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SUMMARIES OF STATE DECANTING STATUTES

As of August 22, 2014
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DISCLAIMER. The attached summaries of state decanting statutes have been prepared by Susan T. Bart, a partner in Sidley Austin 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.

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)	2006; 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 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. 26.25.2514-1.

ACTIVE 8032897v.3 August 17, 2014

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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 the qualified beneficiaries. § 13.36.159(b), (d).

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
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
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No, but may seek court approval ¹¹
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 ¹²
MISCELLANEOUS	
27. Other unique considerations?	Restating trust provision ¹³

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 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 instrument or agreement, 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 estate trust 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 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 power to invade the principal of a trust 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 discretion under this section, may request the court to approve the exercise.

E. The trustee may exercise the discretion to appoint all of the trust estate pursuant to this section by restating the trust.

ACTIVE 7726926v.2 August 18, 2014

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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 § 14-10819(A); § 14-10819(D).

¹² “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).

¹³ “The trustee may exercise the discretion to appoint all of the trust estate pursuant to this section by restating the trust.” § 14-10819(E).

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
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, authority to invade principal 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
7. May remainder beneficiaries' interests be accelerated?	No 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?	Boomerang provision ¹⁹

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, to invade the principal 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 by appointing all or part of the principal subject to the power in favor of a trustee of a trust (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;

(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. Furthermore, notwithstanding the foregoing provisions of this subsection (a), 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. 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 provided that the governing instrument for the second trust permits distributions to or among members of the class only when and to the extent 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 of the trust under subsection (a) of this section 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 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.

(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.

ACTIVE 7730147v.3 August 18, 2014

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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. § 3528(a). “Furthermore, notwithstanding the foregoing provisions of this subsection (a), 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).

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. *See* § 3528(a)(1).

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 § 3528(a).

FLORIDA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	FLA. STAT. § 736.04117
Effective Date	1/1/07
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, absolute power 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?	Presumably no ⁴
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Presumably no ⁵
7. May trustee 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 ⁶
13. Charitable deduction savings provision?	Yes ⁷
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	Delaware tax trap ⁸
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ⁹
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes 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

FLORIDA STATUTE
FLA. STAT. § 736.04117

736.04117 Trustee's power to invade principal in trust. — (1) (a) Unless the trust instrument expressly provides otherwise, a trustee who has absolute power 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 the power 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, the second trust shall not contain any provision 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) For purposes of this subsection, an absolute power to invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term “absolute” is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.

(2) The exercise of a power to invade principal under subsection (1) shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust.

(3) The exercise of a power to invade principal under subsection (1) 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 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.

(4) The trustee shall notify all qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the trustee's exercise of the trustee's power to invade principal pursuant to subsection (1), of the manner in which the trustee intends to exercise the power. 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 code.

(5) The exercise of the power to invade principal under subsection (1) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(6) 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 (1).

(7) 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 code or under another provision of law or under common law.

ACTIVE 7730180v.3 August 18, 2014

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² “Unless the trust instrument expressly provides otherwise, a trustee who has absolute power 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 the power 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” FLA. STAT. ANN. § 736.04117(1)(a). “For purposes of this subsection, an absolute power to invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term ‘absolute’ is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.” § 736.04117(1)(a)(3)(b).

³ § 736.04117(1)(a)(2).

⁴ § 736.04117(1)(a)(1).

⁵ § 736.04117(1)(a)(1).

⁶ § 736.04117(1)(a)(3).

⁷ § 736.04117(1)(a)(3).

⁸ § 736.04117(3).

⁹ § 736.04117(3).

¹⁰ The trustee must provide 60 days' notice to all qualified beneficiaries of the first trust. § 736.04117(4).

¹¹ § 736.04117(4).

¹² § 736.04117(6).

ILLINOIS
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	760 ILCS 5/16.4
Effective Date	1/1/13
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?	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?	Presumably yes ¹⁰
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> Presumably no <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> 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 ; 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?	Yes, unless court approval is granted ²⁹
22. Court approval required to decant?	No, unless primary beneficiary objects or notice cannot be given as required 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?	Yes ³²
25. Standard of review?	Yes ³³
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes ³⁴
MISCELLANEOUS	
27. Other unique considerations?	Remedies provision ³⁵ ; subsequently discovered assets ³⁶

ILLINOIS STATUTE
760 ILCS 5/16.4

16.4. Distribution of trust principal in further trust.

(a) **Definitions.** In this Section:

“*Absolute discretion*” means the right to distribute principal that is not limited or modified in any manner to or for the benefit of one or more beneficiaries of the trust, whether or not the term “absolute” is used. A power to distribute principal that includes purposes such as best interests, welfare, or happiness shall constitute absolute discretion.

“*Authorized trustee*” means an entity or individual, other than the settlor, who has authority under the terms of the first trust to distribute the principal of the trust for the benefit of one or more current beneficiaries.

“*Code*” means the United States Internal Revenue Code of 1986, as amended from time to time, including corresponding provisions of subsequent internal revenue laws and corresponding provisions of State law.

“*Current beneficiary*” means a person who is currently receiving or eligible to receive a distribution of principal or income from the trustee on the date of the exercise of the power.

“*Distribute*” means the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

“*First trust*” means an existing irrevocable inter vivos or testamentary trust part or all of the principal of which is distributed in further trust under subsection (c) or (d).

“*Presumptive remainder beneficiary*” means a beneficiary of a trust, as of the date of determination and assuming non-exercise of all powers of appointment, who either (i) would be eligible to receive a distribution of income or principal if the trust terminated on that date, or (ii) would be eligible to receive a distribution of income or principal if 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.

“*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.

“*Second trust*” means any irrevocable trust to which principal is distributed in accordance with subsection (c) or (d).

“*Successor beneficiary*” means any beneficiary other than the current and presumptive remainder beneficiaries, but does not include a potential appointee of a power of appointment held by a beneficiary.

(b) **Purpose.** An independent trustee who has discretion to make distributions to the beneficiaries shall exercise that discretion in the trustee’s fiduciary capacity, whether the trustee’s discretion is absolute or limited to ascertainable standards, in furtherance of the purposes of the trust.

(c) **Distribution to second trust if absolute discretion.** An authorized trustee who has the absolute discretion to distribute the principal of a trust may distribute part or all of the principal of the 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 and remainder beneficiaries of the first trust.

- (1) If the authorized trustee exercises the power under this subsection, the authorized 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.
- (2) If the authorized trustee grants a power of appointment, 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.
- (3) If the beneficiary or beneficiaries of the first trust are described as a class of persons, the beneficiary or beneficiaries of the second trust may include one or more persons of such class who become includible in the class after the distribution to the second trust.

(d) **Distribution to second trust if no absolute discretion.** An authorized trustee who has the power to distribute the principal of a trust but does not have the absolute discretion to distribute the principal of the trust may distribute part or all of the principal of the first trust in favor of a trustee of a second trust, provided that the current beneficiaries of the second trust shall be the same as the current beneficiaries of the first trust and the successor and remainder beneficiaries of the second trust shall be the same as the successor and remainder beneficiaries of the first trust.

- (1) If the authorized trustee exercises the power under this subsection (d), the second trust shall include the same language authorizing the trustee to distribute the income or principal of a trust as set forth in the first trust.
- (2) If the beneficiary or beneficiaries of the first trust are described as a class of persons, the beneficiary or beneficiaries of the second trust shall include all persons who become includible in the class after the distribution to the second trust.
- (3) If the authorized trustee exercises the power under this subsection (d) 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.

(4) **Supplemental Needs Trusts.**

- (i) Notwithstanding the other provisions of this subsection (d), the authorized trustee may distribute part or all of the principal of a disabled beneficiary's interest in the first trust in favor of a trustee of a second trust which is a supplemental needs trust if the authorized trustee determines that to do so would be in the best interests of the disabled beneficiary.

- (ii) **Definitions.** For purposes of this subsection (d):

"Best interests" of a disabled beneficiary include, without limitation, consideration of the financial impact to the disabled beneficiary's family.

"Disabled beneficiary" means a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust who the authorized trustee determines has a disability that substantially impairs the beneficiary's ability to provide for his or her own care or custody and that constitutes a substantial handicap, whether or not the beneficiary has been adjudicated a "disabled person".

"Governmental benefits" means financial aid or services from any State, Federal, or other public agency.

“*Supplemental needs second trust*” means a trust that complies with paragraph (iii) of this paragraph (4) and that relative to the first trust contains either lesser or greater restrictions on the trustee’s power to distribute trust income or principal and which the trustee believes would, if implemented, allow the disabled beneficiary to receive a greater degree of governmental benefits than the disabled beneficiary will receive if no distribution is made.

(iii) **Remainder beneficiaries.** A supplemental needs second trust may name remainder and successor beneficiaries other than the disabled beneficiary’s estate, provided that the second trust names the same presumptive remainder beneficiaries and successor beneficiaries to the disabled beneficiary’s interest, and in the same proportions, as exist in the first trust. In addition to the foregoing, where the first trust was created by the disabled beneficiary or the trust property has been distributed directly to or is otherwise under the control of the disabled beneficiary, the authorized trustee may distribute to a “pooled trust” as defined by federal Medicaid law for the benefit of the disabled beneficiary or the supplemental needs second trust must contain pay back provisions complying with Medicaid reimbursement requirements of federal law.

(iv) **Reimbursement.** A supplemental needs second trust shall not be liable to pay or reimburse the State or any public agency for financial aid or services to the disabled beneficiary except as provided in the supplemental needs second trust.

(e) **Notice.** An authorized trustee may exercise the power to distribute in favor of a second trust under subsections (c) and (d) without the consent of the settlor or the beneficiaries of the first trust and without court approval if:

- (1) there are one or more legally competent current beneficiaries and one or more legally competent presumptive remainder beneficiaries and the authorized trustee sends written notice of the trustee’s decision, specifying the manner in which the trustee intends to exercise the power and the prospective effective date for the distribution, to all of the legally competent current beneficiaries and presumptive remainder beneficiaries, determined as of the date the notice is sent and assuming non-exercise of all powers of appointment; and
- (2) no beneficiary to whom notice was sent objects to the distribution in writing delivered to the trustee within 60 days after the notice is sent (“notice period”).

A trustee is not required to provide a copy of the notice to a beneficiary who is known to the trustee but who cannot be located by the trustee after reasonable diligence or who is not known to the trustee.

If a charity is a current beneficiary or presumptive remainder beneficiary of the trust, the notice shall also be given to the Attorney General’s Charitable Trust Bureau.

(f) **Court involvement.**

- (1) The trustee may for any reason elect to petition the court to order the distribution, including, without limitation, the reason that the trustee’s exercise of the power to distribute under this Section is unavailable, such as:
 - (a) a beneficiary timely objects to the distribution in a writing delivered to the trustee within the time period specified in the notice; or
 - (b) there are no legally competent current beneficiaries or legally competent presumptive remainder beneficiaries.

- (2) If the trustee receives a written objection within the notice period, either the trustee or the beneficiary may petition the court to approve, modify, or deny the exercise of the trustee's powers. The trustee has the burden of proving the proposed exercise of the power furthers the purposes of the trust.
- (3) In a judicial proceeding under this subsection (f), the trustee may, but need not, present the trustee's opinions and reasons for supporting or opposing the proposed distribution, including whether the trustee believes it would enable the trustee to better carry out the purposes of the trust. A trustee's actions in accordance with this Section shall not be deemed improper or inconsistent with the trustee's duty of impartiality unless the court finds from all the evidence that the trustee acted in bad faith.

(g) **Term of the second trust.** The second trust to which an authorized trustee distributes the assets of the first trust may have a term that is longer than the term set forth in the first trust, including, but not limited to, a term measured by the lifetime of a current beneficiary; provided, however, that the second trust shall be limited to the same permissible period of the rule against perpetuities that applied to the first trust, unless the first trust expressly permits the trustee to extend or lengthen its perpetuities period.

(h) **Divided discretion.** If an authorized trustee has absolute discretion to distribute the principal of a trust and the same trustee or another trustee has the power to distribute principal under the trust instrument which power is not absolute discretion, such authorized trustee having absolute discretion may exercise the power to distribute under subsection (c).

(i) **Later discovered assets.** To the extent the authorized trustee does not provide otherwise:

- (1) The distribution of all of the assets comprising the principal of the first trust in favor of a second trust shall be deemed to include subsequently discovered assets otherwise belonging to the first trust and undistributed principal paid to or acquired by the first trust subsequent to the distribution in favor of the second trust.
- (2) The distribution of part but not all of the assets comprising the principal of the first trust in favor of a second trust shall not include subsequently discovered assets belonging to the first trust and principal paid to or acquired by the first trust subsequent to the distribution in favor of a second trust; such assets shall remain the assets of the first trust.

(j) **Other authority to distribute in further trust.** This Section shall not be construed to abridge the right of any trustee to distribute property in further trust that arises under the terms of the governing instrument of a trust, any provision of applicable law, or a court order. In addition, distribution of trust principal to a second trust may be made by agreement between a trustee and all primary beneficiaries of a first trust, acting either individually or by their respective representatives in accordance with Section 16.1 of this Act.

(k) **Need to distribute not required.** An authorized trustee may exercise the power to distribute in favor of a second trust under subsections (c) and (d) whether or not there is a current need to distribute principal under the terms of the first trust.

(l) **No duty to distribute.** Nothing in this Section is intended to create or imply a duty to exercise a power to distribute principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under subsection (c) or (d). Notwithstanding any other provision of this Section, a trustee has no duty to inform beneficiaries about the availability of this Section and no duty to review the trust to determine whether any action should be taken under this Section.

(m) **Express prohibition.** A power authorized by subsection (c) or (d) may not be exercised if expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the first trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under subsection (c) or (d).

(n) **Restrictions.** An authorized trustee may not exercise a power authorized by subsection (c) or (d) to affect 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, except with respect to a second trust which is a supplemental needs trust;
- (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; except to indemnify or exonerate one party from liability for actions of another party with respect to distribution that unbundles the governance structure of a trust to divide and separate fiduciary and nonfiduciary responsibilities among several parties, including without limitation one or more trustees, distribution advisors, investment advisors, trust protectors, or other parties, provided however that such modified governance structure may reallocate fiduciary responsibilities from one party to another but may not reduce them;
- (3) to eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under subsection (c) or (d); provided, however, such person's right to remove or replace the authorized trustee may be eliminated if a separate independent, non-subservient individual or entity, such as a trust protector, acting in a nonfiduciary capacity has the right to remove or replace the authorized trustee;
- (4) to reduce, limit or modify the perpetuities provision specified in the first trust in the second trust, unless the first trust expressly permits the trustee to do so.

(o) **Exception.** Notwithstanding the provisions of paragraph (1) of subsection (n) but subject to the other limitations in this Section, an authorized trustee may exercise a power authorized by subsection (c) or (d) to distribute to a second trust; provided, however, that the exercise of such power does not subject the second trust to claims of reimbursement by any private or governmental body and does not at any time interfere with, reduce the amount of, or jeopardize an individual's entitlement to government benefits.

(p) **Tax limitations.** If any contribution to the first trust qualified for the annual exclusion under Section 2503(b) of the Code, the marital deduction under Section 2056(a) or 2523(a) of the Code, or the charitable deduction under Section 170(a), 642(c), 2055(a) or 2522(a) of the Code, is a direct skip qualifying for treatment under Section 2642(c) of the Code, or qualified for any other specific tax benefit that would be lost by the existence of the authorized trustee's authority under subsection (c) or (d) for income, gift, estate, or generation-skipping transfer tax purposes under the Code, then the authorized trustee shall not have the power to distribute the principal of a trust pursuant to subsection (c) or (d) in a manner that would prevent the contribution to the first trust from qualifying for or would reduce the exclusion, deduction, or other tax benefit that was originally claimed with respect to that contribution.

- (1) Notwithstanding the provisions of this subsection (p), the authorized trustee may exercise the power to pay the first trust to a trust as to which the settlor of the first trust is not considered the owner under Subpart E of Part I of Subchapter J of Chapter 1 of Subtitle A of the Code even if the settlor is considered such owner of the first trust. Nothing in this Section shall be construed as preventing the authorized trustee from distributing part or all of the first trust to a second trust that is a trust as to which the settlor of the first trust is considered the owner under Subpart E of Part I of Subchapter J of Chapter 1 of Subtitle A of the Code.
- (2) During any period when the first trust owns subchapter S corporation stock, an authorized trustee may not exercise a power authorized by paragraph (c) or (d) to distribute part or all of the S corporation stock to a second trust that is not a permitted shareholder under Section 1361(c)(2) of the Code.

- (3) During any period when the first trust owns an interest in property subject to the minimum distribution rules of Section 401(a)(9) of the Code, an authorized trustee may not exercise a power authorized by subsection (c) or (d) to distribute part or all of the interest in such property to a second trust that would result in the shortening of the minimum distribution period to which the property is subject in the first trust.

(q) **Limits on compensation of trustee.**

- (1) Unless the court upon application of the trustee directs otherwise, an authorized trustee may not exercise a power authorized by subsection (c) or (d) solely to change the provisions regarding the determination of the compensation of any trustee; provided, however, an authorized trustee may exercise the power authorized in subsection (c) or (d) in conjunction with other valid and reasonable purposes to bring the trustee's compensation into accord with reasonable limits in accord with Illinois law in effect at the time of the exercise.
- (2) The compensation payable to the trustee or trustees of the first trust may continue to be paid to the trustees of the second trust during the terms of the second trust and may be determined in the same manner as otherwise would have applied in the first trust; provided, however, that no trustee shall receive any commission or other compensation imposed upon assets distributed due to the distribution of property from the first trust to a second trust pursuant to subsection (c) or (d).

(r) **Written instrument.** The exercise of a power to distribute principal under subsection (c) or (d) must be made by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust and the second trust.

(s) **Terms of second trust.** Any reference to the governing instrument or terms of the governing instrument in this Act includes the terms of a second trust established in accordance with this Section.

(t) **Settlor.** The settlor of a first trust is considered for all purposes to be the settlor of any second trust established in accordance with this Section. If the settlor of a first trust is not also the settlor of a second trust, then the settlor of the first trust shall be considered the settlor of the second trust, but only with respect to the portion of second trust distributed from the first trust in accordance with this Section.

(u) **Remedies.** A trustee who reasonably and in good faith takes or omits to take any action under this Section is not liable to any person interested in the trust. An act or omission by a trustee under this Section is presumed taken or omitted reasonably and in good faith unless it is determined by the court to have been an abuse of discretion. If a trustee reasonably and in good faith takes or omits to take any action under this Section and a person interested in the trust opposes the act or omission, the person's exclusive remedy is to obtain an order of the court directing the trustee to exercise authority in accordance with this Section in such manner as the court determines necessary or helpful for the proper functioning of the trust, including without limitation prospectively to modify or reverse a prior exercise of such authority. Any claim by any person interested in the trust that an act or omission by a trustee under this Section was an abuse of discretion is barred if not asserted in a proceeding commenced by or on behalf of the person within two years after the trustee has sent to the person or the person's personal representative a notice or report in writing sufficiently disclosing facts fundamental to the claim such that the person knew or reasonably should have known of the claim. Except for a distribution of trust principal from a first trust to a second trust made by agreement in accordance with Section 16.1 of this Act, the preceding sentence shall not apply to a person who was under a legal disability at the time the notice or report was sent and who then had no personal representative. For purposes of this subsection (u), a personal representative refers to a court appointed guardian or conservator of the estate of a person.

(v) **Application.** This Section is available to trusts in existence on the effective date of this amendatory Act of the 97th General Assembly or created on or after the effective date of this amendatory Act of the 97th General Assembly. This Section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in Illinois under Illinois law or that is governed by Illinois law with respect to the meaning and effect of its terms, including a trust whose governing law has been changed to the laws of this State, unless the governing instrument expressly prohibits use of this Section by specific reference to this Section. A provision in the

governing instrument in the form: “Neither the provisions of Section 16.4 of the Trusts and Trustees Act nor any corresponding provision of future law may be used in the administration of this trust” or a similar provision demonstrating that intent is sufficient to preclude the use of this Section.

ACTIVE 7687149v.2 August 18, 2014

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² § 5/16.4(c).

³ § 5/16.4(d).

⁴ § 5/16.4(n)(1).

⁵ § 5/16.4(n)(1).

⁶ “An authorized trustee who has the absolute discretion to distribute the principal of a trust may distribute part or all of the principal of the 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 and remainder beneficiaries of the first trust.” § 5/16.4(c).

⁷ “An authorized trustee who has the power to distribute the principal of a trust but does not have the absolute discretion to distribute the principal of a trust may distribute part or all of the principal of the first trust in favor of a trustee of a second trust, provided that the current beneficiaries of the second trust shall be the same as the current beneficiaries of the first trust and the successor and remainder beneficiaries of the second trust shall be the same as the successor and remainder beneficiaries of the first trust.” § 5/16.4(d).

⁸ § 5/16.4(c).

⁹ The successor and remainder beneficiaries of the second trust must be the same as the successor and remainder beneficiaries of the first trust. § 5/16.4(d).

¹⁰ If the trustee has absolute discretion, the interests of some of the income beneficiaries may be eliminated.

¹¹ If a trustee who does not have the absolute discretion to distribute the principal of the trust exercises the power under subsection (d), “the second trust shall include the same language authorizing the trustee to distribute the income or principal of a trust as set forth in the first trust.” § 5/16.4(d)(1).

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. § 5/16.4(c)(1). 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. § 5/16.4(c)(2).

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. § 5/16.4(d)(3).

¹⁴ § 5/16.4(c)(1).

¹⁵ § 5/16.4(d)(3).

¹⁶ § 5/16.4(d)(4).

¹⁷ § 5/16.4(p).

¹⁸ § 5/16.4(p).

¹⁹ § 5/16.4(p).

²⁰ § 5/16.4(p).

²¹ § 5/16.4(p)(2).

²² § 5/16.4(p)(3).

²³ § 5/16.4(p).

²⁴ § 5/16.4(p)(1).

²⁵ One part of the statute provides that the second trust shall be limited to the same permissible period of the rule against perpetuities that applied to the first trust, unless the first trust expressly permits the trustee to extend or lengthen its perpetuities period. § 5/16.4(g). Another part of the statute provides that the trustee may not reduce, limit or modify the perpetuities provision specified in the first trust in the second trust, unless the first trust expressly permits the trustee to do so. § 5/16.4(n)(4).

²⁶ § 5/16.4(q)(1), (2).

²⁷ § 5/16.4(n)(2), (3).

²⁸ § 5/16.4(e).

²⁹ § 5/16.4(e).

³⁰ The trustee may decant without court approval if: (1) there are one or more legally competent current beneficiaries *and* one or more legally competent presumptive remainder beneficiaries *and* the authorized trustee sends written notice of the trustee's decision to all of the legally competent current beneficiaries and presumptive remainder beneficiaries *and* (2) no beneficiary to whom notice was sent objects to the distribution in writing delivered to the trustee within 60 days after the notice is sent. § 5/16.4(e).

³¹ The trustee is to exercise the power "in furtherance of the purpose of the trust." § 5/16.4(b).

³² § 5/16.4(l).

³³ The standard of review applied is an abuse of discretion standard. § 5/16.4(u).

³⁴ “The statute is available to any trust that is administered in Illinois under Illinois law or that is governed by Illinois law with respect to the meaning and effect of its terms. § 5/16.4(v).

³⁵ § 5/16.4(u).

³⁶ § 5/16.4(i).

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.”.

ACTIVE 7730188v.6 August 18, 2014

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 Sidley Austin 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 “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)	
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 386.675 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 District Court as defined by KRS 386.450(3). Any determination of the District Court shall be subject to KRS 386.454(5); 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 in the District Court pursuant to KRS 386.675 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. In such case approval by the District Court shall have the same meaning as provided in KRS 386.450(3) and the approval shall be subject to KRS 386.454(5).

ACTIVE 7730194v.2 August 18, 2014

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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 in the District Court pursuant to KRS 386.675 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. In such case approval by the District Court shall have the same meaning as provided in KRS 386.450(3) and the approval shall be subject to KRS 386.454(5).” § 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 – 2012 PA 483¹

STATUTORY HISTORY	
Statutory citation	2012 PA 483 ² [tentatively MICH. COMP. LAWS § 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 ³
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No ⁵
5. Must new and old trust beneficiaries be identical?	Yes ⁶
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No ⁷
7. May remainder beneficiaries' interests be accelerated?	No ⁸
8. New and old trust require same distribution standard?	Presumably yes ⁹
9. May trustee grant a power of appointment in new trust?	Presumably yes ¹⁰
10. Must new trust grant identical power of appointment as old trust?	Presumably yes 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?	Catch-all ¹⁵ ; Other ¹⁶
16. Non-grantor trust to grantor trust conversion permitted?	Presumably yes ¹⁷
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁸
18. May trustee increase trustee commission?	No, unless all beneficiaries consent ¹⁹
19. Other restrictions	Decreasing trustee liability or eliminating trustee remover ²⁰
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes, 63 days ²¹
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No ²²
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ²³
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 ²⁴

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.

ACTIVE 7730226v.3 August 18, 2014

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 Sidley Austin 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 This statute amends the Estates and Protected Individuals Code (1998 PA 386). This statute is limited to a trustee decanting to effect administrative changes.

³ 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).

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 terms of the second trust may not materially change the beneficial interests of the beneficiaries of the first trust. § 700.7820A(1)(a).

¹² The “catch-all” tax provision would include the marital deduction. § 700.7820A(1)(b).

¹³ The “catch-all” tax provision would include the charitable deduction. § 700.7820A(1)(b).

¹⁴ “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).

¹⁵ § 700.7820A(1)(b).

¹⁶ “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).

¹⁷ 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).

¹⁸ § 700.7820A(8).

¹⁹ § 700.7820A(2)(a), (b).

²⁰ § 700.7820a(2)(c),(d).

²¹ § 700.7820A(7).

²² “§ 700.7820A(7).

²³ § 700.7815(2).

²⁴ “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).

MICHIGAN
State Decanting Summary 2012 PA 485¹

STATUTORY HISTORY	
Statutory citation	2012 PA 485 ² [tentatively MICH. COMP. LAWS § 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 ³
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 ⁴
4. May new trust eliminate beneficiary's withdrawal rights?	No, for sole beneficiary 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
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 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, but see MCL 700.7815(2)(A) ¹²
15. Other tax savings provisions?	2503(c) ¹³
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ¹⁴
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 ¹⁵
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Boomerang provision ¹⁶ Indemnification provision for first trustee ¹⁷ Codification of common law provision ¹⁸

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.

ACTIVE 7730228v.3 August 18, 2014

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materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

² This statute amends the “Powers of Appointment Act of 1967” (1967 PA 224). This statute codifies common law principles regarding a trustee’s exercise of special powers of appointment.

³ “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).

⁴ “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).

⁵ “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).

⁶ The beneficiaries of the second trust may include only permissible appointees, but may include fewer than all permissible appointees. § 556.115A(1)(a).

⁷ 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).

⁸ § 556.115A(2)(a).

⁹ § 556.115A(2)(a).

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 marital deduction under federal or state law, whether or not that deduction was actually taken. § 556.115A(1)(c).

¹¹ 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).

¹² 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.”

¹³ § 556.115A(1)(b).

¹⁴ § 556.124(3).

¹⁵ § 700.7815(2).

¹⁶ § 556.115A(2)(b).

¹⁷ “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.

¹⁸ § 556.115A(8).

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.

ACTIVE 7733005v.2 August 18, 2014

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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
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?	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?	No, with restrictions ⁶
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Yes, with boomerang provision ⁷
7. May remainder beneficiaries' interests be accelerated?	Silent
8. New and old trust require same distribution standard?	Yes, in certain circumstances ⁸
9. May trustee grant a power of appointment in new trust?	Yes, but only a general power ⁹
10. Must new trust grant identical power of appointment as old trust?	Presumably 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
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, notice <i>may</i> be provided ¹⁵
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No, but may seek court approval ¹⁶
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ¹⁷
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Boomerang provision ¹⁸

**NEVADA STATUTE
NEV. REV. STAT. § 163.556**

NRS 163.556 Circumstances under which trustee is authorized to appoint property of one testamentary trust or irrevocable trust to another trust.

1. 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 for the benefit of one or more of those beneficiaries.

2. Notwithstanding subsection 1, a trustee may not appoint property of the original trust to a second trust if:

(a) The second trust includes a beneficiary who is not a beneficiary of the original trust. For purposes of this paragraph, 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.

(b) Appointing the property will reduce any current fixed income interest, annuity interest or unitrust interest of a beneficiary of the original trust. As used in this paragraph, “unitrust” has the meaning ascribed to it in [NRS 164.700](#).

(c) A contribution made to the original trust qualified for a marital or charitable deduction for federal or state income, gift or estate taxes or qualified for a gift tax exclusion for federal or state tax purposes and the terms of the second trust include a provision which if included in the original trust would prevent the original trust from qualifying for the tax deduction or exclusion.

(d) 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.

(e) 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.

(f) 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.

(g) Under the second trust:

(1) Discretionary distributions may be made by the trustee to a beneficiary or group of beneficiaries of the original trust;

(2) Distributions are not limited by an ascertainable standard; and

(3) A beneficiary or group of beneficiaries has the power to remove and replace the trustee of the second trust with a beneficiary of the second trust or with a trustee that is related to or subordinate to a beneficiary of the second trust.

(h) 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.

3. Notwithstanding the provisions of subsection 1, 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.

4. The provisions of subsection 3 do not prohibit a trustee who is not a beneficiary of the original trust from exercising the authority to appoint property of the original trust to a second trust pursuant to the provisions of subsection 1.

5. 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.

6. The trust instrument of the second trust may:

(a) Grant a power of appointment to one or more of the beneficiaries of the second trust who are proper objects of the exercise of the power in the original trust. The power of appointment includes, without limitation, the power to appoint trust property to the holder of the power, the holder's creditors, the holder's estate, the creditors of the holder's estate or any other person.

(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.

7. 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.

8. 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.

9. 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.

10. The provisions of this section do not impose upon a trustee a duty to exercise the power to appoint property pursuant to subsection 1.

11. 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.

12. 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.

13. 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.

14. 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.

15. As used in this section, "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 U.S.C. § 2041(b)(1)(A) or 2514(c)(1), and any regulations of the United States Treasury promulgated thereunder.

(Added to NRS by [2009, 790](#); A [2011, 1467](#))

ACTIVE 7747022v.2 August 18, 2014

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² "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 for the benefit of one or more of those beneficiaries." § 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(3)(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(3).

⁴ § 163.556(2)(b).

⁵ § 163.556(2)(d).

⁶ "[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 for the benefit of *one or more of those beneficiaries.*" § 163.556(1) (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(2)(e); § 163.556(2)(f).

⁷ § 163.556(1); § 163.556(6)(b).

⁸ If there is an interested trustee, the distribution standard for making distributions to the trustee may need to remain the same. § 163.556(3).

⁹ “The power of appointment includes, without limitation, the power to appoint trust property to the holder of the power, the holder’s creditors, the holder’s estate, the creditors of the holder’s estate or any other person.” § 163.556(6)(a).

¹⁰ § 163.556(6)(a).

¹¹ § 163.556(2)(c).

¹² § 163.556(2)(c).

¹³ If there is an interested trustee, generally the second trust must retain any restrictions on the trustee making distributions to herself. § 163.556(3). Further, if distributions are not limited by an ascertainable standard, the second trust cannot allow a beneficiary to replace the trustee with a beneficiary or a related or subordinate party. § 163.556(2)(g).

¹⁴ § 163.556(2)(h).

¹⁵ § 163.556(5).

¹⁶ § 163.556(5).

¹⁷ § 163.556(10).

¹⁸ § 163.556(6)(b).

NEW HAMPSHIRE
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	N.H. REV. STAT. ANN. § 564-B:4-418
Effective Date	9/9/08
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion to make distributions ²
2. Limitation on trustee who may decant?	Yes 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?	No ⁶
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No ⁷
7. May remainder beneficiaries' interests be accelerated?	Silent
8. New and old trust require same distribution standard?	No, with exceptions 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?	Presumably no
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(b) ¹³
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 to charitable beneficiary ¹⁴
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 ¹⁵
24. Provision that trustee has no duty to consider decanting?	Yes ¹⁶
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	No

**NEW HAMPSHIRE STATUTE
N.H. REV. STAT. ANN. § 564-B:4-418**

564-B:4-418 Trustee's Authority to Decant Trust. –

(a) Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the “first trust”) may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of one or more of those beneficiaries (the “second trust”).

(b) Notwithstanding the provisions of paragraph (a), the trustee may not decant property of the first trust in favor of the second trust under any of the following circumstances:

(1) the second trust includes a beneficiary that is not a beneficiary of the first trust. For purposes of this subparagraph, a permissible appointee of a power of appointment held by a beneficiary of the second trust is not considered to be a beneficiary of the second trust;

(2) the exercise of the power to decant will reduce any current fixed income interest, annuity interest, or unitrust interest of a beneficiary of the first trust;

(3) a contribution to the first trust qualified for a marital or charitable deduction for federal or state income, gift, or estate tax purposes or qualified for a gift tax exclusion for federal or state gift tax purposes, while the terms of the second trust include a provision which, if included in the terms of the first trust, would have prevented the first trust from qualifying for the deduction or exclusion;

(4) the property is subject to a presently exercisable power of withdrawal held by a beneficiary of the first trust; or

(5) under the terms of the second trust:

(A) discretionary distributions may be made to a beneficiary or among a group of beneficiaries of the first trust;

(B) the distributions are not limited by an ascertainable standard; and

(C) the beneficiary or group of beneficiaries has the power to remove and replace the trustee of the second trust with the beneficiary or a member of the group of beneficiaries or with a trustee that is related or subordinate to the beneficiary or a member of the group of beneficiaries (as defined in section 672(c) of the Internal Revenue Code).

(c) Notwithstanding the provisions of paragraph (a), a trustee who is a beneficiary of the first trust may not exercise the authority to appoint property of the first trust in favor of the second trust under any of the following circumstances:

(1) under the terms of the first trust or pursuant to the law governing the administration of the first trust:

(A) such trustee of the first trust does not have the discretion to make or participate in making distributions to himself or herself;

(B) such trustee's discretion to make or participate in making distributions to himself or herself is limited by an ascertainable standard; or

(C) such trustee’s discretion to make or participate in making distributions to himself or herself is exercisable only with the consent of a cotrustee or another person holding an adverse interest; while under the terms of the second trust, such trustee’s discretion to make or participate in making distributions to himself or herself is not limited by an ascertainable standard and is exercisable without the consent of a cotrustee or another person holding an adverse interest; or

(2) under the terms of the first trust or pursuant to the law governing the administration of the first trust, such trustee of the first trust does not have the discretion to make or participate in making distributions in a manner that will discharge such trustee’s legal support obligations, while under the terms of the second trust, such trustee’s discretion is not so limited.

(d) The trustee of the first trust shall notify in writing the director of charitable trusts of a proposed appointment in favor of a second trust at least 30 days in advance of the proposed appointment if, at the time the appointment is being proposed:

(1) at least one charitable organization has the rights of a qualified beneficiary of the first trust; or

(2) the director of charitable trusts has the rights of a qualified beneficiary of the first trust.

(e) This section does not abrogate the trustee’s duty under RSA 564-B:8-801.

(f) This section does not impose on a trustee a duty to exercise a power to decant in favor of another trust or to consider exercising a power to decant in favor of another trust.

(g) A power to decant is not a power to amend the trust. Accordingly, a trustee is not prohibited from decanting property in favor of another trust solely because the first trust is irrevocable or the terms of the first trust provide that it may not be amended.

(h) A trustee’s authority to decant property to another trust under this section is not limited or prohibited by a spendthrift provision in the first trust.

ACTIVE 7747221v.2 August 18, 2014

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² “Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the ‘first trust’) may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of one or more of those beneficiaries (the ‘second trust’).” § 564-B:4-418(a).

³ An interested trustee may decant only to a second trust that imposes an ascertainable standard on a trustee’s distributions to herself and requires the consent of a co-trustee or adverse party. The second trust must also retain any restrictions on distributions that discharge such trustee’s legal support obligations. § 564-B:4-418(c).

⁴ § 564-B:4-418(b)(2).

⁵ § 564-B:4-418(b)(4).

⁶ “Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the ‘first trust’) may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of *one or more of those beneficiaries* (the ‘second trust’).” § 564-B:4-418(a) (emphasis added).

⁷ “Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the ‘first trust’) may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of one or more of *those* beneficiaries (the ‘second trust’).” § 564-B:4-418(a) (emphasis added). 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.”

⁸ The second trust may be required to limit the standard to an ascertainable standard if an interested trustee is decanting or if a beneficiary has a power to remove and replace the trustee with the beneficiary or a related or subordinate party. § 564-B:4-418(b)(5); § 564-B:4-418(c).

⁹ While the statute does not expressly allow for the granting of a power of appointment in the new trust, the language in Section 564-B:4-418(b)(1) indicates that granting a new power of appointment in the new trust is possible. Specifically, the Section provides that “a permissible appointee of a power of appointment held by a beneficiary of the second trust is not considered to be a beneficiary of the second trust[.]” § 564-B:4-418(b)(1). Because it discusses permissible appointees of a power of appointment, the right to grant a power of appointment can be assumed.

¹⁰ § 564-B:4-418(b)(3).

¹¹ § 564-B:4-418(b)(3).

¹² An interested trustee may decant only to a second trust that imposes an ascertainable standard on a trustee’s distributions to herself and requires the consent of a co-trustee or adverse party. The second trust must also retain any restrictions on distributions that discharge such trustee’s legal support obligations. § 564-B:4-418(c). In addition, the statute protects a beneficiary who may remove and replace the trustee with the beneficiary or a related or subordinate party if distributions are not restricted to an ascertainable standard. § 64-B:4-418(b)(5).

¹³ § 564-B:4-418(b)(3).

¹⁴ § 564-B:4-418(d).

¹⁵ “This section does not abrogate the trustee’s duty under RSA 564-B:8-801.” § 564-B:4-418(e). Section 564-B:8-801 sets forth general fiduciary duties.

¹⁶ § 564-B:4-418(f).

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
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?	No

**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.

(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 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.

(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.

(1) 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 7-1.1 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.

ACTIVE 7730173v.4 August 18, 2014

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 Sidley Austin 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 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).

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).

NORTH CAROLINA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	N.C. GEN. STAT. § 36C-8-816.1
Effective Date	10/1/09
Amendment Date(s)	7/20/10; 6/12/13
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, to distribute 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?	No, as to income, annuity or unitrust interests in effect 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?	No ⁸
7. May remainder beneficiaries' interests be accelerated?	No ⁹
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?	Yes ¹²
10. Must new trust grant identical power of appointment as old trust?	No ¹³
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes ¹⁴
13. Charitable deduction savings provision?	Yes ¹⁵
14. Beneficiary/trustee savings provision?	Yes ¹⁶
15. Other tax savings provisions?	2503(c) ¹⁷ ; Delaware tax trap ¹⁸
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes for power of alienation ¹⁹
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²⁰
21. Is decanting prohibited if a beneficiary objects?	No, but beneficiary may seek the court's disapproval ²¹
22. Court approval required to decant?	No, but may seek court approval or disapproval ²²
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes ²³
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 ²⁴

**NORTH CAROLINA STATUTE
N.C. GEN. STAT. § 36C-8-816.1**

§ 36C-8-816.1. Trustee's special power to appoint to a second trust.

(a) For purposes of this section, the following definitions apply:

(1) Current beneficiary. – A person who is a permissible distributee of trust income or principal.

(2) Original trust. – A trust established under an irrevocable trust instrument pursuant to the terms of which a trustee has a discretionary power to distribute principal or income of the trust to or for the benefit of one or more current beneficiaries of the trust.

(3) Second trust. – A trust established under an irrevocable trust instrument, the current beneficiaries of which are one 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.

(b) 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 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 a 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.

(c) The terms of the second trust shall be subject to all of the following:

(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 reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the original trust if that interest has come into effect with respect to the beneficiary.

(4) 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.

(5) If contributions to the original trust have been excluded from the gift tax by the application of section 2503(b) and section 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.

(6) If any 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.

(7) If a trustee of an original trust exercises a power to distribute principal or income that is subject to an ascertainable standard by appointing property to a second trust, 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 current beneficiaries to whom such distribution could be made in the original trust.

(8) 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 the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed.

(d) A trustee may not exercise the power to appoint principal or income under subsection (b) 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 (b) of this section.

(e) The exercise of the power to appoint principal or income under subsection (b) of this section:

(1) 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

(2) Shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed; and

(3) Is not prohibited by a spendthrift provision or by a provision in the original trust instrument that prohibits amendment or revocation of the trust.

(f) To effect the exercise of the power to appoint principal or income under subsection (b) of this section, all of the following shall apply:

(1) 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.

(2) The trustee shall give written notice to all qualified beneficiaries of the original trust, at least 60 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 shall include a copy of the instrument described in subdivision (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 shall be exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.

(4) 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 appoint and bring an action for breach of trust seeking appropriate relief as provided by G.S. 36C-10-1001.

(g) 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 (b) of this section. Nothing in this section shall 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 Chapter or under another provision of law or under common law.

(h) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to a second trust pursuant to subsection (b) of this section. (2009-318, s. 1; 2010-97, s. 5(b).)

ACTIVE 7747868v.3 August 19, 2014

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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 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 a trustee of a second trust." § 36C-8-816.1(b).

³ "A trustee may not exercise the power to appoint principal or income under subsection (b) 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 (b) of this section." § 36C-8-816.1(d).

⁴ "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 if that interest has come into effect with respect to the beneficiary." § 36C-8-816.1(c)(3).

⁵ § 36C-8-816.1(c)(6).

⁶ A trustee may decant in favor of one or more current beneficiaries of the original trust. § 36C-8-816.1(b).

⁷ "If a trustee of an original trust exercises a power to distribute principal or income that is subject to an ascertainable standard by appointing property to a second trust, 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 current beneficiaries to whom such distribution could be made in the original trust." § 36C-8-816.1(c)(7).

⁸ While § 36C-8-816.1(b) speaks of decanting in favor of "current beneficiaries," § 36C-8-816.1(c) states that the beneficiaries of the second trust may include only "beneficiaries" of the first trust.

⁹ § 36C-8-816.1(c)(2).

¹⁰ § 36C-8-816.1(b).

¹¹ § 36C-8-816.1(c)(7).

¹² § 36C-8-816.1(c)(8).

¹³ § 36C-8-816.1(c)(8).

¹⁴ § 36C-8-816.1(c)(4).

¹⁵ § 36C-8-816.1(c)(4).

¹⁶ A trustee may not exercise the power to appoint principal or income under subsection (b) of this section if the trustee is a beneficiary of the original trust. § 36C-8-816.1(d).

¹⁷ § 36C-8-816.1(c)(5).

¹⁸ “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 the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed.” § 36C-8-816(c)(8). G.S. 41-23 is the North Carolina General Statute governing the suspension of power of alienation for trusts. It also repealed the rule against perpetuities as applied to trusts.

¹⁹ “The exercise of the power to appoint principal or income under subsection (b) of this section . . . (2) Shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed;” § 36C-8-816.1(e)(2). G.S. 41-23 is the North Carolina statute governing the suspension of the power of alienation for trusts. It also repealed the rule against perpetuities as applied to trusts.

²⁰ Sixty days’ notice to qualified beneficiaries is required. § 36C-8-816.1(f)(2).

²¹ The statute expressly allows a trustee or beneficiary to seek the court’s approval (or disapproval) of an action to decant. *See* § 36C-8-816.1(h) (“A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee’s special power to appoint to a second trust pursuant to subsection (b) of this section.”). The statute additionally permits an objecting beneficiary to bring an action for breach of trust if the beneficiary chooses to object to the decanting. *See* § 36C-8-816.1(f)(4).

²² § 36C-8-816.1(b). The statute allows a trustee or beneficiary to seek court approval (or disapproval) of an action to decant. *See* § 36C-8-816.1(h) (“A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee’s special power to appoint to a second trust pursuant to subsection (b) of this section.”).

²³ § 36C-8-816.1(g).

²⁴ § 36C-8-816.1(d).

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.

ACTIVE 7730159v.2 August 19, 2014

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 Sidley Austin 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 (2012)
Effective Date	6/23/12
Amendment Date(s)	7/15/13 (S0286 and H5501)
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 distributes 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.

ACTIVE 7749702v.2 August 19, 2014

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 Sidley Austin 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 § 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 (S. Bill 0143)
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 and 3/25/13
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?	No ¹⁸
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?	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?	New trust must have separate trust document ²²

**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 a person;

(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.

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 all beneficiaries of the first trust, in writing, at least twenty days prior to the effective date of the trustee's exercise of the power under § 55-2-15 (applying the South Dakota Virtual Representation Statutes, §§ 55-3-31 to 55-3-38, inclusive). 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.

ACTIVE 7686122v.3 August 19, 2014

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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.

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).

²² “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 may instead 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.*” § 55-2-15 (emphasis added).

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.

ACTIVE 7755651v.3 August 19, 2014

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 Sidley Austin 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 § 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	H.B. 2913 (will be section 112.071 - 112.087, Texas Property Code)
Effective Date	09/01/13
Amendment Date(s)	
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> Probably not 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	May not materially impair beneficiary rights ²⁹ ; trustee liability ³⁰ ; trustee removal ³¹
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes, 30 days ³²
21. Is decanting prohibited if a beneficiary objects?	No ³³
22. Court approval required to decant?	No, unless attorney general objects 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?	Later discovered assets ³⁸ ; codification of common law ³⁹

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 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.

(6) “Limited discretion” means a limited or modified power to distribute principal to or for the benefit of one or more beneficiaries of a trust.

(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 or more current beneficiaries of the first trust who are eligible to receive income or principal from the trust and for the benefit of one or more successor or presumptive remainder beneficiaries of the first trust who are eligible to receive income or principal from the 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) 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.

(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.

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 impair the rights of any beneficiary of the trust;
- (3) materially limit a trustee's fiduciary duty under the trust or as described by Section 111.0035;
- (4) decrease or indemnify against a trustee's liability or exonerate 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 112.073 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.

ACTIVE 7730150v.3 August 19, 2014

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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 or more current beneficiaries and one or more successor or presumptive remainder beneficiaries who are eligible to receive income or principal from the trust. § 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). Restricting the successor and presumptive remainder beneficiaries only to those “eligible to receive income or principal from the trust” seems to effectively restrict decanting to current beneficiaries.

⁸ § 112.073.

⁹ The statute seems intended to permit the second trust to include as beneficiaries remainder beneficiaries of the first trust. However, the statute literally includes only remainder beneficiaries “who are eligible to receive income or

principal from the trust.” § 112.072(a). Arguably, this phrase is superfluous and should be read as “who will be eligible to receive income or principal [when they become current beneficiaries].”

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 The decanting may not “materially impair the rights of any beneficiary of the trust” or “materially limit a trustee’s fiduciary duty under the trust or as described by Section 111.0035.” § 112.085(2), (3). The seemingly broad power to decant granted in § 112.072 to eliminate beneficiaries and change distribution rights if the trustee has unlimited discretion arguably is considerably limited if the rights of a beneficiary cannot be materially impaired.

³⁰ § 112.085(4).

³¹ § 112.085(5).

³² § 112.074.

³³ 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)).

³⁴ § 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.

³⁵ 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).

³⁶ § 112.083.

³⁷ 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.

³⁸ § 112.080.

³⁹ See Section 8 of Act.

VIRGINIA
State Decanting Summary¹

STATUTORY HISTORY	
Statutory citation	VA. CODE. ANN. § 64.2-778.1 (effective 07/01/2012)
Effective Date	7/1/12
Amendment Date(s)	10/1/12 ²
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretionary power to distribute principal or income 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 trust limited to current beneficiaries of old trust?	Presumably 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?	Yes 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?	Yes ¹⁸
15. Other tax savings provisions?	2503(b-c) ¹⁹ ; Delaware tax trap ²⁰
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes ²¹
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes ²²
21. Is decanting prohibited if a beneficiary objects?	No ²³
22. Court approval required to decant?	No, but may seek court approval or disapproval ²⁴
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No ²⁵
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?	Yes ²⁷
MISCELLANEOUS	
27. Other unique considerations?	Court appointing special fiduciary provision ²⁸ Requirement of accounting to commissioner applies to new trust ²⁹

**VIRGINIA STATUTE
VA. CODE ANN. § 64.2-778.1**

§ 64.2-778.1. (Effective October 1, 2012) Trustee's special power to appoint to a second trust.

A. As used in this section unless the context requires a different meaning:

“Current beneficiary” means a person who is a permissible distributee of trust income or principal.

“Interested distributee” means a current beneficiary who has the power to remove the existing trustee of the original trust and designate as successor trustee a person who may be a “related or subordinate party,” as that term is defined in 26 U.S.C. § 672(c), with respect to such current beneficiary.

“Interested trustee” means (i) an individual trustee who is a current beneficiary of the original trust or to whom the net income or principal of the original trust would be distributed if the original trust were terminated, (ii) any trustee of the original trust who may be removed and replaced by an interested distributee, or (iii) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the original trust.

“Original trust” means a trust created by an irrevocable inter vivos or testamentary trust instrument pursuant to the terms of which a trustee has a discretionary power to distribute principal or income of the trust to or for the benefit of one or more current beneficiaries.

“Second trust” means a trust created by an irrevocable inter vivos or testamentary trust instrument, the current beneficiaries of which are one or more of the current beneficiaries of the original trust.

B. The 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 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 a 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 power to appoint trust principal or income in further trust under this section includes the power to create the second trust.

C. The terms of the second trust shall be subject to the following conditions:

1. The beneficiaries of the second trust shall include only beneficiaries of the original trust;
2. If the power to distribute principal or income in the original trust is subject to an ascertainable standard, the power to distribute income or principal in the second trust shall be exercisable in favor of the same current beneficiaries as in the original trust and, unless the court approves otherwise, shall be subject to the same ascertainable standard as in the original trust;
3. A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust shall not have the future beneficial interest accelerated to a present interest in the second trust;
4. The terms of the second trust shall not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the original trust;
5. 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;

6. If contributions to the original trust have been excluded from the gift tax by the application of 26 U.S.C. § 2503(b) or (c), 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;

7. If any beneficiary of the original trust has a 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 outstanding power of withdrawal;

8. The terms of the second trust may confer a power of appointment upon a current beneficiary 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 trust or the second trust. The power of appointment conferred upon a beneficiary shall be subject to the provisions of §§ [55-12.1](#) through [55-13.3](#), 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 original trust; and

9. Notwithstanding subdivisions 1 through 8, the power under this section may be exercised to appoint a second trust that is a special needs trust, subject to the other provisions of this section.

D. A trustee who is an interested trustee may not exercise the power to appoint under this section. The remaining cotrustee or a majority of the remaining cotrustees who are not interested trustees may exercise the power under this section. If all the trustees are interested trustees, or at the request of any of the trustees, the court may appoint a special fiduciary with authority to exercise the power under this section.

E. The exercise of the power under this section shall be:

1. Subject to the fiduciary duties of the trustee of the original trust;

2. Treated for all purposes as the exercise of a power of appointment in a fiduciary capacity that is not a power exercisable in favor of the trustee individually, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate;

3. Subject to the provisions of §§ [55-12.1](#) through [55-13.3](#), 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 original trust; and

4. Permitted regardless of whether the original trust has a spendthrift provision or prohibits amendment or revocation of the original trust.

F. The exercise of the power under this section shall be made by a written instrument, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, 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.

G. At least 60 days prior to the effective date of the exercise of the power under this section, the trustee of the original trust shall give written notice of the trustee's intent to exercise the power, including a copy of the written instrument made pursuant to subsection F, to (i) the grantor of the original trust, if living; (ii) without regard to the exercise of any power of appointment, the qualified beneficiaries of the original trust as determined under §§ [64.2-701](#) and [64.2-708](#), other than the Attorney General, and (iii) all persons acting as advisor or protector of the original trust. The representation provisions of §§ [64.2-714](#), [64.2-716](#), [64.2-717](#), and [64.2-718](#) shall apply to the notice under this subsection. If all qualified beneficiaries of the original trust waive the notice required by this

subsection in a signed written instrument delivered to the trustee of the original trust, the trustee may exercise the power under this section without providing the notice required by this subsection. The receipt of notice under this subsection shall not abrogate any right or remedy of any beneficiary against the trustee under the laws of the Commonwealth other than this section.

H. Nothing in this section shall be construed to (i) create or imply a duty of the trustee to exercise the power granted in this section, and no inference of impropriety shall be made as a result of a trustee not exercising the power granted in this section, or (ii) limit the right of any trustee who has a power to appoint property in further trust under the terms of the original trust or by law.

I. A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the power under this section.

J. If accounts for the original 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.

K. Subject to the provisions of the governing instrument, this section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered under the law of the Commonwealth, regardless of the date the trust was created, unless the governing instrument expressly prohibits the exercise of the power under this section. A provision in the governing instrument that “The provisions of § 64.2-778.1, Code of Virginia, as amended, or any corresponding provision of future law, shall not be used in the administration of this trust” or “My trustee shall not have the power to appoint the income or principal of this trust to another trust” or similar words reflecting such intent shall be sufficient to preclude the application of this section.

ACTIVE 7750365v.3 August 19, 2014

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² On 10/1/12, the decanting statute was renumbered, but no amendments were made.

³ “The 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 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 a trustee of a second trust.” § 64.2-778.1(B).

⁴ “A trustee who is an interested trustee may not exercise the power to appoint under this section. The remaining cotrustee or a majority of the remaining cotrustees who are not interested trustees may exercise the power under this section. If all the trustees are interested trustees, or at the request of any of the trustees, the court may appoint a special fiduciary with authority to exercise the power under this section.” § 64.2-778.1(D). “ ‘Interested trustee’ means (i) an individual trustee who is a current beneficiary of the original trust or to whom the net income or principal of the original trust would be distributed if the original trust were terminated, (ii) any trustee of the original trust who may be removed and replaced by an interested distributee, or (iii) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the original trust.” § 64.2-778.1(A).

⁵ § 64.2-778.1(C).

⁶ § 64.2-778.1(C)(7).

⁷ The trustee may decant for the benefit of one or more current beneficiaries of the original trust. § 64.2-778.1(B).

⁸ “If the power to distribute principal or income in the original trust is subject to an ascertainable standard, the power to distribute income or principal in the second trust shall be exercisable in favor of the same current beneficiaries as in the original trust and, unless the court approves otherwise, shall be subject to the same ascertainable standard as in the original trust[.]” § 64.2-778.1(C)(2).

⁹ § 64.2-778.1(C).

¹⁰ § 64.2-778.1(C)(3).

¹¹ § 64.2-778.1(C).

¹² § 64.2-778.1(C).

¹³ The permissible appointees of the power of appointment may include persons who are not beneficiaries of the original trust or the second trust. § 64.2-778.1(C)(8).

¹⁴ § 64.2-778.1(C)(8).

¹⁵ § 64.2-778.1(C).

¹⁶ § 64.2-778.1(C)(5).

¹⁷ § 64.2-778.1(C)(5).

¹⁸ An interested trustee may not decant. § 64.2-778.1(D).

¹⁹ § 64.2-778.1(C)(6).

²⁰ § 64.2-778.1(C)(8).

²¹ § 64.2-778.1(E).

²² Sixty days’ notice must be given to “(i) the grantor of the original trust, if living; (ii) without regard to the exercise of any power of appointment, the qualified beneficiaries of the original trust as determined under §§ 64.2-701 and 64.2-708, other than the Attorney General, and (iii) all persons acting as advisor or protector of the original trust.”

²³ § 64.2-778.1(I).

²⁴ § 64.2-778.1(B); § 64.2-778.1(I).

²⁵ The exercise of the decanting power is subject to the fiduciary duties of the trustee of the original trust. § 64.2-778.1(E)(1).

²⁶ § 64.2-778.1(H).

²⁷ “Subject to the provisions of the governing instrument, this section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered under the law of the Commonwealth,

regardless of the date the trust was created, unless the governing instrument expressly prohibits the exercise of the power under this section. § 64.2-778.1(K).

²⁸ “A trustee who is an interested trustee may not exercise the power to appoint under this section. The remaining cotrustee or a majority of the remaining cotrustees who are not interested trustees may exercise the power under this section. If all the trustees are interested trustees, or at the request of any of the trustees, the court may appoint a special fiduciary with authority to exercise the power under this section.” § 64.2-778.1(D).

²⁹ “If accounts for the original 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.” § 64.2-778.1(J).

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

(continued)

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:

- a. A copy of the proposed written instrument under which the trustee will appoint assets to a 2nd trust.
- 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.

ACTIVE 8911285v.2 August 20, 2014

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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)
Effective Date	7/1/13
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion over income or principal.
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?	No
13. Charitable deduction savings provision?	No
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?	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
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) On distribution of trust income or principal pursuant to authority in the trust instrument to make discretionary distributions to a trust beneficiary, whether or not the discretionary distributions are pursuant to an ascertainable standard, make distributions of all or any portion of trust income or principal in further trust.

Section 3. This act is effective July 1, 2013.

ACTIVE 7798427v.2 August 19, 2014

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