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SOUTH DAKOTA[1]

State Decanting Summary[2]

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[3]
2. Limitation on trustee who may decant?	Yes[4]
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, except as to marital trusts, charitable trusts, and GRATs[5]
4. May new trust eliminate beneficiary's withdrawal rights?	No[6]
5. Must new and old trust beneficiaries be identical?	No[7]
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No[8]
7. May remainder beneficiaries' interests be accelerated?	Yes[9]
8. New and old trust require same distribution standard?	Presumably no, except as to interested trustee[10]
9. May trustee grant a power of appointment in new trust?	Yes[11]
10. Must new trust grant identical power of appointment as old trust?	Presumably no[12]
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[13]
13. Charitable deduction savings provision?	Yes[14]
14. Beneficiary/trustee savings provision?	Yes[15]
15. Other tax savings provisions?	2503(b-c)[16]; 2702[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?	No[19]
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[20]
24. Provision that trustee has no duty to consider decanting?	No
25. Standard of review?	Yes[21]
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes[22]
MISCELLANEOUS	
27. Other unique considerations?	New trust must have separate trust document[23]

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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.

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[1] Reviewed by P. Daniel Donohue 8/13/13.

[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] § 55-2-15.

[4] 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).

[5] 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).

[6] § 55-2-15(7).

[7] § 55-2-15(1).

[8] § 55-2-15(1)(b).

[9] § 55-2-15(1)(b).

[10] 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).

[11] § 55-2-15.

[12] § 55-2-15.

[13] § 55-2-15(6)(a).

[14] § 55-2-15(6)(b).

[15] § 55-2-15.

[16] § 55-2-15(5).

[17] § 55-2-15(6)(c).

[18] § 55-2-20.

[19] The 2013 amendment eliminated the requirement of notice. The statute now provides that the trustee *may* provide notice. § 55-2-18.

[20] 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.

[21] § 55-1-15(10).

[22] § 55-2-15 (see last sentence).

[23] "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).