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INDIANA[1, 2]

State Decanting Summary[3]

STATUTORY HISTORY	
Statutory citation	IND. CODE § 30-4-3-36
Effective Date	7/1/10
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, absolute power to invade principal[4]
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust[5]
4. May new trust eliminate beneficiary's withdrawal rights?	Yes[6]
5. Must new and old trust beneficiaries be identical?	Unclear[7]
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Presumably no[8]
7. May remainder beneficiaries' interests be accelerated?	Presumably yes[9]
8. New and old trust require same distribution standard?	Presumably no[10]
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[11]
13. Charitable deduction savings provision?	Yes[12]
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	Delaware tax trap[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?	Yes[15]
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 [16]
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	No

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INDIANA STATUTE
IND. CODE § 30-4-3-36

Trust decanting; notice; rules of construction

Sec. 36. (a) Unless a trust expressly provides otherwise, a trustee who has absolute power 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) For purposes of this section, an absolute power to invade principal includes a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support regardless of whether the term "absolute" is used.

(c) 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.

(d) 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.

(e) 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.

(f) 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.

(g) 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).

(h) 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) has sent the trustee a request for notice;

(v) is a charitable organization expressly designated to receive distributions under the terms of a charitable trust;

(vi) is a person appointed to enforce a trust for the care of an animal under IC 30-4-2-18; or

(vii) 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.

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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.".

[1] Reviewed by Jeffrey Dible 8/18/13.

[2] Jeffrey Kolb, Chairperson of the ISBA Probate Review Committee, noted that the Indiana statute was based on the Florida statute.

[3] ***Circular 230 Disclosure***. To comply with certain Treasury regulations, we inform you that these materials are not intended or written to be used, and cannot be used, by any person for the purpose of avoiding U.S. federal tax penalties that may be imposed on such person, and each taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor. 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.

[4] "Unless a trust expressly provides otherwise, a trustee who has absolute power 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). "For purposes of this section, an absolute power to invade principal includes a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support regardless of whether the term 'absolute' is used." § 30-4-3-36(b). In Jeff Dible's opinion, if the trust instrument includes HEMS language and says that it merely illustrates the trustee's discretion to invade and distribute principal but does not limit that discretion, the trustee's discretion to invade principal is arguably still "absolute." The Indiana State Bar Association's Probate Review Committee (PRC) has proposed the following amendment:

> Sec. 36. (a) Unless a trust expressly provides otherwise, a trustee who has ~~absolute power~~ **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) ~~For purposes of this section, an absolute power to invade principal includes a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support regardless of whether the term "absolute" is used.~~

If these changes are approved and enacted, they will be effective July 1, 2014.

[5] 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.

[6] 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.

[7] 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).

[8] § 30-4-3-36(a)(1).

[9] The statute is silent.

[10] The statute is silent, but presumably the distribution standard can change so long as an income, annuity or unitrust interest is not altered.

[11] § 30-4-3-36(a)(3).

[12] § 30-4-3-36(a)(3).

[13] § 30-4-3-36(d).

[14] § 30-4-3-36(d).

[15] § 30-4-3-36(e). A multi-part definition of "qualified beneficiaries" (which is narrower than "interested persons" or "beneficiaries") is found at § 30-4-1-2(14). Remote contingent beneficiaries are not "qualified beneficiaries" unless they have previously given the trustee a request for notice.

[16] § 30-4-3-36(g).