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NEW HAMPSHIRE[1]

State Decanting Summary[2]

STATUTORY HISTORY	
Statutory citation	N.H. REV. STAT. ANN. § 564-B:4-418
Effective Date	9/9/08
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion to make distributions[3]
2. Limitation on trustee who may decant?	Yes[4]
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust[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?	Silent
8. New and old trust require same distribution standard?	No, with exceptions[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?	Presumably no
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[11]
13. Charitable deduction savings provision?	Yes[12]
14. Beneficiary/trustee savings provision?	Yes[13]
15. Other tax savings provisions?	2503(b)[14]
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	No
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	No, except to charitable beneficiary[15]
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[16]
24. Provision that trustee has no duty to consider decanting?	Yes[17]
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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NEW HAMPSHIRE STATUTE
N.H. REV. STAT. ANN. § 564-B:4-418

564-B:4-418 Trustee's Authority to Decant Trust. –

(a) Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the "first trust"') may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of one or more of those beneficiaries (the "second trust").

(b) Notwithstanding the provisions of paragraph (a), the trustee may not decant property of the first trust in favor of the second trust under any of the following circumstances:

(1) the second trust includes a beneficiary that is not a beneficiary of the first trust. For purposes of this subparagraph, a permissible appointee of a power of appointment held by a beneficiary of the second trust is not considered to be a beneficiary of the second trust;

(2) the exercise of the power to decant will reduce any current fixed income interest, annuity interest, or unitrust interest of a beneficiary of the first trust;

(3) a contribution to the first trust qualified for a marital or charitable deduction for federal or state income, gift, or estate tax purposes or qualified for a gift tax exclusion for federal or state gift tax purposes, while the terms of the second trust include a provision which, if included in the terms of the first trust, would have prevented the first trust from qualifying for the deduction or exclusion;

(4) the property is subject to a presently exercisable power of withdrawal held by a beneficiary of the first trust; or

(5) under the terms of the second trust:

(A) discretionary distributions may be made to a beneficiary or among a group of beneficiaries of the first trust;

(B) the distributions are not limited by an ascertainable standard; and

(C) the beneficiary or group of beneficiaries has the power to remove and replace the trustee of the second trust with the beneficiary or a member of the group of beneficiaries or with a trustee that is related or subordinate to the beneficiary or a member of the group of beneficiaries (as defined in section 672(c) of the Internal Revenue Code).

(c) Notwithstanding the provisions of paragraph (a), a trustee who is a beneficiary of the first trust may not exercise the authority to appoint property of the first trust in favor of the second trust under any of the following circumstances:

(1) under the terms of the first trust or pursuant to the law governing the administration of the first trust:

(A) such trustee of the first trust does not have the discretion to make or participate in making distributions to himself or herself;

(B) such trustee's discretion to make or participate in making distributions to himself or herself is limited by an ascertainable standard; or

(C) such trustee's discretion to make or participate in making distributions to himself or herself is exercisable only with the consent of a cotrustee or another person holding an adverse interest; while under the terms of the second trust, such trustee's discretion to make or participate in making distributions to himself or herself is not limited by an ascertainable standard and is exercisable without the consent of a cotrustee or another person holding an adverse interest; or

(2) under the terms of the first trust or pursuant to the law governing the administration of the first trust, such trustee of the first trust does not have the discretion to make or participate in making distributions in a manner that will discharge such trustee's legal support obligations, while under the terms of the second trust, such trustee's discretion is not so limited.

(d) The trustee of the first trust shall notify in writing the director of charitable trusts of a proposed appointment in favor of a second trust at least 30 days in advance of the proposed appointment if, at the time the appointment is being proposed:

(1) at least one charitable organization has the rights of a qualified beneficiary of the first trust; or

(2) the director of charitable trusts has the rights of a qualified beneficiary of the first trust.

(e) This section does not abrogate the trustee's duty under RSA 564-B:8-801.

(f) This section does not impose on a trustee a duty to exercise a power to decant in favor of another trust or to consider exercising a power to decant in favor of another trust.

(g) A power to decant is not a power to amend the trust. Accordingly, a trustee is not prohibited from decanting property in favor of another trust solely because the first trust is irrevocable or the terms of the first trust provide that it may not be amended.

(h) A trustee's authority to decant property to another trust under this section is not limited or prohibited by a spendthrift provision in the first trust.

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[1] Reviewed by Michael R. Conway and John P.C. Duncan 10/8/12.

[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] "Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the 'first trust') may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of one or more of those beneficiaries (the 'second trust')." § 564-B:4-418(a).

[4] An interested trustee may decant only to a second trust that imposes an ascertainable standard on a trustee's distributions to herself and requires the consent of a co-trustee or adverse party. The second trust must also retain any restrictions on distributions that discharge such trustee's legal support obligations. § 564-B:4-418(c).

[5] § 564-B:4-418(b)(2).

[6] § 564-B:4-418(b)(4).

[7] "Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the 'first trust') may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of *one or more of those beneficiaries* (the 'second trust')." § 564-B:4-418(a) (emphasis added).

[8] "Unless the terms of the trust expressly provide otherwise, a trustee with the discretion to make distributions to or for the benefit of one or more beneficiaries of a trust (the 'first trust') may exercise that discretion by appointing the property subject to that authority in favor of another trust for the benefit of one or more of *those* beneficiaries (the 'second trust')." § 564-B:4-418(a) (emphasis added). Section 564-B:1-103(2) defines "beneficiary" as a person that "(A) has a present or future beneficial interest in a trust, vested or contingent; or (B) in a capacity other than that of trustee, holds a power of appointment over trust property."

[9] The second trust may be required to limit the standard to an ascertainable standard if an interested trustee is decanting or if a beneficiary has a power to remove and replace the trustee with the beneficiary or a related or subordinate party. § 564-B:4-418(b)(5); § 564-B:4-418(c).

[10] While the statute does not expressly allow for the granting of a power of appointment in the new trust, the language in Section 564-B:4-418(b)(1) indicates that granting a new power of appointment in the new trust is possible. Specifically, the Section provides that "a permissible appointee of a power of appointment held by a beneficiary of the second trust is not considered to be a beneficiary of the second trust[.]" § 564-B:4-418(b)(1). Because it discusses permissible appointees of a power of appointment, the right to grant a power of appointment can be assumed.

[11] § 564-B:4-418(b)(3).

[12] § 564-B:4-418(b)(3).

[13] An interested trustee may decant only to a second trust that imposes an ascertainable standard on a trustee's distributions to herself and requires the consent of a co-trustee or adverse party. The second trust must also retain any restrictions on distributions that discharge such trustee's legal support obligations. § 564-B:4-418(c). In addition, the statute protects a beneficiary who may remove and replace the trustee with the beneficiary or a related or subordinate party if distributions are not restricted to an ascertainable standard. § 64-B:4-418(b)(5).

[14] § 564-B:4-418(b)(3).

[15] § 564-B:4-418(d).

[16] "This section does not abrogate the trustee's duty under RSA 564-B:8-801." § 564-B:4-418(e). Section 564-B:8-801 sets forth general fiduciary duties.

[17] § 564-B:4-418(f).