if the power holder is a beneficiary of the first trust who is not a current beneficiary, but the exercise of the power of appointment may take effect only after the power holder becomes, or would have become if then living, a current beneficiary of the first trust; and

5. Extend the term of the second trust beyond the term of the first trust.

(c) The class of permissible appointees in favor of which a created or modified power of appointment may be exercised may differ from the class identified in the first trust.

(3) Distribution from first trust to second trust when authorized trustee does not have absolute power to invade.--Unless the trust instrument expressly provides otherwise, an authorized trustee who has a power, other than an absolute power, under the terms of a first trust to invade principal to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the first trust subject to such power in favor of a trustee of one or more second trusts. If the authorized trustee exercises such power:

(a) The second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(b) If the first trust grants a power of appointment to a beneficiary of the first trust, the second trust shall grant such power of appointment in the second trust to such beneficiary, and the class of permissible appointees shall be the same as in the first trust.

(c) If the first trust does not grant a power of appointment to a beneficiary of the first trust, the second trust may not grant a power of appointment in the second trust to such beneficiary.

(d) Notwithstanding paragraphs (a), (b), and (c), the term of the second trust may extend beyond the term of the first trust, and, for any period after the first trust would have otherwise terminated, in whole or in part, under the provisions of the first trust, the trust instrument of the second trust may, with respect to property subject to such extended term:

1. Include language providing the trustee with the absolute power to invade the principal of the second trust during such extended term; and

2. Create a power of appointment, if the power holder is a current beneficiary of the first trust, or expand the class of permissible appointees in favor of which a power of appointment may be exercised.

(4) Distribution from first trust to supplemental needs trust.—

(a) Notwithstanding subsections (2) and (3), unless the trust instrument expressly provides otherwise, an authorized trustee who has the power under the terms of a first trust to invade the principal of the first trust to make current distributions to or for the benefit of a beneficiary with a disability may instead exercise such power by appointing all or part of the principal of the first trust in favor of a trustee of a second trust that is a supplemental needs trust if:

1. The supplemental needs trust benefits the beneficiary with a disability;

2. The beneficiaries of the second trust include only beneficiaries of the first trust; and

3. The authorized trustee determines that the exercise of such power will further the purposes of the first trust.

(b) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to such other beneficiary's beneficial interests in the first trust.

(5) Prohibited distributions.—

(a) An authorized trustee may not distribute the principal of a trust under this section in a manner that would prevent a contribution to that trust from qualifying for, or that would reduce a federal tax benefit, including a federal tax exclusion or deduction, which was originally claimed or could have been claimed for that contribution, including:

1. An exclusion under s. 2503(b) or s. 2503(c) of the Internal Revenue Code;

2. A marital deduction under s. 2056, s. 2056A, or s. 2523 of the Internal Revenue Code;
3. A charitable deduction under s. 170(a), s. 642(c), s. 2055(a), or s. 2522(a) of the Internal Revenue Code;
4. Direct skip treatment under s. 2642(c) of the Internal Revenue Code; or
5. Any other tax benefit for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code.

(b) If S corporation stock is held in the first trust, an authorized trustee may not distribute all or part of that stock to a second trust that is not a permitted shareholder under s. 1361(c)(2) of the Internal Revenue Code. If the first trust holds stock in an S corporation and is, or but for provisions of paragraphs (a), (c), and (d) would be, a qualified subchapter S trust within the meaning of s. 1361(d) of the Internal Revenue Code, the second trust instrument may not include or omit a term that prevents it from qualifying as a qualified subchapter S trust.

(c) Except as provided in paragraphs (a), (b), and (d), an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either trust under ss. 671-679 of the Internal Revenue Code; however, if the settlor is not treated as the owner of the first trust, he or she may not be treated as the owner of the second trust unless he or she at all times has the power to cause the second trust to cease being treated as if it were owned by the settlor.

(d) If an interest in property which is subject to the minimum distribution rules of s. 401(a)(9) of the Internal Revenue Code is held in trust, an authorized trustee may not distribute such an interest to a second trust under subsection (2), subsection (3), or subsection (4) if the distribution would shorten the otherwise applicable maximum distribution period.

(6) Exercise by writing.--The exercise of a power to invade principal under subsection (2), subsection (3), or subsection (4) must be by a written instrument signed and acknowledged by the authorized trustee and filed with the records of the first trust.

(7) Restrictions on exercise of power.--The exercise of a power to invade principal under subsection (2), subsection (3), or subsection (4):

(a) Is considered the exercise of a power of appointment, excluding a power to appoint to the authorized trustee, the authorized trustee's creditors, the authorized trustee's estate, or the creditors of the authorized trustee's estate.

(b) Is subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(c) May apply to a second trust created or administered under the law of any jurisdiction.

(d) May not:

1. Increase the authorized trustee's compensation beyond the compensation specified in the first trust instrument; or

2. Relieve the authorized trustee from liability for breach of trust or provide for indemnification of the authorized trustee for any liability or claim to a greater extent than the first trust instrument; however, the exercise of the power may divide and reallocate fiduciary powers among fiduciaries and relieve a fiduciary from liability for an act or failure to act of another fiduciary as otherwise allowed under law or common law.

(8) Notice.—

(a) The authorized trustee shall provide written notification of the manner in which he or she intends to exercise his or her power to invade principal to all of the following parties at least 60 days before the effective date of the authorized trustee's exercise of such power pursuant to subsection (2), subsection (3), or subsection (4):

1. All qualified beneficiaries of the first trust.
2. If paragraph (5)(c) applies, the settlor of the first trust.
3. All trustees of the first trust.
4. Any person who has the power to remove or replace the authorized trustee of the first trust.

(b) The authorized trustee's obligation to provide notice under this subsection is satisfied when he or she provides copies of the proposed instrument exercising the power, the trust instrument of the first trust, and the proposed trust instrument of the second trust.

(c) If all of those required to be notified waive the notice period by signed written instrument delivered to the authorized trustee, the authorized trustee's power to invade principal shall be exercisable immediately.

(d) The authorized trustee's notice under this subsection does not limit the right of any beneficiary to object to the exercise of the authorized trustee's power to invade principal except as otherwise provided in other applicable provisions of this code.

(9) Inapplicability of spendthrift clause or other prohibition.--The exercise of the power to invade principal under subsection (2), subsection (3), or subsection (4) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(10) No duty to exercise.--Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety may be made as a result of an authorized trustee's failure to exercise the power to invade principal conferred under subsections (2), (3), and (4).

(11) No abridgement of common law rights.-- This section may not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another provision of law or under common law.

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² "Unless a trust instrument expressly provides otherwise, an authorized trustee who has absolute power under the terms of a trust to invade its principal, referred to in this section as the 'first trust,' to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the trust subject to such power in favor of a trustee of one or more other trusts whether created under the same trust instrument as the first trust or a different trust instrument, including a trust instrument created for the purpose of exercising the power granted by this section, each referred to in this section as the 'second trust,'..." Fla. Stat. Ann. § 736.04117(2)(a). "Absolute power" means a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support regardless of whether the term 'absolute' is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness constitutes an absolute power not limited to specific or ascertainable purposes." § 736.04117(1)(a).

³ § 736.04117(3).

⁴ § 736.04117(2)(a)(2); (3)(a).

⁵ § 736.04117(2)(a)(2); (3)(a).

⁶ § 736.04117(2)(a).

⁷ § 736.04117(3)(a).

⁸ § 736.04117(2)(a).

⁹ § 736.04117(3)(a).

¹⁰ § 736.04117(3)(a).

¹¹ § 736.04117(2)(a).

¹² § 736.04117(3)(a).

¹³ § 736.04117(2)(b).

¹⁴ § 736.04117(3)(b), (d).

¹⁵ § 736.04117(2)(b).

¹⁶ § 736.04117(3)(b), (c).

¹⁷ § 736.04117(4).

¹⁸ § 736.04117(5)(a)(2).

¹⁹ § 736.04117(5)(a)(3).

²⁰ § 736.04117(5)(a)(1).

²¹ § 736.04117(5)(a)(4).

²² § 736.04117(5)(b).

²³ § 736.04117(5)(d).

²⁴ § 736.04117(5)(c).

²⁵ § 736.04117(7)(b).

²⁶ § 736.04117(7)(d)(1).

²⁷ § 736.04117(7)(d)(2).

²⁸ The trustee must provide 60 days notice to all qualified beneficiaries, any trustee remover and the settlor if the decanting converts the trust to a grantor trust. § 736.04117(8)(a).

²⁹ § 736.04117(10).

GEORGIA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	GA. CODE ANN. §53-12-62
Effective Date	7/1/18
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion to distribute principal ²
2. Limitation on trustee who may decant?	Yes ³
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes
4. May new trust eliminate beneficiary's withdrawal rights?	Yes
5. Must new and old trust beneficiaries be identical?	No
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	No
7. May remainder beneficiaries' interests be accelerated?	No ⁴
8. New and old trust require same distribution standard?	No
9. May trustee grant a power of appointment in new trust?	Yes ⁵
10. Must new trust grant identical power of appointment as old trust?	No
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ⁶
13. Charitable deduction savings provision?	Yes ⁶
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ⁶ ; 2642(c) ⁶ ; Sub S ⁷ ; 672(f) ⁸ ; Catch-all ⁶
16. Non-grantor trust to grantor trust conversion permitted?	Yes ⁹
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁰
18. May trustee increase trustee commission?	No restriction

19. Other restrictions?	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ¹¹
21. Is decanting prohibited if a beneficiary objects?	Yes
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ¹²
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ¹³
MISCELLANEOUS	
27. Other unique considerations?	Remedies provision ¹⁴ ; reassemble reliance ¹⁵ ; debts ¹⁶

**GEORGIA STATUTE
GA. CODE ANN. § 53-12-62**

(a) As used in this Code section, the term:

(1) “Original trust” refers to the trust from which principal is being distributed.

(2) “Second trust” refers to the trust to which assets are being distributed from the original trust, whether a separate trust or an amended version of the original trust.

(b) (1) As used in this subsection, the term “current beneficiary” means a person who, on the date of distribution to the second trust, is a distributee or permissible distributee of trust income or principal.

(2) Unless the original trust instrument expressly provides otherwise, a trustee, other than a person who contributed property to the trust, with authority to invade the principal of the original trust to make distributions to or for the benefit of one or more of the beneficiaries may also, independently or with court approval, exercise such authority by distributing all or part of the principal of the original trust to a trustee of a second trust; provided, however, that the second trust shall not include as a:

(A) Current beneficiary any person that is not a current beneficiary of income or principal of the original trust; or

(B) Beneficiary any person that is not a beneficiary of the original trust.

(c) Except as provided in this Code section, a trustee may exercise the power to invade the principal of the original trust under subsection (b) of this Code section without the consent of the settlor or the beneficiaries of the original trust if such trustee provides written notice of such trustee's decision to exercise the power to such settlor, if living, and those persons then entitled to annual reports from the trustee of the original trust. Such notice shall:

(1) Describe the manner in which such trustee intends to exercise such power;

(2) Specify the date such trustee proposes to distribute to the second trust; and

- (3) Be delivered at least 60 days before the proposed distribution to the second trust.
- (d) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the original trust.
- (e) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall not extend the permissible period of the rule against perpetuities that applies to such original trust.
- (f) This Code section shall not be construed to abridge the right of any trustee who has a power of invasion to distribute property in further trust that arises under any other law or under common law, and nothing in this Code section shall be construed to imply that the common law does not permit the exercise of a power to invade the principal of a trust in the manner authorized under subsection (b) of this Code section.
- (g) A second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute the principal of such original trust. For purposes of this subsection, the permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of such original trust or second trust.
- (h) If any contribution to the original trust qualified for the annual exclusion under Section 2503(b) of the federal Internal Revenue Code, as it existed on February 1, 2018, the marital deduction under Section 2056(a) or 2523(a) of the federal Internal Revenue Code, as it existed on February 1, 2018, or the charitable deduction under Section 170(a), 642(c), 2055(a), or 2522(a) of the federal Internal Revenue Code, as it existed on February 1, 2018, is a direct skip qualifying for treatment under Section 2642(c) of the federal Internal Revenue Code, as it existed on February 1, 2018, or qualified for any other specific tax benefit that would be lost by the existence of the authorized trustee's authority under subsection (b) of this Code section for income, gift, estate, or generation-skipping transfer tax purposes under the federal Internal Revenue Code, then the authorized trustee shall not have the power to distribute the principal of a trust pursuant to subsection (b) of this Code section in a manner that would prevent the contribution to the original trust from qualifying for such exclusion, deduction, or other tax benefit or would reduce such exclusion, deduction, or other tax benefit that was originally claimed with respect to such contribution.
- (i) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall be subject to the following limitations:
- (1) The second trust need not qualify as a grantor trust for federal income tax purposes, even if the original trust does qualify as a grantor trust, except that if such original trust qualifies as a grantor trust because of the application of [Section 672\(f\)\(2\)\(A\) of the federal Internal Revenue Code](#), as it existed on February 1, 2018, such second trust may not include or omit a term that, if included in or omitted from the original trust instrument, would have prevented such original trust from qualifying under such section;
- (2) The second trust may qualify as a grantor trust for federal income tax purposes, even if the original trust does not so qualify, except that if such original trust does not so qualify and such second trust will so qualify, in whole or in part, with respect to the settlor, such second trust shall grant such settlor or another person a power that would cause such second trust to cease to be a grantor trust for federal income tax purposes unless such settlor objects in a writing delivered to the trustee before the date the trustee proposes to distribute from such original trust to such second trust; and
- (3) When both the original trust and the second trust qualify as grantor trusts for federal income tax purposes and such original trust grants the settlor or another person the power to cause such original trust to cease to be a grantor trust, such second trust shall grant an equivalent power to the settlor or another person unless such settlor objects in a writing delivered to the trustee before the date the trustee proposes to distribute from such original trust to such second trust.
- (j) During any period when the original trust owns stock in a Subchapter "S" corporation as defined in Section 1361(a)(1) of the federal Internal Revenue Code, as it existed on February 1, 2018, an authorized trustee shall not exercise a power authorized by subsection (b) of this Code section to distribute part or all of the stock of the Subchapter "S" corporation to a second trust that is not a permitted shareholder under Section 1361(c)(2) of the federal Internal Revenue Code, as it existed on February 1, 2018.

- (k) A trustee or other person that reasonably relies on the validity of a distribution of property of the original trust to the second trust under subsection (b) of this Code section or any other law or common law shall not be liable for any action or failure to act as a result of such reliance.
- (l) This Code section shall not create or imply a duty for a trustee to exercise a power conferred by this Code section.
- (m) If exercise of the power to invade the principal of the original trust would be effective under subsection (b) of this Code section except that the second trust in part does not comply with this Code section, such exercise of the power shall be effective, a provision in such second trust that is not permitted under this Code section shall be void to the extent necessary to comply with this Code section, and a provision required by this Code section to be in such second trust that is not contained in such second trust shall be deemed to be included in such second trust to the extent necessary to comply with this Code section.
- (n) The settlor of the original trust shall be deemed to be the settlor of the second trust with respect to the portion of the principal of the original trust subject to the exercise of the power to invade the principal of such original trust under subsection (b) of this Code section.
- (o) A debt, liability, or other obligation enforceable against property of the original trust shall be enforceable to the same extent against the property when held by the second trust after exercise of the power to invade the principal of such original trust under subsection (b) of this Code section.
- (p) This Code section shall not apply to a trust held solely for charitable purposes.

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² § 53-12-62(b)(2).

³ § 53-12-62(b)(2). Provides that a donor may not decant.

⁴ § 53-12-62(b)(2)(A).

⁵ § 53-12-62(g).

⁶ § 53-12-62(h).

⁷ § 53-12-62(j).

⁸ § 53-12-62(i)(1).

⁹ § 53-12-62(i)(2), (3).

¹⁰ § 53-12-62(e).

¹¹ § 53-12-62(e).

¹² § 53-12-62(l).

¹³ § 53-12-62(p). Provides that decanting does not apply to a wholly charitable trust.

¹⁴ § 53-12-62(m).

¹⁵ § 53-12-62(k).

¹⁶ § 53-12-62(o).

ILLINOIS
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	3/1201 et seq.
Effective Date	1/1/13
Amendment Date(s)	7/27/15; 1/1/20
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Expanded distributive discretion:</i> Yes, expanded discretion to distribute principal ² <i>Limited distributive discretion:</i> Yes, power to distribute principal without expanded discretion ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁴
5. Must new and old trust beneficiaries be identical?	<i>Expanded distributive discretion:</i> No ⁵ <i>Limited distributive discretion:</i> Yes ⁶
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Expanded distributive discretion:</i> No ⁷ <i>Limited distributive discretion:</i> No ⁸
7. May remainder beneficiaries' interests be accelerated?	No ⁹
8. New and old trust require same distribution standard?	<i>Expanded distributive discretion:</i> No ¹⁰ <i>Limited distributive discretion:</i> Yes ¹¹
9. May trustee grant a power of appointment in new trust?	<i>Expanded distributive discretion:</i> Yes ¹² <i>Limited distributive discretion:</i> Yes ¹³
10. Must new trust grant identical power of appointment as old trust?	<i>Expanded distributive discretion:</i> No ¹⁴ <i>Limited distributive discretion:</i> Yes ¹⁵
11. Supplemental needs trust exception?	Yes ¹⁶
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁷
13. Charitable deduction savings provision?	Yes ¹⁸
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ¹⁹ ; 2642(c) ²⁰ ; Sub S ²¹ ; 401(a)(9) ²² ; Catch-all ²³
16. Non-grantor trust to grantor trust conversion permitted?	Yes ²⁴
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁵

18. May trustee increase trustee commission?	Sometimes ²⁶
19. Other restrictions?	Decreasing trustee liability or eliminating trustee remover ²⁷
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²⁸
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ²⁹
24. Provision that trustee has no duty to consider decanting?	Yes ³⁰
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³¹
MISCELLANEOUS	
27. Other unique considerations?	Reasonable reliance ³² ; Remedies provision ³³ ; court involvement ³⁴ ; charitable protections ³⁵ ; subsequently discovered assets ³⁶

**ILLINOIS STATUTE
760 ILCS 3/1201 et seq.**

Section 1201

Article title. This Article may be referred to as the Trust Decanting Law.

Section 1202

Definitions. In this Article:

- (1) “Appointive property” means the property or property interest subject to a power of appointment.
- (2) “Authorized fiduciary” means:
 - (A) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;
 - (B) a special fiduciary appointed under Section 1209; or
 - (C) a special-needs fiduciary under Section 1213.
- (3) “Court” means the court in this State having jurisdiction in matters relating to trusts.

- (4) “Decanting power” or “the decanting power” means the power of an authorized fiduciary under this Article to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.
- (5) “Expanded distributive discretion” means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.
- (6) “First trust” means a trust over which an authorized fiduciary may exercise the decanting power.
- (7) “First-trust instrument” means the trust instrument for a first trust.
- (8) “Reasonably definite standard” means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of Section 674(b)(5)(A) of the Internal Revenue Code, as amended, and any applicable regulations.
- (9) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (10) “Second trust” means:
 - (A) a first trust after modification under this Article; or
 - (B) a trust to which a distribution of property from a first trust is or may be made under this Article.
- (11) “Second-trust instrument” means the trust instrument for a second trust.

Section 1203

Scope.

- (a) Except as otherwise provided in subsections (b) and (c), this Article applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.
- (b) This Article does not apply to a trust held solely for charitable purposes.
- (c) Subject to Section 1215, a trust instrument may restrict or prohibit exercise of the decanting power.
- (d) This Article does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this State other than this Article, common law, a court order, or a nonjudicial settlement agreement.
- (e) This Article does not affect the ability of a settlor to provide in a trust instrument for the distribution or appointment in further trust of the trust property or for modification of the trust instrument.

Section 1204

Fiduciary duty.

- (a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

- (b) This Article does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this Article.
- (c) Except as otherwise provided in a first-trust instrument, for purposes of this Article and Section 801, the terms of the first trust are deemed to include the decanting power.

Section 1205

Application; governing law. This Article applies to a trust created before, on, or after the effective date of this Code that:

- (1) has its principal place of administration in this State, including a trust whose principal place of administration has been changed to this State; or
- (2) provides by its trust instrument that it is governed by the law of this State or is governed by the law of this State for the purpose of:
 - (A) administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this State;
 - (B) construction of terms of the trust; or
 - (C) determining the meaning or effect of terms of the trust.

Section 1206

Reasonable reliance. A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this Article, law of this State other than this Article or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

Section 1207

Notice.

- (a) In this Section, a notice period begins on the day notice is given under subsection (c) and ends 59 days after the day notice is given.
- (b) Except as otherwise provided in this Article, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.
- (c) Except as otherwise provided in subsection (f), an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than 60 days before the exercise to:
 - (1) each settlor of the first trust, if living or then in existence;
 - (2) each qualified beneficiary of the first trust;
 - (3) each holder of a presently exercisable power of appointment over any part or all of the first trust;
 - (4) each person that currently has the right to remove or replace the authorized fiduciary;

- (5) each other fiduciary of the first trust;
 - (6) each fiduciary of the second trust; and
 - (7) the Attorney General's Charitable Trust Bureau, if the first trust contains a charitable interest.
- (d) An authorized fiduciary is not required to give notice under subsection (c) to a qualified beneficiary who is a minor and has no representative. The authorized fiduciary is not required to give notice under subsection (c) to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.
- (e) A notice under subsection (c) must:
 - (1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;
 - (2) specify the proposed effective date for exercise of the power;
 - (3) include a copy of the first-trust instrument; and
 - (4) include a copy of all second-trust instruments.
- (f) The decanting power may be exercised before expiration of the notice period under subsection (a) if all persons entitled to receive notice waive the period in a signed record.
- (g) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under Section 1209 with the court asserting that:
 - (1) an attempted exercise of the decanting power is ineffective because it did not comply with this Article or was an abuse of discretion or breach of fiduciary duty; or
 - (2) Section 1222 applies to the exercise of the decanting power.
- (h) An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (c) if the authorized fiduciary acted with reasonable care to comply with subsection (c).
- (i) If the first trust contains a charitable interest and the Attorney General objects to the proposed exercise of the decanting power in writing delivered to the authorized fiduciary before the end of the notice period, the authorized fiduciary may proceed with the proposed exercise of the decanting power only with either court approval or the later written consent of the Attorney General.

Section 1208

(Reserved).

Section 1209

Court involvement.

- (a) On application of an authorized fiduciary, a person entitled to notice under Section 1207(c), a beneficiary, or, with respect to a charitable interest, the Attorney General or any other person that has standing to enforce the charitable interest, the court may:
 - (1) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this Article and consistent with the fiduciary duties of the authorized fiduciary;
 - (2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this Article and to exercise the decanting power;
 - (3) approve an exercise of the decanting power;
 - (4) determine that a proposed or attempted exercise of the decanting power is ineffective because:
 - (A) after applying Section 1222, the proposed or attempted exercise does not or did not comply with this Article; or
 - (B) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;
 - (5) determine the extent to which Section 1222 applies to a prior exercise of the decanting power;
 - (6) provide instructions to the trustee regarding the application of Section 1222 to a prior exercise of the decanting power; or
 - (7) order other appropriate relief to carry out the purposes of this Article.
- (b) On application of an authorized fiduciary, the court may approve:
 - (1) an increase in the fiduciary's compensation under Section 1216; or
 - (2) a modification under Section 1218 of a provision granting a person the right to remove or replace the fiduciary.

Section 1210

Formalities. An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must, directly or by reference to the notice required by Section 1207, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

Section 1211

Decanting power under expanded distributive discretion.

- (a) In this Section:

- (1) “Noncontingent” right means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right of any person other than the beneficiary or the beneficiary’s estate.
- (2) “Successor beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined is not a qualified beneficiary. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.
- (3) “Vested interest” means:
 - (A) a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;
 - (B) a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property;
 - (C) a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property;
 - (D) a presently exercisable general power of appointment; or
 - (E) a right to receive an ascertainable part of the trust property on the trust’s termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.
- (b) Subject to subsection (c) and Section 1214, an authorized fiduciary that has expanded distributive discretion to distribute the principal of a first trust to one or more current beneficiaries may exercise the decanting power over the principal of the first trust.
- (c) Subject to Section 1213, in an exercise of the decanting power under this Section, a second trust may not:
 - (1) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection (d);
 - (2) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection (d); or
 - (3) reduce or eliminate a vested interest.
- (d) Subject to subsection (c)(3) and Section 1214, in an exercise of the decanting power under this Section, a second trust may be a trust created or administered under the law of any jurisdiction and may:
 - (1) retain a power of appointment granted in the first trust;
 - (2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

- (3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and
 - (4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.
- (e) A power of appointment described in subsection (d)(1) through (4) of subsection (d) may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.
- (f) If an authorized fiduciary has expanded distributive discretion to distribute part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this Section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

Section 1212

Decanting power under limited distributive discretion.

- (a) In this Section, “limited distributive discretion” means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.
- (b) An authorized fiduciary that has limited distributive discretion over the principal of the first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.
- (c) Under this Section and subject to Section 1214, a second trust may be created or administered under the law of any jurisdiction. Under this Section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust.
- (d) A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:
 - (1) the distribution is applied for the benefit of the beneficiary;
 - (2) the beneficiary is incapacitated or in the opinion of the trustee is unable to manage property or business affairs, and the distribution is made as permitted under this Code; or
 - (3) the distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.
- (e) If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this Section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

Section 1213

Trust for beneficiary with disability.

- (a) In this Section:
 - (1) “Beneficiary with a disability” means a beneficiary of the first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incompetent.
 - (2) “Best interests” of a beneficiary with a disability include, without limitation, consideration of the financial impact to the family of the beneficiary who has a disability.
 - (3) “Governmental benefits” means financial aid or services from a state, federal, or other public agency.
 - (4) “Special-needs fiduciary” means, with respect to a trust that has a beneficiary with a disability:
 - (A) a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;
 - (B) if no trustee or fiduciary has discretion under subparagraph (A), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or
 - (C) if no trustee or fiduciary has discretion under subparagraphs (A) and (B), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.
 - (5) “Special-needs trust” means a trust the trustee believes would not be considered a resource for purposes of determining whether the beneficiary with a disability is eligible for governmental benefits.
- (b) A special-needs fiduciary may exercise the decanting power under Section 1211 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:
 - (1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and
 - (2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust or the best interests of the beneficiary with a disability.
- (c) In an exercise of the decanting power under this Section, the following rules apply:
 - (1) If the first trust was created by the beneficiary with a disability, or to the extent the first trust was funded by the beneficiary with a disability, then notwithstanding paragraph (2) of subsection (c) of Section 1211, the interest in the second trust of a beneficiary with a disability may:

- (A) be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. 1396p(d)(4)(C), as amended; or
 - (B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. 1396p(d)(4)(A), as amended.
- (2) Paragraph (3) of subsection (c) of Section 1211 does not apply to the interests of the beneficiary with a disability.
- (3) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's beneficial interests in the first trust.

Section 1214

Protection of charitable interests.

- (a) In this Section:
 - (1) “Determinable charitable interest” means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and that is unconditional or that will in all events be held for charitable purposes.
 - (2) “Unconditional” means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the Internal Revenue Code on the date of the distribution if the charitable organization meets the requirement on the date of determination.
- (b) If a first trust contains a determinable charitable interest, the Attorney General has the rights of a qualified beneficiary and may represent and bind the charitable interest.
- (c) If a first trust contains a charitable interest, the second trusts in the aggregate may not:
 - (1) diminish the charitable interest;
 - (2) diminish the interest of an identified charitable organization that holds the charitable interest;
 - (3) alter any charitable purpose stated in the first-trust instrument; or
 - (4) alter any condition or restriction related to the charitable interest.
- (d) If there are 2 or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (c).
- (e) If a first trust contains a determinable charitable interest, the second trusts that include charitable interests pursuant to subsection (c) must be administered under the law of this State unless:

- (1) the Attorney General, after receiving notice under Section 1207, fails to object in a signed record delivered to the authorized fiduciary within the notice period;
 - (2) the Attorney General consents in a signed record to the second trusts being administered under the law of another jurisdiction; or
 - (3) the court approves the exercise of the decanting power.
- (f) This Article does not limit the powers and duties of the Attorney General under Illinois law.

Section 1215

Trust limitation on decanting.

- (a) An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:
 - (1) the decanting power; or
 - (2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.
- (b) Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:
 - (1) the decanting power; or
 - (2) a power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.
- (c) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.
- (d) Subject to subsections (a) and (b), an authorized fiduciary may exercise the decanting power under this Article even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.
- (e) If a first-trust instrument contains an express prohibition described in subsection (a) or an express restriction described in subsection (b), that provision must be included in the second-trust instrument.

Section 1216

Change in compensation.

- (a) If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation beyond the specified compensation unless:
 - (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
 - (2) the increase is approved by the court.

- (b) If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by Section 708 unless:
 - (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
 - (2) the increase is approved by the court.
- (c) A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections (a) and (b).

Section 1217

Relief from liability and indemnification.

- (a) Except as otherwise provided in this Section, a second-trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.
- (b) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.
- (c) A second-trust instrument may not reduce fiduciary liability in the aggregate.
- (d) Subject to subsection (c), a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this State other than this Article.

Section 1218

Removal or replacement of authorized fiduciary. An authorized fiduciary may not exercise the decanting power to modify a provision in the first-trust instrument granting another person power to remove or replace the fiduciary unless:

- (1) the person holding the power consents to the modification in a signed record and the modification applies only to the person;
- (2) the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or
- (3) the court approves the modification and the modification grants a substantially similar power to another person.

Section 1219

Tax-related limitations.

- (a) In this Section:
 - (1) “Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under Sections 671 through 677 of the Internal Revenue Code or Section 679 of the Internal Revenue Code.
 - (2) “Nongrantor trust” means a trust that is not a grantor trust.
 - (3) “Qualified benefits property” means property subject to the minimum distribution requirements of Section 401(a)(9) of the Internal Revenue Code, and any applicable regulations, or to any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code or the regulations.
- (b) An exercise of the decanting power is subject to the following limitations:
 - (1) If a first trust contains property that qualified, or would have qualified but for provisions of this Article other than this Section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.
 - (2) If the first trust contains property that qualified, or would have qualified but for provisions of this Article other than this Section, for a charitable deduction for purposes of the income, gift, or estate tax under the Internal Revenue Code or a state income, gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.
 - (3) If the first trust contains property that qualified, or would have qualified but for provisions of this Article other than this Section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code, the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under the same provision of Section 2503 of the Internal Revenue Code. If the first trust contains property that qualified, or would have qualified but for provisions of this Article other than this Section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code, by application of Section 2503(c) of the Internal Revenue Code, the second-trust instrument must not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under Section 2503(c) of the Internal Revenue Code.

- (4) If the property of the first trust includes shares of stock in an S corporation, as defined in Section 1361 of the Internal Revenue Code and the first trust is, or but for provisions of this Article other than this Section would be, a permitted shareholder under any provision of Section 1361 of the Internal Revenue Code, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under Section 1361(c)(2) of the Internal Revenue Code. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this Article other than this Section, would be, a qualified subchapter-S trust within the meaning of Section 1361(d) of the Internal Revenue Code, the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.
- (5) If the first trust contains property that qualified, or would have qualified but for provisions of this Article other than this Section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under Section 2642(c) of the Internal Revenue Code the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under Section 2642(a) of the Internal Revenue Code.
- (6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under Section 401(a)(9) of the Internal Revenue Code and any applicable regulations, or any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and Section 1222 applies to the separate share.
- (7) If the first trust qualifies as a grantor trust because of the application of Section 672(f)(2)(A) of the Internal Revenue Code the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under Section 672(f)(2)(A) of the Internal Revenue Code.
- (8) In this paragraph (8), “tax benefit” means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this Section, except for a benefit arising from being a grantor trust. Subject to paragraph (9) of this subsection (b), a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:
 - (A) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

- (B) the transfer of property held by the first trust or the first trust qualified, or but for provisions of this Article other than this Section, would have qualified for the tax benefit.
- (9) Subject to paragraph (4) of this subsection (b):
 - (A) except as otherwise provided in paragraph (7) of this subsection (b), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and
 - (B) except as otherwise provided in paragraph (10) of this subsection (b), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.
- (10) An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:
 - (A) the first trust and second trusts are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the second trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or
 - (B) the first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:
 - (i) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or
 - (ii) the first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

Section 1220

Duration of second trust.

- (a) Subject to subsection (b), a second trust may have a duration that is the same as or different from the duration of the first trust.
- (b) To the extent that property of a second trust is attributable to property of the first trust, the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation applicable to property of the first trust.

Section 1221

Need to distribute not required. An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

Section 1222

Savings provision.

- (a) If exercise of the decanting power would be effective under this Article except that the second-trust instrument in part does not comply with this Article, the exercise of the power is effective and the following rules apply to the principal of the first trust subject to the exercise of the power:
 - (1) A provision in the second-trust instrument that is not permitted under this Article is void to the extent necessary to comply with this Article.
 - (2) A provision required by this Article to be in the second-trust instrument that is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this Article.
- (b) If a trustee or other fiduciary of a second trust discovers that subsection (a) applies to a prior exercise of the decanting power, the fiduciary shall take such appropriate corrective action as is consistent with the fiduciary's duties.

Section 1223

Trust for care of animal.

- (a) In this Section:
 - (1) "Animal trust" means a trust or an interest in a trust created to provide for the care of one or more designated domestic or pet animals.
 - (2) "Protector" means a person described in paragraph (3) of subsection (b) of Section 408.
- (b) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this Article as if each animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the decanting power.
- (c) A protector for an animal has the rights under this Article of a qualified beneficiary.
- (d) Notwithstanding any other provision of this Article, if a first trust is an animal trust, in an exercise of the decanting power, the second trust must provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

Section 1224

(Reserved).

Section 1225

Settlor.

- (a) For purposes of the laws of this State other than this Article and subject to subsection (b), a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

- (b) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, the intent of a settlor of the second trust, and the intent of the authorized fiduciary may be considered.

Section 1226

Later-discovered property.

- (a) Except as otherwise provided in subsection (c), if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property otherwise belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust.
- (b) Except as otherwise provided in subsection (c), if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the decanting power remains part of the trust estate of the first trust.
- (c) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the decanting power.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² § 3/1211; 3/1202(5).

³ § 3/1212.

⁴ § 3/1211(c)(3), (a)(3); 3/1212(c).

⁵ § 1211(b).

⁶ § 3/1212(c).

⁷ § 3/1211(b).

⁸ § 3/1212(c).

⁹ § 3/1211(c)(1).

¹⁰ § 3/1211.

¹¹ § 3/1212(c).

¹² § 3/1211(d).

¹³ § 3/1212(c).

¹⁴ § 3/1211(d).

¹⁵ § 3/1212(c).

¹⁶ § 3/1213.

¹⁷ § 3/1219(b)(1).

¹⁸ § 3/1219(b)(2).

¹⁹ § 3/1219(b)(3).

²⁰ § 3/1219(b)(5).

²¹ § 3/1219(b)(4).

²² § 3/1219(b)(6).

²³ § 3/1219(b)(8).

²⁴ § 3/1219(b)(9), (10).

²⁵ § 3/1220.

²⁶ § 3/1216.

²⁷ § 3/1217.

²⁸ § 3/1207.

²⁹ § 3/1204(a).

³⁰ § 3/1204(b).

³¹ § 3/12; 3/1205.

³² § 3/1206.

³³ § 3/1222.

³⁴ § 3/1209.

³⁵ § 3/1214.

³⁶ § 3/1226.

INDIANA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	IND. CODE § 30-4-3-36
Effective Date	7/1/10
Amendment Date(s)	7/1/14
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion to invade principal ²
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ³
4. May new trust eliminate beneficiary's withdrawal rights?	Yes ⁴
5. Must new and old trust beneficiaries be identical?	Unclear ⁵
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Presumably no ⁶
7. May remainder beneficiaries' interests be accelerated?	Presumably yes ⁷
8. New and old trust require same distribution standard?	Presumably no ⁸
9. May trustee grant a power of appointment in new trust?	Silent
10. Must new trust grant identical power of appointment as old trust?	Silent
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ⁹
13. Charitable deduction savings provision?	Yes ¹⁰
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	Delaware tax trap ¹¹
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹²
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	

20. Notice to interested parties required prior to decanting?	Yes ¹³
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ¹⁴
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	No

INDIANA STATUTE

IND. CODE § 30-4-3-36

(as of July 1, 2014)

Trust decanting; notice; rules of construction

Sec. 36. (a) Unless a trust expressly provides otherwise, a trustee who has discretion under the terms of a trust (referred to in this section as the “first trust”) to invade the principal of the trust to make distributions to or for the benefit of one (1) or more persons may instead exercise the power by appointing all or part of the principal of the first trust in favor of a trustee of another trust (referred to in this section as the “second trust”) for the benefit of one (1) or more persons under the same trust instrument or under a different trust instrument as long as:

- (1) the beneficiaries of the second trust are the same as the beneficiaries of the first trust;
- (2) the second trust does not reduce any income, annuity, or unitrust interest in the assets of the first trust; and
- (3) if any contributions to the first trust qualified for a marital or charitable deduction for purposes of the federal income, gift, or estate taxes, the second trust does not contain any provision that, if included in the first trust, would have prevented the first trust from qualifying for a deduction or reduced the amount of a deduction.

(b) The exercise of a power to invade principal under subsection (a) must be by an instrument that is:

- (1) in writing;
- (2) signed and acknowledged by the trustee; and
- (3) filed with the records of the first trust.

(c) The exercise of a power to invade principal under subsection (a) is considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate. The exercise of the power does not extend the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(d) The trustee shall notify in writing all qualified beneficiaries of the first trust at least sixty (60) days before the effective date of the trustee's exercise of the power to invade principal under subsection (a) of the manner in which the trustee intends to exercise the power. A copy of the proposed instrument exercising the power satisfies the trustee's notice obligation under this subsection. If all qualified beneficiaries waive the notice period by signed written instrument delivered to the trustee, the trustee's power to invade principal may be exercised immediately.

The trustee's notice under this subsection does not limit the right of any beneficiary to object to the exercise of the trustee's power to invade principal, except as otherwise provided by this article.

(e) The exercise of the power to invade principal under subsection (a) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amending or revoking the trust.

(f) This section is not intended to create or imply a duty to exercise a power to invade principal. No inference of impropriety may be made as a result of a trustee not exercising the power to invade principal conferred under subsection (a).

(g) This section may not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust, under any other provision of this article or any other statute, or under common law.

* * * * *

IC 30-4-1-2

Other definitions

Sec. 2. As used in this article: . . .

(14) "Qualified beneficiary" means:

(A) a beneficiary who, on the date the beneficiary's qualification is determined:

(i) is a distributee or permissible distributee of trust income or principal;

(ii) would be a distributee or permissible distributee of trust income or principal if the interest of the distributee described in item (i) terminated on that date;

(iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date;

(iv) is a charitable organization expressly designated to receive distributions under the terms of a charitable trust;

(v) is a person appointed to enforce a trust for the care of an animal under IC 30-4-2-18; or

(vi) is a person appointed to enforce a trust for a noncharitable purpose under IC 30-4-2-19; or

(B) the attorney general, if the trust is a charitable trust having its principal place of administration in Indiana.

* * * * *

IC 30-4-2.1-14

Rules of interpretation concerning discretionary interests

Sec. 14. (a) The following rules apply only to discretionary interests (as defined in section 14.5 of this chapter):

(1) A discretionary interest is a mere expectancy that is neither a property interest nor an enforceable right.

(2) A creditor may not:

(A) require a trustee to exercise the trustee's discretion to make a distribution; or

(B) cause a court to foreclose a discretionary interest.

(3) A court may review a trustee's distribution discretion only if the trustee acts dishonestly or with an improper motive.

(b) Words such as sole, absolute, uncontrolled, or unfettered discretion dispense with the trustee acting reasonably.

(c) Absent express language to the contrary, if the distribution language in a discretionary interest permits unequal distributions between beneficiaries or distributions to the exclusion of other beneficiaries, a trustee may, in the trustee's discretion, distribute all of the accumulated, accrued, or undistributed income and principal to one (1) beneficiary to the exclusion of the other beneficiaries.

(d) Regardless of whether a beneficiary has any outstanding creditors, a trustee of a discretionary interest may directly pay any expense on behalf of the beneficiary and may exhaust the income and principal of the trust for the benefit of the beneficiary. A trustee is not liable to a creditor for paying the expenses of a beneficiary who holds a discretionary interest.

IC 30-4-2.1-14.5

“Discretionary interest”; rules of construction

Sec. 14.5. (a) As used in this section and section 14 of this chapter, “discretionary interest” refers to any interest over which the trustee has any discretion to make or withhold a distribution.

(b) A discretionary interest may be evidenced by permissive language such as “may make distributions” or may be evidenced by mandatory distribution language that is negated by the discretionary language of the trust such as “the trustee shall make distributions in the trustee’s sole and absolute discretion”.

(c) An interest that includes distribution language that appears mandatory but is subsequently qualified by discretionary distribution language is considered a discretionary interest.

(d) Trust provisions that create discretionary interests include the following examples:

(1) “The trustee may, in the trustee’s sole and absolute discretion, make distributions for health, education, maintenance, and support.”.

(2) The trustee shall, in the trustee’s sole and absolute discretion, make distributions for health, education, maintenance, and support.”.

(3) “The trustee may make distributions for health, education, maintenance, and support.”.

(4) “The trustee shall make distributions for health, education, maintenance, and support. The trustee may exclude any beneficiary or make unequal distributions among the beneficiaries.”.

(5) “The trustee may make distributions for health, education, maintenance, support, comfort, and general welfare.”.

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² “Unless a trust expressly provides otherwise, a trustee who has discretion under the terms of a trust (referred to in this section as the ‘first trust’) to invade the principal of the trust to make distributions to or for the benefit of one (1) or more persons may instead exercise the power by appointing all or part of the principal of the first trust in favor of a trustee of another trust (referred to in this section as the ‘second trust’) for the benefit of one (1) or more persons under the same trust instrument or under a different trust instrument as long as: (1) the beneficiaries of the second trust are the same as the beneficiaries of the first trust . . .” § 30-4-3-36(a).

³ The second trust may not “reduce any income, annuity, or unitrust interest in the assets of the first trust.” § 30-4-3-36(a)(2). If a beneficiary under the first trust has a mandatory interest *other than* an income interest or an annuity or unitrust interest, then so long as a marital or charitable deduction previously taken would not be lost or jeopardized, the second trust may replace that mandatory interest with a discretionary interest.

⁴ If a beneficiary has a vested right under the first trust to receive a partial or final “outright” distribution of trust assets at one or more specific times, the second trust may postpone those distributions or may replace that right with a lesser interest that continues for life or with a discretionary interest. Purely “discretionary interests” are defined in § 30-4-2.1-14 and § 30-4-2.1-14.5.

⁵ See § 30-4-3-36(a)(1). Jeff Dible agrees with other commentators who have concluded that the “one (1) or more persons” phrase, when read in conjunction with “the beneficiaries of the second trust are the same,” means that Indiana’s statute allows decanting to a second trust that eliminates the interests of one

or more beneficiaries of the first trust. As a practical matter, it will be non-controversial only to eliminate beneficiaries who have remote or contingent interests; a proposed decanting that would eliminate the interest of a current beneficiary would likely draw objections when the trustee gives notice (see footnote 15).

⁶ § 30-4-3-36(a)(1).

⁷ The statute is silent.

⁸ The statute is silent, but presumably the distribution standard can change so long as an income, annuity or unitrust interest is not altered.

⁹ § 30-4-3-36(a)(3).

¹⁰ § 30-4-3-36(a)(3).

¹¹ § 30-4-3-36(c).

¹² § 30-4-3-36(c).

¹³ § 30-4-3-36(d). A multi-part definition of “qualified beneficiaries” (which is narrower than “interested persons” or “beneficiaries”) is found at § 30-4-1-2(14). Before July 1, 2014, a remote contingent beneficiary can acquire the status of a “qualified beneficiary” by giving the trustee a request for notice. On and after July 1, 2014, a remote contingent beneficiary (who did not earlier send the trustee a request for notice) cannot be a “qualified beneficiary” (See the amendment to I.C. § 30-4-1-2(14), effective 7-1-2014).

¹⁴ § 30-4-3-36(f).

KENTUCKY
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	KY. REV. STAT. ANN. § 386.175 (effective 7/12/12)
Effective Date	7/12/12
Amendment Date(s)	7/15/14
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretionary power to distribute principal or income ²
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ³
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁴
5. Must new and old trust beneficiaries be identical?	No ⁵
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No ⁶
7. May remainder beneficiaries' interests be accelerated?	No ⁷
8. New and old trust require same distribution standard?	Yes, only when trustee is a possible beneficiary ⁸
9. May trustee grant a power of appointment in new trust?	Yes ⁹
10. Must new trust grant identical power of appointment as old trust?	No ¹⁰
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹¹
13. Charitable deduction savings provision?	Yes ¹²
14. Beneficiary/trustee savings provision?	Yes ¹³
15. Other tax savings provisions?	2503(b-c) ¹⁴ ; Sub S ¹⁵ ; Delaware tax trap ¹⁶
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁷
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	

20. Notice to interested parties required prior to decanting?	Yes ¹⁸
21. Is decanting prohibited if a beneficiary objects?	Yes, unless court approval is granted ¹⁹
22. Court approval required to decant?	No, unless primary beneficiary objects, but may seek court approval ²⁰
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ²¹
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ²²
MISCELLANEOUS	
27. Other unique considerations?	Court appointing special fiduciary provision ²³ Change of situs provision ²⁴

**KENTUCKY STATUTE
KY. REV. STAT. ANN. § 386.175**

386.175 Trustee's power to appoint principal or income in favor of trustee of second trust – in Terms of second trust – Special fiduciary – Notice – Judicial proceedings.

(1) For the purposes of this section, the following definitions apply:

(a) “Current beneficiary” means a person who is a permissible distributee of trust income or principal;

(b) “Original trust” means a trust established under an irrevocable trust instrument pursuant to the terms of which a trustee has discretionary power to distribute principal or income of the trust to or for the benefit of one (1) or more current beneficiaries of the trust; and

(c) “Second trust” means a trust established under an irrevocable trust instrument, the current beneficiaries of which are one (1) or more of the current beneficiaries of the original trust. The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument.

(2) A trustee of an original trust may, without authorization by the court, exercise the discretionary power to distribute principal or income to or for the benefit of one (1) or more current beneficiaries of the original trust by appointing all or part of the principal or income of the original trust subject to the power in favor of the trustee of a second trust. The trustee of the original trust may exercise this power whether or not there is a current need to distribute principal or income under any standard provided in the terms of the original trust. The trustee's special power to appoint trust principal or income in further trust under this section includes the power to create the second trust.

(3) The second trust may be a trust created or administered under the laws of any jurisdiction, within or without the United States.

(4) The terms of the second trust shall be subject to all of the following:

- (a) The beneficiaries of the second trust may include only beneficiaries of the original trust;
 - (b) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust;
 - (c) The terms of the second trust may not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the original trust, including an interest which is to take effect in the future;
 - (d) If any contribution to the original trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code, then the second trust shall not contain any provision that, if included in the original trust, would have prevented the original trust from qualifying for the deduction or that would have reduced the amount of the deduction;
 - (e) If contributions to the original trust have been excluded from the gift tax by the application of Sections 2503(b) and 2503(c) of the Internal Revenue Code, then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust;
 - (f) If any beneficiary of the original trust has a currently exercisable power of withdrawal over trust property, then either:
 - a. The terms of the second trust shall provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or
 - b. Sufficient trust property shall remain in the original trust to satisfy the currently exercisable power of withdrawal;
 - (g) If the original trust holds stock of an S corporation, the terms of the second trust shall not prevent or eliminate an election to be a qualified subchapter S trust or an electing small business trust or result in the termination of the S election of such corporation;
 - (h) If the power to distribute principal or income in the original trust is subject to an ascertainable standard, then the power to distribute income or principal in the second trust shall be subject to the same or a more restrictive ascertainable standard as in the original trust when the trustee exercising the power described in subsection (2) of this section is a possible beneficiary under the standard; and
 - (i) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust. The power of appointment conferred upon a beneficiary shall be subject to KRS 381.224, 381.225, and 381.226 covering the time at which the permissible period of the rule against perpetuities and suspension of power of alienation begins and the law that determines the permissible period of the rule against perpetuities and suspension of power of alienation of the original trust.
- (5) The court may appoint a special fiduciary with the authority to exercise the power to appoint principal or income under subsection (2) of this section.
- (6) The exercise of the power to appoint principal or income under subsection (2) of this section:
- (a) Shall be considered an exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate;

(b) Shall be subject to KRS 381.224, 381.225, and 381.226 covering the time at which the permissible period of the rule against perpetuities and suspension of power of alienation begins and the law that determines the permissible period of the rule against perpetuities and suspension of power of alienation of the original trust; and

(c) Is not prohibited by a spendthrift provision or by a provision in the original trust instrument that prohibits amendment or revocation of the trust.

(7) To effect the exercise of the power to appoint principal or income under subsection (2) of this section, all of the following shall apply:

(a) The exercise of the power to appoint shall be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust and the effective date of the exercise of the power. The instrument shall be filed with the records of the original trust;

(b) The trustee shall give written notice of the trustee's intention to exercise the power to all current beneficiaries of the original trust and all beneficiaries of the oldest generation of remainder beneficiaries of the first trust, by certified mail with restricted delivery and return receipt, at least sixty (60) days prior to the effective date of the exercise of the power to appoint. The notice shall include a copy of the instrument described in paragraph (a) of this subsection;

(c) If all beneficiaries entitled to notice have received the notice as evidenced by the certified mail return receipt and waive the notice period by a signed written instrument delivered to the trustee, the trustee's power to appoint principal or income shall be exercisable after notice is waived by all such beneficiaries, notwithstanding the effective date of the exercise of the power;

(d) A current beneficiary or a beneficiary who is not a current beneficiary but is a member of the oldest generation of the remainder beneficiaries of the original trust may, no later than thirty (30) days from the date of receiving notice under paragraph (b) of this subsection, commence a judicial proceeding in District Court pursuant to KRS 386B.2-010 to object to the proposed exercise of the power under subsection (2) of this section. In such case the proposed exercise of the power shall require consent of the court; and

(e) In the event that a beneficiary did not receive the notice as evidenced by the certified mail return receipt, and no other beneficiary has commenced a proceeding under paragraph (d) of this subsection, the trustee may seek the approval of the District Court to exercise the power.

(8) Nothing in this section shall be construed to create or imply a duty of the trustee to exercise the power to distribute principal or income, and no inference of impropriety shall be made as a result of a trustee not exercising the power to appoint principal or income conferred under subsection (2) of this section. Nothing in this section shall be construed to abridge the right of any trustee who has the power to appoint property in further trust that arises under the terms of the original trust or under any provision of law or under common law.

(9) This section shall not apply to any charitable remainder trust as defined in 26 U.S.C. sec. 664(d).

(10) A trustee or beneficiary may commence a judicial proceeding pursuant to KRS 386B.2-010 to approve or disapprove of a proposed exercise of the trustee's special power to appoint to a second trust pursuant to subsection (2) of this section.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² “A trustee of an original trust may, without authorization by the court, *exercise the discretionary power to distribute principal or income to or for the benefit of one (1) or more current beneficiaries of the original trust* by appointing all or part of the principal or income of the original trust subject to the power in favor of the trustee of a second trust.” § 386.175(2) (emphasis added).

³ “The terms of the second trust may not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the original trust, *including an interest which is to take effect in the future*[.]” § 386.175(4)(c) (emphasis added).

⁴ § 386.175(4)(f).

⁵ § 386.175(1)(c).

⁶ § 386.175(1)(c); § 386.175(4)(b) (“A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust[.]”).

⁷ § 386.175(4)(b).

⁸ § 386.175(4)(h).

⁹ § 386.175(4)(i).

¹⁰ § 386.175(4)(i).

¹¹ § 386.175(4)(d).

¹² § 386.175(4)(d). “This section shall not apply to any charitable remainder trust as defined in 26 U.S.C. sec. 664(d).” § 386.175(9).

¹³ § 386.175(4)(h).

¹⁴ “If contributions to the original trust have been excluded from the gift tax by the application of Sections 2503(b) and 2503(c) of the Internal Revenue Code, then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust[.]” § 386.175(4)(e).

¹⁵ § 386.175(4)(g).

¹⁶ § 386.175(4)(i).

¹⁷ § 386.175(6)(b).

¹⁸ Sixty days' notice is required to all current beneficiaries of the original trust and all beneficiaries of the oldest generation of remainder beneficiaries of the first [sic] trust. § 386.175(7)(b).

¹⁹ § 386.175(7)(d). "A trustee or beneficiary may commence a judicial proceeding pursuant to KRS 386B.2-010 to approve or disapprove of a proposed exercise of the trustee's special power to appoint to a second trust pursuant to subsection (2) of this section." § 386.175(10).

²⁰ § 386.175(7)(d).

²¹ § 386.175(8).

²² "The provisions of KRS 386.450 to 386.504 shall apply to all trusts administered under Kentucky law, except as otherwise specifically provided in the instrument creating the trust, regardless of when created." § 386.502.

²³ § 386.175(5).

²⁴ "The second trust may be a trust created or administered under the laws of any jurisdiction, within or without the United States." § 386.175(3).

MICHIGAN
State Decanting Summary M.C.L.A. 556.115a¹

STATUTORY HISTORY	
Statutory citation	M.C.L.A. 556.115a
Effective Date	12/28/12
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretionary non-ascertainable power to make distributions of principal or income ²
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, except as to marital and charitable trusts ³
4. May new trust eliminate beneficiary's withdrawal rights?	No, for sole beneficiary ⁴
5. Must new and old trust beneficiaries be identical?	No ⁵
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Yes, with boomerang provision ⁶
7. May remainder beneficiaries' interests be accelerated?	Silent
8. New and old trust require same distribution standard?	Silent
9. May trustee grant a power of appointment in new trust?	Yes ⁷
10. Must new trust grant identical power of appointment as old trust?	No ⁸
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ⁹
13. Charitable deduction savings provision?	Yes ¹⁰
14. Beneficiary/trustee savings provision?	No, but see MCL 700.7815(2)(A) ¹¹
15. Other tax savings provisions?	2503(c) ¹²
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹³
18. May trustee increase trustee commission?	Silent
19. Other restrictions	

NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Silent
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ¹⁴
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Boomerang provision ¹⁵ Indemnification provision for first trustee ¹⁶ Codification of common law provision ¹⁷

MICHIGAN STATUTE
MICH. COMP. LAWS § 556.115A

POWERS OF APPOINTMENT ACT OF 1967 (EXCERPT)
Act 224 of 1967

556.115a Second trust.

Sec. 5a. (1) A trustee with a presently exercisable discretionary power to make distributions of income or principal of an irrevocable trust to or for the benefit of 1 or more beneficiaries of the trust may, unless the terms of the first trust expressly provide otherwise, exercise the power by appointing all or part of the property subject to the power in favor of the trustee of a second trust, provided that all of the following conditions are satisfied:

(a) Except as provided in subsection (2), the beneficiaries of the second trust include only permissible appointees, even if fewer than all permissible appointees, of the trustee's discretionary distribution power as of the time the power is exercised.

(b) For a trust, contributions to which have been excluded from gift tax under section 2503(c) of the internal revenue code, 26 USC 2503(c), the trust instrument of the second trust provides that the beneficiary's remainder interest will pass or be payable no later than the date on which the interest would have passed or been payable under the terms of the first trust instrument.

(c) The exercise of the discretionary power does not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify for a marital or charitable deduction under federal or state law by virtue of that beneficiary's interest in the trust, whether or not that deduction is actually taken.

(d) The exercise of the discretionary power does not reduce a presently exercisable general power to withdraw a specified percentage or amount of trust property in a trust beneficiary who is the only trust beneficiary to or for the benefit of whom the trustee has the power to make discretionary distributions.

(2) The second trust instrument may provide 1 or more of the following:

(a) A special or general power of appointment, including a power to appoint trust property to persons who are not beneficiaries of the first trust, to 1 or more of the beneficiaries of the second trust.

(b) That at a time or upon the occurrence of an event specified in the second trust instrument, the remaining trust assets shall thereafter be held for the benefit of beneficiaries who are or who would have been beneficiaries of the first trust on terms and conditions substantially identical, with respect to the interests of those beneficiaries, to the terms and conditions of the first trust.

(c) That assets of the first trust discovered after exercise of the power described in subsection (1) shall be property of the first trust if that trust continues in existence after exercise of the power, or that assets of the first trust discovered after exercise of the power shall be property of the second trust if the first trust terminates upon exercise of the power.

(d) For indemnification of the trustee of the first trust, except as limited by section 7908 of the MTC, MCL 700.7908.

(3) For purposes of this section, all of the following apply:

(a) A discretionary power to make distributions to a given trust beneficiary is presently exercisable when the timeliness of a present distribution to or for the benefit of that beneficiary depends, under the terms of the trust instrument, only on the trustee's judgment as to what is in the beneficiary's best interests.

(b) A power to make distributions is not discretionary if it is limited by a definite and ascertainable standard, but instructions for the trustee to consider such things as a beneficiary's best interests, welfare, comfort, happiness, or general development do not in themselves constitute definite and ascertainable standards, regardless of whether the trustee is also instructed or permitted to consider resources outside the trust that may be available to the beneficiary.

(c) A general power annually to withdraw a specified percentage or amount of trust property is presently exercisable with respect to any year for which the beneficiary who holds the power is entitled, under the terms of the governing instrument, to exercise the power, and each subsequent year for which the beneficiary will be entitled to exercise the power assuming only the beneficiary's survival and the continuation of the trust. For example, if a trust provides that, beginning in the fifth year after the trust becomes irrevocable, the beneficiary shall have the power for the remainder of his or her life annually to withdraw \$5,000.00 or 5% of the value of the trust principal, whichever is greater, then, in the fourth year after the trust becomes irrevocable, the beneficiary's power to make annual withdrawals is not presently exercisable; however, in the fifth year after the trust becomes irrevocable, the beneficiary's power is presently exercisable, for purposes of this section, with respect to the fifth year and each subsequent year during the beneficiary's life.

(4) The trustee of the second trust may be the trustee of the first trust, the second trust may be a trust under the governing instrument of the first trust or another governing instrument, the governing instrument may be one created by the trustee of the first trust, and the governing instrument may be the instrument that exercises the power described in subsection (1).

(5) A second trust shall be treated as both of the following:

(a) A new irrevocable trust for purposes of the notice requirements of section 7814(2)(c) of the MTC, MCL 700.7814.

(b) A continuation of the first trust for purposes of the notice requirements of section 7814(2)(d) of the MTC, MCL 700.7814, and the charge of any fee or commission on the transfer of assets from the first trust to the second trust shall be treated as a change in the rate of the trustee's compensation.

(6) A discretionary power under subsection (1) is a power of appointment and a discretionary power for purposes of section 7815 of the MTC, MCL 700.7815.

(7) This section shall not abridge the right of a trustee who has a power to distribute trust property in further trust under this act, any other statute, or the common law. This section shall not abridge the right of a trustee who has a power to amend or revoke a trust.

(8) It is the intent of the legislature that this section be a codification of the common law of this state in effect before the effective date of the amendatory act that added this section.

(9) As used in this section, "first trust" means an irrevocable trust over which a trustee has a presently exercisable discretionary power to make distributions that is exercised as described in subsection (1).

**MICHIGAN
ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)
Act 386 of 1998**

MICH. COMP. LAWS § 700.7103 (Definitions)

700.7103 Definitions.

Sec. 7103. As used in this article:

- (a) “Action”, with respect to a trustee or a trust protector, includes an act or a failure to act.
- (b) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.
- (c) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).
- (d) “Discretionary trust provision” means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee’s discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:
 - (i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.
 - (ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.
 - (iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.
 - (iv) Whether the distribution of trust property is from income or principal or both of the trust.
 - (v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.
- (e) “Interests of the trust beneficiaries” means the beneficial interests provided in the terms of the trust.
- (f) “Power of withdrawal” means a presently exercisable general power of appointment other than a power that is either of the following:
 - (i) Exercisable by a trustee and limited by an ascertainable standard.
 - (ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
- (g) “Qualified trust beneficiary” means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary’s qualification is determined:

(i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.

(ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.

(iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(h) “Revocable”, as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) “Settlor” means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

(j) “Spendthrift provision” means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary’s interest.

(k) “Support provision” means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

(l) “Trust beneficiary” means a person to whom 1 or both of the following apply:

(i) The person has a present or future beneficial interest in a trust, vested or contingent.

(ii) The person holds a power of appointment over trust property in a capacity other than that of trustee.

(m) “Trust instrument” means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

(n) “Trust protector” means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

(i) The settlor of a trust.

(ii) The holder of a power of appointment.

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² "A power to make distributions is not discretionary if it is limited by a definite and ascertainable standard, but instructions for the trustee to consider such things as a beneficiary's best interests, welfare, comfort, happiness, or general development do not in themselves constitute definite and ascertainable standards, regardless of whether the trustee is also instructed or permitted to consider resources outside the trust that may be available to the beneficiary." § 556.115A(3)(b).

³ "The exercise of the discretionary power does not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify for a marital or charitable deduction under federal or state law by virtue of that beneficiary's interest in the trust, whether or not that deduction is actually taken." § 556.115A(1)(c).

⁴ "The exercise of the discretionary power does not reduce a presently exercisable general power to withdraw a specified percentage or amount of trust property in a trust beneficiary who is the only trust beneficiary to or for the benefit of whom the trustee has the power to make discretionary distributions." § 556.115A(1)(d).

⁵ The beneficiaries of the second trust may include only permissible appointees, but may include fewer than all permissible appointees. § 556.115A(1)(a).

⁶ The beneficiaries of the second trust include only permissible appointees. § 556.115A(1)(a). "The second trust instrument may provide . . . (b) That at a time or upon the occurrence of an event specified in the second trust instrument, the remaining trust assets shall thereafter be held for the benefit of beneficiaries who are or who would have been beneficiaries of the first trust on terms and conditions substantially identical, with respect to the interests of those beneficiaries, to the terms and conditions of the first trust." § 556.115A(2)(b).

⁷ § 556.115A(2)(a).

⁸ § 556.115A(2)(a).

⁹ The decanting may not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify for a marital deduction under federal or state law, whether or not that deduction was actually taken. § 556.115A(1)(c).

¹⁰ The decanting may not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify for a charitable deduction under federal or state law, whether or not that deduction is actually taken. § 556.115A(1)(c).

¹¹ MCL section 700.7815(2)(A) provides: "A person other than a settlor who is a trust beneficiary and trustee of a trust that confers on the trustee a power to make distributions pursuant to a discretionary trust provision to or for the trustee's benefit may exercise the power only in accordance with an ascertainable standard."

¹² § 556.115A(1)(b).

¹³ § 556.124(3).

¹⁴ § 700.7815(2).

¹⁵ § 556.115A(2)(b).

¹⁶ “The second trust instrument may provide 1 or more of the following: . . . (d) For indemnification of the trustee of the first trust, except as limited by section 7908 of the MTC, MCL 700.7908.” § 556.115A(2)(d). MCL § 700.7908 provides limitations on the exculpation of a trustee.

¹⁷ § 556.115A(8).

MICHIGAN
State Decanting Summary – M.C.L.A. 700.7820a¹

STATUTORY HISTORY	
Statutory citation	M.C.L.A. 700.7820a
Effective Date	12/28/12
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, to distribute income or principal ²
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No ³
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁴
5. Must new and old trust beneficiaries be identical?	Yes ⁵
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No ⁶
7. May remainder beneficiaries' interests be accelerated?	No ⁷
8. New and old trust require same distribution standard?	Presumably yes ⁸
9. May trustee grant a power of appointment in new trust?	Presumably yes ⁹
10. Must new trust grant identical power of appointment as old trust?	Presumably yes ¹⁰
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹¹
13. Charitable deduction savings provision?	Yes ¹²
14. Beneficiary/trustee savings provision?	Yes ¹³
15. Other tax savings provisions?	Catch-all ¹⁴ ; Other ¹⁵
16. Non-grantor trust to grantor trust conversion permitted?	Presumably yes ¹⁶
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁷
18. May trustee increase trustee commission?	No, unless all beneficiaries consent ¹⁸

19. Other restrictions	Decreasing trustee liability or eliminating trustee remover ¹⁹
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes, 63 days ²⁰
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No ²¹
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ²²
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Court appointing special fiduciary provision ²³

MICHIGAN STATUTE
Mich. Comp. Laws § 700.7820a

700.7820a Irrevocable trust including discretionary trust provision; distribution; definitions.

Sec. 7820a.

(1) If an irrevocable trust includes a discretionary trust provision, the trustee of the trust may, unless the terms of the first trust expressly provide otherwise, distribute by written instrument all or part of the property subject to that provision to the trustee of a second trust, provided that both of the following conditions are satisfied:

(a) The terms of the second trust do not materially change the beneficial interests of the beneficiaries of the first trust.

(b) If the governing instrument of the first trust expressly indicates an intention that the first trust qualify for a tax benefit or the terms of the first trust are clearly designed to qualify the first trust for a tax benefit, and if the first trust would qualify for the intended tax benefit, the governing instrument of the second trust is not inconsistent with the tax planning that informed the first trust.

(2) A distribution of property to the trustee of a second trust under subsection (1) shall not result in any of the following:

(a) An increase in or a change in the method of determining the compensation of a trustee, unless the increase or change has been consented to in writing by all beneficiaries entitled to receive reports regarding the first trust.

(b) A charge of a fee or commission on the transfer of assets from the first trust to the second trust, unless the fee or commission has been consented to in writing by all beneficiaries entitled to receive reports regarding the first trust.

(c) A reduction in the standard of care applicable to the trustee's actions or an expansion of exoneration of the trustee.

(d) A diminution in the authority of a person who has a power exercisable in a fiduciary capacity to direct or remove the trustee.

(3) For purposes of this section, all of the following apply:

(a) In determining whether a trust is irrevocable, a settlor's lack of capacity to exercise a power of revocation negates the power unless an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving and the agent, conservator, or guardian is authorized to exercise the power of revocation.

(b) An increase in the maximum period during which the vesting of a future interest may be suspended or postponed under applicable law does not constitute a material change in the interest of a beneficiary.

(c) An increase in compensation arising solely because the duration of the second trust is longer than the duration of the first trust does not constitute an increase in or a change in the method of determining the compensation of the trustee.

(4) The distribution power described in subsection (1) shall not be exercised over any portion of the first trust as to which the exercising trustee is the settlor, unless the exercising trustee was acting in a fiduciary capacity when he or she created the first trust.

(5) The trustee of the second trust may be the trustee of the first trust, the second trust may be a trust under the governing instrument of the first trust or another governing instrument, the governing instrument may be created by the trustee of the first trust, and the governing instrument may be the instrument that exercises the power described in subsection (1).

(6) The second trust instrument may provide 1 or both of the following:

(a) That assets of the first trust discovered after exercise of the power described in subsection (1) shall be property of the first trust if that trust is to continue in existence after exercise of the power, or that assets of the first trust discovered after exercise of the power shall be property of the second trust if the first trust terminates upon exercise of the power.

(b) For indemnification of the trustee of the first trust, except as limited by section 7908.

(7) A trustee of the first trust may exercise the power described in subsection (1) without the consent of that trust's settlor, any beneficiary, or a court. However, the trustee shall give written notice of an intended exercise of the power to the settlors of the first trust, if living, and qualified trust beneficiaries no later than 63 days before exercise of the power. The notice required by this section shall include a copy of the proposed instrument of exercise. If the living settlors and qualified trust beneficiaries waive the 63-day notice period in writing, a distribution under subsection (1) may be made before expiration of the notice period.

(8) The period during which the vesting of a future interest may be suspended or postponed by the exercise of the power described in subsection (1) is determined under the powers of appointment act of 1967, 1967 PA 224, MCL 556.111 to 556.133, treating the power under subsection (1) as a power of appointment for purposes of this subsection.

(9) This section shall not abridge the right of a trustee who has a power to distribute trust property in further trust under the terms of a trust instrument, any other statute, or the common law. The provisions of this section shall not abridge any right of a trustee who has a power to amend or terminate a trust.

(10) As used in this section:

(a) “First trust” means an irrevocable trust that has a discretionary trust provision that is exercised as described in subsection (1).

(b) “Tax benefit” means a federal or state tax deduction, exemption, exclusion, or other particular tax attribute. The term tax benefit does not include grantor trust status. A trust has grantor trust status to the extent that the assets of the trust are treated, for federal income tax purposes, as owned by the grantor or another person under sections 671 to 679 of the internal revenue code, 26 USC 671 to 679.

**MICHIGAN
ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)
Act 386 of 1998**

MICH. COMP. LAWS § 700.7103 (Definitions)

700.7103 Definitions.

Sec. 7103. As used in this article:

- (a) “Action”, with respect to a trustee or a trust protector, includes an act or a failure to act.
- (b) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.
- (c) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).
- (d) “Discretionary trust provision” means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee’s discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:
 - (i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.
 - (ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.
 - (iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.
 - (iv) Whether the distribution of trust property is from income or principal or both of the trust.
 - (v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.
- (e) “Interests of the trust beneficiaries” means the beneficial interests provided in the terms of the trust.
- (f) “Power of withdrawal” means a presently exercisable general power of appointment other than a power that is either of the following:
 - (i) Exercisable by a trustee and limited by an ascertainable standard.
 - (ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
- (g) “Qualified trust beneficiary” means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary’s qualification is determined:

(i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.

(ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.

(iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(h) “Revocable”, as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) “Settlor” means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

(j) “Spendthrift provision” means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary’s interest.

(k) “Support provision” means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

(l) “Trust beneficiary” means a person to whom 1 or both of the following apply:

(i) The person has a present or future beneficial interest in a trust, vested or contingent.

(ii) The person holds a power of appointment over trust property in a capacity other than that of trustee.

(m) “Trust instrument” means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

(n) “Trust protector” means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

(i) The settlor of a trust.

(ii) The holder of a power of appointment.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² The trustee may decant an irrevocable trust with a “discretionary trust provision.” § 700.7820A(1)(a). A “discretionary trust provision” is defined in § 700.7103(d).

³ The terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

⁴ The terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

⁵ The terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

⁶ The terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

⁷ The terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

⁸ The terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

⁹ The terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

¹⁰ The terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

¹¹ The “catch-all” tax provision would include the marital deduction. § 700.7820A(1)(b).

¹² The “catch-all” tax provision would include the charitable deduction. § 700.7820A(1)(b).

¹³ “A person other than a settlor who is a trust beneficiary and trustee of a trust that confers on the trustee a power to make distributions pursuant to a discretionary trust provision to or for the trustee's benefit may exercise the power only in accordance with an ascertainable standard.” § 700.7815(3)(a).

¹⁴ § 700.7820A(1)(b).

¹⁵ “The distribution power described in subsection (1) shall not be exercised over any portion of the first trust as to which the exercising trustee is the settlor, unless the exercising trustee was acting in a fiduciary capacity when he or she created the first trust.” § 700.7820A(4).

¹⁶ Grantor trust status, and perhaps by implication non-grantor trust status, is not considered a tax benefit that is subject to the tax savings provision under § 700.7820A(1)(b). § 700.7820A(10)(b).

¹⁷ § 700.7820A(8).

¹⁸ § 700.7820A(2)(a), (b).

¹⁹ § 700.7820a(2)(c),(d).

²⁰ § 700.7820A(7).

²¹ “§ 700.7820A(7).

²² § 700.7815(2).

²³ “If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.” § 700.7815(4).

MINNESOTA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	MINN. STAT. § 502.851
Effective Date	1/1/16
Amendment Date(s)	None
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, absolute discretion to distribute principal ² <i>Limited discretion:</i> Yes, power to distribute principal without absolute discretion ³
2. Limitation on trustee who may decant?	Yes ⁴
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to current income, annuity, or unitrust rights ⁵
4. May new trust eliminate beneficiary's withdrawal rights?	No as to current rights ⁶
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁷ <i>Limited discretion:</i> Yes ⁸
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁹ <i>Limited discretion:</i> No ¹⁰
7. May remainder beneficiaries' interests be accelerated?	No
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> Presumably no <i>Limited discretion:</i> Only for original term ¹¹
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹² <i>Limited discretion:</i> Yes ¹³
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁴ <i>Limited discretion:</i> Yes ¹⁵
11. Supplemental needs trust exception?	Yes ¹⁶
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁷
13. Charitable deduction savings provision?	Yes ¹⁸
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ¹⁹ ; 2642(c) ²⁰ ; Catch-all ²¹
16. Non-grantor trust to grantor trust conversion permitted?	Not specified
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²²

18. May trustee increase trustee commission?	With court approval ²³
19. Other restrictions?	Decreasing trustee liability, eliminating trustee remover or making a conclusive fixation of value ²⁴
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²⁵
21. Is decanting prohibited if a beneficiary objects?	No ²⁶
22. Court approval required to decant?	No ²⁷
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ²⁸
24. Provision that trustee has no duty to consider decanting?	Yes ²⁹
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁰
MISCELLANEOUS	
27. Other unique considerations?	Subsequently discovered assets ³¹ , no trustee fee for decanting ³²

**MINNESOTA STATUTE
502.851**

[502.851] TRUST DECANTING.

Subdivision 1.

Definitions.

The definitions in this subdivision apply to this section.

(a) “Appointed trust” means an irrevocable trust which receives principal from an invaded trust under subdivision 3 or 4, including another trust created by the settlor of the invaded trust, under the terms of the invaded trust or any other trust instrument, or by the trustees, in that capacity, of the invaded trust. For purposes of creating another trust, any requirement that a trust instrument be signed by the settlor shall be deemed satisfied by the signature of the trustee of the appointed trust.

(b) “Authorized trustee” means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than a trustee who is the settlor, or a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee, other than by the exercise of a power of appointment held in a nonfiduciary capacity.

(c) “Current beneficiary” or “beneficiaries” means the person or persons, or as to a class, any person or persons who are or will become members of that class, to whom the trustees may distribute principal at the time of

the exercise of the power, provided that the interest of a beneficiary to whom income, but not principal, may be distributed at the discretion of the trustee of the invaded trust, may be continued in the appointed trust.

(d) Invade means the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

(e) “Invaded trust” means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under subdivision 3 or 4.

(f) “Person or persons interested in the invaded trust” means all qualified beneficiaries as defined in section 501C.0103, paragraph (m).

(g) “Principal” includes the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

(h) “Unlimited discretion” means the unlimited power to distribute principal. A power to distribute principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation of the power to distribute principal.

Subd. 2.

Power of appointment; effect when more or less extensive than authorized.

An exercise of a power of appointment is not void if the exercise is:

(1) more extensive than was authorized but is valid to the extent authorized by the instrument creating its power; or

(2) less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.

Subd. 3.

Authorized trustee with unlimited discretion.

(a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of the principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one, or all of the current beneficiaries of the invaded trust, to the exclusion of any one or more of the current beneficiaries. The successor and remainder beneficiaries of the appointed trust may be none, one, more than one, or all of the successor and remainder beneficiaries of the invaded trust.

(b) An authorized trustee exercising the power under paragraph (a) may grant a discretionary power of appointment in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint may receive principal outright under the terms of the invaded trust.

(c) If the authorized trustee grants a power of appointment, the class of permissible appointees in favor of whom the beneficiary may exercise the power of appointment granted in the appointed trust may be broader or otherwise different from the current, successor, and remainder beneficiaries of the invaded trust.

(d) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of the class.

Subd. 4.

Authorized trustee without unlimited discretion.

(a) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries shall be the same as the successor and remainder beneficiaries of the invaded trust.

(b) If the authorized trustee exercises the power under this subdivision, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

(c) If the authorized trustee exercises the power under this subdivision to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to paragraph (b), may also include language providing the trustee with unlimited discretion to invade the principal of the appointed trust during this extended term.

(d) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of the class.

(e) If the authorized trustee exercises the power under this subdivision and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant the power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.

Subd. 5.

Special power of appointment.

An exercise of the power to invade trust principal under subdivision 3 or 4 shall be considered the exercise of a special power of appointment.

Subd. 6.

Term of appointed trust.

The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

Subd. 7.

Unlimited discretion governs.

If an authorized trustee has unlimited discretion to invade the principal of a trust, and the same trustee or another trustee has the power to invade principal under the trust instrument and that power is not subject to unlimited discretion, the authorized trustee having unlimited discretion may exercise the power of appointment under subdivision 3.

Subd. 8.

Current need to invade principal.

An authorized trustee may exercise the power to appoint in favor of an appointed trust under subdivision 3 or 4 whether or not there is a current need to invade principal under the terms of the invaded trust.

Subd. 9.

Fiduciary duty.

An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power 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 the prevailing circumstances.

Subd. 10.

Subsequently discovered assets.

Unless the authorized trustee provides otherwise:

(1) the appointment of all the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and

(2) the appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust. These assets shall remain the assets of the invaded trust.

Subd. 11.

Requirements for exercise of power to appoint; notice.

(a) The exercise of the power to appoint to an appointed trust under subdivision 3 or 4 must be evidenced by an instrument in writing, signed, dated, and acknowledged by the authorized trustee. The exercise of the power shall be effective 60 days after the date of delivery of notice as specified in paragraph (c), unless each person entitled to notice agrees in writing to an earlier effective date or waives in writing the right to object to the exercise of the power.

(b) An authorized trustee may exercise the power authorized by subdivision 3 or 4 without the consent of the settlor or the persons interested in the invaded trust and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.

(c) A copy of the instrument exercising the power, a copy of the appointed trust, and a copy of the invaded trust shall be delivered to:

(1) any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under subdivision 3 or 4; and

(2) all persons interested in the invaded trust.

(d) Notice of an exercise of the power must be given in the same manner as provided in section 501C.0109.

(e) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or only a part of the assets comprising the principal of the invaded trust and, if a part, the approximate percentage of the value of the principal of the invaded trust that is subject to the appointment.

(f) A person entitled to notice may object to the authorized trustee's exercise of the power under this section by serving a written notice of objection upon the authorized trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.

(g) If the authorized trustee does not receive a written objection to the proposed exercise from a person entitled to notice within the applicable period, the authorized trustee is not liable to any person who received the required notice for the exercise of the power.

(h) If the authorized trustee receives a written objection within the applicable period, either the authorized trustee or any person entitled to notice may petition the court to have the proposed exercise of a power performed as proposed, performed with modifications, or denied. In a proceeding, a person objecting to the proposed exercise has the burden of proof as to whether the authorized trustee's proposed exercise should not be performed. A person who has not objected is not estopped from opposing the proposed exercise in the proceeding. If the authorized trustee decides not to implement the proposed exercise, the trustee shall notify all persons entitled to notice of the decision not to exercise the power and the reasons for the decision, and the authorized trustee's decision not to implement the proposed exercise does not itself give rise to liability to any person interested in the invaded trust. A person entitled to notice may petition the court to have the exercise of a power performed and has the burden of proof as to whether it should be performed.

(i) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be filed with records of the appointed trust and the invaded trust.

Subd. 12.

Rights of trustee.

This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.

Subd. 13.

No duty to exercise a power to invade.

Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under subdivision 3 or 4.

Subd. 14.

Power clarified.

A power authorized by subdivision 3 or 4 may be exercised, subject to the provisions of subdivision 9, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under subdivision 3 or 4.

Subd. 15.

Prohibitions.

An authorized trustee may not exercise a power authorized by subdivision 3 or 4 to effect any of the following:

(1) to reduce, limit, or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a current right to withdraw a percentage of the value of the trust, or a current right to withdraw a specified dollar amount; provided, however, and subject to the other limitations in this section, an authorized trustee may exercise a power authorized by subdivision 3 or 4 to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 501C.1205;

(2) notwithstanding section 501C.1008, paragraph (b), to decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence;

(3) to alter or eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under subdivision 3 or 4, unless notice has been provided to the persons under subdivision 11, paragraph (c), or approval is granted by a court having jurisdiction over the trust;

(4) to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation, or otherwise;

(5) to extend the term of the appointed trust beyond any permissible period of the rule against perpetuities of the invaded trust, and any exercise of the power which extends the term of the appointed trust beyond the permissible period of the rule against perpetuities of the invaded trust shall void the entire exercise of the power; or

(6) to jeopardize:

(i) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code; the marital deduction under section 2056(a) or 2523(a) of the Internal Revenue Code; or the charitable deduction under section 170(a), 642(c), 2055(a), or 2522(a) of the Internal Revenue Code;

(ii) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code; or

(iii) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer purposes under the Internal Revenue Code.

Subd. 16.

Compensation; commissions.

For the purposes of this section:

(1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by subdivision 3 or 4 to change the provisions regarding the determination of the compensation of any trustee. The commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.

(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to subdivision 3 or 4.

Subd. 17.

Application.

Unless the invaded trust expressly provides otherwise, this section applies to any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state.

[501C.0103] DEFINITIONS.

In this chapter:

- (a) “Action” with respect to an act of a trustee includes a failure to act.
- (b) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on the effective date of this act.
- (c) “Beneficiary” means a person that:
 - (1) has a present or future beneficial interest in a trust, vested or contingent; or
 - (2) in a capacity other than that of trustee, holds a power of appointment over trust property.
- (d) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in section 501B.35.
- (e) “Conservator” means a person who is appointed by a court to manage the estate of a protected person under sections 524.5-101 to 524.5-903.
- (f) “Environmental law” means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
- (g) “Guardian” means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is a guardian ad litem, under sections 524.5-101 to 524.5-903.
- (h) “Interests of the beneficiaries” means the beneficial interests provided in the terms of the trust.
- (i) “Jurisdiction,” with respect to a geographic area, includes a state or country.
- (j) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.
- (k) “Power of withdrawal” means a presently exercisable general power of appointment other than a power:
 - (1) exercisable by a trustee and limited by an ascertainable standard; or
 - (2) exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
- (l) “Property” means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
- (m) “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined:

(1) a distributee or permissible distributee of trust income or principal;

(2) a distributee or permissible distributee of trust income or principal if the interests of the distributees described in clause (1) terminated on that date without causing the trust to terminate; or

(3) a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(n) “Revocable,” as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(o) “Settlor” means a person, including a testator, who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.

(p) “Spendthrift provision” means a term of a trust which restricts both voluntary and involuntary transfer of a beneficiary’s interest.

(q) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(r) “Terms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(s) “Trust instrument” means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

(t) “Trustee” includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court.

[501C.0109] METHODS AND WAIVER OF NONJUDICIAL NOTICE.

(a) Notice to a person under this chapter or the sending of a document to a person under this chapter must be accomplished in a manner reasonably suitable under the circumstances and that is likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person’s last known place of residence or place of business, or a properly directed facsimile or electronic message.

(b) Notice otherwise required under this chapter or a document otherwise required to be sent under this chapter need not be provided to a person whose identity is unknown or whose location is unknown and not reasonably ascertainable by the trustee after making reasonable efforts to locate the person.

(c) Notice under this chapter or the sending of a document under this chapter may be waived in writing by the person to be notified or sent the document.

(d) Notice of a judicial proceeding must be given as provided in sections 501C.0201 to 501C.0208

[501C.1008] EXCULPATION OF TRUSTEE.

(a) The terms of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless:

(1) the settlor is represented by independent counsel with respect to the trust instrument containing the term; or

(2) the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

**[501C.1205] TRUST PROVISIONS LINKED TO PUBLIC ASSISTANCE ELIGIBILITY;
SUPPLEMENTAL NEEDS TRUSTS.**

Subdivision 1.

Trusts containing limitations linked to eligibility for public assistance.

(a) Except as allowed by subdivision 2 or 3, a provision in a trust that provides for the suspension, termination, limitation, or diversion of the principal, income, or beneficial interest of a beneficiary if the beneficiary applies for, is determined eligible for, or receives public assistance or benefits under a public health care program is unenforceable as against the public policy of this state, without regard to the irrevocability of the trust or the purpose for which the trust was created.

(b) This subdivision applies to trust provisions created after July 1, 1992. For purposes of this section, a trust provision is created on the date of execution of the first instrument that contains the provision, even though the trust provision is later amended or reformed or the trust is not funded until a later date.

Subd. 2.

Supplemental trusts for persons with disabilities.

(a) It is the public policy of this state to enforce supplemental needs trusts as provided in this subdivision.

(b) For purposes of this subdivision, a “supplemental needs trust” is a trust created for the benefit of a person with a disability and funded by someone other than the trust beneficiary, the beneficiary’s spouse, or anyone obligated to pay any sum for damages or any other purpose to or for the benefit of the trust beneficiary under the terms of a settlement agreement or judgment.

(c) For purposes of this subdivision, a “person with a disability” means a person who, prior to creation of a trust which otherwise qualifies as a supplemental needs trust for the person’s benefit:

(1) is considered to be a person with a disability under the disability criteria specified in Title II or Title XVI of the Social Security Act; or

(2) has a physical or mental illness or condition which, in the expected natural course of the illness or condition, either prior to or following creation of the trust, to a reasonable degree of medical certainty, is expected to:

- (i) last for a continuous period of 12 months or more; and
- (ii) substantially impair the person's ability to provide for the person's care or custody.

Disability may be established conclusively for purposes of this subdivision by the written opinion of a licensed professional who is qualified to diagnose the illness or condition, confirmed by the written opinion of a second licensed professional who is qualified to diagnose the illness or condition.

(d) The general purpose of a supplemental needs trust must be to provide for the reasonable living expenses and other basic needs of a person with a disability when benefits from publicly funded benefit programs are not sufficient to provide adequately for those needs. Subject to the restrictions contained in this paragraph, a supplemental needs trust may authorize distributions to provide for all or any portion of the reasonable living expenses of the beneficiary. A supplemental needs trust may allow or require distributions only in ways and for purposes that supplement or complement the benefits available under medical assistance, Minnesota supplemental aid, and other publicly funded benefit programs for disabled persons. A supplemental needs trust must contain provisions that prohibit disbursements that would have the effect of replacing, reducing, or substituting for publicly funded benefits otherwise available to the beneficiary or rendering the beneficiary ineligible for publicly funded benefits.

(e) A supplemental needs trust is not enforceable if the trust beneficiary becomes a patient or resident after age 64 in a state institution or nursing facility for six months or more and, due to the beneficiary's medical need for care in an institutional setting, there is no reasonable expectation that the beneficiary will ever be discharged from the institution or facility. For purposes of this paragraph "reasonable expectation" means that the beneficiary's attending physician has certified that the expectation is reasonable. For purposes of this paragraph, a beneficiary participating in a group residential program is not deemed to be a patient or resident in a state institution or nursing facility.

(f) The trust income and assets of a supplemental needs trust are considered available to the beneficiary for medical assistance purposes to the extent they are considered available to the beneficiary under medical assistance, supplemental security income, or Minnesota family investment program methodology, whichever is used to determine the beneficiary's eligibility for medical assistance. For other public assistance programs established or administered under state law, assets and income will be considered available to the beneficiary in accordance with the methodology applicable to the program.

(g) Nothing in this subdivision requires submission of a supplemental needs trust to a court for interpretation or enforcement.

(h) Paragraphs (a) to (g) apply to supplemental needs trusts whenever created, but the limitations and restrictions in paragraphs (c) to (g) apply only to trusts created after June 30, 1993.

Subd. 3.

Supplemental needs trusts under federal law.

A trust created on or after August 11, 1993, which qualifies as a supplemental needs trust for a person with a disability under United States Code, title 42, section 1396p(c)(2)(B)(iv) or 1396p(d), as amended by section 13611(b) of the Omnibus Budget Reconciliation Act of 1993, Public Law 103-66, commonly known as OBRA 1993, is enforceable, and the courts of this state may authorize creation and funding of a trust which so qualifies.

Subd. 4.

Annual filing requirement for supplemental needs trusts.

(a) A trustee of a trust under subdivision 3 and United States Code, title 42, section 1396p(d)(4)(A) or (C), shall submit to the commissioner of human services, at the time of a beneficiary's request for medical assistance, the following information about the trust:

- (1) a copy of the trust instrument; and
- (2) an inventory of the beneficiary's trust account assets and the value of those assets.

(b) A trustee of a trust under subdivision 3 and United States Code, title 42, section 1396p(d)(4)(A) or (C), shall submit an accounting of the beneficiary's trust account to the commissioner of human services at least annually until the trust, or the beneficiary's interest in the trust, terminates. Accountings are due on the anniversary of the execution date of the trust unless another annual date is established by the terms of the trust. The accounting must include the following information for the accounting period:

- (1) an inventory of trust assets and the value of those assets at the beginning of the accounting period;
 - (2) additions to the trust during the accounting period and the source of those additions;
 - (3) itemized distributions from the trust during the accounting period, including the purpose of the distributions and to whom the distributions were made;
 - (4) an inventory of trust assets and the value of those assets at the end of the accounting period;
- and
- (5) changes to the trust instrument during the accounting period.

(c) For the purpose of paragraph (b), an accounting period is 12 months unless an accounting period of a different length is permitted by the commissioner.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² § 502.851, subdivision 3.

³ § 502.851, subdivision 4.

⁴ § 502.851, subdivision 1(b), defines authorized trustee to exclude a settlor or a mandatory or discretionary current or future beneficiary.

⁵ § 502.851, subdivision 15(1).

⁶ § 502.851, subdivision 15(1). With respect to future rights, it appears that they could be eliminated even if the authorized trustee has limited discretion. § 502.851, subdivision 4(c).

⁷ “An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of the principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one, or all of the current beneficiaries of the invaded trust, to the exclusion of any one or more of the current beneficiaries. The successor and remainder beneficiaries of the appointed trust may be none, one, more than one, or all of the successor and remainder beneficiaries of the invaded trust.” § 502.851, subdivision 3(a).

⁸ “An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries shall be the same as the successor and remainder beneficiaries of the invaded trust.” § 502.851, subdivision 4(a).

⁹ § 502.851, subdivision 3(a).

¹⁰ § 502.851, subdivision 4(a).

¹¹ “If the authorized trustee exercises the power under this subdivision, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.” § 502.851, subdivision 4(b). During any extended term, however, “the appointed trust may also include language providing the trustee with unlimited discretion to invade the principal of the appointed trust during the extended term.” § 502.851, subdivision 4(c).

¹² The trustee may grant a power of appointment (including a presently exercisable power of appointment) in the second trust to one or more of the current beneficiaries of the first trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of the first trust. § 502.851, subdivision 3(b). The class of permissible appointees in favor of whom a beneficiary may exercise the power of appointment granted in the second trust may be broader than or otherwise different from the current, successor, and presumptive remainder beneficiaries of the first trust. § 502.851, subdivision 3(c).

¹³ If the trustee does not have absolute discretion and if the first trust grants a power of appointment to a beneficiary of the trust, the second trust shall grant such power of appointment in the second trust and the class of permissible appointees shall be the same as in the first trust. § 502.851, subdivision 4(e).

¹⁴ § 502.851, subdivision 3(c).

¹⁵ § 502.851, subdivision 4(e).

¹⁶ § 502.851, subdivision 15(1).

¹⁷ § 502.851, subdivision 15(6)(i).

¹⁸ § 502.851, subdivision 15(6)(i).

¹⁹ § 502.851, subdivision 15(6)(i).

²⁰ § 502.851, subdivision 15(6)(ii).

²¹ § 502.851, subdivision 15(6)(iii).

²² § 502.851, subdivision 15(5).

²³ § 502.851, subdivision 16.

²⁴ § 502.851, subdivision 15(2), (3) and (4).

²⁵ § 502.851, subdivision 11(c) and (d).

²⁶ § 502.851, subdivision 11(b). If there is an objection, the authorized trustee or an interested party may petition the court. § 502.851, subdivision 11(h).

²⁷ § 502.851, subdivision 11(b).

²⁸ “An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power 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 the prevailing circumstances.” § 502.851, subdivision 9.

²⁹ § 502.851, subdivision 13. In addition, if after providing notice the authorized trustee decides not to decant, the decision not to decant does not itself give rise to liability. § 502.851, subdivision 11(h).

³⁰ “Unless the invaded trust expressly provides otherwise, this section applies to any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state.” § 502.851, subdivision 17.

³¹ § 502.851, subdivision 10.

³² § 502.851, subdivision 16(2).

MISSOURI
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	MO. REV. STAT. § 456.4-419
Effective Date	8/28/11
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretionary power to make a distribution of principal or income ²
2. Limitation on trustee who may decant?	Yes ³
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, except as to marital and charitable trusts, GRATs, QSSTs, and ESBTs ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	No ⁶
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No ⁷
7. May remainder beneficiaries' interests be accelerated?	Yes ⁸
8. New and old trust require same distribution standard?	Unclear ⁹
9. May trustee grant a power of appointment in new trust?	Silent
10. Must new trust grant identical power of appointment as old trust?	Silent
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁰
13. Charitable deduction savings provision?	Yes ¹¹
14. Beneficiary/trustee savings provision?	Yes ¹²
15. Other tax savings provisions?	2503(c) ¹³ ; 2702 ¹⁴ ; Sub S ¹⁵
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	No
18. May trustee increase trustee commission?	Silent

19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	No, except as to beneficiaries of new trust ¹⁶
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ¹⁷
24. Provision that trustee has no duty to consider decanting?	Yes ¹⁸
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ¹⁹
MISCELLANEOUS	
27. Other unique considerations?	Codification of common law provision ²⁰

**MISSOURI STATUTE
Mo. Rev. Stat. § 456.4-419**

Distributions of income and principal of first trusts and second trusts, discretionary power of trustee--notice requirements.

456.4-419. 1. Unless the terms of the trust instrument expressly provide otherwise, a trustee who has discretionary power under the terms of a trust to make a distribution of income or principal, whether or not limited by an ascertainable standard, to or for the benefit of one or more beneficiaries of a trust, the first trust, may instead exercise such discretionary power by appointing all or part of the income or principal subject to such discretionary power in favor of a trustee of a second trust, the second trust, created under either the same or different trust instrument in the event that the trustee of the first trust decides that the appointment is necessary or desirable after taking into account the terms and purposes of the first trust, the terms and purposes of the second trust, and the consequences of the distribution.

2. The following provisions apply to any exercise of the authority granted by subsection 1 of this section:

(1) The second trust may have as beneficiaries only one or more of those beneficiaries of the first trust to or for whom any discretionary distribution may be made from the first trust and who are proper objects of the exercise of the power, or one or more of those other beneficiaries of the first trust to or for whom a distribution of income or principal may have been made in the future from the first trust at a time or upon the happening of an event specified under the first trust;

(2) Unless the exercise of such power is limited by an ascertainable standard, no trustee of the first trust may exercise such authority to make a distribution from the first trust if:

- (a) Such trustee is a beneficiary of the first trust; or
- (b) Any beneficiary may remove and replace the trustee of the first trust with a related or subordinate party to such beneficiary within the meaning of Section 672(c) of the Internal Revenue Code;
- (3) Except if participating in a change that is needed for a distribution to any such beneficiary under an ascertainable standard, no trustee shall exercise such authority to the extent that doing so would have the effect either of:
 - (a) Increasing the distributions that can be made in the future from the second trust to the trustee of the first trust or to a beneficiary who can remove and replace the trustee of the first trust with a related or subordinate party to such beneficiary within the meaning of Section 672(c) of the Internal Revenue Code; or
 - (b) Removing restrictions on discretionary distributions imposed by the instrument under which the first trust was created;
- (4) In the case of any trust contributions which have been treated as gifts qualifying for the exclusion from gift tax described in Section 2503(b) of the Internal Revenue Code, by reason of the application of Section 2503(c), the governing instrument for the second trust shall provide that the beneficiary's remainder interest shall vest no later than the date upon which such interest would have vested under the terms of the governing instrument for the first trust;
- (5) The exercise of such authority may not reduce any income interest of any income beneficiary of any of the following trusts:
 - (a) A trust for which a marital deduction has been taken for federal tax purposes under Section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law;
 - (b) A charitable remainder trust under Section 664 of the Internal Revenue Code;
 - (c) A grantor retained annuity trust under Section 2702 of the Internal Revenue Code; or
 - (d) A trust which has been qualified as a Subchapter S trust under Section 1361(d) of the Internal Revenue Code or an electing small business trust under Section 1361(e) of the Internal Revenue Code;
- (6) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions, unless after the exercise of such authority, such beneficiary's power of withdrawal is unchanged with respect to the trust property; and
- (7) A spendthrift clause or a provision in the trust instrument that prohibits amendment or revocation of the trust shall not preclude the trustee from exercising the authority granted by subsection 1 of this section.

3. At least sixty days prior to making a discretionary distribution under subsection 1 of this section, the trustee of the first trust shall notify the permissible distributees of the second trust, or the qualified beneficiaries of the second trust if there are no permissible distributees of the second trust, of the distribution. A beneficiary may waive the right to the notice required by this subsection and, with respect to future distributions, may withdraw a waiver previously given.

4. In exercising the authority granted by subsection 1 of this section, the trustee shall remain subject to all fiduciary duties otherwise imposed under the trust instrument and Missouri law.

5. This section does not impose on a trustee a duty to exercise the authority granted by subsection 1 of this section in favor of another trust or to consider exercising such authority in favor of another trust.

6. This section is intended to codify and, from and after enactment, to provide certain limitations to the common law of this state, and this section applies to any trust governed by the laws of this state, including a trust whose principal place of administration is transferred to this state before or after the enactment of this section.

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² “Unless the terms of the trust instrument expressly provide otherwise, a trustee who has discretionary power under the terms of a trust to make a distribution of income or principal, whether or not limited by an ascertainable standard, to or for the benefit of one or more beneficiaries of a trust, the first trust, may instead exercise such discretionary power by appointing all or part of the income or principal subject to such discretionary power in favor of a trustee of a second trust, the second trust, created under either the same or different trust instrument in the event that the trustee of the first trust decides that the appointment is necessary or desirable after taking into account the terms and purposes of the first trust, the terms and purposes of the second trust, and the consequences of the distribution.” § 456.4-419(1).

³ “Unless the exercise of such power is limited by an ascertainable standard, no trustee of the first trust may exercise such authority to make a distribution from the first trust if: (a) Such trustee is a beneficiary of the first trust; or (b) Any beneficiary may remove and replace the trustee of the first trust with a related or subordinate party to such beneficiary within the meaning of Section 672(c) of the Internal Revenue Code[.]” § 456.4-419(2)(2).

⁴ § 456.4-419(2)(5).

⁵ § 456.4-419(2)(6).

⁶ The second trust may have as beneficiaries one or more beneficiaries of the first trust. § 456.4-419(2)(1).

⁷ The second trust may have as beneficiaries current beneficiaries of the first trust and “one or more of those other beneficiaries of the first trust to or for whom a distribution of income or principal may have been made in the future from the first trust at a time or upon the happening of an event specified under the first trust[.]” § 456.4-419(2)(1).

⁸ § 456.4-419(2)(1).

⁹ Section 456.4-419(3) provides in part: “Except if participating in a change that is needed for a distribution to any such beneficiary under an ascertainable standard, no trustee shall exercise such

authority to the extent that doing so would have the effect . . . of (b) Removing restrictions on discretionary distributions imposed by the instrument under which the first trust was created[.]”

¹⁰ § 456.4-419(2)(5)(a).

¹¹ § 456.4-419(2)(5)(b).

¹² “Unless the exercise of such power is limited by an ascertainable standard, no trustee of the first trust may exercise such authority to make a distribution from the first trust if: (a) Such trustee is a beneficiary of the first trust; or (b) Any beneficiary may remove and replace the trustee of the first trust with a related or subordinate party to such beneficiary within the meaning of Section 672(c) of the Internal Revenue Code[.]” § 456.4-419(2)(2). “Except if participating in a change that is needed for a distribution to any such beneficiary under an ascertainable standard, no trustee shall exercise such authority to the extent that doing so would have the effect either of: (a) Increasing the distributions that can be made in the future from the second trust to the trustee of the first trust or to a beneficiary who can remove and replace the trustee of the first trust with a related or subordinate party to such beneficiary within the meaning of Section 672(c) of the Internal Revenue Code; or (b) Removing restrictions on discretionary distributions imposed by the instrument under which the first trust was created[.]” § 456.4-419(2)(3).

¹³ § 456.4-419(4).

¹⁴ “The exercise of such authority may not reduce any income interest of . . . [a] grantor retained annuity trust under Section 2702 of the Internal Revenue Code[.]” § 456.4-419(2)(5)(c).

¹⁵ “The exercise of such authority may not reduce any income interest of any income beneficiary of any of the following trusts: . . . (d) A trust which has been qualified as a Subchapter S trust under Section 1361(d) of the Internal Revenue Code or an electing small business trust under Section 1361(e) of the Internal Revenue Code[.]” § 456.4-419(2)(5)(d). Note that the prohibition against reducing the income interest of a QSST does not prohibit other changes, such as adding an additional current beneficiary, that could disqualify a QSST. Note that ESBTs do not require the distribution of income and therefore the prohibition against reducing the income interest seems unnecessary.

¹⁶ At least sixty days’ notice to the permissible distributees of the second trust is required. § 456.4-419(3). Notice to the beneficiaries of the first trust does not appear to be required.

¹⁷ The decanting must be “necessary or desirable after taking into account the terms and purposes of the first trust, the terms and purposes of the second trust, and the consequences of the distribution.” § 456.4-419(1).

¹⁸ § 456.4-419(5).

¹⁹ “[T]his section applies to any trust governed by the laws of this state, including a trust whose principal place of administration is transferred to this state before or after the enactment of this section.” § 456.4-419(6).

²⁰ § 456.4-419(6).

NEVADA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	NEV. REV. STAT. § 163.556
Effective Date	10/1/09
Amendment Date(s)	10/1/11; 10/1/15; 10/1/17
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion or authority to distribute income or principal ²
2. Limitation on trustee who may decant?	Yes ³
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, except as to marital trusts, charitable trusts and GRATs ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	No, with restrictions ⁶
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No ⁷
7. May remainder beneficiaries' interests be accelerated?	Yes ⁸
8. New and old trust require same distribution standard?	Yes, for interested trustee ⁹
9. May trustee grant a power of appointment in new trust?	Yes ¹⁰
10. Must new trust grant identical power of appointment as old trust?	Presumably no ¹¹
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	No, but see other provisions ¹²
13. Charitable deduction savings provision?	No, but see other provisions ¹³
14. Beneficiary/trustee savings provision?	Yes ¹⁴
15. Other tax savings provisions?	2503(b-c) ¹⁵
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Implicit ¹⁶
18. May trustee increase trustee commission?	Presumably yes ¹⁷

19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	No, notice <i>may</i> be provided ¹⁸
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No, but may seek court approval ¹⁹
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ²⁰
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ²¹
MISCELLANEOUS	
27. Other unique considerations?	Boomerang provision ²²

**NEVADA STATUTE
NEV. REV. STAT. § 163.556
As of October 1, 2015**

NRS 163.556 Circumstances under which trustee is authorized to appoint property of one testamentary trust or irrevocable trust to another trust.

1. Except as otherwise provided in this section, unless the terms of a testamentary instrument or irrevocable trust provide otherwise, a trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust as provided in this section.

2. The second trust to which a trustee appoints property of the first trust may only have as beneficiaries one or more of the beneficiaries of the original trust:

- (a) To or for whom a distribution of income or principal may be made from the original trust;
- (b) To or for whom a distribution of income or principal may be made in the future from the original trust at a time or upon the happening of an event specified under the first trust; or
- (c) Both paragraphs (a) and (b).

For purposes of this subsection, a permissible appointee of a power of appointment exercised by a beneficiary of the second trust is not considered a beneficiary of the second trust.

3. A trustee may not appoint property of the original trust to a second trust if:

(a) Appointing the property will reduce any income interest of any income beneficiary of the original trust if the original trust is:

(1) A trust for which a marital deduction has been taken for federal or state income, gift or estate tax purposes;

(2) A trust for which a charitable deduction has been taken for federal or state income, gift or estate tax purposes; or

(3) A grantor-retained annuity trust or unitrust under 26 C.F.R. § 25.2702-3(b) and (c).

As used in this paragraph, “unitrust” has the meaning ascribed to it in NRS 164.700.

(b) The property to be appointed is subject to a power of withdrawal which is held by a beneficiary of the original trust and may be executed at the time of the proposed appointment, unless after the exercise of such appointment, the beneficiary of the original trust’s power of withdrawal is unchanged with respect to the trust property.

(c) Property specifically allocated for one beneficiary of the original trust is no longer allocated for that beneficiary under either or both trusts, unless the beneficiary consents in writing.

(d) Property held for the benefit of one or more beneficiaries under both the original and the second trust has a lower value than the value of the property held for the benefit of the same beneficiaries under only the original trust, unless:

(1) The benefit provided is limited to a specific amount or periodic payments of a specific amount; and

(2) The value of the property held in either or both trusts for the benefit of one or more beneficiaries is actuarially adequate to provide the benefit.

(e) A contribution made to the original trust qualified for a gift tax exclusion as described in section 2503(b) of the Internal Revenue Code, 26 U.S.C. § 2503(b), by reason of the application of section 2503(c) of the Internal Revenue Code, 26 U.S.C. § 2503(c), unless the second trust provides that the beneficiary’s remainder interest must vest not later than the date upon which such interest would have vested under the terms of the original trust.

4. A trustee who is a beneficiary of the original trust may not exercise the authority to appoint property of the original trust to a second trust if:

(a) Under the terms of the original trust or pursuant to law governing the administration of the original trust:

(1) The trustee does not have discretion to make distributions to himself or herself;

(2) The trustee’s discretion to make distributions to himself or herself is limited by an ascertainable standard, and under the terms of the second trust, the trustee’s discretion to make distributions to himself or herself is not limited by the same ascertainable standard; or

(3) The trustee’s discretion to make distributions to himself or herself can only be exercised with the consent of a cotrustee or a person holding an adverse interest and under the terms of the second

trust the trustee's discretion to make distributions to himself or herself is not limited by an ascertainable standard and may be exercised without consent; or

(b) Under the terms of the original trust or pursuant to law governing the administration of the original trust, the trustee of the original trust does not have discretion to make distributions that will discharge the trustee's legal support obligations but under the second trust the trustee's discretion is not limited.

5. Notwithstanding the provisions of subsection 1, a trustee who may be removed by the beneficiary or beneficiaries of the original trust and replaced with a trustee that is related to or subordinate, as described in section 672 of the Internal Revenue Code, 26 U.S.C. § 672(c), to a beneficiary, may not exercise the authority to appoint property of the original trust to a second trust to the extent that the exercise of the authority by such trustee would have the effect of increasing the distributions that can be made from the second trust to such beneficiary or group of beneficiaries that held the power to remove the trustee of the original trust and replace such trustee with a related or subordinate person, unless the distributions that may be made from the second trust to such beneficiary or group of beneficiaries described in paragraph (a) of subsection 4 are limited by an ascertainable standard.

6. The provisions of subsections 4 and 5 do not prohibit a trustee who is not a beneficiary of the original trust or who may not be removed by the beneficiary or beneficiaries and replaced with a trustee that is related to or subordinate to a beneficiary from exercising the authority to appoint property of the original trust to a second trust pursuant to the provisions of subsection 1.

7. Before appointing property pursuant to subsection 1, a trustee may give notice of a proposed action pursuant to NRS 164.725 or may petition a court for approval pursuant to NRS 153.031, 164.015 or 164.725. Any notice of a proposed action or a petition for a court's approval must include the trustee's opinion of how the appointment of property will affect the trustee's compensation and the administration of other trust expenses.

8. The trust instrument of the second trust may:

(a) Grant a general or limited power of appointment to one or more of the beneficiaries of the second trust who are beneficiaries of the original trust.

(b) Provide that, at a time or occurrence of an event specified in the trust instrument, the remaining trust assets in the second trust must be held for the beneficiaries of the original trust upon terms and conditions that are substantially identical to the terms and conditions of the original trust.

9. The power to appoint the property of the original trust pursuant to subsection 1 must be exercised by a writing, signed by the trustee and filed with the records of the trust.

10. The exercise of the power to invade principal of the original trust pursuant to subsection 1 is considered the exercise of a power of appointment, other than power to appoint the property to the trustee, the trustee's creditors, the trustee's estate or the creditors of the trustee's estate and the provisions of NRS 111.1031 apply to such power of appointment.

11. The provisions of this section do not abridge the right of any trustee who has the power to appoint property which arises under any other law.

12. The provisions of this section do not impose upon a trustee a duty to exercise the power to appoint property pursuant to subsection 1.

13. The power to appoint property to another trust pursuant to subsection 1 is not a power to amend the trust and a trustee is not prohibited from appointing property to another trust pursuant to subsection 1 if the original trust is irrevocable or provides that it may not be amended.

14. A trustee's power to appoint property to another trust pursuant to subsection 1 is not limited by the existence of a spendthrift provision in the original trust.

15. A trustee exercising any power granted pursuant to this section may designate himself or herself or any other person permitted to act as a trustee as the trustee of the second trust.

16. The trustee of a second trust, resulting from the exercise of the power to appoint property to another trust pursuant to subsection 1, may also exercise the powers granted pursuant to this section with respect to the second trust.

17. This section applies to a trust that is governed by, situated in or administered under the laws of this State, whether the trust is initially governed by, situated in or administered under the laws of this State pursuant to the terms of the trust instrument or whether the governing law, situs or administration of the trust is moved to this State from another state or foreign jurisdiction.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² "Except as otherwise provided in this section, unless the terms of a testamentary instrument or irrevocable trust provide otherwise, a trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust as provided in this section." § 163.556(1).

³ An interested trustee may not decant if under the original trust the trustee does not have discretion to make distributions to himself or herself. § 163.556(4)(a)(1). If an interested trustee decants, generally the second trust must impose the same limits on the trustee's ability to make distributions to herself as the original trust. § 163.556(4)(a)(3) and (4)(b).

⁴ § 163.556(3)(a).

⁵ § 163.556(3)(b).

⁶ "The second trust to which a trustee appoints property of the first trust may only have as beneficiaries *one or more of the beneficiaries* of the original trust . . ." § 163.556(2) (emphasis added). Decanting, however, is not permitted if: "Property specifically allocated for one beneficiary of the original trust is no longer allocated for that beneficiary under either or both trusts, unless the beneficiary consents in writing," or "Property held for the benefit of one or more beneficiaries under both the original and the second trust has a lower value than the value of the property held for the benefit of the same beneficiaries under only the original trust, unless: (1) The benefit provided is limited to a specific amount or periodic payments of a specific amount; and (2) The value of the property held in either or both trusts for the benefit of one or more beneficiaries is actuarially adequate to provide the benefit." § 163.556(3)(c); § 163.556(3)(d).

⁷ § 163.556(2).

⁸ § 163.556(2)(b).

⁹ If there is an interested trustee whose discretion to make distributions to himself or herself is limited by an ascertainable standard, the second trust must also require an ascertainable standard for such distributions. § 163.556(4)(a)(2).

¹⁰ § 163.556(8)(a).

¹¹ § 163.556(8)(a).

¹² The 2015 amendment deleted the marital deduction saving language. The statute prohibits reducing any income interest if the original trust claimed a marital deduction. § 163.556(3)(a)(1). Note, however, that the statute does not literally protect a unitrust interest in a marital trust. In addition, the statute would appear to permit the second trust to grant the spouse a lifetime power of appointment which could violate the marital deduction rules. The statute also appears to allow the trustee to eliminate a spouse's testamentary general power of appointment, which could result in a trust intended to be a general power of appointment marital trust not qualifying for the marital deduction.

¹³ The 2015 amendment deleted the charitable deduction savings language. The statute prohibits reducing an income interest if the original trust claimed a charitable deduction. § 163.556(3)(a)(2). Note, however, that the statute does not literally protect a unitrust or annuity interest in a charitable trust. The statute may not prohibit giving an income beneficiary of a charitable remainder trust a power of appointment over the remainder of the trust, which could threaten the charitable deduction. See § 163.556(8)(a). The interplay of § 163.556(8)(a) permitting a grant of a power of appointment and § 163.556(3)(c) and (d) is unclear. Section 163.556(3)(c) provides that a trustee may not decant if: "Property specifically allocated for one beneficiary of the original trust is no longer allocated for that beneficiary under either or both trusts, unless the beneficiary consents in writing." Assume a trust provides for an annuity to Child and remainder to Charity. If Child may be given a power of appointment to divert the assets from Charity, the charitable deduction is threatened. If Child may not be given a power of appointment, then in the situation where a trust gives income to Child and remainder to Child's descendants per stirpes, the trustee cannot decant to give Child a power of appointment.

¹⁴ If there is an interested trustee, generally the second trust must retain any restrictions on the trustee making distributions to herself. § 163.556(4)(a)(3) and (4)(b).

¹⁵ § 163.556(3)(e).

¹⁶ § 163.556(10); § 111.1031.

¹⁷ The trustee may give notice of the decanting or petition the court, and any notice or petition "must include the trustee's opinion of how the appointment of property will affect the trustee's compensation and the administration of other trust expenses." § 163.556(7).

¹⁸ § 163.556(7).

¹⁹ § 163.556(7).

²⁰ § 163.556(12).

²¹ The statute applies to a trust governed by, sitused in or administered under the laws of Nevada.
§ 163.556(17).

²² § 163.556(8)(b).

NEW HAMPSHIRE
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	N.H. REV. STAT. ANN. § 564-B:4-418 ²
Effective Date	9/9/08
Amendment Date(s)	10/1/15; 7/18/17
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	No ³
2. Limitation on trustee who may decant?	Yes ⁴
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁵
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁶
5. Must new and old trust beneficiaries be identical?	No ⁷
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No ⁸
7. May remainder beneficiaries' interests be accelerated?	Yes ⁹
8. New and old trust require same distribution standard?	No, with exception for charitable trusts ¹⁰
9. May trustee grant a power of appointment in new trust?	Yes ¹¹
10. Must new trust grant identical power of appointment as old trust?	No ¹²
11. Supplemental needs trust exception?	No ¹³
TAX RESTRICTIONS	
12. Marital deduction savings provision?	No
13. Charitable deduction savings provision?	No
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	Catch-all ¹⁴
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	No
18. May trustee increase trustee commission?	Silent

19. Other restrictions	Material purpose ¹⁵
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	No, except to charitable beneficiary ¹⁶
21. Is decanting prohibited if a beneficiary objects?	No ¹⁷
22. Court approval required to decant?	No ¹⁸
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ¹⁹
24. Provision that trustee has no duty to consider decanting?	Yes ²⁰
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Property is retitled ²¹ ; see statute on trust modification ²²

**NEW HAMPSHIRE STATUTE
N.H. REV. STAT. ANN. § 564-B:4-418**

564-B:4-418 Trustee's Power to Decant Trust. –

(a) Subject to the limitations provided in this section, a trustee has the power to decant a trust. The power to decant is the power to appoint some or all of the trust property of a trust ("first trust") to another trust ("second trust"). A trustee's power to decant is a power with respect to an administrative matter of the trust.

(b) (1) The beneficiaries of the second trust may include only one or more of the beneficiaries of the first trust.

(2) The second trust may exclude one or more of the beneficiaries of the first trust.

(3) A person is not a beneficiary of the second trust solely by reason of being a permissible appointee of a power of appointment under the terms of the second trust.

(4) The current distributees and current permissible distributees of the second trust may include one or more persons who, under the terms of the first trust, are not current distributees or current permissible distributees, but would be distributees or permissible distributees upon the occurrence of a future date or event.

(c) Under the terms of the second trust, a person may have a power of appointment if (1) that person was a beneficiary of the first trust or (2) under the terms of the first trust, that person held a power of appointment either in a fiduciary or nonfiduciary capacity.

(d) Except as otherwise provided in this subsection, the terms of the second trust may provide that a trustee has discretion to distribute income or principal, and the terms of the second trust may impose a standard or

no standard on the trustee's discretion regardless of whether the terms of the first trust imposed a standard on the trustee's discretion to distribute income or principal. If the first trust is a charitable trust and the terms of the first trust impose a standard on the trustee's discretion to distribute income or principal, then the terms of the second trust shall impose the same standard on the trustee's discretion to distribute income or principal, unless the director of charitable trusts expressly consents to the modification or elimination of that standard.

(e) The second trust may have a term that is longer than the first trust.

(f) A trustee may not decant to the extent that the terms of the second trust are inconsistent with a material purpose of the first trust.

(g) (1) A trustee may not decant to the extent that the terms of the second trust reduce or eliminate a vested interest of a beneficiary of the first trust.

(2) A vested interest is:

(A) a current right to a mandatory distribution of income or principal, a mandatory annuity interest, or a mandatory unitrust interest;

(B) a currently-exercisable power of withdrawal; or

(C) a noncontingent, unconditional right to receive an ascertainable portion of the trust property upon the trust's termination.

(3) In addition to other possible contingencies, a beneficiary's right to receive a portion of the trust property upon the trust's termination is contingent if, by reason of the trustee's discretionary power to make distributions or under other terms of the trust, any person other than the beneficiary or the beneficiary's estate could receive that portion unless the beneficiary survives a specified date or a specified event.

(h) If a transfer to the first trust qualified for a deduction, credit, exclusion, or exemption for purposes of any income, gift, estate, or generation-skipping transfer tax, then a trustee may decant only to the extent that the decanting would not jeopardize that deduction, credit, exclusion, or exemption.

(i) If a settlor of the first trust or a beneficiary of the first trust is an applicant for public benefits or receives public benefits and the settlor's or beneficiary's eligibility or qualification for those public benefits is dependent on the nature and scope of his or her rights, powers, and interests in the first trust, then a trustee may decant only to the extent that the decanting would not jeopardize the settlor's or beneficiary's eligibility or qualification for those public benefits.

(j) A trustee may not decant to the extent that, under the terms of the second trust:

(1) one or more beneficiaries can remove the trustee;

(2) those beneficiaries can appoint a successor trustee who, with respect to any of them, is a related or subordinate party within the meaning of section 672(c) of the Internal Revenue Code;

(3) the trustee may distribute trust property to any one or more of those beneficiaries; and

(4) the trustee's discretion to make those distributions is not limited by an ascertainable standard.

(k) A trustee who is a beneficiary of the first trust does not have the power to decant to the extent that, under the terms of the first trust:

(1) the trustee does not have the discretion to make or participate in making distributions to himself or herself unless the terms of the second trust impose the same limitation on that trustee's discretion;

(2) the trustee's discretion to make or participate in making distributions to himself or herself is limited by an ascertainable standard unless the terms of the second trust impose the same limitation on that trustee's discretion;

(3) the trustee's discretion to make or participate in making distributions to himself or herself is exercisable only with the consent of a cotrustee or a person holding an adverse interest, unless the terms of the second trust impose the same limitation on that trustee's discretion; or

(4) the trustee does not have the discretion to make or participate in making distributions in a manner that will discharge his or her legal support obligations, unless the terms of the second trust impose the same limitation on that trustee's discretion.

(l) A trustee is not prohibited from decanting solely because:

(1) the first trust is irrevocable;

(2) the terms of the first trust provide that the trust may not be amended or modified;

(3) the first trust contains a spendthrift provision;

(4) under the terms of the first trust, the trustee does not have any discretion in making distributions of income or principal; or

(5) except as provided in subsection (d), the terms of the first trust impose a standard on the trustee's discretion to distribute income or principal.

(m) A trustee of a charitable trust or a trust in which a charitable organization has a vested interest shall notify the director of charitable trusts of a proposed decanting, and the trustee shall provide that notice in writing at least 30 days before the effective date of the decanting. A trustee of a noncharitable trust may notify a beneficiary of a proposed decanting, but does not have any duty to do so. The right of any beneficiary to object to a proposed decanting terminates if the beneficiary does not notify the trustee of an objection within 60 days after the proposal was sent to the beneficiary but only if the proposal informed the beneficiary of the right to object and the time allowed for objection.

(n) A trustee's power to decant may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust. A nonjudicial settlement agreement made in accordance with RSA 564-B:1-111, however, may only restrict or eliminate a trustee's power to decant. Except as otherwise provided under the terms of the trust, a trustee's power to decant is in addition to any other powers conferred by the terms of the trust, this chapter, or the laws of this state. This section does not expand, restrict, eliminate, or otherwise alter any power that, with respect to a trust, a person holds in a nonfiduciary capacity.

(o) A trustee does not have a duty to decant or an ongoing duty to consider whether to decant. In exercising the power to decant, a trustee has a duty to exercise the power in a manner that is consistent with the settlor's intent as expressed in the terms of the trust, and the trustee shall act in accordance with the trustee's duties under this chapter and the terms of the first trust.

(p) A trustee may exercise the power to decant, without court approval, the consent of the settlor, or the consent of any of the beneficiaries of the first trust. A trustee or any other interested person may ask a court to approve a trustee's exercise of the power to decant.

(q) Upon a decanting in which all of the first trust's property is appointed to the second trust, the following shall apply:

(1) the first trust shall terminate;

(2) the terms of the second trust shall govern the second trust and its property, including any property acquired from the first trust;

(3) all title to real property and other property owned by the first trust and all contractual rights possessed by the first trust are vested in the second trust without reversion or impairment; and

(4) all liabilities of the first trust are vested in the second trust.

(r) After a decanting in which all of the first trust's property is appointed to the second, the name of the trustee of the second trust may be substituted in any pending proceeding for the name of the trustee of the first trust.

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² As of January 1, 2017, a case was pending in the New Hampshire Supreme Court regarding the propriety of the trustees exercising a decanting power granted under the trust instrument to decant to eliminate certain beneficiaries. *David Hodges, Jr. v. Alan Johnson*. Interestingly, a not-for-profit group, the New Hampshire Trust Council, filed a brief as *amicus curiae* in support of the trustees. See www.perspectatrust.com/perspecta-attorneys-draft-friend-of-the-court-brief; www.nhtrustcouncil.com.

³ § 564-B:4-418(4), (5).

⁴ An interested trustee's power to decant is limited unless the second trust imposes the same limitation on the trustee's discretion to make distributions to herself or himself. § 564-B:4-418(k). In addition, a trustee who can be removed and replaced by a beneficiary with a related or subordinate party who will have discretion to make distributions not subject to an ascertainable standard cannot decant. § 564-B:4-418(j).

⁵ § 564-B:4-418(g).

⁶ § 564-B:4-418(g). A decanting may not eliminate a noncontingent, unconditional right to receive an ascertainable portion of the trust property upon the trust termination.

⁷ § 564-B:4-418(b).

⁸ § 564-B:4-418(b). Section 564-B:1-103(2) defines “beneficiary” as a person that “(A) has a present or future beneficial interest in a trust, vested or contingent; or (B) in a capacity other than that of trustee, holds a power of appointment over trust property.”

⁹ § 564-B:4-418(b)(4).

¹⁰ § 564-B:4-418(d).

¹¹ § 564-B:4-418(c).

¹² § 564-B:4-418(c).

¹³ If a beneficiary or settlor is receiving public benefits, the trustee may decant only to the extent the decanting would not jeopardize the beneficiary’s or settlor’s qualification for those benefits. §564-B:4-418(i).

¹⁴ § 564-B:4-418(h).

¹⁵ § 564-B:4-418(f).

¹⁶ § 564-B:4-418(m).

¹⁷ § 564-B:4-418(p). If notice is given and a beneficiary does not object within 60 days, the beneficiary’s right to object terminates. § 564-B:4-418(m).

¹⁸ § 564-B:4-418(p).

¹⁹ The trustee has a duty to exercise the power in a manner that is consistent with the settlor’s intent as expressed in the terms of the trust and shall act in accordance with the trustee’s duties. § 564-B:4-418(o).

²⁰ § 564-B:4-418(o).

²¹ §564-B:4-418(q)(3).

²² § 564-B:4-419.

NEW MEXICO
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	N.M.S.1978 §46-12-101, et seq.
Effective Date	1/1/17
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, expanded discretion to distribute principal ² <i>Limited discretion:</i> Yes, limited discretion to distribute principal ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁶ <i>Limited discretion:</i> Yes ⁷
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁸ <i>Limited discretion:</i> No ⁹
7. May remainder beneficiaries' interests be accelerated?	No ¹⁰
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> No ¹¹ <i>Limited discretion:</i> Yes ¹²
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹³ <i>Limited discretion:</i> Yes ¹⁴
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁵ <i>Limited discretion:</i> Yes ¹⁶
11. Supplemental needs trust exception?	Yes ¹⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²⁰ ; 2642(c) ²¹ ; Sub S ²² ; 401(a)(9) ²³ ; 672(f)(2)(A) ²⁴ ; Catch-all ²⁵
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits ²⁶
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁷
18. May trustee increase trustee commission?	Sometimes ²⁸

19. Other restrictions?	Decreasing trustee liability ²⁹ or eliminating trustee remover ³⁰
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ³¹
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No ³²
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³³
24. Provision that trustee has no duty to consider decanting?	Act does not create such a duty ³⁴
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁵
MISCELLANEOUS	
27. Other unique considerations?	Reasonable reliance provision ³⁶ ; protection of charitable interests ³⁷ ; saving provision for flawed decantings ³⁸ ; decanting of pet trusts ³⁹ ; provision re identity of settlor ⁴⁰ ; subsequently discovered assets ⁴¹

**NEW MEXICO STATUTE
HB 280**

SECTION 1-101. SHORT TITLE.--Sections 1-101 through 1-129 of this act may be cited as the “Uniform Trust Decanting Act”.

SECTION 1-102. DEFINITIONS.--As used in the Uniform Trust Decanting Act:

A. “appointive property” means the property or property interest subject to a power of appointment;

B. “ascertainable standard” means a standard relating to an individual's health, education, support or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A), as amended, or 26 U.S.C. Section 2514(c)(1), as amended, and any applicable regulations;

C. “authorized fiduciary” means:

(1) trustee or other fiduciary, other than a settlor, that has discretion to distribute, or direct a trustee to distribute, part or all of the principal of the first trust to one or more current beneficiaries;

(2) a special fiduciary appointed under Section 1-109 of the Uniform Trust Decanting Act; or

(3) a special-needs fiduciary under Section 1-113 of the Uniform Trust Decanting Act;

D. “beneficiary” means a person that:

- (1) has a present or future, vested or contingent, beneficial interest in a trust;
- (2) holds a power of appointment over trust property; or
- (3) is an identified charitable organization that will or may receive distributions under the terms of the trust;

E. “charitable interest” means an interest in a trust that:

- (1) is held by an identified charitable organization and makes the organization a qualified beneficiary;
- (2) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or
- (3) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary;

F. “charitable organization” means:

- (1) a person, other than an individual, organized and operated exclusively for charitable purposes; or
- (2) a government or governmental subdivision, agency or instrumentality, to the extent it holds funds exclusively for a charitable purpose;

G. “charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose or another purpose the achievement of which is beneficial to the community;

H. “court” means the district court;

I. “current beneficiary” means a beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal. “Current beneficiary”:

- (1) includes the holder of a presently exercisable general power of appointment; and
- (2) does not include a person that is a beneficiary only because the person holds any other power of appointment;

J. “decanting power” or “the decanting power” means the power of an authorized fiduciary under the Uniform Trust Decanting Act to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust;

K. “expanded distributive discretion” means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard;

L. “first trust” means a trust over which an authorized fiduciary may exercise the decanting power;

M. “first-trust instrument” means the trust instrument for a first trust;

N. “general power of appointment” means a power of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate;

O. “jurisdiction”, with respect to a geographic area, includes a state or country;

P. “person” means an individual; an estate; a business or nonprofit entity; a public corporation; a government or governmental subdivision, agency or instrumentality; or another legal entity;

Q. “power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. “Power of appointment” does not include a power of attorney;

R. “powerholder” means a person in which a donor creates a power of appointment;

S. “presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the relevant time. “Presently exercisable power of appointment”:

(1) includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

(2) does not include a power exercisable only at the powerholder's death;

T. “qualified beneficiary” means a beneficiary that on the date the beneficiary's qualification is determined:

(1) is a distributee or permissible distributee of trust income or principal;

(2) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in Paragraph (1) of this subsection terminated on that date without causing the trust to terminate; or

(3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date;

U. “reasonably definite standard” means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A), as amended, and any applicable regulations;

V. “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

W. “second trust” means:

(1) a first trust after modification under the Uniform Trust Decanting Act; or

(2) a trust to which a distribution of property from a first trust is or may be made under the Uniform Trust Decanting Act;

X. “second-trust instrument” means the trust instrument for a second trust;

Y. “settlor”, except as otherwise provided in Section 1-125 of the Uniform Trust Decanting Act, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent that another person has power to revoke or withdraw that portion;

Z. “sign” means, with present intent to authenticate or adopt a record:

(1) to execute or adopt a tangible symbol; or

(2) to attach to or logically associate with the record an electronic symbol, sound or process;

AA. “state” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. “State” includes an Indian tribe, pueblo, nation or band located within the United States and recognized by federal law or formally acknowledged by a state of the United States;

BB. “terms of the trust” means the manifestation of the settlor’s intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding or as may be established by court order or nonjudicial settlement agreement; and

CC. “trust instrument” means a record executed by the settlor to create a trust or by any person to create a second trust that contains some or all of the terms of the trust, including any amendments.

SECTION 1-103. SCOPE.--

A. Except as otherwise provided in Subsections B and C of this section, the Uniform Trust Decanting Act applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

B. The Uniform Trust Decanting Act does not apply to a trust held solely for charitable purposes.

C. Subject to Section 1-115 of the Uniform Trust Decanting Act, a trust instrument may restrict or prohibit exercise of the decanting power.

D. The Uniform Trust Decanting Act does not limit the power of a trustee, powerholder or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, New Mexico law other than the Uniform Trust Decanting Act, common law, a court order or a nonjudicial-settlement agreement.

E. The Uniform Trust Decanting Act does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

SECTION 1-104. FIDUCIARY DUTY.--

A. In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

B. The Uniform Trust Decanting Act does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of the Uniform Trust Decanting Act.

C. Except as otherwise provided in a first-trust instrument, the terms of the first trust are, for purposes of the Uniform Trust Decanting Act, Section 46A-8-801 NMSA 1978 and Subsection A of Section 46A-8-802 NMSA 1978, deemed to include the decanting power.

SECTION 1-105. APPLICATION--GOVERNING LAW.--

A. The Uniform Trust Decanting Act applies to a trust that:

(1) has its principal place of administration in New Mexico, including a trust whose principal place of administration has been changed to New Mexico; or

(2) provides by its trust instrument that it is governed by New Mexico law or is governed by New Mexico law for the purpose of:

(a) administration, including administration of a trust whose governing law for purposes of administration has been changed to New Mexico law;

(b) construction of terms of the trust; or

(c) determining the meaning or effect of terms of the trust.

B. Except as otherwise provided in the Uniform Trust Decanting Act, on and after January 1, 2017:

(1) the Uniform Trust Decanting Act applies to a trust created before, on or after January 1, 2017;

(2) the Uniform Trust Decanting Act applies to a judicial proceeding concerning a trust commenced on or after January 1, 2017;

(3) the Uniform Trust Decanting Act applies to a judicial proceeding concerning a trust commenced before January 1, 2017 unless the court finds that application of a particular provision of the Uniform Trust Decanting Act would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of the Uniform Trust Decanting Act does not apply and the superseded law applies;

(4) a rule of construction or presumption provided in the Uniform Trust Decanting Act applies to a trust instrument executed before January 1, 2017 unless there is a clear indication of a contrary intent in the terms of the instrument; and

(5) except as otherwise provided in Paragraphs (1) through (4) of this subsection, an action done before January 1, 2017 is not affected by the Uniform Trust Decanting Act.

C. If a right is acquired, extinguished or barred on the expiration of a prescribed period that commenced under New Mexico law other than the Uniform Trust Decanting Act before January 1, 2017, the law continues to apply to the right.

SECTION 1-106. REASONABLE RELIANCE.--A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust

under the Uniform Trust Decanting Act, New Mexico law other than the Uniform Trust Decanting Act or the law of another jurisdiction, is not liable to any person for any action or failure to act as a result of the reliance.

SECTION 1-107. NOTICE--EXERCISE OF DECANTING POWER.--

A. In this section, a notice period begins on the day notice is given under Subsection C of this section and ends fifty-nine days after the day notice is given.

B. Except as otherwise provided in the Uniform Trust Decanting Act, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

C. Except as otherwise provided in Subsection F of this section, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than sixty days before the exercise to:

- (1) each settlor of the first trust, if living or then in existence;
- (2) each qualified beneficiary of the first trust;
- (3) each holder of a presently exercisable power of appointment over any part or all of the first trust;
- (4) each person that currently has the right to remove or replace the authorized fiduciary;
- (5) each other fiduciary of the first trust;
- (6) each fiduciary of the second trust; and
- (7) the attorney general, if Subsection B of Section 1-114 of the Uniform Trust Decanting Act applies.

D. An authorized fiduciary is not required to give notice under Subsection C of this section to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

- E. A notice given under Subsection C of this section shall:
- (1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;
 - (2) specify the proposed effective date for exercise of the power;
 - (3) include a copy of the first-trust instrument; and
 - (4) include a copy of all second-trust instruments.

F. The decanting power may be exercised before expiration of the notice period specified in Subsection A of this section if all persons entitled to receive notice waive the period in a signed record.

G. The receipt of notice, waiver of the notice period or expiration of the notice period does not affect the right of a person to file an application under Section 1-109 of the Uniform Trust Decanting Act asserting that:

(1) an attempted exercise of the decanting power is ineffective because it did not comply with the Uniform Trust Decanting Act or was an abuse of discretion or breach of fiduciary duty; or

(2) Section 1-122 of the Uniform Trust Decanting Act applies to the exercise of the decanting power.

H. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under Subsection C of this section if the authorized fiduciary acted with reasonable care to comply with that subsection.

SECTION 1-108. REPRESENTATION.--

A. Notice to a person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code has the same effect as notice given directly to the person represented.

B. Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

C. A person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code may file an application under Section 1-109 of the Uniform Trust Decanting Act on behalf of the person represented.

D. A settlor shall not represent or bind a beneficiary under the Uniform Trust Decanting Act.

SECTION 1-109. COURT INVOLVEMENT.--

A. On application of an authorized fiduciary, a person entitled to notice under Subsection C of Section 1-107 of the Uniform Trust Decanting Act, a beneficiary or, with respect to a charitable interest, the attorney general or other person that has standing to enforce the charitable interest, the court, may:

(1) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under the Uniform Trust Decanting Act and consistent with the fiduciary duties of the authorized fiduciary;

(2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under the Uniform Trust Decanting Act and to exercise the decanting power;

(3) approve an exercise of the decanting power;

(4) determine that a proposed or attempted exercise of the decanting power is ineffective because:

(a) after applying Section 1-122 of the Uniform Trust Decanting Act, the proposed or attempted exercise does not or did not comply with the Uniform Trust Decanting Act; or

(b) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;

(5) determine the extent to which Section 1-122 of the Uniform Trust Decanting Act applies to a prior exercise of the decanting power;

(6) provide instructions to the trustee regarding the application of Section 1-122 of the Uniform Trust Decanting Act to a prior exercise of the decanting power; or

(7) order other relief to carry out the purposes of the Uniform Trust Decanting Act.

B. On application of an authorized fiduciary, the court may approve:

(1) an increase in the fiduciary's compensation under Section 1-116 of the Uniform Trust Decanting Act; or

(2) a modification under Section 1-118 of the Uniform Trust Decanting Act of a provision granting a person the right to remove or replace the fiduciary.

SECTION 1-110. FORMALITIES.--An exercise of the decanting power shall be made in a record signed by an authorized fiduciary. The signed record shall, directly or by reference to the notice required by Section 1-107 of the Uniform Trust Decanting Act, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

SECTION 1-111. DECANTING POWER UNDER EXPANDED DISTRIBUTIVE DISCRETION.--

A. As used in this section:

(1) "noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. "Noncontingent right" does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate;

(2) "presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary;

(3) "successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. "Successor beneficiary" does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment; and

(4) "vested interest" means:

(a) a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

(b) a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount or a percentage of value of some or all of the trust property;

(c) a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount or a percentage of value of some or all of the trust property;

(d) a presently exercisable general power of appointment; or

(e) a right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

B. Subject to Subsection C of this section and Section 1-114 of the Uniform Trust Decanting Act, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

C. Subject to Section 1-113 of the Uniform Trust Decanting Act, in an exercise of the decanting power under this section, a second trust shall not:

(1) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in Subsection D of this section;

(2) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary or successor beneficiary of the first trust, except as otherwise provided in Subsection D of this section; or

(3) reduce or eliminate a vested interest.

D. Subject to Paragraph (3) of Subsection C of this section and Section 1-114 of the Uniform Trust Decanting Act, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

(1) retain a power of appointment granted in the first trust;

(2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

(4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

E. A power of appointment described in Paragraphs (1) through (4) of Subsection D of this section may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

F. If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

SECTION 1-112. DECANTING POWER UNDER LIMITED DISTRIBUTIVE DISCRETION.--

A. As used in this section, “limited distributive discretion” means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

B. An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

C. Under this section and subject to Section 1-114 of the Uniform Trust Decanting Act, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts,

in the aggregate, shall grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust.

D. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

- (1) the distribution is applied for the benefit of the beneficiary;
- (2) the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated and the distribution is made as permitted under the Uniform Trust Code; or
- (3) the distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

E. If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power provided by this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

SECTION 1-113. TRUST FOR BENEFICIARY WITH DISABILITY.--

A. As used in this section:

(1) “beneficiary with a disability” means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incapacitated;

(2) “governmental benefits” means financial aid or services from a state, federal or other type of public agency;

(3) “special-needs fiduciary” means, with respect to a trust that has a beneficiary with a disability:

(a) a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(b) if no trustee or fiduciary has discretion under Subparagraph (a) of this paragraph, a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(c) if no trustee or fiduciary has discretion under Subparagraphs (a) and (b) of this paragraph, a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries; and

(4) “special-needs trust” means a trust that the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

B. A special-needs fiduciary may exercise the decanting power provided by Section 1-111 of the Uniform Trust Decanting Act over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

(1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and

(2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

C. In an exercise of the decanting power provided by this section, the following rules apply:

(1) notwithstanding Paragraph (2) of Subsection C of Section 1-111 of the Uniform Trust Decanting Act, the interest in the second trust of a beneficiary with a disability may:

(a) be a pooled trust as defined by medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. Section 1396p(d)(4)(C), as amended; or

(b) contain payback provisions complying with reimbursement requirements of medicaid law under 42 U.S.C. Section 1396p(d)(4)(A), as amended;

(2) Paragraph (3) of Subsection C of Section 1-111 of the Uniform Trust Decanting Act does not apply to the interests of the beneficiary with a disability; and

(3) except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's beneficial interests in the first trust.

SECTION 1-114. PROTECTION OF CHARITABLE INTEREST.--

A. As used in this section:

(1) “determinable charitable interest” means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event or after the passage of a specified time and that is unconditional or will be held solely for charitable purposes; and

(2) “unconditional” means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986, as amended, on the date of the distribution if the charitable organization meets the requirement on the date of determination.

B. If a first trust contains a determinable charitable interest, the attorney general has the rights of a qualified beneficiary and may represent and bind the charitable interest.

C. If a first trust contains a charitable interest, the second trust or trusts shall not:

- (1) diminish the charitable interest;
- (2) diminish the interest of an identified charitable organization that holds the charitable interest;
- (3) alter any charitable purpose stated in the first-trust instrument; or
- (4) alter any condition or restriction related to the charitable interest.

D. If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of Subsection C of this section.

E. If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to Subsection C of this section shall be administered under New Mexico law unless:

(1) the attorney general, after receiving notice under Section 1-107 of the Uniform Trust Decanting Act, fails to object in a signed record delivered to the authorized fiduciary within the notice period;

(2) the attorney general consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or

(3) the court approves the exercise of the decanting power.

F. The Uniform Trust Decanting Act does not limit the powers and duties of the attorney general under New Mexico law other than that act.

SECTION 1-115. TRUST LIMITATION ON DECANTING.--

A. An authorized fiduciary shall not exercise the decanting power to the extent that the first-trust instrument expressly prohibits exercise of:

(1) the decanting power; or

(2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust.

B. Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

(1) the decanting power; or

(2) a power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

C. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

D. Subject to Subsections A and B of this section, an authorized fiduciary may exercise the decanting power provided by the Uniform Trust Decanting Act even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

E. If a first-trust instrument contains an express prohibition described in Subsection A of this section or an express restriction described in Subsection B of this section, the provision shall be included in the second-trust instrument.

SECTION 1-116. CHANGE IN COMPENSATION.--

A. If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

B. If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by the Uniform Trust Code unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

C. A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of Subsections A and B of this section.

SECTION 1-117. RELIEF FROM LIABILITY AND INDEMNIFICATION.--

A. Except as otherwise provided in this section, a second-trust instrument shall not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

B. A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

C. A second-trust instrument shall not reduce fiduciary liability in the aggregate.

D. Subject to Subsection C of this section, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by New Mexico law other than the Uniform Trust Decanting Act.

SECTION 1-118. REMOVAL OR REPLACEMENT OF AUTHORIZED FIDUCIARY.--An authorized fiduciary shall not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

A. the person holding the power consents to the modification in a signed record and the modification applies only to the person;

B. the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

C. the court approves the modification and the modification grants a substantially similar power to another person.

SECTION 1-119. TAX-RELATED LIMITATIONS.--

A. As used in this section:

- (1) “grantor trust” means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. Sections 671 through 677, as amended, or 26 U.S.C. Section 679, as amended;
- (2) “Internal Revenue Code” means the United States Internal Revenue Code of 1986, as amended;
- (3) “nongrantor trust” means a trust that is not a grantor trust; and
- (4) “qualified benefits property” means property subject to the minimum distribution requirements of 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations or subject to any similar requirements that refer to 26 U.S.C. Section 401(a)(9), as amended or the regulations.

B. An exercise of the decanting power is subject to the following limitations:

- (1) if a first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified;
- (2) if the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for a charitable deduction for purposes of the income, gift or estate tax under the Internal Revenue Code or a state income, gift, estate or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified;
- (3) if the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, the second-trust instrument shall not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(b), as amended. If the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, by application of 26 U.S.C. Section 2503(c), as amended, the second-trust instrument shall not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(c), as amended;
- (4) if the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. Section 1361, as amended, and the first trust is, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would be, a permitted shareholder under any provision of 26 U.S.C. Section 1361, as amended, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. Section 1361(c)(2), as amended. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. Section 1361(d), as amended, the second-trust instrument shall not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust;

(5) if the first trust contains property that qualified, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would have qualified, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c), as amended, the second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. Section 2642(c), as amended;

(6) if the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument shall not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations or any similar requirements that refer to 26 U.S.C. Section 401(a)(9), as amended, or the regulations. If an attempted exercise of the decanting power violates this paragraph, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power, and Section 1-122 of the Uniform Trust Decanting Act applies to the separate share;

(7) if the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A), as amended, the second trust shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. Section 672(f)(2)(A), as amended;

(8) as used in this paragraph, “tax benefit” means a federal or state tax deduction, exemption, exclusion or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to Paragraph (9) of this subsection, a second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(a) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

(b) the transfer of property held by the first trust or the first trust qualified, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would have qualified, for the tax benefit;

(9) subject to Paragraph (4) of this subsection:

(a) except as otherwise provided in Paragraph (7) of this subsection, the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(b) except as otherwise provided in Paragraph (10) of this subsection, the second trust may be a grantor trust, even if the first trust is a nongrantor trust; and

(10) an authorized fiduciary shall not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(a) the first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the second trust to cease to be a grantor trust and the second trust does not grant an equivalent power to the settlor or other person; or

(b) the first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless: 1) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or 2) the first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

SECTION 1-120. DURATION OF SECOND TRUST.--

A. Subject to Subsection B of this section, a second trust may have a duration that is the same as or different from the duration of the first trust.

B. To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any maximum perpetuity, accumulation or suspension-of-the-power-of-alienation rules that apply to property of the first trust.

SECTION 1-121. NEED TO DISTRIBUTE NOT REQUIRED.—An authorized fiduciary may exercise the decanting power regardless of whether under the first trust’s discretionary distribution standard the fiduciary would have made, or could have been compelled to make, a discretionary distribution of principal at the time of the exercise.

SECTION 1-122. SAVING PROVISION.--

A. If exercise of the decanting power would be effective under the Uniform Trust Decanting Act except that the second-trust instrument in part does not comply with the Uniform Trust Decanting Act, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) a provision in the second-trust instrument that is not permitted under the Uniform Trust Decanting Act is void to the extent necessary to comply with the Uniform Trust Decanting Act; and

(2) a provision required by the Uniform Trust Decanting Act to be in the second-trust instrument that is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with the Uniform Trust Decanting Act.

B. If a trustee or other fiduciary of a second trust determines that Subsection A of this section applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary’s duties.

SECTION 1-123. TRUST FOR CARE OF ANIMAL.--

A. As used in this section:

(1) “animal trust” means a trust or an interest in a trust created to provide for the care of one or more animals; and

(2) “protector” means a person appointed in an animal trust to enforce the trust on behalf of the animal or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

B. The decanting power may be exercised over an animal trust that has a protector to the extent that the trust could be decanted under the Uniform Trust Decanting Act as if each animal that benefits from the trust were an individual if the protector consents in a signed record to the exercise of the power.

C. A protector for an animal has the rights under the Uniform Trust Decanting Act of a qualified beneficiary.

D. Notwithstanding any other provision of the Uniform Trust Decanting Act, if a first trust is an animal trust, in an exercise of the decanting power, the second trust shall provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

SECTION 1-124. TERMS OF SECOND TRUST.--A reference in the Uniform Trust Code to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

SECTION 1-125. SETTLOR.--

A. For purposes of New Mexico law other than the Uniform Trust Decanting Act and subject to Subsection B of this section, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

B. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust and the authorized fiduciary may be considered.

SECTION 1-126. LATER-DISCOVERED PROPERTY.--

A. Except as otherwise provided in Subsection C of this section, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

B. Except as otherwise provided in Subsection C of this section, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

C. An authorized fiduciary may provide in an exercise of the decanting power, or by the terms of a second trust, for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

SECTION 1-127. OBLIGATIONS.--A debt, liability or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

SECTION 1-128. UNIFORMITY OF APPLICATION AND CONSTRUCTION.--In applying and construing the Uniform Trust Decanting Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 1-129. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform Trust Decanting Act modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² § 1-111(B). See § 1-102(K) for definition of “expanded distributive discretion.”

³ § 1-112(B).

⁴ If there is expanded discretion, no as to a “vested interest.” § 1-111(C)(3). “Vested interest” is defined in § 1-111(A)(4). If there is limited discretion, the second trust must grant each beneficiary interests substantially similar to the beneficiary’s interests under the first trust. § 1-112(C).

⁵ With respect to expanded discretion, see § 1-111(C)(3). With respect to limited discretion, see § 1-112(C).

⁶ § 1-111(C).

⁷ § 1-112(C).

⁸ § 1-111(C)

⁹ § 1-112.

¹⁰ With respect to expanded discretion, see § 1-111(C)(1). With respect to limited discretion, see § 1-112(C).

¹¹ § 1-111.

¹² § 1-112(C).

¹³ § 1-111(D), (E).

¹⁴ If substantially similar to power granted to beneficiary under first trust. § 1-112(C).

¹⁵ § 1-111(D), (E).

¹⁶ § 1-112(C).

¹⁷ § 1-113.

¹⁸ § 1-119(B)(1).

¹⁹ § 1-119(B)(2).

²⁰ § 1-119(B)(3).

²¹ § 1-119(B)(5).

²² § 1-119(B)(4).

²³ § 1-119(B)(6).

²⁴ § 1-119(B)(7).

²⁵ § 1-119(B)(8).

²⁶ § 1-110(B)(9), (10).

²⁷ § 1-120.

²⁸ § 1-116.

²⁹ § 1-117.

³⁰ § 1-118.

³¹ § 1-107.

³² § 1-109.

³³ § 1-104.

³⁴ § 1-104(B).

³⁵ § 1-105.

³⁶ A trustee may reasonably rely on the validity of a prior attempted decanting. § 1-106.

³⁷ § 1-114.

³⁸ § 1-122.

³⁹ § 1-123.

⁴⁰ § 1-125.

⁴¹ § 1-126.

NEW YORK
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	N.Y. EST. POWERS & TRUSTS § 10-6.6
Effective Date	7/24/92
Amendment Date(s)	8/17/11; 11/13/13; 7/22/14; 11/20/15
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, unlimited discretion to invade principal ² <i>Limited discretion:</i> Yes, power to invade principal without unlimited discretion ³
2. Limitation on trustee who may decant?	Yes ⁴
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No ⁵
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁶
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁷ <i>Limited discretion:</i> Yes ⁸
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁹ <i>Limited discretion:</i> No ¹⁰
7. May remainder beneficiaries' interests be accelerated?	No ¹¹
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> Presumably no <i>Limited discretion:</i> Yes, but not required during extended term when new trust has longer term length than old trust ¹²
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹³ <i>Limited discretion:</i> Yes ¹⁴
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> Yes, except for a grant of a broad special POA ¹⁵ <i>Limited discretion:</i> Yes ¹⁶
11. Supplemental needs trust exception?	Yes ¹⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²⁰ ; 2642(c) ²¹ ; Catch-all ²²
16. Non-grantor trust to grantor trust conversion permitted?	Silent ²³
OTHER RESTRICTIONS	

17. Rule against perpetuities savings provision?	Yes ²⁴
18. May trustee increase trustee commission?	No, unless the court approves ²⁵
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²⁶
21. Is decanting prohibited if a beneficiary objects?	No ²⁷
22. Court approval required to decant?	No ²⁸
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ²⁹
24. Provision that trustee has no duty to consider decanting?	Yes ³⁰
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³¹
MISCELLANEOUS	
27. Other unique considerations?	Common law decanting? ³²

**NEW YORK STATUTE
N.Y. EST POWERS & TRUSTS § 10-6.6**

§ 10-6.6 Exercise of a power of appointment; effect when more extensive or less extensive than authorized; trustee's authority to invade principal in trust

(a) An exercise of a power of appointment is not void because its exercise is:

(1) More extensive than was authorized but is valid to the extent authorized by the instrument creating the power.

(2) Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.

(b) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).

(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (c) of section 10-3.4 of this article (including a presently

exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of the invaded trust.

(2) If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.

(4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.

(c) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.

(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.

(3) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of such class.

(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.

(d) An exercise of the power to invade trust principal under paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of this article.

(e) The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

(f) If an authorized trustee has unlimited discretion to invade the principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (b) of this section.

(g) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (b) and (c) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.

(h) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power 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 the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(i) Unless the authorized trustee provides otherwise:

(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and

(2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.

(j) The exercise of the power to appoint to an appointed trust under paragraph (b) or (c) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date. The exercise of the power is irrevocable on such effective date, either thirty days following service of the notice or the effective date as set forth in the written consent.

(1) An authorized trustee may exercise the power authorized by paragraphs (b) and (c) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.

(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.

(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.

(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (b) or (c) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.

(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and, within twenty days of the effective date, the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.

(7) Prior to the effective date as provided herein, a trustee may revoke the exercise of the power to invade to a new trust. Where a trustee has served notice of the exercise of the power pursuant to subparagraph (2) of this paragraph, the trustee shall serve notice of the revocation of the exercise of the power to persons interested in the invaded trust and the appointed trust by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust. Where the notice of the exercise of the power was filed with the court, the trustee shall file the notice of revocation of the exercise of the power with such court.

(k) This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.

(l) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (b) or (c) of this section.

(m) A power authorized by paragraph (b) or (c) of this section may be exercised, subject to the provisions of paragraph (h) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under paragraph (b) or (c) of this section.

(n) An authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to effect any of the following:

(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (b) or (c) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-1.12 of this chapter;

(2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;

(3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section unless a court having jurisdiction over the trust specifies otherwise;

(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or

(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the internal revenue code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the internal revenue code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the internal revenue code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.

(o) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section.

(p) An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power.

(q) (1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to change the provisions regarding the determination of the compensation of any trustee; the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.

(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (b) or (c) of this section.

(r) Unless the invaded trust expressly provides otherwise, this section applies to:

(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.

(s) For purposes of this section:

(1) The term “appointed trust” means an irrevocable trust which receives principal from an invaded trust under paragraph (b) or (c) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust. For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be executed and acknowledged by the person establishing such trust shall be deemed satisfied by the execution and acknowledgment of the trustee of the appointed trust.

(2) The term “authorized trustee” means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).

(3) References to sections of the “internal revenue code” refer to the United States internal revenue code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and also refer to corresponding provisions of state law.

(4) The term “current beneficiary or beneficiaries” means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power, provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.

(5) The term “invade” shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

(6) The term “invaded trust” means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (b) or (c) of this section.

(7) The term “person or persons interested in the invaded trust” shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate’s court procedure act.

(8) The term “principal” shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

(9) The term “unlimited discretion” means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.

(10) The creator shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee’s authority to pay trust principal to the creator pursuant to section 7-1.11 of this chapter or by reason of the trustee’s authority under the trust instrument or any other provision of law to pay or reimburse the creator for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities.

(t) Cross-reference. For the exercise of the power under paragraph (b) or (c) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7 of this article.

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² “An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than

one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).” § 10-6.6(b).

³ “An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.” § 10-6.6(c).

⁴ The term “authorized trustee” excludes the creator of the trust and a beneficiary to whom income or principal must be paid or who is or will become eligible to receive a distribution. § 10-6.6(s)(2).

⁵ § 10-6.6(n)(1).

⁶ § 10-6.6(n)(1), if currently exercisable only.

⁷ The current beneficiaries may be “one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).” § 10-6.6(b). In *Matter of Johnson*, Surrogate’s Court decision 2011-2809/B (January 13, 2015), the court invalidated a decanting under the version of the statute in effect as of July 25, 2011 because the permissible appointees of the beneficiary’s power of appointment were more expansive under the second trust. In *Matter of Johnson*, Surrogate’s Court decision 2011-2810/A (January 13, 2015), the court invalidated a decanting under the version of the statute in effect as of July 25, 2011 because the class of permissible appointees and the class of takers in default were broader under the second trust.

⁸ § 10-6.6(c).

⁹ The successor and remainder beneficiaries of the appointed trust shall be one, more than one or all of the successor and remainder beneficiaries of such invaded trust. § 10-6.6(b).

¹⁰ The successor and remainder beneficiaries of the appointed trust must be the same as the successor and remainder beneficiaries of the invaded trust. § 10-6.6(c).

¹¹ Only current beneficiaries of the invaded trust can be current beneficiaries of the appointed trust. 10-6.6(b). The interest of an income beneficiary (who is not a principal beneficiary), however, may be continued in the appointed trust. § 10-6.6(s)(4).

¹² The appointed trust must “include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.” § 10-6.6(c)(1). If the appointed trust has a longer term than the invaded trust, however, after the invaded trust’s original term, the appointed trust may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term. § 10-6.6(c)(2).

¹³ § 10-6.6(b)(1).

¹⁴ “[I]f the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.” § 10-6.6(c)(4).

¹⁵ It is not necessary, however, to include a power of appointment that is in the invaded trust. “If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.” § 10-6.6(b)(3). “If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator’s spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator’s spouse.” § 10-6.6(b)(2).

¹⁶ § 10-6.6(c)(4).

¹⁷ § 10-6.6(n)(1).

¹⁸ § 10-6.6(n)(5).

¹⁹ § 10-6.6(n)(5).

²⁰ § 10-6.6(n)(5).

²¹ § 10-6.6(n)(5).

²² “An authorized trustee may not exercise a power authorized by paragraph (b) or (c) . . . [t]o jeopardize . . . any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.” § 10-6.6(n)(5).

²³ “The 2011 Recommendation of the Surrogate’s Court Advisory Committee states: ‘There is nothing contained in the proposed provision that precludes the authorized trustee from paying assets from a non-grantor trust to a grantor trust.’” N.Y. EST. POWERS & TRUSTS § 10-6.6, 2011 Recommendation of the Surrogate’s Court Advisory Committee.

²⁴ “An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power” § 10-6.6(p). Sections 9-1.1, 10-8.1 and 10-8.2 discuss the rule against perpetuities.

²⁵ § 10-6.6(q)(1).

²⁶ Thirty days’ notice is required to the creator, if living, to any person having the right to remove or replace the trustee and to any persons interested in the invaded trust and the appointed trust. § 10-6.6(j).

²⁷ § 10-6.6(j)(1).

²⁸ § 10-6.6(j)(1).

²⁹ “An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power 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 the prevailing circumstances.” § 10-6.6(h).

³⁰ § 10-6.6(l).

³¹ “Unless the invaded trust expressly provides otherwise, this section applies to: (1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and (2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.” §10-6.6(r).

³² *Matter of Hoppenstein*, 2015-2918A, NYLJ 1202784244139 (Surr. NY March 31, 2017) appears to recognize a common law decanting that did not comply with the decanting statute.

NORTH CAROLINA

State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	N.C. GEN. STAT. § 36C-8B
Effective Date	10/1/09
Amendment Date(s)	7/20/10; 6/12/13; 10/1/15; 07/18/17
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion to distribute principal ²
2. Limitation on trustee who may decant?	No ³
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	Ascertainable Standard: Yes ⁶ Broader discretion: No ⁷
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	No ⁸
7. May remainder beneficiaries' interests be accelerated?	No ⁹
8. New and old trust require same distribution standard?	Ascertainable Standard: Yes ¹⁰ Broader discretion: No ¹¹
9. May trustee grant a power of appointment in new trust?	Yes ¹²
10. Must new trust grant identical power of appointment as old trust?	No ¹⁵
11. Supplemental needs trust exception?	Yes ¹⁴
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁵
13. Charitable deduction savings provision?	Yes ¹⁶
14. Beneficiary/trustee savings provision?	In part ¹⁷
15. Other tax savings provisions?	2503(b) ¹⁸ ; 2642(c) ¹⁹ ; Sub S ²⁰ ; 401(a)(9) ²¹ ; 672(f)(2)(A) ²² ; Catch-all ²³
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits ²⁴
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁵
18. May trustee increase trustee commission?	Sometimes ²⁶

19. Other restrictions?	Decreasing trustee liability ²⁷ or eliminating trustee remover ²⁸
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²⁹
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No ³⁰
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³¹
24. Provision that trustee has no duty to consider decanting?	No ³²
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³³
MISCELLANEOUS	
27. Other unique considerations?	Reasonable reliance provision ³⁴ ; saving provision for flawed decantings ³⁵ ; provision re identity of settlor ³⁶ ; subsequently discovered assets. ³⁷

**NORTH CAROLINA STATUTE
N.C. GEN. STAT. § 36C-8B**

§ 36C-8B-1. Short title

This Article shall be known and may be cited as the North Carolina Uniform Trust Decanting Act.

§ 36C-8B-2. Definitions

The following definitions apply to this Article, unless the context clearly requires otherwise:

- (1) Authorized fiduciary.--A trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries. The term also includes a special fiduciary appointed under G.S. 36C-8B-9 or a special-needs fiduciary under G.S. 36C-8B-13.
- (2) Current beneficiary.--A beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal.
- (3) Decanting power.--The power of an authorized fiduciary under this Article to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.
- (4) First trust.--A trust over which an authorized fiduciary may exercise the decanting power.

(5) Second trust.--A first trust after modification pursuant to this Article or a trust to which a distribution of property from a first trust is or may be made pursuant to this Article.

§ 36C-8B-3. Scope

- (a) Except as otherwise provided in this section, this Article applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.
- (b) This Article shall not apply to a trust held solely for charitable purposes as described in G.S. 36C-4-405(a).
- (c) Subject to G.S. 36C-8B-15, a trust instrument may restrict or prohibit exercise of the decanting power.
- (d) This Article shall not limit the power of a trustee, power holder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this State other than this Article, common law, a court order, or a nonjudicial settlement agreement.
- (e) This Article shall not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

§ 36C-8B-4. Fiduciary duty

- (a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.
- (b) This Article does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this Article.
- (c) Except as otherwise provided in the terms of the first trust, for purposes of this Article, G.S. 36C-8-801, and G.S. 36C-8-802(a), the terms of the first trust shall be deemed to include the decanting power.

§ 36C-8B-5. Application; governing law

- (1) The trust has its principal place of administration in this State, including a trust that has had its principal place of administration changed to this State.
- (2) The trust provides by its trust instrument that it is governed by the law of this State or is governed by the law of this State for any of the following purposes:
 - a. Administration, including administration of a trust that has had its governing law for purposes of administration changed to this State.
 - b. Construction of terms of the trust.
 - c. Determination of the meaning or effect of terms of the trust.

§ 36C-8B-6. Reasonable reliance

A trustee or other person that reasonably relies on the validity of the exercise of a decanting power under this Article, law of this State other than this Article, or the exercise of a similar power under the law of this State or another jurisdiction shall not be liable to any person for any action or failure to act as a result of the reliance.

§ 36C-8B-7. Notice; exercise of decanting power

(a) Except as otherwise provided in this Article, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

(b) Except as otherwise provided in this section, an authorized fiduciary shall give written notice of the intended exercise of the decanting power at least 60 days prior to the effective date of the exercise of the decanting power to all of the following:

- (1) Any settlor as to whom the second trust would be a grantor trust.
- (2) Each qualified beneficiary of the first trust.
- (3) Each person that currently has the right to remove or replace the authorized fiduciary.
- (4) Each other fiduciary of the first trust.

(c) The notice required pursuant to subsection (b) of this section shall meet all of the following requirements:

- (1) Specify the manner in which the authorized fiduciary intends to exercise the decanting power.
- (2) Specify the proposed effective date for exercise of the power.
- (3) Include a copy of the first trust.
- (4) Include a copy of all second trusts.

(d) The decanting power may be exercised before expiration of the notice period under subsection (b) of this section if all persons entitled to receive notice waive the period in a signed written instrument.

(e) The receipt of notice, waiver of the notice period, or expiration of the notice period shall not affect the right of a person to file an application pursuant to G.S. 36C-8B-9 asserting any of the following:

- (1) An attempted exercise of the decanting power is ineffective because it did not comply with this Article or was an abuse of discretion or breach of fiduciary duty.
- (2) The provisions of G.S. 36C-8B-22 apply to the exercise of the decanting power.

(f) An exercise of the decanting power shall not be ineffective because of the failure to give notice to one or more persons pursuant to subsection (b) of this section if the authorized fiduciary acted with reasonable care to comply with subsection (b) of this section.

§ 36C-8B-8. Reserved

§ 36C-8B-9. Court involvement

(a) An authorized fiduciary, a beneficiary, or a person entitled to notice under G.S. 36C-8B-7(b) may commence a proceeding for any of the following purposes:

- (1) To approve or disapprove a proposed exercise of the authorized fiduciary's decanting power.
- (2) To appoint a special fiduciary to exercise the decanting power.

(b) Nothing in this section shall affect the right of a person to file an action in the superior court division of the General Court of Justice for declaratory relief under Article 26 of Chapter 1 of the General Statutes, including, but not limited to, an action to determine the extent to which G.S. 36C-8B-22 applies to a prior exercise of the decanting power.

§ 36C-8B-10. Formalities

An exercise of the decanting power shall be made in a written instrument signed by an authorized fiduciary. The signed written instrument shall identify, directly or by reference to the notice required by G.S. 36C-8B-7, the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

§ 36C-8B-11. Decanting power

(a) The following definitions apply to this section:

(1) Noncontingent right.--A right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.

(2) Vested interest.--An interest where any of the following exist:

a. A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power.

b. A current and noncontingent right, annually or more frequently, to a mandatory distribution of (i) income, (ii) a specified dollar amount, or (iii) a percentage of value of some or all of the trust property.

c. A current and noncontingent right, annually or more frequently, to withdraw (i) income, (ii) a specified dollar amount, or (iii) a percentage of value of some or all of the trust property.

d. A power of withdrawal.

e. A right to receive an ascertainable part of the trust property on the trust's termination which is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(b) With the exception of a special-needs trust, as provided in G.S. 36C-8B-13, an authorized fiduciary that has distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal or income of the first trust, subject to the following limitations:

(1) A second trust may not include as a current beneficiary a person that is not a current beneficiary of the first trust, except as provided in subsection (c) of this section.

(2) The beneficiaries of a second trust may include only beneficiaries of the first trust, except as provided in subsection (c) of this section.

(3) A second trust may not reduce or eliminate a vested interest.

(4) If an authorized fiduciary has distributive discretion over principal that is subject to an ascertainable standard, then the powers to distribute income or principal to current beneficiaries in a second trust or trusts

shall be subject to the same ascertainable standard as in the first trust and, in the aggregate, shall be exercisable in favor of the same current beneficiaries to whom such distributions could be made in the first trust.

(c) Subject to the limitation provided in subdivision (3) of subsection (b) of this section, a second trust may do all of the following:

(1) Retain a power of appointment granted in the first trust.

(2) Omit a power of appointment granted in the first trust, other than a power of withdrawal.

(3) Create or modify a power of appointment if the power holder is a current beneficiary of the first trust who is not the authorized fiduciary and the authorized fiduciary has distributive discretion to distribute principal to the beneficiary.

(4) Create or modify a power of appointment if the power holder is a remainder beneficiary of the first trust who is not the authorized fiduciary, but the exercise of the power may take effect only after the power holder becomes, or would have become, if then living, a current beneficiary.

(d) A power of appointment described in subsection (c) of this section may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

(e) If an authorized fiduciary has distributive discretion over part, but not all, of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has distributive discretion.

(f) For purposes of G.S. 36C-8-814, the first trust shall be deemed to include the decanting power.

§ 36C-8B-12. Reserved

§ 36C-8B-13. Trust for beneficiary with disability

(a) The following definitions apply in this section:

(1) Beneficiary with a disability.--A beneficiary of a first trust who the special-needs fiduciary believes may qualify, now or in the future, for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits, or is an individual who has been adjudicated incompetent.

(2) Governmental benefits.--Financial aid or services from a State, federal, or other public agency.

(3) Special-needs fiduciary.--With respect to a trust that has a beneficiary with a disability, the term has any of the following meanings:

a. A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries.

b. If no trustee or fiduciary has discretion as described in sub-subdivision a. of this subdivision, a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries.

c. If no trustee or fiduciary has discretion as described in sub-subdivisions a. or b. of this subdivision, a

trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(4) Special-needs trust.--A trust that the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(b) A special-needs fiduciary may exercise the decanting power provided in G.S. 36C-8B-11 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if both of the following conditions are satisfied:

(1) A second trust is a special-needs trust that benefits the beneficiary with a disability.

(2) The special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

(c) In exercising the decanting power pursuant to this section, all of the following rules apply:

(1) Notwithstanding G.S. 36C-8B-11(b)(2), the interest in the second trust of a beneficiary with a disability may have either of the following characteristics:

a. Be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. § 1396p(d)(4)(C).

b. Contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. § 1396p(d)(4)(A).

(2) The restriction contained in G.S. 36C-8B-11(b)(3) shall not apply to the interests of the beneficiary with a disability.

(3) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.

(d) For the purposes of this section, the second trust shall not be deemed a termination of the first trust for the purpose of triggering a payback provision in the first trust provided the second trust contains a payback provision complying with the reimbursement requirement of Medicaid law under 42 U.S.C. § 1396p(d)(4).

§ 36B-8B-14. Reserved

§ 36C-8B-15. Trust limitation on decanting

(a) An authorized fiduciary shall not exercise the decanting power to the extent the terms of the first trust expressly prohibit exercise of the decanting power or a power granted by State law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(b) Exercise of the decanting power shall be subject to any restriction in the terms of the first trust that expressly applies to the exercise of the following powers:

(1) The decanting power, and any such restriction contained in the terms of the first trust, shall be included in the terms of the second trust.

(2) A power granted by State law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(c) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest shall not preclude exercise of the decanting power.

(d) Subject to subsections (a) and (b) of this section, an authorized fiduciary may exercise the decanting power under this Article even if the first trust permits the authorized fiduciary or another person to modify the terms of the first trust or to distribute part or all of the principal of the first trust to another trust.

§ 36C-8B-16. Change in compensation

(a) If a first trust specifies an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless either of the following conditions is satisfied:

(1) All qualified beneficiaries of the second trust consent to the increase in a signed written instrument.

(2) The increase is approved by the clerk of superior court pursuant to G.S. 36C-2-203(a)(3).

(b) For the purposes of this section, a change in an authorized fiduciary's compensation which is incidental to other changes made by the exercise of the decanting power shall not be deemed an increase in the fiduciary's compensation.

§ 36C-8B-17. Relief from liability and indemnification

(a) Except as otherwise provided in this section, a second trust shall not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first trust.

(b) A second trust may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(c) A second trust shall not reduce fiduciary liability in the aggregate; provided, however, a second trust may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by the laws of this State other than this Article.

§ 36C-8B-18. Removal or replacement of authorized fiduciary

An authorized fiduciary may not exercise the decanting power to modify a provision in a first trust granting another person power to remove or replace the fiduciary unless one or more of the following occur:

(1) The person holding the power consents to the modification in a signed written instrument and the modification applies only to the person holding the power.

(2) The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed written instrument and the modification grants a substantially similar power to another person.

(3) A court approves the modification and the modification grants a substantially similar power to another

person.

§ 36C-8B-19. Tax-related limitations

(a) The following definitions apply in this section:

- (1) Grantor trust.--A trust as to which a settlor of a first trust is considered the owner under sections 671 through 677 or section 679 of the Internal Revenue Code.
- (2) Nongrantor trust.--A trust that is not a grantor trust.
- (3) Qualified benefits property.--Property subject to the minimum distribution requirements of section 401(a)(9), and any applicable regulations, or to any similar requirements that refer to section 401(a)(9) of the Internal Revenue Code or the regulations.

(b) An exercise of the decanting power shall be subject to the following limitations:

- (1) If a first trust contains property that qualified, or would have qualified but for the provisions of this Chapter other than this section, for a marital deduction or a charitable deduction for purposes of the gift or estate tax under the Internal Revenue Code or a State gift, estate, or inheritance tax, the second trust must include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the marital deduction or charitable deduction, as the case may be, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or State law under which the transfer qualified.
- (2) If the first trust contains property that qualified, or would have qualified but for the provisions of this Chapter other than this section, for the exclusion from gift tax described in section 2503(b) of the Internal Revenue Code, or section 2503(b) by the application of section 2503(c) of the Internal Revenue Code, the second trust may not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under section 2503(b) or section 2503(c) of the Internal Revenue Code.
- (3) If the property of the first trust includes shares of stock in an S Corporation, as defined in section 1361 of the Internal Revenue Code, the following provisions apply:
 - a. If the first trust is, or but for the provisions of this Chapter other than this section would be, a permitted shareholder under any provision of section 1361 of the Internal Revenue Code, an authorized fiduciary may exercise the power with respect to part or all of the S Corporation stock only if any second trust receiving the stock is a permitted shareholder under section 1361(c)(2) of the Internal Revenue Code.
 - b. If the first trust is, or but for the provisions of this Chapter other than this section would be, a qualified Subchapter-S trust within the meaning of section 1361(d) of the Internal Revenue Code, the second trust must not include or omit a term that prevents the second trust from qualifying as a qualified Subchapter-S trust.
- (4) If the first trust contains property that qualified, or would have qualified but for the provisions of this Chapter other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under section 2642(c) of the Internal Revenue Code, the second trust must not include or omit a term that, if included in or omitted from the first trust, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under section 2642(c) of the Internal Revenue Code.

(5) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second trust may not include or omit any term that, if included in or omitted from the first trust, would have increased the minimum distribution required with respect to the qualified benefits property under section 401(a)(9) of the Internal Revenue Code and any applicable regulations thereunder, or similar requirements that refer to section 401(a)(9) of the Internal Revenue Code or the regulations thereunder. If an attempted exercise of the decanting power violates this subdivision, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and G.S. 36C-8B-22 applies to the separate share.

(6) The following provisions apply to a grantor trust:

a. If the first trust qualifies as a grantor trust because of the application of section 672(f)(2)(A) of the Internal Revenue Code, the second trust may not include or omit a term that, if included in or omitted from the first trust, would have prevented the first trust from qualifying under section 672(f)(2)(A) of the Internal Revenue Code.

b. Subject to subdivision (3) of this subsection relating to S corporation stock, (i) except as otherwise provided in sub-subdivision a. of this subdivision, the second trust may be a nongrantor trust even if the first trust is a grantor trust, and (ii) except as otherwise provided in sub-subdivision c. of this subdivision, the second trust may be a grantor trust even if the first trust is a nongrantor trust.

c. An authorized fiduciary may not exercise the decanting power if the settlor objects in a signed written instrument delivered to the fiduciary within the notice period and (i) the first trust and the second trust are both grantor trusts, in whole or in part, and the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or another person, or (ii) the first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor, unless the settlor has the power at all times to cause the trust to cease to be a grantor trust, or the first trust contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second trust contains the same provision.

(7) For the purposes of this subdivision, the term “tax benefit” means a federal or State tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to sub-subdivision b. of subdivision (6) of this subsection, a second trust may not include or omit a term that, if included in or omitted from the first trust, would have prevented qualification of the second trust for a tax benefit if both of the following apply:

a. The first trust expressly indicates an attempt to qualify for the benefit, or the first trust clearly is designed to enable the first trust to qualify for the tax benefit.

b. The transfer of property held by the first trust or the first trust qualified, or but for the provisions of this Chapter other than this section would have qualified, for the tax benefit.

§ 36C-8B-20. Duration of second trust

(a) Subject to subsection (b) of this section, a second trust may have a duration that is the same as or different from the duration of the first trust.

(b) To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of

alienation which apply to property of the first trust.

§ 36C-8B-21. Need to distribute not required

An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of exercise.

§ 36C-8B-22. Saving provision

(a) If exercise of the decanting power would be effective under this Article except that the second trust in part does not comply with this Article, the exercise of the decanting power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) A provision in the second trust which is not permitted under this Article is void to the extent necessary to comply with this Article.

(2) A provision required by this Article to be in the second trust which is not contained in the second trust is deemed to be included in the second trust to the extent necessary to comply with this Article.

(b) If a trustee or other fiduciary of a second trust determines that subsection (a) of this section applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

§ 36C-8B-23. Reserved

§ 36C-8B-24. Terms of second trust

A reference in this Chapter to a trust instrument or terms of the trust includes a second trust and the terms of the second trust.

§ 36C-8B-25. Settlor

(a) For the purposes of the laws of this State other than this Article and subject to subsection (b) of this section, a settlor of a first trust shall be deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

(b) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust, and the authorized fiduciary may be considered.

§ 36C-8B-26. Later-discovered property

(a) Except as otherwise provided in subsection (c) of this section, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

(b) Except as otherwise provided in subsection (c) of this section, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

(c) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² 36C-8B-11(b). The legislature substantially modified the Uniform Act by eliminating the distinction between "expanded distribution" and distributions "limited by an ascertainable standard." Except for 36C-8B-11(b)(4), there is no mention of an ascertainable standard in the decanting power provision.

³ The settlor may not decant. 36C-8B-2(1).

⁴ The second trust may not reduce or eliminate a vested interest. 36C-8B-11(b)(3). "Vested interest" is defined in §36C-8B-11(a)(2).

⁵ 36C-8B-11(b)(3).

⁶ 36C-8B-11(b)(2).

⁷ 36C-8B-11(b)(2).

⁸ 36C-8B-11(b)(1).

⁹ 36C-8B-11(b)(1).

¹⁰ Section 11(b)(4) provides:

(4) If an authorized fiduciary has distributive discretion over principal that is subject to an ascertainable standard, then the powers to distribute income or principal to current beneficiaries in a second trust or trusts shall be subject to the same ascertainable standard as in the first trust and, in the aggregate, shall be exercisable in favor of the same current beneficiaries to whom such distributions could be made in the first trust.

The inclusion of the phrase "in the aggregate" suggests that a trust permitting discretionary distributions to more than one beneficiary may be severed into separate trusts. 36C-8B-11(b)(4).

¹¹ 36C-8B-11(b).

¹² The authorized fiduciary may not, however, create or modify a power exercisable by himself or herself. 36C-8B-11(c)(3)-(4). The second trust may omit a power of appointment, apparently even if the power is held by the authorized fiduciary. 36C-8B-11(c)(2).

¹³ 36C-8B-11(c)(2)-(4).

¹⁴ 36C-8B-13.

¹⁵ 36C-8B-19(b)(1).

¹⁶ 36C-8B-19(b)(1).

¹⁷ If the authorized fiduciary is a beneficiary, typically the authorized fiduciary's discretion would be limited to an ascertainable standard, in which case the same standard must be used in the second trust and, "in the aggregate," must be exercisable in favor of the same current beneficiaries of the first trust and the authorized fiduciary can eliminate a power of appointment, but cannot create or modify a power of appointment held by the authorized fiduciary. 36C-8B-11(b)(c).

¹⁸ 36C-8B-19(b)(2).

¹⁹ 36C-8B-19(b)(4).

²⁰ 36C-8B-19(b)(3).

²¹ 36C-8B-19(b)(5).

²² 36C-8B-19(b)(6).

²³ 36C-8B-19(b)(7).

²⁴ 36C-8B-19(b)(6).

²⁵ 36C-8B-20.

²⁶ 36C-8B-16.

²⁷ 36C-8B-17.

²⁸ 36C-8B-18.

²⁹ 36C-8B-7(b).

³⁰ 36C-8B-7(a).

³¹ 36C-8B-4.

³² 36C-8B-4(b).

³³ 36C-8B-5.

³⁴ A trustee may reasonably rely on the validity of a prior attempted decanting. 36C-8B-6.

³⁵ 36C-8B-22.

³⁶ 36C-8B-25.

³⁷ 36C-8B-26.

North Dakota
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	NDCC § 59-16.1-01 ET SEQ.
Effective Date	8/1/17
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, unlimited discretion to distribute principal ² <i>Limited discretion:</i> Yes, power to distribute principal without unlimited discretion ³
2. Limitation on trustee who may decant?	Yes ⁴
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁵
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁶
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁷ <i>Limited discretion:</i> Yes ⁸
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁹ <i>Limited discretion:</i> No ¹⁰
7. May remainder beneficiaries' interests be accelerated?	No ¹¹
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> Presumably no ¹² <i>Limited discretion:</i> Yes ¹³
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹⁴ <i>Limited discretion:</i> Yes ¹⁵
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁴ <i>Limited discretion:</i> Yes ¹⁵
11. Supplemental needs trust exception?	Yes ¹⁶
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁷
13. Charitable deduction savings provision?	Yes ¹⁸
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ¹⁹ ; 2642(c) ²⁰ ; Catch-all ²¹
16. Non-grantor trust to grantor trust conversion permitted?	Unspecified
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²²

18. May trustee increase trustee commission?	No ²³
19. Other restrictions?	Decreasing trustee liability or eliminating trustee remover ²⁴
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²⁵
21. Is decanting prohibited if a beneficiary objects?	Unclear ²⁶
22. Court approval required to decant?	No ²⁷
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ²⁸
24. Provision that trustee has no duty to consider decanting?	Yes ²⁹
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Severance provision ³⁰ ; subsequently discovered assets ³¹

**NORTH DAKOTA STATUTE
59-16.1-1 ET SEQ.**

§ 59-16.1-01. Consistency with power of attorney provisions.

The provisions of this chapter relating to power of attorney are subject to other provisions of law.

§ 59-16.1-02. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. “Appointed trust” means an irrevocable trust which receives principal from an invaded trust under this chapter, including a trust created by the settlor of the invaded trust, under the terms of the invaded trust or any other trust instrument, or by the trustees, acting in that capacity, of the invaded trust. For purposes of creating another trust, a requirement that a trust instrument be signed by the settlor is deemed satisfied by the signature of the trustee of the appointed trust.

2. “Authorized trustee” means, as to an invaded trust, a trustee with authority to pay trust principal to or for one or more current beneficiaries other than a trustee who is the settlor, or a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee, other than by the exercise of a power of appointment held in a nonfiduciary capacity.

3. “Current beneficiary” or “beneficiaries” means individual, or as to a class, an individual who is or will become members of that class, to whom the trustees may distribute principal at the time of the exercise of the power, provided that the interest of a beneficiary to whom income, but not principal, may be distributed at the discretion of the trustee of the invaded trust, may be continued in the appointed trust.

4. “Invade” means the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

5. “Invaded trust” means an existing irrevocable inter vivos or testamentary trust whose principal is appointed under this chapter.

6. “Person or persons interested in the invaded trust” means all qualified beneficiaries as defined in subsection 16 of section 59-09-06.

7. “Principal” includes the income of the trust at the time of the exercise of the power which is not currently required to be distributed, including accrued and accumulated income.

8. “Unlimited discretion” means the unlimited power to distribute principal. A power to distribute principal which includes words, such as best interests, welfare, comfort, or happiness may not be considered a limitation of the power to distribute principal.

§ 59-16.1-03. Power of appointment.

An exercise of a power of appointment is not void if the exercise is:

1. More extensive than was authorized, but is valid to the extent authorized by the instrument creating its power; or

2. Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.

§ 59-16.1-04. Authorized trustee with unlimited discretion.

1. An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of the principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one, or all of the current beneficiaries of the invaded trust, to the exclusion of any one or more of the current beneficiaries. The successor and remainder beneficiaries of the appointed trust may be none, one, more than one, or all of the successor and remainder beneficiaries of the invaded trust.

2. An authorized trustee exercising the power under subsection 1 of section 59-16.1-04 may grant a discretionary power of appointment in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint may receive principal outright under the terms of the invaded trust.

3. If the authorized trustee grants a power of appointment, the class of permissible appointees in favor of whom the beneficiary may exercise the power of appointment granted in the appointed trust may be broader or otherwise different from the current, successor, and remainder beneficiaries of the invaded trust.

4. If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of the class.

§ 59-16.1-05. Authorized trustee without unlimited discretion.

1. An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust must be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries must be the same as the successor and remainder beneficiaries of the invaded trust.

2. If the authorized trustee exercises the power under this section, the appointed trust must include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

3. If the authorized trustee exercises the power under this section to extend the term of the appointed trust beyond the term of the invaded trust, then for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, then the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subsection 2 of section 59-16.1-05, also may include language

providing the trustee with unlimited discretion to invade the principal of the appointed trust during this extended term.

4. If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of the class.

5. If the authorized trustee exercises the power under this section and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant the power of appointment in the appointed trust and the class of permissible appointees must be the same as in the invaded trust.

§ 59-16.1-06. Special power of appointment.

An exercise of the power to invade trust principal under this chapter is considered to be the exercise of a special power of appointment.

§ 59-16.1-07. Term of appointed trust.

The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, a term measured by the lifetime of a current beneficiary.

§ 59-16.1-08. Unlimited discretion governs.

If an authorized trustee has unlimited discretion to invade the principal of a trust, and the same trustee or another trustee has the power to invade principal under the trust instrument and the power is not subject to unlimited discretion, then the authorized trustee having unlimited discretion may exercise the power of appointment under section 59.16.1-04.

§ 59-16.1-09. Current need to invade principal.

An authorized trustee may exercise the power to appoint in favor of an appointed trust under sections 59-6.1-04 and 59-16.1-05 whether or not there is a current need to invade principal under the terms of the invaded trust.

§ 59-16.1-10. Fiduciary duty.

An authorized trustee exercising the power under this chapter has a fiduciary duty to exercise the power 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 the prevailing circumstances.

§ 59-16.1-11. Subsequently discovered assets.

Unless the authorized trustee provides otherwise:

1. The appointment of all the assets comprising the principal of the invaded trust to an appointed trust must include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and

2. The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust may not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust. These assets must remain the assets of the invaded trust.

§ 59-16.1-12. Requirements for exercise of power to appoint — Notice.

1. The exercise of the power to appoint to an appointed trust under sections 59-16.1-04 and 59-16.1-05 must be evidenced by a written instrument that is signed, dated, and acknowledged by the authorized trustee. The exercise of the power is effective sixty days after the date of delivery of notice as specified in subsection 3, unless each individual entitled to notice agrees in writing to an earlier effective date or waives in writing the right to object to the exercise of the power.

2. An authorized trustee may exercise the power authorized by under sections 59-16.1-04 and 59-16.1-05 without the consent of the settlor or the person interested in the invaded trust and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.

3. A copy of the instrument exercising the power, a copy of the appointed trust, and a copy of the invaded trust must be delivered to:

(a) A person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under sections 59-16.1-04 and 59-16.1-05; and

(b) A person interested in the invaded trust.

4. Notice of an exercise of the power must be given in the same manner as provided in section 59-09-09.

5. The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or only a part of the assets comprising the principal of the invaded trust and, if a part, the approximate percentage of the value of the principal of the invaded trust that is subject to the appointment.

6. An individual entitled to notice may object to the authorized trustee's exercise of the power under this section by serving a written notice of objection upon the authorized trustee prior to the effective date of the exercise of the power. The failure to object does not constitute consent.

7. If the authorized trustee does not receive a written objection to the proposed exercise from an individual entitled to notice within the applicable period, the authorized trustee is not liable to a person who received or was deemed to have received the required notice in that person's personal, representative, or represented capacities for the exercise of the power.

8. If the authorized trustee receives a written objection within the applicable period, either the authorized trustee or an individual entitled to notice may petition the court to have the proposed exercise of a power performed as proposed, performed with modifications, or denied. In a proceeding, an individual objecting to the proposed exercise has the burden of proof as to whether the authorized trustee's proposed exercise should not be performed.

(a) A person who has not objected is not estopped from opposing the proposed exercise in the proceeding.

(b) If the authorized trustee decides not to implement the proposed exercise, the trustee shall notify all persons entitled to notice of the decision not to exercise the power and the reason for the decision, and the authorized trustee's decision not to implement the proposed exercise does not give rise to liability to an individual interested in the invaded trust.

(c) A person entitled to notice may petition the court to have the exercise of a power performed and has the burden of proof as to whether it should be performed.

9. A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust must be filed with records of the appointed trust and the invaded trust.

§ 59-16.1-13. Rights of trustee.

This section does not abridge the right of a trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by a court having jurisdiction over the trust.

§ 59-16.1-14. No duty to exercise a power to invade.

This chapter not create a duty to exercise a power to invade principal and inference of impropriety may not be made as a result of an authorized trustee not exercising the power conferred under sections 59-16.1-04 and 59-16.1-05.

§ 59-16.1-15. Power clarified.

A power authorized under sections 59-16.1-04 and 59-16.1-05 may be exercised subject to the provisions of section 59-16.1-10, unless expressly prohibited by the terms of the governing instrument or by the provisions of section 59-16.1-10, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constituting a spendthrift clause does not preclude the exercise of a power under sections 59-16.1-04 and 59-16.1-05.

§ 59-16.1-16. Prohibitions.

An authorized trustee may exercise a power authorized by this chapter to appoint a trust that is a supplemental needs trust that conforms to chapter 59-08. However, an authorized trustee may not exercise a power authorized by this chapter to effect the following:

1. To reduce, limit, or modify any beneficiary's current right to:
 - (a) A mandatory distribution of income or principal;
 - (b) A mandatory annuity or unitrust interest;
 - (c) A current right to withdraw a percentage of the value of the trust; or
 - (d) A current right to withdraw a specified dollar amount;
2. Notwithstanding subsection 2 of section 59-18-08, to decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
3. To alter or eliminate a provision granting another individual the right to remove or replace the authorized trustee exercising the power under sections 59-16.1-04 or 59-16.1-05, unless notice has been provided to the persons under subsection 3 of section 59-16.1-12, or approval is granted by a court having jurisdiction over the trust;
4. To make a binding and conclusive fixation of the value of an asset for purposes of distribution, allocation, or otherwise;
5. To extend the term of the appointed trust beyond a permissible period of the rule against perpetuities of the invaded trust, and an exercise of the power that extends the term of the appointed trust beyond the permissible period of the rule against perpetuities of the invaded trust voids the entire exercise of the power; or
6. To jeopardize:
 - (a) The deduction or exclusion originally claimed with respect to a contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code; the marital deduction under section 2056(a) or 2523(a) of the Internal Revenue Code; or the charitable deduction under section 170(a), 642(c), 2055(a), or 2522(a) of the Internal Revenue Code.
 - (b) The qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code; or
 - (c) Any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code.

§ 59-16.1-17. Compensation — Commissions.

For the purposes of this section, unless a court otherwise directs:

1. An authorized trustee may not exercise a power authorized under sections 59-16.1-04 and 59-16.1-05 to change the provisions regarding the determination of the compensation of a trustee. The commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and must be determined in the same manner as in the invaded trust.
2. A trustee may not receive a paying commission or other compensation for appointing of property from the invaded trust to an appointed trust under sections 59-16.1-04 and 59-16.1-05.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently

verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² § 59-16.1-04; § 59-16.1-02.

³ § 59-16.1-05

⁴ Settlor and beneficiaries acting as trustee may not decant § 59-16.1-02(2).

⁵ § 59-16.1-16(1).

⁶ § 59-16.1-16(1).

⁷ § 59-16.1-04(1).

⁸ § 59-16.1-05(1).

⁹ § 59-16.1-04(1).

¹⁰ § 59-16.1-05(1).

¹¹ § 59-16.1-04(1)

¹² § 59-16.1-04(1).

¹³ § 59-16.1-05(2).

¹⁴ § 59-16.1-04(3).

¹⁵ § 59-16.1-05(5).

¹⁶ § 59-16.1-16. It appears, however, that the restrictions on reducing mandatory distributions would apply, thus greatly limiting the ability to convert to a special needs trust.

¹⁷ § 59-16.1-16(6)(a).

¹⁸ § 59-16.1-16(6)(a).

¹⁹ § 59-16.1-16(6)(a).

²⁰ § 59-16.1-16(6)(b).

²¹ § 59-16.1-16(6)(c).

²² § 59-16.1-16(5).

²³ § 59-16.1-17.

²⁴ § 59-16.1-16(2), (3).

²⁵ § 59-16.1-12(3), (4).

²⁶ The statute provides that an individual entitled to notice may object to a prospective exercise of the decanting power. §59-16.1-12(6). If such an objection is made, any individual entitled to notice or the authorized trustee may petition the court to implement or deny the decanting. §59-16.1-12(8). The statute does not expressly prohibit the authorized trustee from proceeding with the decanting without court approval.

²⁷ § 59-16.1-12(2).

²⁸ § 59-16.1-10.

²⁹ § 59-16.1-14.

³⁰ § 59-16.1-03.

³¹ § 59-16.1-11.

OHIO
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	OHIO REV. CODE ANN. § 5808.18
Effective Date	3/22/12
Amendment Date(s)	3/27/13
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, absolute power to distribute principal ² <i>Limited discretion:</i> Yes, power, other than absolute power, to make distributions of principal ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, with exception ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁶ <i>Limited discretion:</i> Yes ⁷
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> Yes, with boomerang provision ⁸ <i>Limited discretion:</i> No ⁹
7. May remainder beneficiaries' interests be accelerated?	<i>Unlimited discretion:</i> No ¹⁰ <i>Limited discretion:</i> No ¹¹
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> No ¹² <i>Limited discretion:</i> Yes ¹³
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹⁴ <i>Limited discretion:</i> Yes ¹⁵
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁶ <i>Limited discretion:</i> Yes ¹⁷
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²⁰ ; Sub S ²¹ ; 2642(c) ²² ; 401(a)(9) ²³ ; Catch-all ²⁴
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁵
18. May trustee increase trustee commission?	No, unless beneficiaries consent or court approves ²⁶
19. Other restrictions	Yes ²⁷
NOTICE, CONSENT & APPROVAL	

20. Notice to interested parties required prior to decanting?	Yes ²⁸
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No, unless testamentary trust ²⁹
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³⁰
24. Provision that trustee has no duty to consider decanting?	Yes ³¹
25. Standard of review?	Yes ³²
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³³
MISCELLANEOUS	
27. Other unique considerations?	Boomerang provision ³⁴ Codification of common law provision ³⁵ Fiduciary power over trustee provision ³⁶

**OHIO STATUTE
OHIO REV. CODE ANN. § 5808.18**

(A) Unless the trust instrument expressly provides otherwise and subject to the limitations set forth in this section, all of the following apply:

(1) If a trustee of a trust, referred to in this section as the “first trust,” has absolute power under the terms of the first trust to make distributions of principal to one or more current beneficiaries, that trustee may exercise that power by distributing all or any part of the principal subject to the power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of another trust, referred to in this section as the “second trust,” that is for the benefit of one or more current beneficiaries of the first trust. The second trust may be a trust under the trust instrument for the first trust or under a different governing instrument, including a governing instrument created by the trustee of the first trust. A trustee of a first trust who is authorized to make distributions to the trustee of a second trust pursuant to division (A) of this section may do so at any time, whether or not the trustee of the first trust would otherwise have made a distribution at that time to, or for the benefit of, any beneficiary pursuant to the terms of the first trust.

(2) In determining whether a trustee has absolute power to make distributions of principal to any current beneficiary and the identity of the current beneficiaries, all of the following apply:

(a) An absolute power to distribute principal includes any power to make distributions of principal that is not limited by reasonably definite standards or ascertainable standards, whether or not the word “absolute” is used in the trust instrument.

(b) A power to make distributions of principal for purposes that include best interests, welfare, comfort or happiness, or words of similar import, if not otherwise limited by reasonably definite standards or ascertainable standards, constitutes an absolute power not limited by reasonably definite standards or ascertainable standards, regardless of any requirement to take into account other resources of the current beneficiary or beneficiaries to whom those distributions may be made.

(c) If the current beneficiaries of the first trust are defined, in whole or in part, as a class of persons, that class includes any person who falls within that class of persons after the distribution to the second trust.

(d) A power to make distributions for the benefit of a beneficiary is considered a power to make distributions to that beneficiary.

(3) If property is distributed pursuant to the authority described in division (A) of this section, the governing instrument for the second trust may do either or both of the following:

(a) Grant a power of appointment to one or more of the beneficiaries for whose benefit the property was so distributed, including a power to appoint trust property to the power holder, the power holder's creditors, the power holder's estate, the creditors of the power holder's estate, or any other person, whether or not that person is a beneficiary of the first trust or the second trust;

(b) Provide that, at a time or upon an event specified in that governing instrument, the remaining trust property shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions that are substantially identical to the terms and conditions of the trust instrument for the first trust, except that any current beneficiary or beneficiaries for whose benefit the property could have been, but was not, so distributed may be excluded from having any beneficial interest in the second trust.

(4) For purposes of division (A)(3) of this section, "terms and conditions" refer only to those terms and conditions that govern the interests of the beneficiaries.

(5) For purposes of division (A) of this section, charitable organizations that are not expressly designated in the terms of the first trust to receive distributions but to which the trustee of the first trust, in the discretion of the trustee, or in the discretion of any other person directing the trustee and acting in a fiduciary capacity, may at any time make a distribution, are considered beneficiaries of the first trust.

(B) Unless the trust instrument expressly provides otherwise and subject to the limitations set forth in this section, a trustee of a first trust who has power, other than absolute power as described in division (A) of this section, under the terms of the first trust to make distributions of principal to one or more current beneficiaries may exercise that power by distributing all or any part of the principal subject to the power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of a second trust. The second trust may be a trust under the trust instrument for the first trust or under a different governing instrument, including a governing instrument created by the trustee of the first trust. The power described in this division may be exercised whether or not there is a current need to distribute trust principal under any standard contained in the first trust. The exercise of a trustee's power under this division is valid only if the governing instrument for the second trust does not materially change the interests of the beneficiaries of the first trust. For purposes of this division, a power to make distributions for the benefit of a beneficiary shall be considered a power to make distributions to that beneficiary.

(C) The exercise of the power to make distributions to a second trust under division (A) or (B) of this section is subject to the following additional limitations:

(1)

(a) The distribution to the trustee of the second trust shall not result in the reduction, limitation, or modification of any of the following rights or interests of a beneficiary of the first trust if the right or interest has come into effect with respect to the beneficiary:

(i) The current right to a mandatory distribution of income or principal of the first trust;

(ii) The current mandatory annuity or unitrust interest in the property of the first trust;

(iii) The right annually to withdraw a percentage of the value of the first trust or a specified dollar amount.

(b) For purposes of division (C)(1)(a)(i) of this section, a beneficiary's current right to a distribution of income is not considered to be mandatory if, under the terms of the first trust, current distributions of principal may be made to any person other than that current beneficiary.

(2) If any transfer to the first trust qualified, or if not for the provisions of division (A) or (B) of this section would have qualified, for a marital or charitable deduction for purposes of any federal income, gift, or estate tax under the Internal Revenue Code, or for purposes of any state income, gift, estate, or inheritance tax, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the first trust from qualifying for that deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or under the same provisions of the applicable state law under which the transfer to the first trust so qualified.

(3) If any transfer to the first trust has been treated, or if not for the provisions of division (A) or (B) of this section would have been treated, as a gift qualifying for the exclusion from the gift tax described in section 2503(b) of the Internal Revenue Code, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented any gift to the first trust from so qualifying under the same provisions of section 2503 of the Internal Revenue Code under which the transfer to the first trust so qualified.

(4) If the assets of the first trust include any shares of stock in an S corporation, as defined in section 1361 of the Internal Revenue Code, and the first trust is, or if not for the provisions of division (A) or (B) of this section would be, a permitted shareholder under any provision of section 1361 of the Internal Revenue Code, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the first trust from qualifying as a permitted shareholder of shares of stock in an S corporation under the same provisions of section 1361 of the Internal Revenue Code under which the first trust so qualified.

(5) If any transfer to the first trust has been treated, or if not for the provisions of division (A) or (B) of this section would have been treated, as a gift qualifying for a zero inclusion ratio for purposes of the federal generation-skipping transfer tax under section 2642(c) of the Internal Revenue Code, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the transfer to the first trust from so qualifying.

(6) If the assets of the first trust include any interest subject to the minimum distribution rules of section 401(a)(9) of the Internal Revenue Code and the treasury regulations issued under that section, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have shortened the maximum distribution period otherwise allowable under section 401(a)(9) of the Internal Revenue Code and the treasury regulations with respect to that interest under the first trust.

(7)

(a) As used in division (C)(7) of this section, "tax benefit" means any federal or state tax deduction, exemption, exclusion, or other tax benefit not otherwise listed in division (C) of this section.

(b) If the trust instrument for the first trust expressly indicates an intention to qualify for any tax benefit or if the terms of the trust instrument for the first trust are clearly designed to enable the

first trust to qualify for a tax benefit, and if the first trust did qualify, or if not for the provisions of division (A) or (B) of this section would have qualified, for any tax benefit, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the first trust from qualifying for that tax benefit.

(8) The distribution to the trustee of the second trust shall not result in either of the following:

(a) An increase in, or a change in the method of determining, the compensation of the trustee unless the increase in, or change in the method of determining, that compensation has been consented to by all of the persons, other than the trustee of the second trust, who are current beneficiaries of the second trust or is approved by the court having jurisdiction over the trust. However, an increase in compensation of the trustee arising solely because the duration of the second trust is longer than the duration of the first trust is not considered an increase in, or a change in the method of determining, the compensation of the trustee.

(b) A reduction in the standard of care applicable to the actions of the trustee of the first trust or the second trust or an exoneration of the trustee of the first trust or the second trust from liability for actions taken in bad faith or with willful disregard of the duties of either trustee, including by increasing the extent to which the trustee is entitled to indemnification from the trust, as provided in the terms of the first trust and under any law of this state.

(D) The exercise of the power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section shall be by an instrument in writing, signed by the trustee of the first trust and filed with the records of the first trust.

(E) The power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section shall not be exercised in a manner contrary to any provision of section 2131.08 of the Revised Code to the extent applicable to the first trust and after applying the provisions of section 2131.09 of the Revised Code to the extent applicable to the first trust. Solely for purposes of applying under this division the provisions of sections 2131.08 and 2131.09 of the Revised Code, the exercise of the power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section is considered the exercise of a nongeneral power of appointment as defined in division (F) of section 2131.09 of the Revised Code.

(F) The trustee of the first trust shall notify all current beneficiaries of the first trust, in writing, of the intended distribution to the trustee of a second trust pursuant to division (A) or (B) of this section not later than thirty days prior to that distribution. The distribution may be made prior to the expiration of thirty days from the date on which that notice is given to all current beneficiaries of the first trust if all of those current beneficiaries waive the thirty-day period from receipt of that notice. The trustee's giving of notice of an intended distribution under this division or the waiver or expiration of that thirty-day period from receipt of the notice do not limit the right of any beneficiary to object to the exercise of the trustee's power to distribute trust principal as provided in any other applicable provision of the Ohio Trust Code.

(G) Any person, other than the trustee, who has a power exercisable in a fiduciary capacity to direct the trustee to make any distribution of principal that, if held by the trustee, would be a power to make a distribution as described in division (A) or (B) of this section, may exercise that power by directing the trustee to make a distribution under either division (A) or (B) of this section, whichever would be applicable if that person were the trustee, subject to all of the limitations described in this section that apply to a trustee's exercise of that power.

(H) The exercise of the power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section is not prohibited by a spendthrift clause or a provision in the trust instrument that prohibits the amendment or revocation of the trust.

(I) For purposes of division (A) of section 5808.14 of the Revised Code, a trustee who acts reasonably and in good faith in exercising the power to distribute trust income or principal to the trustee of a second trust in accordance with division (A) or (B) of this section, is presumed to have acted in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(J) Nothing in this section is intended to create or imply a duty to exercise a power to distribute income or principal of a trust, and no inference of impropriety shall arise as a result of a trustee not exercising the power to make any distribution to the trustee of a second trust under division (A) or (B) of this section.

(K) If the first trust is a testamentary trust established under the will of a testator who was domiciled in this state at the time of the testator's death, the power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section may be exercised only if approved by the court, if any, that has jurisdiction over the testamentary trust.

(L) Divisions (A) and (B) of this section do not apply to either of the following:

- (1) Any trust during any period that the trust may be revoked or amended by its settlor;
- (2) Any trustee with respect to any portion of the first trust as to which that trustee is also the settlor.

(M) If, and to the extent that, a trustee makes any distribution pursuant to division (A) or (B) of this section to the trustee of a second trust, then for purposes of division (W) of section 5801.01 of the Revised Code, the governing instrument for the second trust is considered to be an amendment of the trust instrument signed by the settlor of the first trust, even if that governing instrument is signed by a person other than that settlor.

(N) Nothing in this section shall be construed to limit the power of any trustee to distribute trust property in further trust, whether that power arises under the terms of the trust instrument, under any other section of Title LVIII of the Revised Code, under any other statute, or under the common law. The terms of a trust instrument may do any of the following:

- (1) Confer upon the trustee the power to make any distribution, or confer upon any other person acting in a fiduciary capacity the power to direct the trustee to make any distribution, in further trust that is broader or more limited than, or that conflict with, the provisions of this section;
- (2) Provide for different requirements for notice to beneficiaries of the trust of the trustee's exercise of the power conferred under the terms of the trust instrument or described in division (A) or (B) of this section;
- (3) Waive any requirement of notice to the beneficiaries of the trust of the trustee's exercise of the power conferred under the terms of the trust instrument or described in division (A) or (B) of this section;
- (4) Otherwise include any terms and conditions governing the distribution in further trust that the settlor of the trust determines.

(O)

(1) Division (A) of this section is intended to be a codification of the common law of this state in effect prior to March 22, 2012, and applies to distributions, whenever made, from any trust that is governed by the law of this state or that has its principal place of administration in this state, whether that trust was created before, on, or after March 22, 2012.

(2) Division (B) of this section applies to distributions made on or after March 22, 2012, from any trust that is governed by the law of this state or that has its principal place of administration in this state, whether that trust was created before, on, or after March 22, 2012.

Amended by 129th General Assembly File No. 201, HB 479, §1, eff. 3/27/2013.

Added by 129th General Assembly File No. 65, SB 117, §1, eff. 3/22/2012.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² “If a trustee of a trust, referred to in this section as the ‘first trust,’ has absolute power under the terms of the first trust to make distributions of principal to one or more current beneficiaries, that trustee may exercise that power by distributing all or any part of the principal subject to the power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of another trust, referred to in this section as the ‘second trust,’ that is for the benefit of one or more current beneficiaries of the first trust.” § 5808.18(A)(1). “An absolute power to distribute principal includes any power to make distributions of principal that is not limited by reasonably definite standards or ascertainable standards, whether or not the word ‘absolute’ is used in the trust instrument. . . . A power to make distributions of principal for purposes that include best interests, welfare, comfort or happiness, or words of similar import, if not otherwise limited by reasonably definite standards or ascertainable standards, constitutes an absolute power not limited by reasonably definite standards or ascertainable standards, regardless of any requirement to take into account other resources of the current beneficiary or beneficiaries to whom those distributions may be made.” § 5808.18(A)(2).

³ § 5808.18(B).

⁴ “The distribution to the trustee of the second trust shall not result in the reduction, limitation, or modification of any of the following rights or interests of a beneficiary of the first trust if the right or interest has come into effect with respect to the beneficiary: (i) The current right to a mandatory distribution of income or principal of the first trust; (ii) The current mandatory annuity or unitrust interest in the property of the first trust[.]” § 5808.18(C)(1)(a)(i-ii). A beneficiary’s “current right to a distribution of income is not considered to be mandatory if, under the terms of the first trust, current distributions of principal may be made to any person other than that current beneficiary.” § 5808.18(C)(1)(b).

⁵ § 5808.18(C)(1)(a)(iii).

⁶ The second trust may be for the benefit of one or more current beneficiaries of the first trust. § 5808.18(A)(1).

⁷ The second trust may not “materially change the interests of the beneficiaries of the first trust.” § 5808.18(B).

⁸ The second trust must be for the benefit of one or more *current* beneficiaries of the first trust. § 5808.18(A)(1) “The governing instrument for the second trust may . . . [p]rovide that, at a time or upon an event specified in that governing instrument, the remaining trust property shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions that are substantially identical to the terms and conditions of the trust instrument for the first trust, except that any current beneficiary or beneficiaries for whose benefit the property could have been, but was not, so distributed may be excluded from having any beneficial interest in the second trust.” § 5808.18(A)(3)(b).

⁹ The beneficiaries must remain the same. § 5808.18(B).

¹⁰ § 5808.18(A).

¹¹ The second trust may not materially change the interests of the beneficiaries of the first trust. § 5808.18(B).

¹² § 5808.18(A)(1).

¹³ The second trust may not materially change the interests of the beneficiaries of the first trust. § 5808.18(B).

¹⁴ § 5808.18(A)(3)(a).

¹⁵ The second trust may not materially change the interests of the beneficiaries of the first trust, presumably including any power of appointment granted to such beneficiaries. § 5808.18(B).

¹⁶ § 5808.18(A)(3)(a).

¹⁷ § 5808.18(B).

¹⁸ The savings provision applies to state, as well as federal, deductions. § 5808.18(C)(2).

¹⁹ The savings provision applies to state, as well as federal, deductions. § 5808.18(C)(2).

²⁰ § 5808.18(C)(3).

²¹ § 5808.18(C)(4).

²² § 5808.18(C)(5).

²³ § 5808.18(C)(6).

²⁴ § 5808.18(C)(7)(b).

²⁵ “The power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section shall not be exercised in a manner contrary to any provision of section 2131.08 of the Revised Code to the extent applicable to the first trust, and after applying the provisions of division (B) of section 2131.09 of the Revised Code to the extent applicable to the first trust.” § 5808.18(E). Sections

2131.08-.09 of the Revised Code are provisions regarding the rule against perpetuities and exemption of certain trusts.

²⁶ § 5808.18(C)(8)(a).

²⁷ “The distribution to the trustee of the second trust shall not result in . . . [a] reduction in the standard of care applicable to the actions of the trustee of the first trust or the second trust or an exoneration of the trustee of the first trust or the second trust from liability for actions taken in bad faith or with willful disregard of the duties of either trustee, including by increasing the extent to which the trustee is entitled to indemnification from the trust, as provided in the terms of the first trust and under any law of this state.” § 5808.18(C)(8)(b).

²⁸ Thirty days’ notice is required to all current beneficiaries of the first trust. § 5808.18(F).

²⁹ § 5808.18(K).

³⁰ “For purposes of division (A) of section 5808.14 of the Revised Code, a trustee who acts reasonably and in good faith in exercising the power to distribute trust income or principal to the trustee of a second trust in accordance with division (A) or (B) of this section, is presumed to have acted in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” § 5808.18(I).

³¹ § 5808.18(J).

³² Section 5808.18(I) provides that “a trustee who acts reasonably and in good faith in exercising” the decanting power “is presumed to have acted in accordance with the terms and purposes of the trust and the interest of the beneficiaries” for purposes of § 5808.14(A). Ohio Revised Code § 5808.14(A) provides:

The judicial standard of review for discretionary trusts is that the trustee shall exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except that with respect to distribution decisions a reasonableness standard shall not be applied to the exercise of discretion by the trustee of a wholly discretionary trust. The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it.

³³ The statute applies to “any trust that is governed by the law of this state or that has its principal place of administration in this state.” § 5808.18(O)(2).

³⁴ § 5808.18(A)(3)(b).

³⁵ § 5808.18(O)(1).

³⁶ § 5808.18(G).

RHODE ISLAND
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	RHODE ISLAND, R.I. GEN. LAWS § 18-4-31
Effective Date	6/23/12
Amendment Date(s)	7/15/13
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, authority to invade principal ²
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ³
4. May new trust eliminate beneficiary's withdrawal rights?	Silent
5. Must new and old trust beneficiaries be identical?	No ⁴
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Yes ⁵
7. May remainder beneficiaries' interests be accelerated?	No ⁶
8. New and old trust require same distribution standard?	Silent
9. May trustee grant a power of appointment in new trust?	Silent
10. Must new trust grant identical power of appointment as old trust?	Silent
11. Supplemental needs trust exception?	No ⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ⁸
13. Charitable deduction savings provision?	Yes ⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	No
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	No
18. May trustee increase trustee commission?	Silent

19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes, 60 days ¹⁰
21. Is decanting prohibited if a beneficiary objects?	No ¹¹
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ¹²
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	No

**RHODE ISLAND STATUTE
RHODE ISLAND, R.I. GEN. LAWS § 18-4-31 (2013)**

§ 18-4-31 Power to invade principal in trust. – (a) Unless the trust instrument expressly provides otherwise or unless the trust is a “Special Needs Trust” or “Supplemental Needs Trust” created in accordance with 42 United States Code section 1396p(d)(4)(A), a trustee who has authority under the terms of a trust to invade the principal of the trust, referred to in this section as the “first trust,” to make distributions to or for the benefit of one or more persons, may instead exercise such authority by appointing all or part of the principal of the trust subject to the power in favor of a trustee of another trust, referred to in this section as the “second trust,” for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument, provided:

- (1) The beneficiaries of the second trust may include only beneficiaries of the first trust;
 - (2) The second trust may not reduce any fixed income, annuity or unitrust interest in the assets of the first trust; and
 - (3) If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift or estate tax purposes under the Internal Revenue Code of 1986, as amended 26 U.S.C. § 1, et seq., the second trust shall not contain any provisions which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction.
- (b) The exercise of a power to invade principal under subsection (a) shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust.
- (c) The exercise of a power to invade principal under subsection (a)(1) or (a)(2) shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee’s creditors, the trustee’s estate, or the creditors of the trustee’s estate.

(d) The trustee shall notify all Qualified Beneficiaries (as hereinafter defined) of the first trust, in writing, of the manner in which the trustee intends to exercise the power, such notice to be at least sixty (60) days prior to the effective date of the trustee's exercise of the trustee's power to invade principal. A copy of the proposed instrument exercising the power shall satisfy the trustee's notice obligation under this subsection. If all Qualified Beneficiaries waive the notice period by signed written instrument delivered to the trustee, the trustee's power to invade principal shall be exercisable immediately. The trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee's power to invade principal except as provided in other applicable provisions of this title.

(e) "Qualified Beneficiary" means a living beneficiary who, on the date the beneficiary's qualifications is determined:

- (1) Is a distributee or permissible distribute of trust income or principal;
- (2) Would be a distribute or permissible distribute of trust income or principal if the interests of the distributees described in subsection (a) terminated on that date without causing the trust to terminate; or
- (3) Would be a distributee or permissible distribute of trust income or principal if the trust terminated in accordance with its terms on that date.

(f) The exercise of the power to invade principal under subsection (a)(1) or (a)(2) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(g) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of a trustee not exercising the power to invade principal conferred under subsection (a)(1) or (a)(2).

(h) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this title or under another provisions of law or under common law.

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² § 18-4-31(a).

³ § 18-4-31(a)(2).

⁴ § 18-4-31(a).

⁵ § 18-4-31(a).

⁶ § 18-4-31(a).

⁷ A trustee who has absolute power under the terms of a trust to invade the principal of the trust *may not* invade the principal in trust *if* the trust is a “Special Needs Trust” or “Supplemental Needs Trust” created in accordance with 42 United States Code Section 1396p(d)(4)(A). See § 18-4-31(a).

⁸ § 18-4-31(a)(3).

⁹ § 18-4-31(a)(3).

¹⁰ § 18-4-31(d). “Qualified beneficiary” is defined in § 18-4-31(e).

¹¹ The statute grants all qualifying beneficiaries the right to object to the trustee’s exercise of power, but it does not state that the exercise of power will be prevented by an objection. See § 18-4-31(d).

¹² § 18-4-31(g).

SOUTH CAROLINA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	§ 62-7-816A
Effective Date	1/1/14
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Discretion over principal or income ²
2. Limitation on trustee who may decant?	Yes ³
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, subject to tax restriction ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	If old trust subject to ascertainable standard ⁶
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Presumably no ⁷
7. May remainder beneficiaries' interests be accelerated?	No ⁸
8. New and old trust require same distribution standard?	If old trust subject to ascertainable standard ⁹
9. May trustee grant a power of appointment in new trust?	Yes ¹⁰
10. Must new trust grant identical power of appointment as old trust?	No
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	No ¹¹
13. Charitable deduction savings provision?	No ¹²
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ¹³ , 2503(c) ¹⁴ , 2702 ¹⁵ , catch-all ¹⁶
16. Non-grantor trust to grantor trust conversion permitted?	
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Implicit ¹⁷
18. May trustee increase trustee commission?	Silent

19. Other restrictions?	No
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes, 90 days ¹⁸
21. Is decanting prohibited if a beneficiary objects?	Presumably yes
22. Court approval required to decant?	No, unless original trust prohibits decanting ¹⁹
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ²⁰
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	No

**SOUTH CAROLINA STATUTE
§ 62-7-816A
(S. Bill 0143)**

Section 62-7-816A. (a) Unless the terms of the instrument expressly provide otherwise, a trustee with the discretion to make distributions of principal or income to or for the benefit of one or more beneficiaries of a trust, the original trust, may exercise that discretion by appointing all or part of the property subject to that discretion in favor of another trust for the benefit of one or more of those beneficiaries, the second trust. This power may be exercised without the approval of a court, but court approval is necessary if the terms of the original trust expressly prohibit the exercise of such power or require court approval.

(b) The trustee of the original trust may exercise this power whether or not there is a current need to distribute principal or income under any standard provided in the original trust. The trustee's special power to appoint trust principal or income in further trust under this section includes the power to create the second trust.

(c) The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument, and the trustee of the second trust may be either the trustee of the original trust or another trustee.

(d) The terms of the second trust are subject to the following requirements:

(1) The beneficiaries of the second trust may include only beneficiaries of the original trust.

(2) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust.

(3) The terms of the second trust may not contain any provision nor reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of an original trust document if the inclusion of the provision or reduction in the original trust document would have disqualified any assets of the original trust for any federal or state income, estate, or gift tax deduction received on account of any assets of the original trust, or if the inclusion of the provision or reduction in the original trust would have reduced the amount of any federal or state income, estate, or gift tax deduction received. In addition, the terms of the second trust may not reduce any retained interest of a beneficiary of the original trust if the interest is a qualified interest under Internal Revenue Code Section 2702.

(4) If contributions to the original trust have been excluded from the gift tax by the application of Internal Revenue Code Section 2503(b) and Section 2503(c), then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust.

(5) If a beneficiary of the original trust has a power of withdrawal over trust property, then either:

(A) the terms of the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or

(B) sufficient trust property must remain in the original trust to satisfy the outstanding power of withdrawal.

(6) If the power to distribute principal or income in the original trust is subject to an ascertainable standard, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same beneficiaries as in the original trust.

(7) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust.

(e) A trustee may not exercise the power to appoint principal or income under subsection (a) of this section if the trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust, then the court may appoint a special fiduciary with authority to exercise the power to appoint principal or income under subsection (a) of this section.

(f) The exercise of the power to appoint principal or income under subsection (a) of this section:

(1) is considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate or the creditors of the trustee's estate;

(2) does not result in the trustee or cotrustees of the original trust being considered the settlor of the second trust;

(3) is not prohibited by a spendthrift provision or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(g) To effect the exercise of the power to appoint principal or income under subsection (a) of this section, all of the following apply:

(1) The exercise of the power to appoint must be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust, and the effective date of the exercise of the power. The instrument must be filed with the records of the original trust.

(2) The trustee shall give written notice to all qualified beneficiaries of the original trust, at least ninety days prior to the effective date of the exercise of the power to appoint, of the trustee's intention to exercise the power. The notice must include a copy of the instrument described in item (1) of this subsection.

(3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee's power to appoint principal or income is exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.

(h) The provisions of this section shall not be construed to create or imply a duty of the trustee to exercise the power to distribute principal or income, or to create an inference of impropriety made as a result of a trustee not exercising the power to appoint principal or income conferred under subsection (a) of this section. The provisions of this section shall not be construed to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the original trust or under any other section of this article or under another provision of law or under common law. The terms of an original trust may modify or waive the notice requirements under subsection (g), reduce or increase restrictions on altering the interests of beneficiaries under subsection (d), and may otherwise contain provisions that are inconsistent with the requirements of this section.

(i) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to another trust pursuant to subsection (a) of this section.

(j) The provisions of Section 62-7-109 regarding notices and the sending of documents to persons under this article apply for the purposes of notices and the sending of documents under this section.

REPORTER'S COMMENT

Providing decanting authority to a trustee, authority to appoint the property of an original trust to a second trust, provides a nonjudicial method for modifying an irrevocable trust when doing so would be in the best interests of the beneficiaries or in furtherance of the purposes of the trust. Some examples of how decanting authority might be used by a trustee include: modifying the administrative or substantive provisions of a trust to account for a change in law, combining trusts to reduce administrative costs, limiting the authority of interested trustees, correcting scrivener's errors, and conforming the distribution provisions of a trust to the requirements of a special needs trust.

Subsection (a) authorizes a trustee with discretion to make distributions of principal or income to or for the benefit of one or more beneficiaries of the original trust to exercise that discretion by appointing all or part of such property to a second trust. This authority may be exercised whether the original trust grants the trustee absolute discretion over distributions or whether the trustee's discretion is limited by an ascertainable standard.

Subsections (b) and (c) affirm the broad decanting authority intended to be afforded to trustees to eliminate the uncertainty that was faced by trustees exercising decanting authority in reliance solely on common law principles. Subsection (b) provides that the trustee may exercise the power to decant whether or not there is a current need to distribute property under any standard provided in the original trust, for example, by decanting property from an original trust that limits distributions to an ascertainable standard to a second trust to promote administration of the trust or preservation of trust property. But see subdivision (d)(6), which prevents a trustee from exercising decanting authority to eliminate an ascertainable standard limiting the trustee's discretion in the original trust document.

Subsection (d) provides certain requirements for the terms of the second trust. Subdivisions (d)(1) and (d)(2) prevent a trustee from exercising decanting authority to add beneficiaries to the second trust who were not beneficiaries of the original trust or accelerate the interest of a beneficiary with only a future interest in the original trust to a present interest under the second trust. Subdivisions (d)(3) and (d)(4) restrict a trustee's ability to modify terms of an original trust or a beneficiary's fixed interest in the trust if the original trust qualified for certain tax benefits. Under subdivision (d)(5), a trustee is required to preserve a beneficiary's power of withdrawal over trust property; the trustee may do so by either maintaining sufficient trust property in the original trust to satisfy the beneficiary's power of withdrawal, or by providing the beneficiary with an identical power of withdrawal under the terms of the second trust. Subdivision (d)(6) prevents a trustee from modifying any ascertainable standard governing the trustee's power to make distributions under the terms of the original trust. Subdivision (d)(7) provides that the terms of the second trust may grant a power of appointment to a beneficiary of the original trust exercisable in favor of persons who are not beneficiaries of the original or second trust.

The remaining provisions of the statute address procedural concerns, including notice requirements and the procedure for decanting if the trustee is a beneficiary of the original trust. Subsection (e) prevents a trustee with a beneficial interest in the original trust from exercising the authority to decant, while preserving the ability to decant in circumstances where all trustees have an interest in the trust. Subsection (f) provides that the trustee's power to decant is considered the exercise of a special power of appointment, does not result in the trustee being treated as the settlor of the second trust, and is not prohibited by a spendthrift provision or a provision prohibiting amendment or revocation of the original trust. Subsection (g) provides the procedural requirements for effecting a decanting, including the requisite notice and the beneficiaries' ability to waive the notice period. Subsection (h) affirms that the provisions of section 62-7-816A do not create an affirmative duty in the trustee to exercise the special power to appoint, limit the trustee's decanting authority derived from some other source, or nullify any decanting provisions included in an original trust that are inconsistent with the provisions of this section. Subsection (i) allows either a trustee or beneficiary to seek court approval or disapproval of a proposed exercise of the decanting power, and subsection (j) incorporates the notice provisions of SCTC section 62-7-109.

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² § 62-7-816A(a).

³ A trustee who is a beneficiary of the original trust may not decant. § 62-7-816A(e).

⁴ The second trust may not reduce any fixed income, annuity, or unitrust interest if the reduction would reduce the amount of or disqualify the trust for a tax deduction. § 62-7-816A(d)(3).

⁵ § 62-7-816A(d)(5).

⁶ If the distribution power over the original trust is subject to any ascertainable standard, then the distribution power in the second trust must be subject to the same ascertainable standard and must be exercisable in favor of the same beneficiaries. § 62-7-816A(d)(6).

⁷ The provision prohibiting acceleration of a future beneficial interest to a present interest suggests that the future beneficial interests may be retained.

⁸ § 62-7-816A(d)(2).

⁹ If the distribution power over the original trust is subject to any ascertainable standard, then the distribution power in the second trust must be subject to the same ascertainable standard and must be exercisable in favor of the same beneficiaries. § 62-7-816A(d)(6).

¹⁰ § 62-7-816A(d)(7).

¹¹ But see catch-all provision.

¹² But see catch-all provision.

¹³ § 62-7-816A(d)(4).

¹⁴ § 62-7-816A(d)(4).

¹⁵ § 62-7-816A(d)(3).

¹⁶ § 62-7-816A(d)(3).

¹⁷ Decanting is treated as the exercise of a non-general power of appointment. § 62-7-816A(f)(1).

¹⁸ § 62-7-816A(g)(2).

¹⁹ § 62-7-816A(a).

²⁰ § 62-7-816A(h).

SOUTH DAKOTA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	S.D. CODIFIED LAWS §§ 55-2-15 to 55-2-21
Effective Date	3/5/07
Amendment Date(s)	2008; 2009; 3/2/12; 3/25/13; 2/15/17
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion to make a distribution of principal or income ²
2. Limitation on trustee who may decant?	Yes ³
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, except as to marital trusts, charitable trusts, and GRATs ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	No ⁶
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No ⁷
7. May remainder beneficiaries' interests be accelerated?	Yes ⁸
8. New and old trust require same distribution standard?	Presumably no, except as to interested trustee ⁹
9. May trustee grant a power of appointment in new trust?	Yes ¹⁰
10. Must new trust grant identical power of appointment as old trust?	Presumably no ¹¹
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹²
13. Charitable deduction savings provision?	Yes ¹³
14. Beneficiary/trustee savings provision?	Yes ¹⁴
15. Other tax savings provisions?	2503(b-c) ¹⁵ ; 2702 ¹⁶
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁷
18. May trustee increase trustee commission?	Silent

19. Other restrictions?	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Sometimes ¹⁸
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ¹⁹
24. Provision that trustee has no duty to consider decanting?	No
25. Standard of review?	Yes ²⁰
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ²¹
MISCELLANEOUS	
27. Other unique considerations?	

**SOUTH DAKOTA STATUTE
S.D. CODIFIED LAWS §§ 55-2-15 to 55-2-21**

55-2-15. Trustee authorized to distribute income or principal from first trust may appoint all or part in favor of trustee of second trust--Restrictions--Power of appointment to beneficiary of second trust. Unless the terms of the governing instrument expressly provide otherwise, if a trustee has discretion under the terms of a governing instrument to make a distribution of income or principal to or for the benefit of one or more beneficiaries of a trust (the "first trust"), whether or not restricted by any standard, then the trustee, independently or with court approval, may exercise such discretion by appointing part or all of the income or principal subject to the discretion in favor of a trustee of a second trust (the "second trust") under a governing instrument separate from the governing instrument of the first trust. Before exercising its discretion to appoint and distribute assets to a second trust, the trustee of the first trust shall determine whether the appointment is necessary or desirable after taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution. For the purposes of this section, a trustee of the first trust is a restricted trustee if either the trustee is a beneficiary of the first trust or if a beneficiary of the first trust has a power to change the trustees within the meaning of § 55-2-17. In addition, the following apply to all appointments made under this section:

- (1) The second trust may only have as beneficiaries one or more of the beneficiaries of the first trust:
 - (a) To or for whom a discretionary distribution of income or principal may be made from the first trust; or
 - (b) To or for whom a distribution of income or principal may be made in the future from the first trust at a time or upon the happening of an event specified under the first trust; or
 - (c) Both (a) and (b);

(2) No restricted trustee of the first trust may exercise such authority over the first trust to the extent that doing so could have the effect of:

(a) Benefiting the restricted trustee as a beneficiary of the first trust, unless the exercise of such authority is limited by an ascertainable standard based on or related to health, education, maintenance, or support; or

(b) Removing restrictions on discretionary distributions to a beneficiary imposed by the governing instrument under which the first trust was created, except that a provision in the second trust which limits distributions by an ascertainable standard based on or related to the health, education, maintenance, or support of any such beneficiary is permitted, or to a trust established pursuant to 42 U.S.C. § 1396(p)(d)(4);

(3) No restricted trustee of the first trust may exercise such authority over the first trust to the extent that doing so would have the effect of increasing the distributions that can be made from the second trust to the restricted trustees of the first trust or to a beneficiary who may change the trustees of the first trust within the meaning of § 55-2-17 compared to the distributions that can be made to such trustee or beneficiary, as the case may be, under the first trust, unless the exercise of such authority is limited by an ascertainable standard based on or related to health, education, maintenance, or support;

(4) The provisions of subdivisions (2) and (3) only apply to restrict the authority of a trustee if either a trustee, or a beneficiary who may change the trustee, is a United States citizen or domiciliary under the Internal Revenue Code, or the trust owns property that would be subject to United States estate or gift taxes if owned directly by such aperson;

(5) In the case of any trust contributions which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) of the Internal Revenue Code of 1986, by reason of the application of I.R.C. § 2503(c), the governing instrument for the second trust shall provide that the beneficiary's remainder interest shall vest no later than the date upon which such interest would have vested under the terms of the governing instrument for the first trust;

(6) The exercise of such authority may not reduce any income interest of any income beneficiary of any of the following trusts:

(a) A trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 or for state tax purposes under any comparable provision of applicable state law;

(b) A charitable remainder trust under I.R.C. § 664; or

(c) A grantor retained annuity trust or unitrust under I.R.C. § 2702;

(7) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions, unless after the exercise of such authority, such beneficiary's power of withdrawal is unchanged with respect to the trust property;

(8) The exercise of such authority is not prohibited by a spendthrift clause or by a provision in the governing instrument that prohibits amendment or revocation of the trust;

(9) Any appointment made by a trustee shall be considered a distribution by the trustee pursuant to the trustee's distribution powers and authority; and

(10) If the trustee's distribution discretion is not subject to a standard, or if the trustee's distribution discretion is subject to a standard that does not create a support interest, then the court may review the trustee's determination or any related appointment only pursuant to § 55-1-43. Any other court review of the trustee's determination or any related appointment may be made only pursuant to § 55-1-42.

Notwithstanding the foregoing provisions of this section, the governing instrument of the second trust may grant a power of appointment to one or more of the beneficiaries of the second trust who are beneficiaries of the first trust. The power of appointment may include the power to appoint trust property to the holder of the power of appointment, the holder's creditors, the holder's estate, the creditors of the holder's estate, or any other person, whether or not that person is a trust beneficiary.

Furthermore, notwithstanding the provisions of this section or § 55-2-18 or 55-2-19, a trustee may also exercise the power described in those sections by modifying the first trust without an actual distribution of property, in which case the second trust is the modified first trust. In exercising the power described by the preceding sentence of this section, a trustee shall notify all beneficiaries of the trust, in writing, at least twenty days prior to the effective date of the trustee's exercise of the power.

This section applies to any trust administered under the laws of this state, including a trust whose governing jurisdiction is transferred to this state.

55-2-16. Action that may not be taken by restricted trustee may be taken by another unrestricted trustee. Any action that may not be taken by a trustee of the first trust by reason of the restrictions in subdivision 55-2-15(2) may instead be taken by any other trustee of the first trust who is not so restricted, or, if none, by the next available party who can be a successor trustee and who is not so restricted. The second trust may be a trust created or administered under the laws of any jurisdiction, within or without the United States.

55-2-17. Conditions under which beneficiary has power to change trustees. For the purposes of § 55-2-15, a beneficiary shall be considered to have the power to "change the trustees" if he or she can, alone or with others, name himself or herself as a trustee or can remove a trustee and replace that trustee with a new trustee who is the beneficiary or who is related or subordinate (as defined in § 672 of the I.R.C.) to the beneficiary.

55-2-18. Exercise of power to distribute income or principal by written instrument--Notice to beneficiaries of first trust. The exercise of the power to distribute the income or principal of the trust under § 55-2-15 shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust. The trustee of the first trust may notify the beneficiaries of the first trust, in writing, prior to the effective date of the trustee's exercise of the power under § 55-2-15 (applying sections 1 to 26, inclusive, of this Act). A copy of the proposed exercise of this authority and the second trust agreement shall satisfy this notice provision. For the purposes of this section, the term, beneficiaries, means those persons who would be entitled to notice and a copy of the first trust instrument under § 55-2-13.

55-2-19. Exercise of power to distribute income or principal considered exercise of power of appointment. The exercise of the power to distribute the income or principal of the trust under § 55-2-15 shall be considered the exercise of a power of appointment (other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate).

55-2-20. Impermissible use of power. The power under § 55-2-15 may not be exercised to suspend the power to alienate trust property or extend the first trust beyond the permissible period of any rule against perpetuities applicable to the first trust.

55-2-21. Trustee's right to distribute income or principal in trust arising under law or terms of first trust not abridged. No provision of §§ 55-2-15 to 55-2-20, inclusive, may be construed to abridge the right of any trustee who has power to distribute income or principal in further trust which arises under statute, common law, or the terms of the first trust.

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² § 55-2-15.

³ A trustee who is a beneficiary or who may be removed by a beneficiary (a "restricted trustee") is limited when decanting in a manner that affects such trustee's or beneficiary's interest. § 55-2-15(2), (3) and (4).

⁴ There is no general prohibition on reducing income rights. However, decanting may not reduce any income interest of any income beneficiary of a marital deduction trust, a charitable remainder trust or a grantor retained annuity trust. § 55-2-15(6).

⁵ § 55-2-15(7).

⁶ § 55-2-15(1).

⁷ § 55-2-15(1)(b).

⁸ § 55-2-15(1)(b).

⁹ There are, however, restrictions on an "interested trustee" that prevents an interest in the distribution to the restricted trustee or to a beneficiary who may change the trustees of the old trust, unless the exercise of such authority is limited by an ascertainable standard. See § 55-2-15(2), (3).

¹⁰ § 55-2-15.

¹¹ § 55-2-15.

¹² § 55-2-15(6)(a).

¹³ § 55-2-15(6)(b).

¹⁴ § 55-2-15.

¹⁵ § 55-2-15(5).

¹⁶ § 55-2-15(6)(c).

¹⁷ § 55-2-20.

¹⁸ The 2013 amendment eliminated the requirement of notice. The statute now provides that the trustee *may* provide notice. § 55-2-18. Twenty days' notice is required if the decanting modifies the first trust without an actual distribution of property.

¹⁹ The trustee shall take into account the purposes of the first trust, the terms and conditions of the second trust and the consequences of the distribution. § 55-2-15.

²⁰ § 55-1-15(10).

²¹ § 55-2-15 (see last sentence).

TENNESSEE
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	TENN. CODE ANN. § 35-15-816(b)(27)
Effective Date	7/01/04
Amendment Date(s)	7/01/13
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, authority to invade principal ²
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income ³
4. May new trust eliminate beneficiary's withdrawal rights?	Silent ⁴
5. Must new and old trust beneficiaries be identical?	No ⁵
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Yes ⁶
7. May remainder beneficiaries' interests be accelerated?	Silent
8. New and old trust require same distribution standard?	No ⁷
9. May trustee grant a power of appointment in new trust?	Yes ⁸
10. Must new trust grant identical power of appointment as old trust?	No ⁹
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁰
13. Charitable deduction savings provision?	Yes ¹¹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ¹² ; 2642(c) ¹³ ; Sub S ¹⁴
16. Non-grantor trust to grantor trust conversion permitted?	Silent ¹⁵
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁶
18. May trustee increase trustee commission?	Silent

19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	No
21. Is decanting prohibited if a beneficiary objects?	Silent ¹⁷
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Implied ¹⁸
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ¹⁹
MISCELLANEOUS	
27. Other unique considerations?	No

**TENNESSEE STATUTE
TENN. CODE ANN. § 35-15-816(b)(27)**

(27) Unless the terms of the instrument expressly provide otherwise:

(A) A trustee who has authority, under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to invade the principal of a trust to make distributions to, or for the benefit of, one or more proper objects of the exercise of the power, may instead exercise such authority by appointing all or part of the principal of the trust in favor of a trustee of a trust under an instrument other than that under which the power to invade is created or under the same instrument; provided, however, that the exercise of such authority:

(i) Does not reduce any fixed income interest of any income beneficiary of the trust; and

(ii) Is in favor of the proper objects of the exercise of the power;

(B) The exercise of the power to invade the principal of the trust under subdivision (b)(27)(A) shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust;

(C) The exercise of the power to invade principal of the trust under subdivision (b)(27)(A) shall not extend the permissible period of the rule against perpetuities that applies to the trust; and

(D) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under any other statute or under common law.

(E) The exercise of the power to appoint principal under subdivision (b)(27)(A) shall be considered an exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate;

(F) The second trust:

(i) May confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal of the original trust;

(ii) The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust; and

(iii) The power of appointment conferred upon a beneficiary must preclude any exercise that would extend the permissible period of the rule against perpetuities that applies to the trust;

(G) If any contribution to the original trust qualified for the annual exclusion under § 2503(b) of the Internal Revenue Code, the marital deduction under §§ 2056(a) or 2523(a) of the Internal Revenue Code, or the charitable deduction under §§ 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, is a direct skip qualifying for treatment under § 2642(c) of the Internal Revenue Code, or qualified for any other specific tax benefit that would be lost by the existence of the authorized trustee's authority under subdivision (b)(27)(A) for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code, then the authorized trustee shall not have the power to distribute the principal of a trust pursuant to subdivision (b)(27)(A) in a manner that would prevent the contribution to the original trust from qualifying for or would reduce the exclusion, deduction, or other tax benefit that was originally claimed with respect to that contribution;

(H) During any period when the original trust owns stock in a subchapter S corporation as defined in § 1361(a)(1) of the Internal Revenue Code, an authorized trustee shall not exercise a power authorized by subdivision (b)(27)(A) to distribute part or all of the stock of the S corporation to a second trust that is not a permitted shareholder under § 1361(c)(2) of the Internal Revenue Code;

(I) This section applies to any trust that is administered in this state; and

(J) For purposes of this section, the term "original trust" refers to the trust from which principal is being distributed and the phrase "second trust" refers to the trust to which assets are being distributed from the original trust.

2013 COMMENTS TO OFFICIAL TEXT

Subdivision (b)(27) authorizes a trustee who possesses a discretionary power to distribute principal outright to trust beneficiaries to exercise that power in further trust. This power, which is commonly referred to as a "decanting" power, is considered a limited power of appointment.

The power may be exercised with respect to any trust that is administered in Tennessee.

In order to exercise the power, the Trustee is required to sign a written notarized instrument that is maintained with the records of the original trust as well as the second trust. The Trustee does not have to obtain consent of the beneficiaries or a Court in order to exercise the power.

The power may only be exercised in favor of the proper objects of the exercise of the discretionary power. This means that new beneficiaries cannot be added to the second trust, though the second trust does not have to benefit all of the beneficiaries of the original trust. The second trust may grant a power of appointment to a

beneficiary of the original trust, which power may be exercisable in favor of beneficiaries who were not beneficiaries of the original trust.

There are several limitations on the exercise of the power that prevent loss of tax benefits:

(1) the permissible rule of perpetuities applicable to the original trust may not be extended either by exercise of the decanting power or by the exercise of a power of appointment granted to a beneficiary in the second trust;

(2) if the original trust qualified for the federal gift tax annual exclusion under Code Section 2503(b), the federal gift or estate tax marital or charitable deduction, favorable generation-skipping transfer treatment under Code Section 2642(c), or any other specific tax benefit, the decanting power may not be exercised in a manner that causes the loss of the tax benefit; and

(3) if the original trust owns stock in a Subchapter S corporation, the power may not be exercised in favor of a second trust that is not a qualified shareholder in a Subchapter S corporation.

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² § 35-15-816(b)(27); see Comment to § 35-15-816 ("Subdivision (b)(27) authorizes a trustee who possesses a discretionary power to distribute principal outright to trust beneficiaries to exercise that power in further trust.").

³ § 35-15-816(b)(27)(A)(i).

⁴ The author understands that Tennessee attorneys construe the statute to permit the elimination of a withdrawal right over principal but not income.

⁵ A trustee may decant, but the exercise of the trustee's authority must be "in favor of the proper objects of the exercise of the power[.]" § 35-15-816(b)(27)(A)(ii). This implies that the new trust must be in favor of one or more of the beneficiaries of the old trust, and the author understands this is how Tennessee attorneys construe the statute.

⁶ § 35-15-816(b)(27)(A). The author understands that Tennessee attorneys construe the statute to limit the beneficiaries of the new trust to current beneficiaries of the old trust.

⁷ § 35-15-816(b)(27)(A). The author understands that Tennessee attorneys construe the statute as not requiring the same distribution standard.

⁸ § 35-15-816(b)(27)(F).

⁹ § 35-15-816(b)(27)(F).

¹⁰ § 35-15-816(b)(27)(G).

¹¹ § 35-15-816(b)(27)(G).

¹² § 35-15-816(b)(27)(G).

¹³ § 35-15-816(b)(27)(G).

¹⁴ § 35-15-816(b)(27)(H).

¹⁵ The author understands that Tennessee attorneys construe the statute as permitting a non-grantor trust to grantor trust conversion.

¹⁶ “The exercise of the power to invade principal of the trust under subdivision (b)(27)(A) shall not extend the permissible period of the rule against perpetuities that applies to the trust[.]” § 35-15-816(b)(27)(C). In addition, any power of appointment granted may not extend the rule against perpetuities period. § 35-15-816(b)(27)(F)(iii).

¹⁷ The author understands that Tennessee attorneys construe the statute as not permitting decanting if a beneficiary objects.

¹⁸ “The fact that the trustee has a power does not imply a duty that the power must be exercised.”
Comment to § 35-15-816.

¹⁹ The statute applies to trusts administered in this state. § 35-15-816(b)(27)(I).

TEXAS State Decanting Summary¹

STATUTORY HISTORY	
Statutory Citation	Section 112.071 - 112.087, Texas Property Code
Effective Date	09/01/13
Amendment Date(s)	09/01/17
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Full discretion not limited in any manner ² <i>Limited discretion:</i> Limited power to distribute principal ³
2. Limitation on trustee who may decant?	No, but interested trustee limited to an ascertainable standard ⁴
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity or unitrust ⁵
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁶
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁷ <i>Limited discretion:</i> Yes ⁸
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁹ <i>Limited discretion:</i> No ¹⁰
7. May remainder beneficiaries' interests be accelerated?	<i>Unlimited discretion:</i> Presumably yes ¹¹ <i>Limited discretion:</i> No ¹²
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> Presumably no ¹³ <i>Limited discretion:</i> Yes ¹⁴
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹⁵ <i>Limited discretion:</i> Yes; must be identical ¹⁶
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁷ <i>Limited discretion:</i> Yes ¹⁸
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁹
13. Charitable deduction savings provision?	Yes ²⁰
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²¹ , 2642(c) ²² , S corp ²³ , 401(a)(9) ²⁴ , catch-all ²⁵
16. Non-grantor trust to grantor trust conversion permitted?	Yes ²⁶
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁷
18. May trustee increase trustee commission?	Sometimes ²⁸
19. Other restrictions	Trustee liability ²⁹ ; trustee removal ³⁰

NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes, 30 days ³¹
21. Is decanting prohibited if a beneficiary objects?	No ³²
22. Court approval required to decant?	No, unless attorney general objects ³³
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³⁴
24. Provision that trustee has no duty to consider decanting?	Yes ³⁵
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁶
MISCELLANEOUS	
27. Other unique considerations?	Later discovered assets ³⁷ ; codification of common law ³⁸

TEXAS H.B. No. 2913

SUBCHAPTER D. DISTRIBUTION OF TRUST PRINCIPAL IN FURTHER TRUST

Sec. 112.071. DEFINITIONS. In this subchapter:

- (1) “Authorized trustee” means a person, other than the settlor, who has authority under the terms of a first trust to distribute the principal of the trust to or for the benefit of one or more current beneficiaries.
- (2) “Charity” means a charitable entity or a charitable trust, as those terms are defined by Section 123.001.
- (3) “Current beneficiary,” with respect to a particular date, means a person who is receiving or is eligible to receive a distribution of income or principal from a trust on that date.
- (4) “First trust” means an existing irrevocable inter vivos or testamentary trust all or part of the principal of which is distributed in further trust under Section 112.072 or 112.073.
- (5) “Full discretion” means the power to distribute principal to or for the benefit of one or more of the beneficiaries of a trust that is not a trust with limited discretion.
- (6) “Limited discretion” means:
 - (A) a power to distribute principal according to mandatory distribution provisions under which the trustee has no discretion; or
 - (B) a power to distribute principal to or for the benefit of one or more beneficiaries of a trust that is limited by an ascertainable standard, including the health, education, support, or maintenance of the beneficiary.

(7) “Presumptive remainder beneficiary,” with respect to a particular date, means a beneficiary of a trust on that date who, in the absence of notice to the trustee of the exercise of the power of appointment and assuming that any other powers of appointment under the trust are not exercised, would be eligible to receive a distribution from the trust if:

(A) the trust terminated on that date; or

(B) the interests of all beneficiaries currently eligible to receive income or principal from the trust ended on that date without causing the trust to terminate.

(8) “Principal” means property held in trust for distribution to a remainder beneficiary when the trust terminates and includes income of the trust that, at the time of the exercise of a power of distribution under Section 112.072 or 112.073, is not currently required to be distributed.

(9) “Second trust” means any irrevocable trust to which principal is distributed under Section 112.072 or 112.073.

(10) “Successor beneficiary” means a beneficiary other than a current or presumptive remainder beneficiary. The term does not include a potential appointee under a power of appointment held by a beneficiary.

Sec. 112.072. DISTRIBUTION TO SECOND TRUST: TRUSTEE WITH FULL DISCRETION.

(a) An authorized trustee who has the full discretion to distribute the principal of a trust may distribute all or part of the principal of that trust in favor of a trustee of a second trust for the benefit of one, more than one, or all of the current beneficiaries of the first trust and, for the benefit of one, more than one, or all of the successor or presumptive remainder beneficiaries of the first trust.

(b) The authorized trustee may, in connection with the exercise of a power of distribution under this section, grant a power of appointment, including a currently exercisable power of appointment, in the second trust to one or more of the current beneficiaries of the first trust who, at the time the power of appointment is granted, is eligible to receive the principal outright under the terms of the first trust.

(c) If the authorized trustee grants a power of appointment to a beneficiary under Subsection (b), the class of permissible appointees in whose favor the beneficiary may appoint under that power may be broader or different than the current, successor, and presumptive remainder beneficiaries of the first trust.

(d) If the beneficiaries of the first trust are described as a class of persons, the beneficiaries of the second trust may include one or more persons who become members of that class after the distribution to the second trust.

(e) The authorized trustee shall exercise a power to distribute under this section in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.

Sec. 112.073. DISTRIBUTION TO SECOND TRUST: TRUSTEE WITH LIMITED DISCRETION.

(a) An authorized trustee who has limited discretion to distribute the principal of a trust may distribute all or part of the principal of that trust in favor of a trustee of a second trust as provided by this section.

(b) The current beneficiaries of the second trust must be the same as the current beneficiaries of the first trust, and the successor and presumptive remainder beneficiaries of the second trust must be the same as the successor and presumptive remainder beneficiaries of the first trust.

(c) The second trust must include the same language authorizing the trustee to distribute the income or principal of the trust that was included in the first trust.

(d) If the beneficiaries of the first trust are described as a class of persons, the beneficiaries of the second trust must include all persons who become members of that class after the distribution to the second trust.

(e) If the first trust grants a power of appointment to a beneficiary of the trust, the second trust must grant the power of appointment to the beneficiary in the second trust, and the class of permissible appointees under that power must be the same as the class of permissible appointees under the power granted by the first trust.

(f) The authorized trustee shall exercise a power of distribution under this section in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.

Sec. 112.074. NOTICE REQUIRED.

(a) An authorized trustee may exercise a power of distribution under Section 112.072 or 112.073 without the consent of the settlor or beneficiaries of the first trust and without court approval if the trustee provides to all of the current beneficiaries and presumptive remainder beneficiaries written notice of the trustee's decision to exercise the power.

(b) For the purpose of determining who is a current beneficiary or presumptive remainder beneficiary entitled to the notice, a beneficiary is determined as of the date the notice is sent. A beneficiary includes a person entitled to receive property under the terms of the first trust.

(c) Except as provided by Subsection (e-1), in addition to the notice required under Subsection (a), the authorized trustee shall give written notice of the trustee's decision to the attorney general if:

- (1) a charity is entitled to notice;
- (2) a charity entitled to notice is no longer in existence;
- (3) the trustee has the authority to distribute trust assets to one or more charities that are not named in the trust instrument; or
- (4) the trustee has the authority to make distributions for a charitable purpose described in the trust instrument, but no charity is named as a beneficiary for that purpose.

(d) If the beneficiary has a court-appointed guardian or conservator, the notice required to be given by this section must be given to that guardian or conservator. If the beneficiary is a minor for whom no guardian or conservator has been appointed, the notice required to be given by this section must be given to a parent of the minor.

(e) The authorized trustee is not required to provide the notice to a beneficiary who:

- (1) is known to the trustee and cannot be located by the trustee after reasonable diligence;
- (2) is not known to the trustee;
- (3) waives the requirement of the notice under this section; or
- (4) is a descendant of a beneficiary to whom the trustee has given notice if the beneficiary and the beneficiary's ancestor have similar interests in the trust and no apparent conflict of interest exists between them.

(e-1) The trustee is not required to give notice to the attorney general under Subsection (c) if the attorney general waives that requirement in writing;

(e-2) For purposes of Subsection (e)(3), a beneficiary is considered to have waived the requirement that notice be given under this section if a person to whom notice is required to be given with respect to that beneficiary under Subsection (d) waives the requirement that notice be given under this section.

(f) The notice required under Subsection (a) must:

(1) include a statement that:

(A) the authorized trustee intends to exercise the power of distribution;

(B) the beneficiary has the right to object to the exercise of the power; and

(C) the beneficiary may petition a court to approve, modify, or deny the exercise of the trustee's power to make a distribution under this subchapter;

(2) describe the manner in which the trustee intends to exercise the power;

(3) specify the date the trustee proposes to distribute the first trust to the second trust;

(4) include the name and mailing address of the trustee;

(5) include copies of the agreements of the first trust and the proposed second trust;

(6) be given not later than the 30th day before the proposed date of distribution to the second trust; and

(7) be sent by registered or certified mail, return receipt requested, or delivered in person, unless the notice is waived in writing by the person to whom notice is required to be given.

Sec. 112.075. WRITTEN INSTRUMENT REQUIRED. A distribution under Section 112.072 or 112.073 must be made by a written instrument that is signed and acknowledged by the authorized trustee and filed with the records of the first trust and the second trust.

Sec. 112.076. REFERENCE TO TRUST TERMS. A reference to the governing instrument or terms of the governing instrument of a trust includes the terms of a second trust to which that trust's principal was distributed under this subchapter.

Sec. 112.077. SETTLOR OF SECOND TRUST.

(a) Except as provided by Subsection (b), the settlor of a first trust is considered to be the settlor of a second trust established under this subchapter.

(b) If a settlor of a first trust is not also the settlor of a second trust into which principal of that first trust is distributed, the settlor of the first trust is considered the settlor of the portion of the second trust distributed to the second trust from that first trust under this subchapter.

Sec. 112.078. COURT-ORDERED DISTRIBUTION.

(a) An authorized trustee may petition a court to order a distribution under this subchapter.

(b) If the authorized trustee receives a written objection to a distribution under this subchapter from a beneficiary before the proposed effective date of the distribution specified in the notice provided to the beneficiary under Section 112.074, the trustee or the beneficiary may petition a court to approve, modify, or deny the exercise of the trustee's power to make a distribution under this subchapter.

(c) If the authorized trustee receives a written objection to the distribution from the attorney general not later than the 30th day after the date the notice required by Section 112.074 was received by the attorney general, the trustee may not make a distribution under Section 112.072 or 112.073 without petitioning a court to approve or modify the exercise of the trustee's power to make a distribution under this subchapter.

(d) In a judicial proceeding under this section, the authorized trustee may present the trustee's reasons for supporting or opposing a proposed distribution, including whether the trustee believes the distribution would enable the trustee to better carry out the purposes of the trust.

(e) The authorized trustee has the burden of proving that the proposed distribution furthers the purposes of the trust, is in accordance with the terms of the trust, and is in the interests of the beneficiaries.

(f) This section does not limit a beneficiary's right to bring an action against a trustee for breach of trust.

Sec. 112.079. **DIVIDED DISCRETION.** If an authorized trustee has full discretion to distribute the principal of a trust and another trustee has limited discretion to distribute principal under the trust instrument, the authorized trustee having full discretion may exercise the power to distribute the trust's principal under Section 112.072.

Sec. 112.080. **LATER DISCOVERED ASSETS.** To the extent the authorized trustee does not provide otherwise:

(1) the distribution of all of the principal of a first trust to a second trust includes subsequently discovered assets otherwise belonging to the first trust and principal paid to or acquired by the first trust after the distribution of the first trust's principal to the second trust; and

(2) the distribution of part of the principal of a first trust to a second trust does not include subsequently discovered assets belonging to the first trust or principal paid to or acquired by the first trust after the distribution of principal from the first trust to the second trust, and those assets or that principal remain the assets or principal of the first trust.

Sec. 112.081. **OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST NOT LIMITED.** This subchapter may not be construed to limit the power of an authorized trustee to distribute property in further trust under the terms of the governing instrument of a trust, other law, or a court order.

Sec. 112.082. **NEED FOR DISTRIBUTION NOT REQUIRED.** An authorized trustee may exercise the power to distribute principal to a second trust under Section 112.072 or 112.073 regardless of whether there is a current need to distribute principal under the terms of the first trust.

Sec. 112.083. **DUTIES NOT CREATED.**

(a) This subchapter does not create or imply a duty for an authorized trustee to exercise a power to distribute principal, and impropriety may not be inferred as a result of the trustee not exercising a power conferred by Section 112.072 or 112.073.

(b) An authorized trustee does not have a duty to inform beneficiaries about the availability of the authority provided by this subchapter or a duty to review the trust to determine whether any action should be taken under this subchapter.

Sec. 112.084. CERTAIN DISTRIBUTIONS PROHIBITED.

(a) Except as provided by Subsection (b), an authorized trustee may not exercise a power to distribute principal of a trust otherwise provided by Section 112.072 or 112.073 if the distribution is expressly prohibited by the terms of the governing instrument of the trust.

(b) A general prohibition of the amendment or revocation of a trust or a provision that constitutes a spendthrift clause does not preclude the exercise of a power to distribute principal of a trust under Section 112.072 or 112.073.

Sec. 112.085. EXCEPTIONS TO POWER OF DISTRIBUTION. An authorized trustee may not exercise a power to distribute principal of a trust under Section 112.072 or 112.073 to:

- (1) reduce, limit, or modify a beneficiary's current, vested right to:
 - (A) receive a mandatory distribution of income or principal;
 - (B) receive a mandatory annuity or unitrust interest;
 - (C) withdraw a percentage of the value of the trust; or
 - (D) withdraw a specified dollar amount from the trust;
- (2) materially limit a trustee's fiduciary duty:
 - (A) under the terms of the trust; or
 - (B) in a manner that would be prohibited by Section 111.0035.
- (3) decrease or indemnify against a trustee's liability;
- (4) add a provision exonerating a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
- (5) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the distribution power under Section 112.072 or 112.073; or
- (6) reduce, limit, or modify in the second trust a perpetuities provision included in the first trust, unless expressly permitted by the terms of the first trust.

Sec. 112.086. TAX-RELATED LIMITATIONS.

(a) The authorized trustee may not distribute the principal of a trust under Section 112.072 or 112.073 in a manner that would prevent a contribution to that trust from qualifying for or that would reduce the exclusion, deduction, or other federal tax benefit that was originally claimed for that contribution, including:

- (1) the annual exclusion under Section 2503(b), Internal Revenue Code of 1986;
- (2) a marital deduction under Section 2056(a) or 2523(a), Internal Revenue Code of 1986;

(3) the charitable deduction under Section 170(a), 642(c), 2055(a), or 2522(a), Internal Revenue Code of 1986;

(4) direct skip treatment under Section 2642(c), Internal Revenue Code of 1986; or

(5) any other tax benefit for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code of 1986.

(b) Notwithstanding Subsection (a), an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either or both trusts under Sections 671-679, Internal Revenue Code of 1986.

(c) If S corporation stock is held in trust, an authorized trustee may not distribute all or part of that stock under Section 112.072 or 112.073 to a second trust that is not a permitted shareholder under Section 1361(c)(2), Internal Revenue Code of 1986.

(d) If an interest in property that is subject to the minimum distribution rules of Section 401(a)(9), Internal Revenue Code of 1986, is held in trust, an authorized trustee may not distribute the trust's interest in the property to a second trust under Section 112.072 or 112.073 if the distribution would shorten the minimum distribution period applicable to the property.

Sec. 112.087. COMPENSATION OF TRUSTEE. (a) Except as provided by Subsection (b) and unless a court, on application of the authorized trustee, directs otherwise, the trustee may not exercise a power under Section 112.072 or 112.073 solely to change trust provisions regarding the determination of the compensation of any trustee.

(b) An authorized trustee, in connection with the exercise of a power under Section 112.072 or 112.73 for another valid and reasonable purpose, may bring the trustee's compensation into conformance with reasonable limits authorized by state law.

(c) The compensation payable to an authorized trustee of the first trust may continue to be paid to the trustee of the second trust during the term of the second trust and may be determined in the same manner as the compensation would have been determined in the first trust.

(d) An authorized trustee may not receive a commission or other compensation for the distribution of a particular asset from a first trust to a second trust under Section 112.072 or 112.073.

* * * * *

SECTION 8. The legislature intends Subchapter D, Chapter 112, Property Code, as added by this Act, to be a codification of the common law of this state in effect before the effective date of this Act.

SECTION 9.

(a) Except as otherwise expressly provided by a trust, a will creating a trust, or this section, the changes in law made by this Act apply to a trust existing or created on or after September 1, 2013.

(b) For a trust existing on September 1, 2013, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2013.

(c) Section 115.002, Property Code, as amended by this Act, applies only to a court action commenced on or after the effective date of this Act. An action commenced before the effective date of this Act is governed by the law in effect immediately before that date, and the former law is continued in effect for that purpose.

SECTION 10. This Act takes effect September 1, 2013.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² § 112.072. Full discretion means a power to distribute principal that is “not limited or modified by the terms of the trust in any way, including by restrictions that limit distributions to purposes such as the best interests, welfare, or happiness of the beneficiaries.” §112.071(5).

³ § 112.073. Limited discretion is defined as a “limited or modified power to distribute principal.” § 112.071(6).

⁴ § 113.029 provides:

(b) Subject to Subsection (d), and unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply:

(1) a person, other than a settlor, who is a beneficiary and trustee, trustee affiliate, or discretionary power holder of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's, the trustee affiliate's, or the discretionary power holder's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's, the trustee affiliate's, or the discretionary power holder's individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

⁵ § 112.085(1).

⁶ § 112.085(1).

⁷ If the trustee has unlimited discretion, the power may be exercised in favor of one, more than one or all of the current beneficiaries and one, more than one or all of the successor or presumptive remainder beneficiaries. § 112.072(a). “Current beneficiary” is defined in § 112.071(3). “Presumptive remainder beneficiary” is defined in § 112.071(7). “Successor beneficiary” is defined in § 112.071(10).

⁸ § 112.073.

⁹ § 112.072(a).

¹⁰ The beneficiaries, including successor and presumptive remainder beneficiaries, must remain the same.

¹¹ The statute permits the second trust to benefit one or more successor or presumptive remainder beneficiaries and does not limit their interests to remainder interests.

¹² The beneficiaries must remain the same.

¹³ The statute does not require the same distribution standard.

¹⁴ The second trust must include the same language authorizing distributions.

¹⁵ § 112.072(b), (c).

¹⁶ § 112.073(e).

¹⁷ § 112.072(b), (c).

¹⁸ § 112.073(e).

¹⁹ § 112.086(a)(2).

²⁰ § 112.086(a)(3).

²¹ § 112.086(a)(1).

²² § 112.086(a)(4).

²³ § 112.086(c).

²⁴ § 112.086(d).

²⁵ § 112.086(a)(5).

²⁶ § 112.086(b).

²⁷ § 112.085(6).

²⁸ Unless the court approves, the decanting may not be for the sole purpose of changing trustee compensation, but if the decanting is for another valid and reasonable purpose, it may bring the trustee's compensation in conformance with reasonable limits authorized by state law. § 112.087.

²⁹ § 112.085(4).

³⁰ § 112.085(5).

³¹ § 112.074.

³² A beneficiary has a right to object (§ 112.074(f)(1)(B)). If the trustee receives an objection before the effective date for the decanting, the beneficiary may bring a court action to block the decanting but the decanting may proceed without court approval (§ 112.078(b)) unless the attorney general objects (§ 112.078(c)).

³³ § 112.074(a); § 112.078(c). The trustee may seek court approval. § 112.078(a). Court approval may be required to change trustee compensation. § 112.087.

³⁴ The trustee must exercise the decanting power “in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.” § 112.072(e); § 112.073(f). The trustee may not exercise the decanting power in a manner that would limit the trustee’s fiduciary duty under the terms of the trust or in a manner that would be prohibited by Section 111.0035. §112.085(2); Section 111.0035 contains mandatory trust requirements including the duty of a trustee to act in good faith and in accordance with the purposes of the trust.

³⁵ § 112.083.

³⁶ The application of the decanting statute to trusts in existence on September 1, 2013 is unclear. The Act states that “the changes in law made by this Act apply to a trust ‘existing or created on or after September 1, 2013,’ ” but that for a trust existing on September 1, 2013, the changes in law made by the Act apply “only to an act or omission relating to the trust that occurs on or after September 1, 2013.” The Act also states that it is a codification of common law.

³⁷ § 112.080.

³⁸ See Section 8 of Act.

VIRGINIA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	VA. CODE. ANN. § 64.2-779 ²
Effective Date	7/1/17
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, expanded discretion to distribute income or principal ³ <i>Limited discretion:</i> Yes, limited discretion to distribute income or principal ⁴
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁵
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁶
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁷ <i>Limited discretion:</i> Yes ⁸
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No ⁹ <i>Limited discretion:</i> No ¹⁰
7. May remainder beneficiaries' interests be accelerated?	No ¹¹
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> No ¹² <i>Limited discretion:</i> Yes ¹³
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹⁴ <i>Limited discretion:</i> Yes ¹⁵
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No ¹⁶ <i>Limited discretion:</i> Yes, with some exceptions ¹⁷
11. Supplemental needs trust exception?	Yes ¹⁸
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁹
13. Charitable deduction savings provision?	Yes ²⁰
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²¹ ; 2642(c) ²² ; Sub S ²³ ; 401(a)(9) ²⁴ ; 672(f)(2)(A) ²⁵ ; Catch-all ²⁶
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits ²⁷
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁸
18. May trustee increase trustee commission?	Sometimes ²⁹
19. Other restrictions?	Decreasing trustee liability ³⁰ or eliminating trustee remover ³¹
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ³²

21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No ³³
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³⁴
24. Provision that trustee has no duty to consider decanting?	Act does not create such a duty ³⁵
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁶
MISCELLANEOUS	
27. Other unique considerations?	Reasonable reliance provision ³⁷ ; protection of charitable interests ³⁸ ; saving provision for flawed decantings ³⁹ ; decanting of pet trusts ⁴⁰ ; provision re identity of settlor ⁴¹ ; subsequently discovered assets ⁴²

**VIRGINIA STATUTE
VA. CODE ANN. § 64.2-779**

Article 8.1. Uniform Trust Decanting Act

§ 64.2-779.1. Scope.

- A. Except as otherwise provided in subsections B and C, this article applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.
- B. This article does not apply to a trust held solely for charitable purposes.
- C. Subject to § 64.2-779.12, a trust instrument may restrict or prohibit exercise of the decanting power.
- D. This article does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, a law of the Commonwealth other than this article, common law, a court order, or a nonjudicial settlement agreement.
- E. This article does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

§ 64.2-779.2. Fiduciary duty.

- A. In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.
- B. This article does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this article.

C. Except as otherwise provided in a first-trust instrument, for purposes of this article and § 64.2- 763 and subsection A of § 64.2-764, the terms of the first trust are deemed to include the decanting power.

§ 64.2-779.3. Application; governing law.

This article applies to a trust created before, on, or after July 1, 2017, that:

1. Has its principal place of administration in the Commonwealth, including a trust whose principal place of administration has been changed to the Commonwealth; or
2. Provides by its trust instrument that it is governed by the law of the Commonwealth or is governed by the law of the Commonwealth for the purpose of:
 - a. Administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of the Commonwealth;
 - b. Construction of terms of the trust; or
 - c. Determining the meaning or effect of terms of the trust.

§ 64.2-779.4. Reasonable reliance.

A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this article, a law of the Commonwealth other than this article, or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

§ 64.2-779.5. Notice; exercise of decanting power.

A. In this section, a notice period begins on the day notice is given under subsection C and ends 59 days after the day notice is given.

B. Except as otherwise provided in this article, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

C. Except as otherwise provided in subsection F, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than 60 days before the exercise to (i) each settlor of the first trust, if living or then in existence; (ii) each qualified beneficiary of the first trust; (iii) each holder of a presently exercisable power of appointment over any part or all of the first trust; (iv) each person that currently has the right to remove or replace the authorized fiduciary; (v) each other fiduciary of the first trust; (vi) each fiduciary of the second trust; (vii) each person acting as an advisor or protector of the first trust; (viii) each person holding an adverse interest who has the power to consent to the revocation of the first trust; and (ix) the Attorney General, if subsection B of § 64.2-779.11 applies.

D. An authorized fiduciary is not required to give notice under subsection C to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

E. A notice under subsection C shall (i) specify the manner in which the authorized fiduciary intends to exercise the decanting power, (ii) specify the proposed effective date for exercise of the power, (iii) include a copy of the first-trust instrument, and (iv) include a copy of all second-trust instruments.

F. The decanting power may be exercised before expiration of the notice period under subsection A if all persons entitled to receive notice waive the period in a signed record.

G. The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under § 64.2-779.6 asserting that (i) an attempted exercise of the decanting power is ineffective because it did not comply with this article or was an abuse of discretion or breach of fiduciary duty or (ii) § 64.2-779.19 applies to the exercise of the decanting power.

H. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection C if the authorized fiduciary acted with reasonable care to comply with subsection C.

§ 64.2-779.6. Court involvement.

A. On application of an authorized fiduciary, a person entitled to notice under subsection C of § 64.2-779.5, a beneficiary, or with respect to a charitable interest the Attorney General or other person that has standing to enforce the charitable interest, the court may (i) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this article and consistent with the fiduciary duties of the authorized fiduciary; (ii) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this article and to exercise the decanting power; (iii) approve an exercise of the decanting power; (iv) determine that a proposed or attempted exercise of the decanting power is ineffective because (a) after applying § 64.2-779.19, the proposed or attempted exercise does not or did not comply with this article or (b) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty; (v) determine the extent to which § 64.2-779.19 applies to a prior exercise of the decanting power; (vi) provide instructions to the trustee regarding the application of § 64.2-779.19 to a prior exercise of the decanting power; or (vii) order other relief to carry out the purposes of this article.

B. On application of an authorized fiduciary, the court may approve (i) an increase in the fiduciary's compensation under § 64.2-779.13 or (ii) a modification under § 64.2-779.15 of a provision granting a person the right to remove or replace the fiduciary.

§ 64.2-779.7. Formalities.

An exercise of the decanting power shall be made in a record signed by an authorized fiduciary. The signed record shall, directly or by reference to the notice required by § 64.2-779.5, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to or held subject to the terms of each second trust and the property, if any, that remains in the first trust.

§ 64.2-779.8. Decanting power under expanded distributive discretion.

A. As used in this section:

"Noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. "Noncontingent right" does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.

"Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

"Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. "Successor beneficiary" does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

"Vested interest" means:

1. A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

2. A current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property;

3. A current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property;

4. A presently exercisable general power of appointment; or

5. A right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

B. Subject to subsection C and § 64.2-779.11, an authorized fiduciary that has expanded distributive discretion over the income or principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the income or principal of the first trust.

C. Subject to § 64.2-779.10, in an exercise of the decanting power under this section, a second trust may not:

1. Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection D;

2. Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection D; or

3. Reduce or eliminate a vested interest.

D. Subject to subdivision C 3 and § 64.2-779.11, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

1. Retain a power of appointment granted in the first trust;

2. Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

3. Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

4. Create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

E. A power of appointment described in subdivisions D 1 through 4 may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

F. If an authorized fiduciary has expanded distributive discretion over part but not all of the income or principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the income or principal over which the authorized fiduciary has expanded distributive discretion.

§ 64.2-779.9. Decanting power under limited distributive discretion.

A. As used in this section, “limited distributive discretion” means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

B. An authorized fiduciary that has limited distributive discretion over the income or principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the income or principal of the first trust.

C. Under this section and subject to § 64.2-779.11, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust. A second trust that defers or postpones a contingent right of a beneficiary to receive an outright distribution of assets upon the attainment of a certain age or upon the occurrence of a specific event (a “deferred distribution”) shall be substantially similar to the first trust if the second trust provides that (i) during the lifetime of the beneficiary, no portion of the income or principal attributable to the deferred distribution may be distributed to, or for the benefit of, any person other than the beneficiary and (ii) the beneficiary shall have a testamentary general power of appointment exercisable in favor of the beneficiary’s estate over the deferred distribution or the deferred distribution shall be payable to the beneficiary’s estate if the second trust does not terminate during the beneficiary’s lifetime.

D. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

1. The distribution is applied for the benefit of the beneficiary;
2. The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this chapter; or
3. The distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

E. If an authorized fiduciary has limited distributive discretion over part but not all of the income or principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the income or principal over which the authorized fiduciary has limited distributive discretion.

§ 64.2-779.10. Trust for beneficiary with disability.

A. As used in this section:

“Beneficiary with a disability” means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been determined to be an incapacitated person.

“Governmental benefits” means financial aid or services from a state, federal, or other public agency.

“Special-needs fiduciary” means, with respect to a trust that has a beneficiary with a disability:

1. A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

2. If no trustee or fiduciary has discretion under subdivision 1, a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

3. If no trustee or fiduciary has discretion under subdivisions 1 and 2, a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

“Special-needs trust” means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

B. A special-needs fiduciary may exercise the decanting power under § 64.2-779.8 over the income or principal of a first trust, including a first trust under which the fiduciary has only limited distributive discretion as defined in subsection A of § 64.2-779.9, as if the fiduciary had authority to distribute income or principal to a beneficiary with a disability subject to expanded distributive discretion if:

1. A second trust is a special-needs trust that benefits the beneficiary with a disability; and

2. The special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

C. In an exercise of the decanting power under this section, the following rules apply:

1. Notwithstanding subdivision C 2 of § 64.2-779.8, the interest in the second trust of a beneficiary with a disability may:

a. Be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. § 1396p(d)(4)(C); or

b. Contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. § 1396p(d)(4)(A).

2. Subdivision C 3 of § 64.2-779.8 does not apply to the interests of the beneficiary with a disability.

3. Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary’s beneficial interests in the first trust.

§ 64.2-779.11. Protection of charitable interest.

A. As used in this section:

“Determinable charitable interest” means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and that is unconditional or will be held solely for charitable purposes.

“Unconditional” means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986 on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

B. If a first trust contains a determinable charitable interest, the Attorney General has the rights of a qualified beneficiary and may represent and bind the charitable interest.

C. If a first trust contains a charitable interest, the second trust or trusts may not:

1. Diminish the charitable interest;
2. Diminish the interest of an identified charitable organization that holds the charitable interest;
3. Alter any charitable purpose stated in the first-trust instrument; or
4. Alter any condition or restriction related to the charitable interest.

D. If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection C.

E. If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subsection C must be administered under the law of the Commonwealth unless:

1. The Attorney General, after receiving notice under § 64.2-779.5, fails to object in a signed record delivered to the authorized fiduciary within the notice period;
2. The Attorney General consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or
3. The court approves the exercise of the decanting power.

F. This article does not limit the powers and duties of the Attorney General under law of the Commonwealth other than this article.

§ 64.2-779.12. Trust limitation on decanting.

A. An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:

1. The decanting power; or
2. A power granted by state law to the fiduciary to distribute part or all of the income or principal of the trust to another trust or to modify the trust.

B. Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

1. The decanting power; or
2. A power granted by state law to a fiduciary to distribute part or all of the income or principal of the trust to another trust or to modify the trust.

C. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

D. Subject to subsections A and B, an authorized fiduciary may exercise the decanting power under this article even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the income or principal of the first trust to another trust.

E. If a first-trust instrument contains an express prohibition described in subsection A or an express restriction described in subsection B, the provision must be included in the second-trust instrument.

§ 64.2-779.13. Change in compensation.

A. If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

1. All qualified beneficiaries of the second trust consent to the increase in a signed record;
- or
2. The increase is approved by the court.

B. If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by this chapter unless:

1. All qualified beneficiaries of the second trust consent to the increase in a signed record;
- or
2. The increase is approved by the court.

C. A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections A and B.

§ 64.2-779.14. Relief from liability and indemnification.

A. Except as otherwise provided in this section, a second-trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

B. A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

C. A second-trust instrument may not reduce fiduciary liability in the aggregate.

D. Subject to subsection C, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of the Commonwealth other than this article.

§ 64.2-779.15. Removal or replacement of authorized fiduciary.

An authorized fiduciary may not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

1. The person holding the power consents to the modification in a signed record and the modification applies only to the person;

2. The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

3. The court approves the modification and the modification grants a substantially similar power to another person.

§ 64.2-779.16. Tax-related provisions.

A. As used in this section:

“Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under §§ 671 through 677 of the Internal Revenue Code or § 679 of the Internal Revenue Code.

“Internal Revenue Code” means the United States Internal Revenue Code of 1986.

“Nongrantor trust” means a trust that is not a grantor trust.

“Qualified benefits property” means property subject to the minimum distribution requirements of § 401(a)(9) of the Internal Revenue Code and any applicable regulations, or to any similar requirements that refer to § 401(a)(9) of the Internal Revenue Code or the regulations.

B. An exercise of the decanting power is subject to the following limitations:

1. If a first trust contains property that qualified, or would have qualified but for provisions of this article other than this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

2. If the first trust contains property that qualified, or would have qualified but for provisions of this article other than this section, for a charitable deduction for purposes of the income, gift, or estate tax under the Internal Revenue Code or a state income, gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

3. If the first trust contains property that qualified, or would have qualified but for provisions of this article other than this section, for the exclusion from the gift tax described in § 2503(b) of the Internal Revenue Code, the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under § 2503(b) of the Internal Revenue Code. If the first trust contains property that qualified, or would have qualified but for provisions of this article other than this section, for the exclusion from the gift tax described in § 2503(b) of the Internal Revenue Code by application of § 2503(c) of the Internal Revenue Code, the second-trust instrument must not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under § 2503(c) of the Internal Revenue Code.

4. If the property of the first trust includes shares of stock in an S corporation, as defined in § 1361 of the Internal Revenue Code, and the first trust is, or but for provisions of this article other than this section would be, a permitted shareholder under any provision of § 1361 of the Internal Revenue Code, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under § 1361(c)(2) of the Internal Revenue Code. If the property of

the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this article other than this section would be, a qualified subchapter-S trust within the meaning of § 1361(d) of the Internal Revenue Code, the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

5. If the first trust contains property that qualified, or would have qualified but for provisions of this article other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under § 2642(c) of the Internal Revenue Code the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under § 2642(c) of the Internal Revenue Code.

6. If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under § 401(a)(9) of the Internal Revenue Code and any applicable regulations, or any similar requirements that refer to § 401(a)(9) of the Internal Revenue Code or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power, and § 64.2-779.19 applies to the separate share.

7. If the first trust qualifies as a grantor trust because of the application of § 672(f)(2)(A) of the Internal Revenue Code, the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under § 672(f)(2)(A) of the Internal Revenue Code.

8. In this subdivision, “tax benefit” means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to subdivision 9, a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit:

a. The first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

b. The transfer of property held by the first trust or the first trust qualified, or would have qualified but for provisions of this article other than this section, would have qualified for the tax benefit.

9. Subject to subdivision 4:

a. Except as otherwise provided in subdivision 7, the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

b. Except as otherwise provided in subdivision 10, the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

10. An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

a. The first trust and a second trust are both grantor trusts, in whole or in part, the first-trust instrument grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second-trust instrument does not grant an equivalent power to the settlor or other person; or

b. The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:

(1) The settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(2) The first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

C. If an authorized fiduciary that has limited distributive discretion over the income or principal of a first trust reasonably determines that the overall income, estate, gift, and generation-skipping tax consequences of the first trust may be reduced by either (i) granting a general power of appointment to a beneficiary of the first trust or (ii) eliminating a general power of appointment granted to a beneficiary of the first trust, the fiduciary may exercise the decanting power over all or any portion of the principal of the trust to grant or eliminate such a general power of appointment and shall, in addition, have the powers found in subsection D of § 64.2-779.8 as if the fiduciary had expanded distributive discretion, subject to the following provisions:

1. In the case of the grant of a general power of appointment, the class of permissible appointees contained in the second trust shall be limited to the creditors of the powerholder or the creditors of the powerholder's estate.

2. In the case of the elimination of a general power of appointment, the class of permissible appointees in the second trust shall exclude the powerholder, the powerholder's creditors, the powerholder's estate, and the creditors of the powerholder's estate, but shall otherwise be identical to the class of appointees permitted in the first trust.

§ 64.2-779.17. Duration of second trust.

A. Subject to subsection B, a second trust may have a duration that is the same as or different from the duration of the first trust.

B. To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation that apply to property of the first trust.

§ 64.2-779.18. Need to distribute not required.

An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of income or principal at the time of the exercise.

§ 64.2-779.19. Savings provision.

A. If exercise of the decanting power would be effective under this article except that the second-trust instrument in part does not comply with this article, the exercise of the power is effective and the following rules apply with respect to the income or principal of the second trust attributable to the exercise of the power:

1. A provision in the second-trust instrument which is not permitted under this article is void to the extent necessary to comply with this article.

2. A provision required by this article to be in the second-trust instrument which is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this article.

B. If a trustee or other fiduciary of a second trust determines that subsection A applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

§ 64.2-779.20. Trust for care of animal.

A. As used in this section:

“Animal trust” means a trust or an interest in a trust created to provide for the care of one or more animals.

“Protector” means a person appointed in an animal trust to enforce the trust on behalf of the animal or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

B. The decanting power may be exercised over an animal trust that has a protector to the extent that the trust could be decanted under this article if each animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the power.

C. A protector for an animal has the rights under this article of a qualified beneficiary.

D. Notwithstanding any other provision of this article, if a first trust is an animal trust, in an exercise of the decanting power, the second trust must provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

§ 64.2-779.21. Terms of second trust.

A reference in this chapter to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

2017, c. 592.

§ 64.2-779.22. Settlor.

A. For purposes of law of the Commonwealth other than this article and subject to subsection B, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the income or principal of the first trust subject to the exercise of the decanting power.

B. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust, and the authorized fiduciary may be considered.

§ 64.2-779.23. Later-discovered property.

A. Except as otherwise provided in subsection C, if exercise of the decanting power was intended to distribute all the income or principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

B. Except as otherwise provided in subsection C, if exercise of the decanting power was intended to distribute less than all the income or principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

C. An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

§ 64.2-779.24. Obligations.

A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

§ 64.2-779.25. Accountings.

If accounts for the first trust are filed with the commissioner of accounts, the accounts for the second trust shall be filed with the commissioner of accounts unless the court orders otherwise.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² Virginia's initial decanting statute, Va. Code Ann. §64.2-778 (effective 7/1/2012, amended 10/1/12 and 7/1/14) was completely replaced by a new statute based on the Uniform Trust Decanting Act.

³ §64.2-779.8. The trustee may only exercise the decanting power over the part of income or principal over which the trustee has distributive discretion. "Expanded distributive discretion" is not defined but "limited distributive discretion" is defined.

⁴ §64.2-779.9. The trustee may only exercise the decanting power over the part of income or principal over which the trustee has distributive discretion. "Expanded distributive discretion" is not defined but "limited distributive discretion" is defined.

⁵ If there is expanded discretion, no as to a "vested interest." §64.2-779.8, C, 3. "Vested interest" is defined in §64.2-779.8, A. If there is limited discretion, the second trust must grant each beneficiary interests substantially similar to the beneficiary's interests under the first trust. §64.2-779.8, C.

⁶ With respect to expanded discretion, decanting cannot eliminate a presently exercisable power of appointment and therefore could not eliminate a withdrawal right if the beneficiary has attained the particular age. A right of withdrawal could be eliminated if the beneficiary has not attained the particular age. §64.2-779.8, C, 3. With respect to limited discretion, the trustee may defer or postpone a contingent right of a beneficiary to receive an outright distribution of assets upon the attainment of a certain age or upon the occurrence of a specific event (a "deferred distribution") if the second trust provides that (i) during the lifetime of the beneficiary, no portion of the income or principal attributable to the deferred distribution may be distributed to, or for the benefit of, any person other than the beneficiary and (ii) the beneficiary shall have a testamentary general power of appointment exercisable in favor of the beneficiary's estate over the deferred distribution or the deferred distribution shall be payable to the beneficiary's estate if the second trust does not terminate during the beneficiary's lifetime. §64.2-779.9, C. This provision only applies to a "contingent" right, and thus presumably does not apply if the beneficiary has reached the designated age. Presumably this exception should apply to a right of withdrawal at a certain age, although literally it applies only to a right to a distribution. It appears that the second trust cannot give the beneficiary a lifetime power of appointment under the "deferred distribution."

⁷ §64.2-779.8.

⁸ §64.2-779.9, C.

⁹ §64.2-779.8, C.

¹⁰ §64.2-779.9, C.

¹¹ With respect to expanded discretion, see §64.2-779.8, C, 1. With respect to limited discretion, see §64.2-779.9, C.

¹² §64.2-779.8.

¹³ §64.2-779.9, C.

¹⁴ §64.2-779.8, D. If the powerholder is a current beneficiary, the trustee must have expanded distributive discretion to distribute principal to the beneficiary. §64.2-779.8, D, 3.

¹⁵ If substantially similar to power granted to beneficiary under first trust or a testamentary general power of appointment over a “deferred distribution.” §64.2-779.9, C. In addition, the trustee may grant a general power of appointment limited to creditors if the trustee believes a general power of appointment will improve the tax consequences of the trust. §64.2-779.16, C.

¹⁶ §64.2-779.8, D.

¹⁷ §64.2-779.9, C. The trustee may grant a general power of appointment limited to creditors or eliminate a general power of appointment if such modifications will reduce overall taxes. §64.2-779.16, C.

¹⁸ §64.2-779.10.

¹⁹ §64.2-779.16, B, 1.

²⁰ §64.2-779.16, B, 2.

²¹ §64.2-779.16, B, 3.

²² §64.2-779.16, B, 5.

²³ §64.2-779.16, B, 4.

²⁴ §64.2-779.16, B, 6.

²⁵ §64.2-779.16, B, 7.

²⁶ §64.2-779.16, B, 8.

²⁷ §64.2-779.16, B, 9-10.

²⁸ §64.2-779.17.

²⁹ §64.2-779.13.

³⁰ §64.2-779.14.

³¹ §64.2-779.15.

³² §64.2-779.5.

³³ §64.2-779.5.

³⁴ §64.2-779.2.

³⁵ §64.2-779.2, B.

³⁶ §64.2-779.3.

³⁷ A trustee may reasonably rely on the validity of a prior attempted decanting. §64.2-779.4.

³⁸ §64.2-779.11.

³⁹ §64.2-779.19.

⁴⁰ §64.2-779.20.

⁴¹ §64.2-779.22.

⁴² §64.2-779.23.

WASHINGTON
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	Chapter 11.107 RCW
Effective Date	7/23/2017
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion</i> : Yes, expanded discretion to distribute principal ²
	<i>Limited discretion</i> : Yes, limited discretion to distribute principal ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion</i> : No ⁶
	<i>Limited discretion</i> : Yes ⁷
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion</i> : No ⁸
	<i>Limited discretion</i> : No ⁹
7. May remainder beneficiaries' interests be accelerated?	No ¹⁰
8. New and old trust require same distribution standard?	<i>Unlimited discretion</i> : No ¹¹
	<i>Limited discretion</i> : Yes ¹²
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion</i> : Yes ¹³
	<i>Limited discretion</i> : Yes ¹⁴
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion</i> : No ¹⁵
	<i>Limited discretion</i> : Yes ¹⁶
11. Supplemental needs trust exception?	Yes ¹⁷
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁸
13. Charitable deduction savings provision?	Yes ¹⁹
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ²⁰ ; 2642(c) ²¹ ; Sub S ²² ; 401(a)(9) ²³ ; 672(f)(2)(A) ²⁴ ; Catch-all ²⁵ ; limitations on beneficiary-trustee ²⁶
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits ²⁷
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁸
18. May trustee increase trustee commission?	Sometimes ²⁹

19. Other restrictions?	Decreasing trustee liability ³⁰ or eliminating trustee remover ³¹
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ³²
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No, ³³ unless all qualified beneficiaries are minors without representation ³⁴
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes ³⁵
24. Provision that trustee has no duty to consider decanting?	Yes ³⁶
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁷
MISCELLANEOUS	
27. Other unique considerations?	Reasonable reliance provision ³⁸ ; protection of charitable interests ³⁹ ; saving provision for flawed decantings ⁴⁰ ; provision re identity of settlor ⁴¹ ; subsequently discovered assets ⁴² ; real estate and other property vest in second trust ⁴³ ; carryover of action or proceeding ⁴⁴ ; rights, privileges, powers vest in second trust. ⁴⁵

CHAPTER 11.107 RCW TRUSTS-DECANTING POWER

11.107.010. Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of Title 26 U.S.C. Sec. 2041(b)(1)(A) or 2514(c)(1) of the federal internal revenue code and any applicable regulations, as amended, as of July 23, 2017.

(2) "Charitable interest" means an interest in a trust that:

- (a) Is held by a charitable organization;
- (b) Benefits charitable organizations;
- (c) Is held for charitable purposes; or
- (d) Holds assets subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes.

(3) "Charitable purpose" means a purpose that is for: The relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which are beneficial to a community.

(4) "Decanting power" or "the decanting power" means the power of a trustee under this chapter to distribute income and principal of a first trust to one or more second trusts or to modify the terms of the first trust.

(5) "Expanded discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

(6) "First trust" means a trust over which a trustee may exercise the decanting power.

(7) "Limited discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(8) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(9) "Qualified beneficiary" means a beneficiary that on the date of qualification is described in RCW **11.98.002(2)**.

(10) "Reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of Title 26 U.S.C. Sec. 674(b)(5)(A) of the federal internal revenue code and any applicable regulations, as amended, as of July 23, 2017.

(11) "Second trust" means:

(a) A first trust after modification under this chapter; or

(b) A trust to which a distribution of income and principal from a first trust is or may be made under this chapter.

11.107.020. Decanting power under expanded discretion.

(1) Subject to (a) of this subsection and RCW **11.107.070**, a trustee that has expanded discretion to distribute the principal of a first trust to one or more current beneficiaries may exercise the decanting power over the principal of the first trust, subject to the following:

(a) Except as provided in RCW **11.107.060**, a second trust may not in an exercise of the decanting power under this section:

(i) Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in (b) of this subsection;

(ii) Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in (b) of this subsection; or

(iii) Reduce or eliminate a vested interest;

(b) Subject to (a)(iii) of this subsection and RCW **11.107.070**, a second trust may in an exercise of the decanting power under this section:

- (i) Retain a power of appointment granted in the first trust;
 - (ii) Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;
 - (iii) Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the trustee has expanded discretion to distribute principal to the current beneficiary; and
 - (iv) Create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary;
- (c) A power of appointment described in (b) of this subsection may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust;
- (d) In an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction; and
- (e) If a trustee has expanded discretion to distribute part but not all of the principal of a first trust, the trustee may exercise the decanting power under this section only over that part of the principal.
- (2) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.
- (a) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.
 - (b) "Successor beneficiary" means a beneficiary that on the date of the beneficiary's qualification is determined not to be a qualified beneficiary. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.
 - (c) "Vested interest" means:
 - (i) A right to a mandatory distribution that is noncontingent as of the date of the exercise of the decanting power;
 - (ii) A current and noncontingent right, annually or more frequently, to either a mandatory distribution of income or to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust income or principal;
 - (iii) A presently exercisable general power of appointment; or
 - (iv) A right to receive an ascertainable part of the trust principal on trust termination that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur.

11.107.030 Decanting power under limited discretion.

Subject to RCW 11.107.070, a trustee that has limited discretion to distribute the principal of a first trust to one or more current beneficiaries may exercise the decanting power over the principal of the first trust, subject to the following:

(1) Second trusts under this section, in the aggregate, must grant each beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficial interests of the beneficiary in the first trust;

(2) A power to make a distribution under the second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

(a) The distribution is made for the benefit of the beneficiary;

(b) The beneficiary is incapacitated or otherwise under a legal disability or the trustee reasonably believes the beneficiary is incapacitated or under a legal disability, and the distribution is made as permitted by the first trust instrument or otherwise as permitted by law; or

(c) The distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary;

(3) In an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction; and

(4) If a trustee has limited discretion to distribute part but not all of the principal of a first trust, the trustee may exercise the decanting power under this section only over that part of the principal.

11.107.040 Decanting statute—Procedure to exercise decanting power.

(1) The trustee of the first trust may exercise the decanting power under RCW **11.107.020** and **11.107.30** if:

(a) The trustee determines that the exercise of the decanting power is consistent with the trustee's fiduciary duties described in RCW **11.107.080**(1);

(b) In the event that the first trust contains a charitable interest, the trustee gives written notice to the attorney general of the trustee's intention to exercise the decanting power; and

(c) The trustee gives written notice of the trustee's intention to exercise the decanting power to each qualified beneficiary, each holder of a presently exercisable power of appointment over any part of the first trust, and each person that currently has the right to remove or replace the trustee not less than sixty days prior to the effective date of the exercise.

(2) The trustee of the first trust, qualified beneficiaries, and any other party as defined by RCW **11.96A.030**(5) may agree to exercise by the trustee of the decanting power by means of a binding agreement under RCW **11.96A.220**.

(3) The trustee of the first trust, a qualified beneficiary, a holder of a presently exercisable power of appointment over any part of the first trust, and a person that currently has the right to remove or replace the trustee may petition the court under chapter **11.96A** RCW regarding exercise of the decanting power for the following relief, to:

(a) Provide instructions to the trustee regarding whether a proposed exercise of the decanting power is permitted under this chapter and consistent with the fiduciary duties of the trustee;

(b) Approve an exercise of the decanting power;

(c) Determine that a proposed or attempted exercise of the decanting power is ineffective because the proposed or attempted exercise does not or did comply with this chapter or the proposed or attempted exercise would be or was an abuse of the trustee's discretion or a breach of fiduciary duty; or

(d) Order other relief to carry out the purposes of this chapter.

(4) The trustee of the first trust may petition the court under chapter **11.96A** RCW regarding exercise of the decanting power for the following relief:

(a) An increase of the trustee's compensation under RCW **11.107.070(2)(a)(ii)**; or

(b) Modification under RCW **11.107.070(4)(b)** of a provision granting a person the right to remove or replace the trustee.

(5) If there is at least one qualified beneficiary who is not a minor or who has a representative, the trustee is not required to give notice under subsection (1)(c) of this section to a qualified beneficiary who is a minor and has no representative. If all qualified beneficiaries are minors and none has a representative, the trustee must petition for appointment of a guardian ad litem under RCW **11.98A.160**.

(6) The trustee is not required to give notice under this section to a person who is not known to the trustee or is known to the trustee but cannot be located by the trustee after reasonable diligence.

(7) A notice under subsection (1) of this section or petition under subsection (3) or (4) of this section must:

(a) Specify the manner in which the trustee must exercise the decanting power;

(b) Specify the proposed effective date for exercise of the decanting power;

(c) Include a copy of all governing instruments of the first trust; and

(d) Include a copy of all governing instruments of the second trust. An exercise of the decanting power under this section must be made in a record signed by the trustee; for this purpose, a "record signed by the trustee" must include a court order under subsection (3) of this section.

(8) The decanting power may be exercised before expiration of the notice period under subsection (1) of this section if all persons entitled to receive notice waive the period in writing. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (1) of this section if the trustee acted with reasonable care to comply with this section.

11.107.050 Decanting statute—Effects and consequences of an exercise of the decanting power.

(1) A trustee or other person that reasonably relies on the validity of a distribution of part or all of the income and principal of a trust to another trust, or a modification of a trust, under this chapter or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

(2) A debt, liability, or other obligation enforceable against income and principal of a first trust is enforceable to the same extent against that income and principal when held by the second trust after exercise of the decanting power.

(3) For purposes of the law of this state other than this chapter and subject to this subsection, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first

trust subject to the exercise of the decanting power. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust and the intent of a settlor of the second trust, if different, may be considered. The intent of the trustee may also be considered.

(4) If the trustee intends to distribute all of the principal of a first trust to a second trust and the trustee makes a good faith effort to do so, the distribution of all of the principal of a first trust to a second trust includes subsequently discovered assets otherwise belonging to the first trust and principal paid to or acquired by the first trust after the distribution of the first trust's principal. If the trustee does not intend to distribute all of the principal of a first trust to a second trust, the distribution of part of the principal of a first trust to a second trust does not include subsequently discovered assets belonging to the first trust or principal paid to or acquired by the first trust after the distribution of principal from the first trust to the second trust, and those assets or that principal remain the assets or principal of the first trust.

(5) A reference under this title to a trust instrument or to terms of the trust includes the second trust, the second trust instrument, and the terms of the second trust.

(6) The title to all real estate and other property, both tangible and intangible, owned by the first trust remains vested in the second trust without reversion or impairment.

(7) An action or proceeding pending by or against the first trust may be continued by or against the second trust as if the decanting had not occurred.

(8) Except as otherwise provided by this chapter, all of the rights, privileges, immunities, powers, and purposes of the first trust remain vested in the second trust.

11.107.060 Decanting statute—Trust for beneficiary with a disability.

(1) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Beneficiary with a disability" means a beneficiary of the first trust who the trustee believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who is incapacitated within the meaning of RCW **11.88.010**.

(b) "Governmental benefits" means financial aid or services from a state, federal, or other public agency.

(c) "Special needs trust" means a trust the trustee believes would not be considered a resource for purposes of determining whether the beneficiary with a disability is eligible for governmental benefits.

(2) A trustee may exercise the decanting power under RCW **11.107.020** and **11.107.030** over the property of the first trust as if the trustee had authority to distribute principal to a beneficiary with a disability subject to expanded discretion if:

(a) The second trust is a special needs trust that benefits the beneficiary with a disability; and

(b) The trustee determines that exercise of the decanting power will further the purposes of the first trust.

(3) In an exercise of the decanting power under this section, the following rules apply:

(a) The provisions of the second trust for a beneficiary with a disability may:

(i) Meet the medicaid law requirements for an account in a pooled trust for a beneficiary with a disability under 42 U.S.C. Sec. 1369p(d)(4)(C), as amended, including requiring a payback to the state of medicaid expenditures of funds not retained by the pooled trust; or

(ii) Meet the medicaid law requirements for a trust for the sole benefit of a beneficiary with a disability under age sixty-five under 42 U.S.C. Sec. 1369(d)(4)(A), as amended, including requiring a payback to the state of medicaid expenditures.

(b) RCW **11.107.020(1)(a)(iii)** does not apply to the interests of the beneficiary with a disability.

(c) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust unless inconsistent with (a)(i) or (ii) of this subsection(3).

11.107.070 Decanting statute—Specific prohibitions.

(1) A trustee may not exercise the decanting power to the extent the first trust instrument expressly prohibits exercise of the decanting power or a power granted by state law to the trustee to modify the trust including, but not limited to, modification pursuant to chapter **11.96A** RCW, and any exercise of the decanting power is subject to the prohibition and the prohibition must be included in the second trust instrument or modified first trust instrument. If the first trust instrument contains an express restriction on exercise of the decanting power or such a power to modify the trust, the exercise of the decanting power is subject to the restriction and the restriction must be included in the second trust instrument or modified first trust instrument.

(2) (a) Whether or not a first trust instrument specifies a trustee's compensation, the trustee may not exercise the decanting power to increase the trustee's compensation beyond any compensation specified or above the compensation permitted by RCW **11.98.070(26)** unless:

(i) All qualified beneficiaries of the second trust consent to the increase in a signed record; or

(ii) The increase is approved by the court.

(b) A change in a trustee's compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the trustee's compensation for purposes of this subsection (2).

(3) Except as otherwise provided in subsection (2)(a)(i) or (ii) or (b) of this section, a second trust instrument may not relieve a trustee from liability for breach of trust to a greater extent than the first trust instrument.

(a) A second trust instrument may provide for indemnification of a trustee of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(b) A second trust instrument may not reduce fiduciary liability in the aggregate.

(c) Subject to (b) of this subsection, a second trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees or statutory trust advisors, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this state other than this chapter. This includes but is not limited to directed trusts.

(4) A trustee may not exercise the decanting power to modify a provision in the first trust instrument granting another person power to remove or replace the trustee unless:

(a) All qualified beneficiaries of the second trust consent to the modification in a signed record; or

(b) The court approves the modification and the modification grants a substantially similar power to another person.

(5) A second trust may have a duration that is the same as or different from the duration of the first trust. Notwithstanding the foregoing, to the extent that income and principal of a second trust is attributable to income and principal of the first trust, the second trust is subject to any maximum perpetuity, accumulation, or suspension of the power of alienation rules that were applicable to income and principal of the first trust.

(6) If a first trust contains a charitable interest, the attorney general has the rights of a qualified beneficiary and may represent and bind the charitable interest and the attorney general has the authority to participate in any proceedings in accordance with chapter **11.110** RCW. If a first trust contains a charitable interest, the second trusts, in the aggregate, may not:

(a) Diminish the charitable interest;

(b) Diminish the interest of any entity that holds the charitable interest; or

(c) Alter any charitable purpose stated in the first trust instrument.

(7) If the first trust contains assets that qualified, or would have qualified but for the provisions of this chapter other than this subsection, for a tax benefit as defined in this subsection, the second trust instrument must not include or omit a term which would have prevented the first trust from qualifying in the same manner for, or would have reduced the amount of, that tax benefit.

(a) For the purposes of this subsection, "tax benefit" includes any federal or state tax deduction, exemption, exclusion, or other tax benefit under federal or state statute, regulation, or other law, except for the benefit of being a grantor trust other than under Title 26 U.S.C. Sec. 672(f)(2)(A) of the federal internal revenue code, as amended, as of July 23, 2017, including but not limited to the following:

(i) The marital deduction for gift, estate, or inheritance tax purposes, including but not limited to the deductions under Title 26 U.S.C. Sec. 2056 of the federal internal revenue code, as amended, as of July 23, 2017, and RCW **83.100.047**;

(ii) The charitable deduction for purposes of the income, gift, or estate tax under the internal revenue code or a state income, gift, estate, or inheritance tax;

(iii) The exclusion from the gift tax described in 26 U.S.C. Sec. 2503(b), including by application of Title 26 U.S.C. Sec. 2503(c) of the internal revenue code, as amended;

(iv) Status as a permitted shareholder in an S corporation, as defined in Title 26 U.S.C. Sec. 1361 of the federal internal revenue code, as amended, as of July 23, 2017, including as a qualified subchapter S trust within the meaning of Title 26 U.S.C. Sec. 1361(c)(2) of the federal internal revenue code;

(v) Qualification for a zero inclusion ratio for purposes of the generation-skipping transfer tax under Title 26 U.S.C. Sec. 2642(c) of the federal internal revenue code, as amended, as of July 23, 2017;

(vi) Meeting required minimum distribution and any similar requirements under Title 26 U.S.C. Sec. 401(a)(9) of the federal internal revenue code, as amended, as of July 23, 2017, and any applicable regulations; or

(vii) Qualification as a grantor trust because of the application of Title 26 U.S.C. Sec. 672(f)(2)(A) of the federal internal revenue code, as amended, as of July 23, 2017.

(b) Subject to (a)(vii) of this subsection, the second trust may be a nongrantor trust, even if the first trust is a grantor trust, and except as otherwise provided in this subsection (7)(b) the second trust may be a grantor trust, even if the first trust is a nongrantor trust. The trustee may not exercise the decanting power if the settlor objects in a written instrument delivered to the trustee within the notice period under RCW **11.107.040(1)(c)**; and

(i) (A) The first trust and second trust are both grantor trusts, in whole or in part;

(B) The first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust; and

(C) The second trust does not grant an equivalent power to the settlor or other person; or

(ii) The first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor unless:

(A) The settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(B) The first trust instrument contains a provision granting the settlor or another person the power to cause the first trust to cease to be a grantor trust and the second trust instrument contains the same provision.

(8) A trustee may not exercise the decanting power if RCW **11.98.200** applies to the first trust and exercise would cause RCW **11.98.200** not to apply to the second trust or modified first trust instrument.

(9) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

11.107.080 Application—Miscellaneous.

(1) This chapter applies to any express trust, within the meaning of RCW **11.98.009**, other than a trust during such time as the grantor has retained the right to revoke or amend. In exercising the decanting power, the trustee must act in accordance with the trustee's fiduciary duties, including the duty to act in accordance with the purposes of the first trust. Except as otherwise provided in the first trust instrument, for purposes of this chapter the terms of the first trust are deemed to include the decanting power.

(2) This chapter does not limit the power of a trustee, powerholder, or other person to distribute or appoint income and principal in further trust or to modify a trust under the trust instrument, law of this state other than this title, a court order, or a nonjudicial agreement. This chapter does not increase or modify the requirements for a binding agreement under RCW **11.96A.220** or the requirements for a directed trust under chapter **11.98A**

RCW. This chapter does not affect the ability of a settlor to provide in a trust instrument for the distribution or appointment in further trust of the trust income and principal or for modification of the trust instrument.

- (3) This chapter does not apply to a trust held solely for charitable purposes.
- (4) This chapter does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this chapter.
- (5) This chapter applies to a trust created before, on, or after July 23, 2017, that:
 - (a) Has its situs in this state, including a trust whose situs has been changed to this state; or
 - (b) Provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for purposes of:
 - (i) Administration, including a trust whose governing law for purposes of administration has been changed to the law of this state;
 - (ii) Construction of terms of the trust; or
 - (iii) Determining the meaning or effect of terms of the trust.
- (6) A trustee may exercise the decanting power whether or not the trustee would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.
- (7) If exercise of the decanting power would be effective under this chapter except that the second trust instrument in part does not comply with this chapter, the exercise of the decanting power is effective and the following rules apply to the principal of the first trust subject to the exercise of the power:
 - (a) A provision in the second trust instrument which is not permitted under this chapter is void to the extent necessary to comply with this chapter.
 - (b) A provision required by this chapter to be in the second trust instrument which is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this chapter.
- (8) If a trustee of a second trust discovers that subsection (7) of this section applies to a prior exercise of the decanting power, the trustee must take such appropriate corrective action as is consistent with the trustee's duties.

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² 11.107.020. See 11.107.010(5) for definition of "expanded discretion."

³ 11.107.030. See 11.107.010(7) for definition of "limited discretion."

⁴ If there is expanded discretion, no as to a “vested interest.” 11.107.020(1)(a)(iii). “Vested interest” is defined in §11.107.020(2)(c). If there is limited discretion, the second trust must grant each beneficiary interests substantially similar to the beneficiary’s interests under the first trust. 11.107.030(1).

⁵ With respect to expanded discretion, see 11.107.020(1)(a)(iii). With respect to limited discretion, see 11.107.030(1).

⁶ 11.107.020(1)(a).

⁷ 11.107.030(1).

⁸ 11.107.020(1)(a).

⁹ 11.107.030.

¹⁰ With respect to expanded discretion, see 11.107.020(1)(a)(i). With respect to limited discretion, see 11.107.030(1).

¹¹ 11.107.020.

¹² 11.107.030(1).

¹³ 11.107.020(1)(b).

¹⁴ If substantially similar to power granted to beneficiary under first trust. 11.107.030(1).

¹⁵ 11.107.020(1)(b),(c).

¹⁶ 11.107.030(1).

¹⁷ 11.107.060.

¹⁸ 11.107.070(7)(a)(i). The legislature references RCW 83.100.047 in this subsection, which governs elections under 2056 and 2056A of the Internal Revenue Code. Although the latter is not specifically referred to in the Uniform Act, the tax benefits would presumably be preserved under the tax savings catch-all provisions thereunder.

¹⁹ 11.107.070(7)(a)(ii).

²⁰ 11.107.070(7)(a)(iii).

²¹ 11.107.070(7)(a)(v).

²² 11.107.070(7)(a)(iv).

²³ 11.107.070(7)(a)(vi).

²⁴ 11.107.070(7)(a)(vii).

²⁵ 11.107.070(7)(a).

²⁶ RCW 11.98.200 creates default rules that limit the powers of a beneficiary acting as trustee to avoid adverse tax consequences. RCW 11.107.070(8) provides that if 11.98.200 applies to the first trust, it must also apply to the second trust.

²⁷ 11.107.070(7)(b).

²⁸ 11.107.070(5).

²⁹ 11.107.070(2).

³⁰ 11.107.070(3).

³¹ 11.107.070(4).

³² 11.107.040(1)(c).

³³ 11.107.040.

³⁴ 11.107.040(5).

³⁵ 11.107.040(1)(a); 11.107.080(1).

³⁶ 11.107.080(4).

³⁷ 11.107.080(5). The legislature adds 11.107.080(5)(a), which is not part of the Uniform Act. This subsection provides that the statute is applicable to trusts with a situs in the State of Washington, including trusts whose situs has been changed to Washington.

³⁸ A trustee may reasonably rely on the validity of a prior attempted decanting. 11.107.050(1).

³⁹ 11.107.070(6).

⁴⁰ 11.107.080(7).

⁴¹ 11.107.050(3).

⁴² 11.107.050(4).

⁴³ 11.107.050(6). The legislature adds 11.107.050(6), which is not part of the Uniform Act. This subsection provides that the title to all real estate and other property, both tangible and intangible, owned by the first trust remains vested in the second trust without reversion or impairment.

⁴⁴ 11.107.050(7). The legislature adds 11.107.050(7), which is not part of the Uniform Act. This subsection provides that an action or proceeding pending by or against the first trust may be continued by or against the second trust as if the decanting had not occurred.

⁴⁵ 11.107.050(8). The legislature adds 11.107.050(8), which is not part of the Uniform Act. This subsection provides that, except as otherwise provided by that chapter, all of the rights, privileges, immunities, powers, and purposes of the first trust remain vested in the second trust.

WISCONSIN
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	§ 701.0418
Effective Date	7/1/14
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, absolute discretion to distribute principal ²
	<i>Limited discretion:</i> Yes, power to distribute principal without absolute discretion ³
	In either case, beneficiary must be eligible to receive or entitled to income, annuity or unitrust ⁴
2. Limitation on trustee who may decant?	Yes ⁵
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity or unitrust ⁶
4. May new trust eliminate beneficiary's withdrawal rights?	Yes, except for Crummey rights ⁷
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No ⁸
	<i>Limited discretion:</i> Yes ⁹
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No
7. May remainder beneficiaries' interests be accelerated?	Presumably yes
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> No ¹⁰
	<i>Limited discretion:</i> Yes ¹¹
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes ¹²
	<i>Limited discretion:</i> No ¹³
10. Must new trust grant identical power of appointment as old trust?	No ¹⁴
11. Supplemental needs trust exception?	Yes ¹⁵
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁶
13. Charitable deduction savings provision?	Yes ¹⁷
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) ¹⁸
16. Non-grantor trust to grantor trust conversion permitted?	Yes ¹⁹

OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²⁰
18. May trustee increase trustee commission?	Presumably yes
19. Other restrictions?	Special needs ²¹ ; increasing exculpation ²²
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²³
21. Is decanting prohibited if a beneficiary objects?	Yes, unless court approval is granted ²⁴
22. Court approval required to decant?	No ²⁵
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ²⁶
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Trustee is not settlor of second trust ²⁷ ; subsequently discovered assets ²⁸

WISCONSIN STATUTE
Wisc. Stat. § 701.0418

701.0418 Trustee's power to appoint assets to new trust.

(1) Definitions. In this section:

(a) "Absolute power" means a power to invade trust assets for the benefit of a beneficiary that is not limited by a specific or ascertainable standard, whether or not the term "absolute" is used in the trust instrument. "Absolute power" includes a power to invade trust assets for the best interests, welfare, comfort, or happiness of a beneficiary.

(b) "First trust" means the trust from which assets are or may be appointed under sub. (2).

(c) "Second trust" means the trust or trusts to which assets are or may be appointed under sub. (2).

(2) Power to appoint.

(a) Except as otherwise provided in this subsection and in subs. (3) and (5), a trustee who has the power to invade the principal of a first trust for the benefit of a beneficiary who is eligible to receive or entitled

to the income of the first trust or entitled to an annuity or unitrust payment from the first trust may exercise the power by appointing part or all of the assets of the first trust in favor of a trustee of a 2nd trust if all of the following apply:

1. The appointment of assets does not reduce any fixed income, annuity, or unitrust interest of a beneficiary.

2. If the trustee's power to invade income or principal of the first trust is limited by a specific or ascertainable standard, the appointment of assets does not result in the trustee of the 2nd trust or any other person having a power to invade the income or principal of the 2nd trust that is broader than the trustee's power to invade income or principal of the first trust. This subdivision does not apply if the 2nd trust is a trust for an individual with a disability.

3. One of the following applies:

a. The beneficiaries of the first trust are the same as the beneficiaries of the 2nd trust.

b. If the first trust grants the trustee the absolute power to invade principal, the 2nd trust includes only all or some of the beneficiaries of the first trust.

(b) Paragraph (a) applies to a trustee whether or not the trustee has an absolute power to invade principal and whether or not there is a current need to invade principal under the terms of the first trust.

(3) Limitations on exercise of power. A trustee may not appoint assets to a 2nd trust under sub. (2) if any of the following applies:

(a) The trust instrument creating the first trust expressly prohibits the trustee from appointing assets of the first trust to a 2nd trust by reference to this section or by using the term "decanting."

(b) A contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code and one of the following applies:

1. The 2nd trust contains a provision that, if included in the first trust, would have prevented the first trust from qualifying for the deduction or would have reduced the amount of the deduction.

2. The 2nd trust does not contain a provision that was contained in the first trust that, if omitted from the first trust, would have prevented the first trust from qualifying for the deduction or would have reduced the amount of the deduction.

(c) The trustee has a beneficial interest in the first trust unless the 2nd trust is a trust for an individual with a disability, the trustee's only beneficial interest in the first trust is as a remainder beneficiary, and the trustee's beneficial interest in the 2nd trust is not greater than the trustee's beneficial interest in the first trust.

(d) The appointment of assets to a 2nd trust would impair currently exercisable withdrawal rights of a beneficiary of the first trust and one of the following applies:

1. The withdrawal rights were granted to the beneficiary in a manner designed to allow contributions subject to the withdrawal rights to qualify for the federal gift tax annual exclusion.

2. The terms of the 2nd trust would impair gifts previously made to the first trust from qualifying for the federal gift tax annual exclusion under section 2503 of the Internal Revenue Code.

(e) The appointment of assets to the 2nd trust would violate a rule against perpetuities applicable to the first trust or suspend a trustee's power of alienation over assets of the first trust in a manner that would cause all or a portion of the 2nd trust to be void.

(f) The appointment of assets to the 2nd trust under sub. (2) would impair the essential purpose of a trust for an individual with a disability.

(4) Permissible terms of 2nd trust.

(a) Subject to pars. (b) to (d) and subs. (2), (3), and (5), the trustee of the first trust may create a 2nd trust instrument that includes terms that are intended to achieve any purpose, including terms that are intended to do any of the following:

1. Correct a drafting error in the first trust.
2. Clarify potentially ambiguous terms contained in the first trust.
3. Change the age of distribution to a beneficiary of the first trust.
4. Extend the duration of the first trust.
5. Protect a beneficiary of the first trust, including protecting the beneficiary from self-destructive behavior.
6. Allow the trustee of the 2nd trust to transfer trust assets to a community trust. In this subdivision, "community trust" means a master trust that is established and managed by a nonprofit organization that maintains sub-accounts for individual beneficiaries that each satisfy the definition of a trust for an individual with a disability.
7. Add or remove a spendthrift trust provision to the first trust.
8. Modify investment provisions contained in the first trust, including those relating to permissible investments, use of investment advisors, or self-dealing transactions.
9. Change a present or future trustee of the first trust, including by defining the method by which a trustee or cotrustee may be appointed or removed and replaced.
10. Appoint a trust protector of the 2nd trust and define the powers of the trust protector.
11. Appoint a directing party of the 2nd trust and define the powers of the directing party.
12. Change the principal place of administration of the first trust.
13. Change the governing law of the first trust.
14. Allow for the division of the first trust into 2 or more trusts.
15. Allow for the merger of the first trust with one or more trusts.
16. Add or modify an exculpatory provision for a trustee, trust protector, or directing party.

17. Obtain desirable tax treatment, as determined by the trustee of the first trust, or to avoid adverse tax consequences, as determined by the trustee of the first trust, including provisions relating to grantor trust status under sections 671 to 679 of the Internal Revenue Code.

18. Modify a power in the first trust to invade income and principal.

19. Modify or eliminate a general or special power of appointment in the first trust.

(b) The trust instrument of the 2nd trust may include terms granting a beneficiary a general or special power of appointment only if the trustee of the first trust has the absolute power to invade income and principal.

(c)

1. The trust instrument of the 2nd trust may include terms that are intended to change terms of the first trust that are applicable to a beneficiary who is an individual with a disability only if the purpose of the change is to allow the beneficiary to qualify or continue to be qualified to receive public assistance.

2. Subdivision 1. applies regardless of whether the first trust includes specific or ascertainable standards for distribution.

(d) The trust instrument of the 2nd trust may include a term that adopts or expands an exculpatory provision relating to the trustee only if one of the following applies:

1. Any trustee of the first trust who would benefit from the adoption of the term in the 2nd trust abstains from the consideration and adoption of the term and the trustees of the first trust who would not benefit from the adoption of the term adopt the trust instrument of the 2nd trust.

2. A court approves the trust instrument of the 2nd trust.

(5) Procedural matters.

(a) A trustee shall appoint assets to a 2nd trust under sub. (2) by an instrument in writing that is signed and acknowledged by the trustee and shall include the written instrument with the records of the first and 2nd trusts. A trustee may appoint assets to a 2nd trust under sub. (2) upon notice, without court approval, under the procedure described in par. (b), or with court approval, under the procedure described in par. (c).

(b)

1. If a trustee chooses to proceed without a court order, the trustee shall give notice of the manner in which the trustee intends to appoint assets to a 2nd trust under sub. (2) to all of the following:

- a. The qualified beneficiaries of the first trust.
- b. Each trust protector appointed under the terms of the first trust.
- c. Each directing party appointed under the terms of the first trust.
- d. The settlor of the first trust, if living.

2. To satisfy the trustee's notice obligation under this paragraph, a trustee shall provide each person entitled to receive notice under subd. 1. all of the following:

appoint assets to a 2nd trust.

- a. A copy of the proposed written instrument under which the trustee will
- b. The proposed effective date of the appointment.
- c. A copy of the trust instrument of the first trust.
- d. A copy of the trust instrument of the 2nd trust.

3. A trustee may not appoint assets to the 2nd trust until 30 days after the trustee provides notice as required under this paragraph unless every person who is entitled to receive notice under subd. 1. waives the 30-day notice period by delivering a signed written instrument to the trustee. A person's waiver of the 30-day notice period does not constitute that person's consent to the trustee's appointment of assets to a 2nd trust.

4. If a person entitled to receive notice under subd. 1. delivers a written objection to the trustee before the effective date of the appointment of assets to a 2nd trust, the trustee may not appoint the assets to a 2nd trust, as specified in the trustee's notice, without obtaining court approval under par. (c) unless the written objection is withdrawn.

5. If the trustee does not receive a written objection from any person entitled to receive notice under subd. 1. before the effective date of the appointment of assets to the 2nd trust or all written objections to the proposed appointment of assets to the 2nd trust are withdrawn, the trustee may appoint the assets to a 2nd trust, as specified in the notice.

(c)

1. If a trustee chooses to proceed with court approval, including after receiving a written objection to a proposed appointment of assets, the trustee shall petition a court to approve a proposed appointment of assets to a 2nd trust under sub. (2). The trustee shall provide notice of the petition to all qualified beneficiaries of the first trust, each trust protector appointed under the first trust, each directing party appointed under the first trust, and to the settlor of the first trust, if living. The trustee shall include in the notice of the petition the proposed effective date of the appointment of assets to a 2nd trust. The trustee shall also provide to each person who is entitled to receive notice under this paragraph a copy of the proposed instrument under which the trustee will appoint assets to a 2nd trust, the proposed effective date of the appointment, a copy of the trust instrument of the first trust, and a copy of the trust instrument of the 2nd trust.

2. If a person who is entitled to receive notice under subd. 1. files an objection with the court, in determining whether to grant or deny a petition under subd. 1., the court shall consider all of the following:

- a. The purpose of the proposed appointment of assets under sub. (2).
- b. The reasons for any objection made by a person entitled to receive notice under subd. 1.
- c. Changes in circumstances that have occurred since the creation of the first trust.
- d. Whether the appointment of assets under sub. (2) complies with the requirements of this section.

3. If no person who is entitled to receive notice under subd. 1. files an objection with the court or any objection that has been filed with the court is withdrawn, the court shall enter an order

approving the appointment of assets under sub. (2) as set forth in the trustee's notice unless the court determines that the appointment of assets does not comply with the requirements of this section.

(6) Subsequently discovered assets.

(a) The appointment of all of the assets of the first trust in favor of the trustee of the 2nd trust includes subsequently discovered assets otherwise belonging to the first trust and assets paid to or acquired by the first trust subsequent to the appointment in favor of the 2nd trust.

(b) Except as otherwise provided by the trustee of the first trust, the appointment of part but not all of the assets of the first trust in favor of the 2nd trust does not include subsequently discovered assets belonging to the first trust or assets paid to or acquired by the first trust subsequent to the appointment in favor of the 2nd trust, which remain the assets of the first trust.

(7) Liability.

(a) This section does not create or imply a duty on a trustee to appoint assets to a 2nd trust under sub. (2). A trustee that does not appoint assets to a 2nd trust under sub. (2) is not liable for the failure to do so.

(b) A trustee who appoints assets to a 2nd trust under sub. (2) is not liable to any beneficiary for any loss related to the appointment unless the trustee did not appoint the assets in good faith.

(8) Miscellaneous provisions.

(a) The appointment of assets to a 2nd trust under sub. (2) is not an exercise of a general power of appointment.

(b) A trustee may appoint assets to a 2nd trust under sub. (2) even if the first trust includes a spendthrift clause or a provision that prohibits amendment or revocation of the trust.

(c) This section does not limit a trustee who has a power to invade principal to appoint property in further trust to the extent the power arises under the terms of the first trust or under any other section of this chapter or under another provision of law or under common law.

(d) The restriction relating to a trustee under sub. (3) (c) does not preclude a cotrustee who does not have a beneficial interest in the first trust from appointing assets to a 2nd trust under sub. (2) even if the terms of the first trust, applicable law, or other circumstances would otherwise require the majority or unanimous action of the trustees of the first trust.

(e) For purposes of this section, if beneficiaries of a first trust are defined as a class of persons, the class shall include any person who falls within the class of persons after the trustee appoints assets to the 2nd trust.

(f) Notwithstanding s. 701.0103 (23), a trustee of a first trust who appoints assets to a 2nd trust under sub. (2) or creates a 2nd trust instrument under sub. (4) is not the settlor of the 2nd trust.

(g) To the extent a directing party or trust protector has the power to invade the principal of a first trust, as described in sub. (2), this section applies to the directing party or trust protector as if the directing party or trust protector is a trustee.

NOTE: This section is created eff. 7-1-14 by 2013 Wis. Act 92.

¹ **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² § 701.0418(2).

³ § 701.0418(2)(b).

⁴ § 701.0418(2)(a).

⁵ § 701.0418(3)(c).

⁶ § 701.0418(2)(a)(1).

⁷ § 701.0418(3)(d); see also § 701.0418(4)(a)(3).

⁸ § 701.0418(2)(a)(3)(b).

⁹ § 701.0418(2)(a)(3)(a).

¹⁰ § 701.0418(2)(a)(2).

¹¹ *Id.*

¹² § 701.0418(4)(b).

¹³ *Id.*

¹⁴ If the trustee has limited discretion and the first trust grants a beneficiary a power of appointment, § 701.0418(4)(b) literally prohibits granting the same power of appointment in the second trust.

¹⁵ § 701.0418(2)(a)(2); § 701.0418(4)(a)(6); § 701.0418(4)(c); see also § 701.0418(3)(c) and § 701.0418(3)(f).

¹⁶ § 701.0418(3)(b).

¹⁷ *Id.*

¹⁸ § 701.0418(3)(d).

¹⁹ § 701.0418(4)(a)(17).

²⁰ § 701.0418(3)(e).

²¹ § 701.0418(4)(c).

²² § 701.0418(4)(d).

²³ § 701.0418(5)(b), (c).

²⁴ § 701.0418(5)(b)(4).

²⁵ § 701.0418(5)(a), (b).

²⁶ § 701.0418(7).

²⁷ § 701.0418(8)(f).

²⁸ § 701.0418(6).

WYOMING
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	W.S. 4-10-816(a)(xxviii), (b)
Effective Date	7/1/13
Amendment Date(s)	7/1/15; 7/1/17
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	No
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Silent
4. May new trust eliminate beneficiary's withdrawal rights?	Silent
5. Must new and old trust beneficiaries be identical?	Silent
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Silent
7. May remainder beneficiaries' interests be accelerated?	Silent
8. New and old trust require same distribution standard?	Silent
9. May trustee grant a power of appointment in new trust?	Silent
10. Must new trust grant identical power of appointment as old trust?	Silent
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes
13. Charitable deduction savings provision?	Yes
14. Beneficiary/trustee savings provision?	Yes ²
15. Other tax savings provisions?	Catch all
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	No
18. May trustee increase trustee commission?	Silent

19. Other restrictions?	No
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	No
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	No ³
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	No

WYOMING STATUTE
W.S. 4-10-816(a)(xxviii)

4-10-816. Specific powers of trustee.

(a) Without limiting the authority conferred by W.S. 4-10-815, a trustee may: . . .

(xxviii) Distribute all or any portion of trust income or principal in further trust for the benefit of trust beneficiaries pursuant to authority granted in the trust instrument to make discretionary or mandatory distributions of trust income or principal to the trust beneficiaries, whether or not the discretionary or mandatory distributions are pursuant to an ascertainable standard;

(b) The power provided in paragraph (a)(xxviii) of this section shall not be exercised in any manner that would prevent qualification for a federal estate or gift tax marital deduction, federal estate or gift tax charitable deduction, or other federal income, estate, gift or generation-skipping transfer tax benefit claimed for the trust from which the distribution in further trust is made. If the trustee making a distribution in further trust under paragraph (a)(xxviii) of this section is a beneficiary of the trust from which the distribution in further trust is made, the distribution in further trust may not change the trustee's interest as a beneficiary in the trust. A trustee shall not be liable for exercising the power permitted under paragraph (a)(xxviii) of this section if the power is exercised in good faith.

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² If the trustee is a beneficiary, the decanting may not change the trustee's interest.

³ The statute provides that a trustee shall not be liable for a good faith exercise of the decanting power, but does not protect the trustee from not exercising the decanting power.