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VIRGINIA[1]

State Decanting Summary[2]

STATUTORY HISTORY	
Statutory citation	VA. CODE. ANN. § 64.2-778.1 (effective 07/01/2012)
Effective Date	7/1/12
Amendment Date(s)	10/1/12[3]
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretionary power to distribute principal or income[4]
2. Limitation on trustee who may decant?	Yes[5]
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust[6]
4. May new trust eliminate beneficiary's withdrawal rights?	No[7]
5. Must new and old trust beneficiaries be identical?	*Unlimited discretion:* No[8] *Limited discretion:* Yes[9]
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Presumably no[10]
7. May remainder beneficiaries' interests be accelerated?	No[11]
8. New and old trust require same distribution standard?	*Unlimited discretion:* No[12] *Limited discretion:* Yes[13]
9. May trustee grant a power of appointment in new trust?	Yes[14]
10. Must new trust grant identical power of appointment as old trust?	No[15]
11. Supplemental needs trust exception?	Yes[16]
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[17]
13. Charitable deduction savings provision?	Yes[18]
14. Beneficiary/trustee savings provision?	Yes[19]
15. Other tax savings provisions?	2503(b-c)[20]; Delaware tax trap[21]
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes[22]
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes[23]
21. Is decanting prohibited if a beneficiary objects?	No[24]
22. Court approval required to decant?	No, but may seek court approval or disapproval[25]
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No[26]
24. Provision that trustee has no duty to consider decanting?	Yes[27]
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes[28]
MISCELLANEOUS	
27. Other unique considerations?	Court appointing special fiduciary provision[29] Requirement of accounting to commissioner applies to new trust[30]

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VIRGINIA STATUTE
VA. CODE ANN. § 64.2-778.1

§ 64.2-778.1. (Effective October 1, 2012) Trustee's special power to appoint to a second trust.

A. As used in this section unless the context requires a different meaning:

"Current beneficiary" means a person who is a permissible distributee of trust income or principal.

"Interested distributee" means a current beneficiary who has the power to remove the existing trustee of the original trust and designate as successor trustee a person who may be a "related or subordinate party," as that term is defined in 26 U.S.C. § 672(c), with respect to such current beneficiary.

"Interested trustee" means (i) an individual trustee who is a current beneficiary of the original trust or to whom the net income or principal of the original trust would be distributed if the original trust were terminated, (ii) any trustee of the original trust who may be removed and replaced by an interested distributee, or (iii) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the original trust.

"Original trust" means a trust created by an irrevocable inter vivos or testamentary trust instrument pursuant to the terms of which a trustee has a discretionary power to distribute principal or income of the trust to or for the benefit of one or more current beneficiaries.

"Second trust" means a trust created by an irrevocable inter vivos or testamentary trust instrument, the current beneficiaries of which are one or more of the current beneficiaries of the original trust.

B. The 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 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 a 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 power to appoint trust principal or income in further trust under this section includes the power to create the second trust.

C. The terms of the second trust shall be subject to the following conditions:

1. The beneficiaries of the second trust shall include only beneficiaries of the original trust;

2. If the power to distribute principal or income in the original trust is subject to an ascertainable standard, the power to distribute income or principal in the second trust shall be exercisable in favor of the same current beneficiaries as in the original trust and, unless the court approves otherwise, shall be subject to the same ascertainable standard as in the original trust;

3. A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust shall not have the future beneficial interest accelerated to a present interest in the second trust;

4. The terms of the second trust shall not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the original trust;

5. 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;

6. If contributions to the original trust have been excluded from the gift tax by the application of 26 U.S.C. § 2503(b) or (c), 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;

7. If any beneficiary of the original trust has a 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 outstanding power of withdrawal;

8. The terms of the second trust may confer a power of appointment upon a current beneficiary 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 trust or the second trust. The power of appointment conferred upon a beneficiary shall be subject to the provisions of §§ 55-12.1 through 55-13.3, covering 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 original trust; and

9. Notwithstanding subdivisions 1 through 8, the power under this section may be exercised to appoint a second trust that is a special needs trust, subject to the other provisions of this section.

D. A trustee who is an interested trustee may not exercise the power to appoint under this section. The remaining cotrustee or a majority of the remaining cotrustees who are not interested trustees may exercise the power under this section. If all the trustees are interested trustees, or at the request of any of the trustees, the court may appoint a special fiduciary with authority to exercise the power under this section.

E. The exercise of the power under this section shall be:

1. Subject to the fiduciary duties of the trustee of the original trust;

2. Treated for all purposes as the exercise of a power of appointment in a fiduciary capacity that is not a power exercisable in favor of the trustee individually, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate;

3. Subject to the provisions of §§ 55-12.1 through 55-13.3, covering 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 original trust; and

4. Permitted regardless of whether the original trust has a spendthrift provision or prohibits amendment or revocation of the original trust.

F. The exercise of the power under this section shall be made by a written instrument, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, 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.

G. At least 60 days prior to the effective date of the exercise of the power under this section, the trustee of the original trust shall give written notice of the trustee's intent to exercise the power, including a copy of the written instrument made pursuant to subsection F, to (i) the grantor of the original trust, if living; (ii) without regard to the exercise of any power of appointment, the qualified beneficiaries of the original trust as determined under §§ 64.2-701 and 64.2-708, other than the Attorney General, and (iii) all persons acting as advisor or protector of the original trust. The representation provisions of §§ 64.2-714, 64.2-716, 64.2-717, and 64.2-718 shall apply to the notice under this subsection. If all qualified beneficiaries of the original trust waive the notice required by this

subsection in a signed written instrument delivered to the trustee of the original trust, the trustee may exercise the power under this section without providing the notice required by this subsection. The receipt of notice under this subsection shall not abrogate any right or remedy of any beneficiary against the trustee under the laws of the Commonwealth other than this section.

H. Nothing in this section shall be construed to (i) create or imply a duty of the trustee to exercise the power granted in this section, and no inference of impropriety shall be made as a result of a trustee not exercising the power granted in this section, or (ii) limit the right of any trustee who has a power to appoint property in further trust under the terms of the original trust or by law.

I. A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the power under this section.

J. If accounts for the original trust are filed with the commissioner of accounts, the accounts for the second trust shall be filed with the commissioner of accounts unless the court orders otherwise.

K. Subject to the provisions of the governing instrument, this section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered under the law of the Commonwealth, regardless of the date the trust was created, unless the governing instrument expressly prohibits the exercise of the power under this section. A provision in the governing instrument that "The provisions of § 64.2-778.1, Code of Virginia, as amended, or any corresponding provision of future law, shall not be used in the administration of this trust" or "My trustee shall not have the power to appoint the income or principal of this trust to another trust" or similar words reflecting such intent shall be sufficient to preclude the application of this section.

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[1] Reviewed by Farhad Aghdami 8/27/13.

[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] On 10/1/12, the decanting statute was renumbered, but no amendments were made.

[4] "The 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 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 a trustee of a second trust." § 64.2-778.1(B).

[5] "A trustee who is an interested trustee may not exercise the power to appoint under this section. The remaining cotrustee or a majority of the remaining cotrustees who are not interested trustees may exercise the power under this section. If all the trustees are interested trustees, or at the request of any of the trustees, the court may appoint a special fiduciary with authority to exercise the power under this section." § 64.2-778.1(D). " 'Interested trustee' means (i) an individual trustee who is a current beneficiary of the original trust or to whom the net income or principal of the original trust would be distributed if the original trust were terminated, (ii) any trustee of the original trust who may be removed and replaced by an interested distributee, or (iii) an individual trustee whose legal

obligation to support a beneficiary may be satisfied by distributions of income and principal of the original trust." § 64.2-778.1(A).

[6] § 64.2-778.1(C).

[7] § 64.2-778.1(C)(7).

[8] The trustee may decant for the benefit of one or more current beneficiaries of the original trust. § 64.2-778.1(B).

[9] "If the power to distribute principal or income in the original trust is subject to an ascertainable standard, the power to distribute income or principal in the second trust shall be exercisable in favor of the same current beneficiaries as in the original trust and, unless the court approves otherwise, shall be subject to the same ascertainable standard as in the original trust[.]" § 64.2-778.1(C)(2).

[10] § 64.2-778.1(C).

[11] § 64.2-778.1(C)(3).

[12] § 64.2-778.1(C).

[13] § 64.2-778.1(C).

[14] The permissible appointees of the power of appointment may include persons who are not beneficiaries of the original trust or the second trust. § 64.2-778.1(C)(8).

[15] § 64.2-778.1(C)(8).

[16] § 64.2-778.1(C).

[17] § 64.2-778.1(C)(5).

[18] § 64.2-778.1(C)(5).

[19] An interested trustee may not decant. § 64.2-778.1(D).

[20] § 64.2-778.1(C)(6).

[21] § 64.2-778.1(C)(8).

[22] § 64.2-778.1(E).

[23] Sixty days' notice must be given to "(i) the grantor of the original trust, if living; (ii) without regard to the exercise of any power of appointment, the qualified beneficiaries of the original trust as determined under §§ 64.2-701 and 64.2-708, other than the Attorney General, and (iii) all persons acting as advisor or protector of the original trust."

[24] § 64.2-778.1(I).

[25] § 64.2-778.1(B); § 64.2-778.1(I).

[26] The exercise of the decanting power is subject to the fiduciary duties of the trustee of the original trust. § 64.2-778.1(E)(1).

[27] § 64.2-778.1(H).

[28] "Subject to the provisions of the governing instrument, this section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered under the law of the Commonwealth, regardless of the date the trust was created, unless the governing instrument expressly prohibits the exercise of the power under this section. § 64.2-778.1(K).

[29] "A trustee who is an interested trustee may not exercise the power to appoint under this section. The remaining cotrustee or a majority of the remaining cotrustees who are not interested trustees may exercise the power under this section. If all the trustees are interested trustees, or at the request of any of the trustees, the court may appoint a special fiduciary with authority to exercise the power under this section." § 64.2-778.1(D).

[30] "If accounts for the original trust are filed with the commissioner of accounts, the accounts for the second trust shall be filed with the commissioner of accounts unless the court orders otherwise." § 64.2-778.1(J).