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DELAWARE[1]

State Decanting Summary[2]

STATUTORY HISTORY	
Statutory citation	DEL. CODE ANN. tit. 12, § 3528
Effective Date	6/30/03
Amendment Date(s)	6/24/04, 6/27/06, 7/5/07, 7/6/09, 7/13/11, 8/6/13
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, authority to invade principal[3]
2. Limitation on trustee who may decant?	No, but see DC § 3314[4]
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, except as to marital trusts[5]
4. May new trust eliminate beneficiary's withdrawal rights?	No, for sole beneficiary; yes, for multiple beneficiaries[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?	Yes, with boomerang provision[8]
7. May remainder beneficiaries' interests be accelerated?	No[9]
8. New and old trust require same distribution standard?	Yes[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?	No[12]
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[13]
13. Charitable deduction savings provision?	No
14. Beneficiary/trustee savings provision?	No, but see DC § 3314[14]
15. Other tax savings provisions?	2503(b-c)[15]; Delaware tax trap[16]
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes[17]
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Silent
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes[18]
24. Provision that trustee has no duty to consider decanting?	No
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes[19]
MISCELLANEOUS	
27. Other unique considerations?	Boomerang provision[20]

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DELAWARE STATUTE
DEL. CODE ANN. tit. 12, § 3528

(a) Unless the terms of the instrument expressly provide otherwise, a trustee who has authority (whether acting at such trustee's discretion or at the direction or with the consent of an adviser), under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to invade the principal of a trust (the "first trust") to make distributions to, or for the benefit of, 1 or more proper objects of the exercise of the power, may instead exercise such authority by appointing all or part of the principal subject to the power in favor of a trustee of a trust (the "second trust") under an instrument other than that under which the power to invade is created or under the same instrument, provided, however, that, except as otherwise provided in this subsection (a):

(1) The exercise of such authority is in favor of a second trust having only beneficiaries who are proper objects of the exercise of the power;

(2) In the case of any trust, contributions to which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) (26 U.S.C. § 2503(b)) of the Internal Revenue Code of 1986 (26 U.S.C. § 1 et seq.) (hereinafter referred to in this section as the "I.R.C."), by reason of the application of I.R.C. § 2503(c) (26 U.S.C. § 2503(c)), the governing instrument for the second trust shall provide that the beneficiary's remainder interest shall vest and become distributable no later than the date upon which such interest would have vested and become distributable under the terms of the governing instrument for the first trust;

(3) The exercise of such authority does not reduce any income or unitrust interest of any beneficiary of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 (26 U.S.C. § 2056 or § 2523) or for state tax purposes under any comparable provision of applicable state law; and

(4) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary who is the only trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions.

Notwithstanding the foregoing provisions of this subsection (a) of this section, the governing instrument for the second trust may grant a power of appointment (including a power to appoint trust property to the powerholder, the powerholder's creditors, the powerholder's estate, the creditors of the powerholder's estate or any other person, whether or not such person is a trust beneficiary) to 1 or more of the trust beneficiaries who are proper objects of the exercise of the power in the first trust. Furthermore, notwithstanding the foregoing provisions of this subsection (a), the governing instrument of the second trust may provide that, at a time or upon an event specified in the governing instrument, the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary's interest that are substantially identical to the first trust's terms and conditions concerning such beneficial interests. The exercise of a trustee's authority granted under this subsection (a) shall in all respects comply with any standard that limits the trustee's authority to make distributions from the first trust but may be exercised whether or not the trustee would have been permitted to exercise the power to make a current outright distribution of all of the trust assets in compliance with any such standard. For purposes of this subsection (a), an open class of beneficiaries identified in the governing instrument for the first trust (such as, but not limited to, a class comprised of the descendants of a person who is living or who has living descendants) is a proper object of the exercise of a power to make distributions and the exercise of such a power in favor of a second trust having only beneficiaries, including unborn future beneficiaries, who are among the members of the open class satisfies the requirement of paragraph (a)(1) of this section provided that the governing instrument for the second trust permits distributions to or among members of the class only when and to the extent permitted by the governing instrument for the first trust. A trustee's power, pursuant to this subsection (a), to appoint principal in favor of the trustee of a second trust shall include the power to create the second trust.

(b) The exercise of the power to invade the principal of the trust under subsection (a) of this section shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust.

(c) The exercise of the power to invade the principal of the trust under subsection (a) of this section 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) and shall be subject to the provisions of Chapter 5 of Title 25 covering the time at which the permissible period of the rule against perpetuities begins and the law which determines the permissible period of the rule against perpetuities.

(d) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust which arises under any other section of this chapter or under another statute or under common law.

(e) When exercising the authority granted under subsection (a) of this section, the trustee and any adviser directing or consenting to the trustee's exercise of such authority shall be held to the standard of care and the standard of liability applicable to the trustee and any such adviser when making outright distributions, free from trust, to or for the benefit of 1 or more permissible distributees. No trustee or adviser shall have a duty to exercise such authority nor, absent wilful misconduct, any liability to any person for failure to exercise such authority or failure to consider whether to exercise such authority.

(f) This section shall be available to any trust that is administered in this State.

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[1] Reviewed by Michael M. Gordon 8/22/13.

[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] DEL. CODE ANN. tit. 12, § 3528(a). The decanting "shall in all respects comply with any standard that limits the trustee's authority to make distributions from the first trust but may be exercised whether or not the trustee would have been permitted to exercise the power to make a current outright distribution of all of the trust assets in compliance with any such standard." § 3528(a).

[4] Section 3314 limits a fiduciary's power to make distributions to himself or herself to avoid unintended gift and estate tax issues. In part, the statute prohibits a fiduciary from exercising: "(1) The power to make discretionary distributions of either principal or income to or for the benefit of the fiduciary, the fiduciary's estate, the creditors of the fiduciary, or the creditors of the fiduciary's estate unless the power is either: a. Limited by an ascertainable standard relating to the fiduciary's health, education, support, or maintenance within the meaning of 26 U.S.C. §§ 2041 (relating to powers of appointment) and 2514 (relating to powers of appointment); or b. Exercisable by the fiduciary only in conjunction with another person having a substantial interest in the property subject to the power which is adverse to the interest of the fiduciary within the meaning of 26 U.S.C. § 2041(b)(1)(C)(ii)." § 3314(c)(1).

[5] There is no general prohibition on reducing income rights. However the "exercise of such authority does not reduce any income or unitrust interest of any beneficiary of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 (26 U.S.C. § 2056 or § 2523) or for state tax purposes under any comparable provision of applicable state law[.]" § 3528(a)(3).

[6] § 3528(a)(4).

[7] A trustee may decant for the benefit of 1 or more proper objects in the old trust. § 3528(a).

[8] The trustee may decant for the benefit of 1 or more proper objects of the exercise of the power. § 3528(a). "Furthermore, notwithstanding the foregoing provisions of this subsection (a), the governing instrument of the second trust may provide that, at a time or upon an event specified in the governing instrument, the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary's interest that are substantially identical to the first trust's terms and conditions concerning such beneficial interests." § 3528(a).

[9] Remainder beneficiaries' interests can not be accelerated because the second trust must be in favor of beneficiaries who are proper objects of the exercise of the power. *See* § 3528(a)(1).

[10] "The exercise of a trustee's authority granted under this subsection (a) shall in all respects comply with any standard that limits the trustee's authority to make distributions from the first trust . . . ." § 3528(a).

[11] § 3528(a).

[12] § 3528(a).

[13] § 3528(a)(3).

[14] Section 3314 limits a fiduciary's power to make distributions to himself or herself to avoid unintended gift and estate tax issues. In part, the statute prohibits a fiduciary from exercising: "(1) The power to make discretionary distributions of either principal or income to or for the benefit of the fiduciary, the fiduciary's estate, the creditors of the fiduciary, or the creditors of the fiduciary's estate unless the power is either: a. Limited by an ascertainable standard relating to the fiduciary's health, education, support, or maintenance within the meaning of 26 U.S.C. §§ 2041 (relating to powers of appointment) and 2514 (relating to powers of appointment); or b. Exercisable by the fiduciary only in conjunction with another person having a substantial interest in the property subject to the power which is adverse to the interest of the fiduciary within the meaning of 26 U.S.C. § 2041(b)(1)(C)(ii)." § 3314(c)(1).

[15] § 3528(a)(2).

[16] § 3528(c).

[17] § 3528(c).

[18] The trustee is held to the standard of care and the standard of liability applicable to the trustee when making outright distributions. § 3528(e).

[19] "This section shall be available to any trust that is administered in this State." § 3528(f).

[20] § 3528(a).