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NEW YORK[1]

State Decanting Summary[2]

STATUTORY HISTORY	
Statutory citation	N.Y. EST. POWERS & TRUSTS § 10-6.6
Effective Date	7/24/92
Amendment Date(s)	8/17/11; 11/13/13
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	*Unlimited discretion*: Yes, unlimited discretion to invade principal[3]
	Limited discretion: Yes, power to invade principal without unlimited discretion[4]
2. Limitation on trustee who may decant?	Yes[5]
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No[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?	*Unlimited discretion*: No[10]
	Limited discretion: No[11]
7. May remainder beneficiaries' interests be accelerated?	No[12]
8. New and old trust require same distribution standard?	*Unlimited discretion*: Presumably no
	Limited discretion: Yes, but not required during extended term when new trust has longer term length than old trust[13]
9. May trustee grant a power of appointment in new trust?	*Unlimited discretion*: Yes[14]
	Limited discretion: Yes[15]
10. Must new trust grant identical power of appointment as old trust?	*Unlimited discretion*: Yes, except for a grant of a broad special POA[16]
	Limited discretion: Yes[17]
11. Supplemental needs trust exception?	Yes[18]
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[19]
13. Charitable deduction savings provision?	Yes[20]
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b)[21]; 2642(c)[22]; Catch-all[23]
16. Non-grantor trust to grantor trust conversion permitted?	Silent[24]
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes[25]
18. May trustee increase trustee commission?	No, unless the court approves[26]
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes[27]
21. Is decanting prohibited if a beneficiary objects?	No[28]
22. Court approval required to decant?	No[29]
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes[30]
24. Provision that trustee has no duty to consider decanting?	Yes[31]
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes[32]
MISCELLANEOUS	
27. Other unique considerations?	No

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NEW YORK STATUTE
N.Y. EST POWERS & TRUSTS § 10-6.6

§ 10-6.6 Exercise of a power of appointment; effect when more extensive or less extensive than authorized; trustee's authority to invade principal in trust

(a) An exercise of a power of appointment is not void because its exercise is:

(1) More extensive than was authorized but is valid to the extent authorized by the instrument creating the power.

(2) Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.

(b) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).

(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (c) of section 10-3.4 of this article (including a presently exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of the invaded trust.

(2) If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.

(4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.

(c) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.

(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.

(3) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of such class.

(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.

(d) An exercise of the power to invade trust principal under paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of this article.

(e) The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

(f) If an authorized trustee has unlimited discretion to invade the principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (b) of this section.

(g) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (b) and (c) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.

(h) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(i) Unless the authorized trustee provides otherwise:

(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and

(2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.

(j) The exercise of the power to appoint to an appointed trust under paragraph (b) or (c) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date.

(1) An authorized trustee may exercise the power authorized by paragraphs (b) and (c) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.

(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed

trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.

(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.

(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (b) or (c) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.

(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.

(k) This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.

(1) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (b) or (c) of this section.

(m) A power authorized by paragraph (b) or (c) of this section may be exercised, subject to the provisions of paragraph (h) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under paragraph (b) or (c) of this section.

(n) An authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to effect any of the following:

(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (b) or (c) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-1.12 of this chapter;

(2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;

(3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section unless a court having jurisdiction over the trust specifies otherwise;

(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or

(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the internal revenue code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the internal revenue code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the internal revenue code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.

(o) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section.

(p) An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power.

(q) (1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to change the provisions regarding the determination of the compensation of any trustee; the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.

(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (b) or (c) of this section.

(r) Unless the invaded trust expressly provides otherwise, this section applies to:

(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.

(s) For purposes of this section:

(1) The term “appointed trust” means an irrevocable trust which receives principal from an invaded trust under paragraph (b) or (c) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust. For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be executed and acknowledged by the person establishing such trust shall be deemed satisfied by the execution and acknowledgment of the trustee of the appointed trust.

(2) The term “authorized trustee” means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).

(3) References to sections of the “internal revenue code” refer to the United States internal revenue code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and also refer to corresponding provisions of state law.

(4) The term “current beneficiary or beneficiaries” means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute

principal at the time of the exercise of the power, provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.

(5) The term "invade" shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

(6) The term "invaded trust" means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (b) or (c) of this section.

(7) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act.

(8) The term "principal" shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

(9) The term "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.

(10) The creator shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee's authority to pay trust principal to the creator pursuant to section 7-1.1 of this chapter or by reason of the trustee's authority under the trust instrument or any other provision of law to pay or reimburse the creator for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities.

(t) Cross-reference. For the exercise of the power under paragraph (b) or (c) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7 of this article.

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[1] Reviewed by Pamela Ehrenkranz 8/19/13.

[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] "An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries)." § 10-6.6(b).

[4] "An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the

appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust." § 10-6.6(c).

[5] The term "authorized trustee" excludes the creator of the trust and a beneficiary to whom income or principal must be paid or who is or will become eligible to receive a distribution. § 10-6.6(s)(2).

[6] § 10-6.6(n)(1).

[7] § 10-6.6(n)(1), if currently exercisable only.

[8] The current beneficiaries may be "one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries)." § 10-6.6(b).

[9] § 10-6.6(c).

[10] The successor and remainder beneficiaries of the appointed trust shall be one, more than one or all of the successor and remainder beneficiaries of such invaded trust. § 10-6.6(b).

[11] The successor and remainder beneficiaries of the appointed trust must be the same as the successor and remainder beneficiaries of the invaded trust. § 10-6.6(c).

[12] Only current beneficiaries of the invaded trust can be current beneficiaries of the appointed trust. 10-6.6(b). The interest of an income beneficiary (who is not a principal beneficiary), however, may be continued in the appointed trust. § 10-6.6(s)(4).

[13] The appointed trust must "include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust." § 10-6.6(c)(1). If the appointed trust has a longer term than the invaded trust, however, after the invaded trust's original term, the appointed trust may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term. § 10-6.6(c)(2).

[14] § 10-6.6(b)(1).

[15] "[I]f the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust." § 10-6.6(c)(4).

[16] It is not necessary, however, to include a power of appointment that is in the invaded trust. "If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust." § 10-6.6(b)(3). "If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse." § 10-6.6(b)(2).

[17] § 10-6.6(c)(4).

[18] § 10-6.6(n)(1).

[19] § 10-6.6(n)(5).

[20] § 10-6.6(n)(5).

[21] § 10-6.6(n)(5).

[22] § 10-6.6(n)(5).

[23] "An authorized trustee may not exercise a power authorized by paragraph (b) or (c) . . . [t]o jeopardize . . . any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code." § 10-6.6(n)(5).

[24] "The 2011 Recommendation of the Surrogate's Court Advisory Committee states: 'There is nothing contained in the proposed provision that precludes the authorized trustee from paying assets from a non-grantor trust to a grantor trust.'" N.Y. EST. POWERS & TRUSTS § 10-6.6, 2011 Recommendation of the Surrogate's Court Advisory Committee.

[25] "An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power . . . ." § 10-6.6(p). Sections 9-1.1, 10-8.1 and 10-8.2 discuss the rule against perpetuities.

[26] § 10-6.6(q)(1).

[27] Thirty days' notice is required to the creator, if living, to any person having the right to remove or replace the trustee and to any persons interested in the invaded trust and the appointed trust. § 10-6.6(j).

[28] § 10-6.6(j)(1).

[29] § 10-6.6(j)(1).

[30] "An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances." § 10-6.6(h).

[31] § 10-6.6(l).

[32] "Unless the invaded trust expressly provides otherwise, this section applies to: (1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and (2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust." §10-6.6(r).