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State Decanting Summary[2]

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?	*Unlimited discretion*: Yes, absolute power to distribute principal[3]
	Limited discretion: Yes, power, other than absolute power, to make distributions of principal[4]
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, with exception[5]
4. May new trust eliminate beneficiary's withdrawal rights?	No[6]
5. Must new and old trust beneficiaries be identical?	*Unlimited discretion*: No[7]
	Limited discretion: Yes[8]
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	*Unlimited discretion*: Yes, with boomerang provision[9]
	Limited discretion: No[10]
7. May remainder beneficiaries' interests be accelerated?	*Unlimited discretion*: No[11]
	Limited discretion: No[12]
8. New and old trust require same distribution standard?	*Unlimited discretion*: No[13]
	Limited discretion: Yes[14]
9. May trustee grant a power of appointment in new trust?	*Unlimited discretion*: Yes[15]
	Limited discretion: Yes[16]
10. Must new trust grant identical power of appointment as old trust?	*Unlimited discretion*: No[17]
	Limited discretion: 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]; Sub S[22]; 2642(c)[23]; 401(a)(9)[24]; Catch-all[25]
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes[26]
18. May trustee increase trustee commission?	No, unless beneficiaries consent or court approves[27]
19. Other restrictions	Yes[28]
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes[29]
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No, unless testamentary trust[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?	Boomerang provision[35] Codification of common law provision[36] Fiduciary power over trustee provision[37]

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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 AssemblyFile No.201,HB 479, §1, eff. 3/27/2013.

Added by 129th General AssemblyFile No.65,SB 117, §1, eff. 3/22/2012.

CH1 7730159v.1 August 22, 2013

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[1] Reviewed by M. Patricia Culler, 8/21/13.

[2] ***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.

[3] "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).

[4] § 5808.18(B).

[5] "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).

[6] § 5808.18(C)(1)(a)(iii).

[7] The second trust may be for the benefit of one or more current beneficiaries of the first trust. § 5808.18(A)(1).

[8] The second trust may not "materially change the interests of the beneficiaries of the first trust." § 5808.18(B).

[9] 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).

[10] The beneficiaries must remain the same. § 5808.18(B).

[11] § 5808.18(A).

[12] The second trust may not materially change the interests of the beneficiaries of the first trust. § 5808.18(B).

[13] § 5808.18(A)(1).

[14] The second trust may not materially change the interests of the beneficiaries of the first trust. § 5808.18(B).

[15] § 5808.18(A)(3)(a).

[16] 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).

[17] § 5808.18(A)(3)(a).

[18] § 5808.18(B).

[19] The savings provision applies to state, as well as federal, deductions. § 5808.18(C)(2).

[20] The savings provision applies to state, as well as federal, deductions. § 5808.18(C)(2).

[21] § 5808.18(C)(3).

[22] § 5808.18(C)(4).

[23] § 5808.18(C)(5).

[24] § 5808.18(C)(6).

[25] § 5808.18(C)(7)(b).

[26] "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.

[27] § 5808.18(C)(8)(a).

[28] "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).

[29] Thirty days' notice is required to all current beneficiaries of the first trust. § 5808.18(F).

[30] § 5808.18(K).

[31] "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).

[32] § 5808.18(J).

[33] 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.

[34] 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).

[35] § 5808.18(A)(3)(b).

[36] § 5808.18(O)(1).

[37] § 5808.18(G).