SIDLEY AUSTIN LLP
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KENTUCKY[1]

State Decanting Summary[2]

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[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?	No[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?	Yes, only when trustee is a possible beneficiary[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?	Yes[13]
14. Beneficiary/trustee savings provision?	Yes[14]
15. Other tax savings provisions?	2503(b-c)[15]; Sub S[16]; Delaware tax trap[17]
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes[18]
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes[19]
21. Is decanting prohibited if a beneficiary objects?	Yes, unless court approval is granted[20]
22. Court approval required to decant?	No, unless primary beneficiary objects, but may seek court approval[21]
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes[22]
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes[23]
MISCELLANEOUS	
27. Other unique considerations?	Court appointing special fiduciary provision[24] Change of situs provision[25]

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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).

CH1 7730194v.1 June 12, 2013

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[1] Reviewed by Turney Berry 10/9/12.

[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] "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).

[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, *including an interest which is to take effect in the future*[.]" § 386.175(4)(c) (emphasis added).

[5] § 386.175(4)(f).

[6] § 386.175(1)(c).

[7] § 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[.]").

[8] § 386.175(4)(b).

[9] § 386.175(4)(h).

[10] § 386.175(4)(i).

[11] § 386.175(4)(i).

[12] § 386.175(4)(d).

[13] § 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).

[14] § 386.175(4)(h).

[15] "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).

[16] § 386.175(4)(g).

[17] § 386.175(4)(i).

[18] § 386.175(6)(b).

[19] 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).

[20] § 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).

[21] § 386.175(7)(d).

[22] § 386.175(8).

[23] "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.

[24] § 386.175(5).

[25] "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).