SOUTH CAROLINA
State Decanting Summary[1]

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

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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).