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NORTH CAROLINA[1]

State Decanting Summary[2]

STATUTORY HISTORY	
Statutory citation	N.C. GEN. STAT. § 36C-8-816.1
Effective Date	10/1/09
Amendment Date(s)	7/20/10; 6/12/13
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, to distribute 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?	No, as to income, annuity or unitrust interests in effect[5]
4. May new trust eliminate beneficiary's withdrawal rights?	No[6]
5. Must new and old trust beneficiaries be identical?	*Unlimited discretion*: No[7] *Limited discretion*: Yes[8]
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	No[9]
7. May remainder beneficiaries' interests be accelerated?	No[10]
8. New and old trust require same distribution standard?	*Unlimited discretion*: No[11] *Limited discretion*: Yes[12]
9. May trustee grant a power of appointment in new trust?	Yes[13]
10. Must new trust grant identical power of appointment as old trust?	No[14]
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[15]
13. Charitable deduction savings provision?	Yes[16]
14. Beneficiary/trustee savings provision?	Yes[17]
15. Other tax savings provisions?	2503(c)[18]; Delaware tax trap[19]
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes for power of alienation[20]
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes[21]
21. Is decanting prohibited if a beneficiary objects?	No, but beneficiary may seek the court's disapproval[22]
22. Court approval required to decant?	No, but may seek court approval or disapproval[23]
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes[24]
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Court appointing special fiduciary provision[25]

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NORTH CAROLINA STATUTE
N.C. GEN. STAT. § 36C-8-816.1

§ 36C-8-816.1. Trustee's special power to appoint to a second trust.

(a) For purposes of this section, the following definitions apply:

(1) Current beneficiary. – A person who is a permissible distributee of trust income or principal.

(2) Original trust. – A trust established under an irrevocable 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 of the trust.

(3) Second trust. – A trust established under an irrevocable trust instrument, the current beneficiaries of which are one or more of the current beneficiaries of the original trust. The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument.

(b) A 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 special 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 all of the following:

(1) The beneficiaries of the second trust may include only beneficiaries of the original trust.

(2) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust.

(3) The terms of the second trust may not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the original trust if that interest has come into effect with respect to the beneficiary.

(4) 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.

(5) If contributions to the original trust have been excluded from the gift tax by the application of section 2503(b) and section 2503(c) of the Internal Revenue Code, then 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.

(6) If any beneficiary of the original trust has a power of withdrawal over trust property, then either:

a. The terms of the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or

b. Sufficient trust property must remain in the original trust to satisfy the outstanding power of withdrawal.

(7) If a trustee of an original trust exercises a power to distribute principal or income that is subject to an ascertainable standard by appointing property to a second trust, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same current beneficiaries to whom such distribution could be made in the original trust.

(8) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income 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 or second trust. The power of appointment conferred upon a beneficiary shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed.

(d) A trustee may not exercise the power to appoint principal or income under subsection (b) of this section if the trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust, then the court may appoint a special fiduciary with authority to exercise the power to appoint principal or income under subsection (b) of this section.

(e) The exercise of the power to appoint principal or income under subsection (b) of this section:

(1) 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

(2) Shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed; and

(3) Is not prohibited by a spendthrift provision or by a provision in the original trust instrument that prohibits amendment or revocation of the trust.

(f) To effect the exercise of the power to appoint principal or income under subsection (b) of this section, all of the following shall apply:

(1) The exercise of the power to appoint shall be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including 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.

(2) The trustee shall give written notice to all qualified beneficiaries of the original trust, at least 60 days prior to the effective date of the exercise of the power to appoint, of the trustee's intention to exercise the power. The notice shall include a copy of the instrument described in subdivision (1) of this subsection.

(3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee’s power to appoint principal or income shall be exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.

(4) The trustee’s notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee’s power to appoint and bring an action for breach of trust seeking appropriate relief as provided by G.S. 36C-10-1001.

(g) Nothing in this section shall be construed to create or imply a duty of the trustee to exercise the power to distribute principal or income, and no inference of impropriety shall be made as a result of a trustee not

exercising the power to appoint principal or income conferred under subsection (b) of this section. Nothing in this section shall be construed to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the original trust or under any other section of this Chapter or under another provision of law or under common law.

(h) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to a second trust pursuant to subsection (b) of this section. (2009-318, s. 1; 2010-97, s. 5(b).)

CH1 7747868v.2 August 22, 2013

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[1] Reviewed by Graham D. Holding, Jr., 8/21/13.

[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] "A 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." § 36C-8-816.1(b).

[4] "A trustee may not exercise the power to appoint principal or income under subsection (b) of this section if the trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust, then the court may appoint a special fiduciary with authority to exercise the power to appoint principal or income under subsection (b) of this section." § 36C-8-816.1(d).

[5] "The terms of the second trust may not reduce any fixed income, annuity or unitrust interest of a beneficiary in the assets of the original trust if that interest has come into effect with respect to the beneficiary." § 36C-8-816.1(c)(3).

[6] § 36C-8-816.1(c)(6).

[7] A trustee may decant in favor of one or more current beneficiaries of the original trust. § 36C-8-816.1(b).

[8] "If a trustee of an original trust exercises a power to distribute principal or income that is subject to an ascertainable standard by appointing property to a second trust, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same current beneficiaries to whom such distribution could be made in the original trust." § 36C-8-816.1(c)(7).

[9] While § 36C-8-816.1(b) speaks of decanting in favor of "current beneficiaries," § 36C-8-816.1(c) states that the beneficiaries of the second trust may include only "beneficiaries" of the first trust.

[10] § 36C-8-816.1(c)(2).

[11] § 36C-8-816.1(b).

[12] § 36C-8-816.1(c)(7).

[13] § 36C-8-816.1(c)(8).

[14] § 36C-8-816.1(c)(8).

[15] § 36C-8-816.1(c)(4).

[16] § 36C-8-816.1(c)(4).

[17] A trustee may not exercise the power to appoint principal or income under subsection (b) of this section if the trustee is a beneficiary of the original trust. § 36C-8-816.1(d).

[18] § 36C-8-816.1(c)(5).

[19] "The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income 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 or second trust. The power of appointment conferred upon a beneficiary shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed." § 36C-8-816(c)(8). G.S. 41-23 is the North Carolina General Statute governing the suspension of power of alienation for trusts. It also repealed the rule against perpetuities as applied to trusts.

[20] "The exercise of the power to appoint principal or income under subsection (b) of this section . . . (2) Shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed;" § 36C-8-816.1(e)(2). G.S. 41-23 is the North Carolina statute governing the suspension of the power of alienation for trusts. It also repealed the rule against perpetuities as applied to trusts.

[21] Sixty days' notice to qualified beneficiaries is required. § 36C-8-816.1(f)(2).

[22] The statute expressly allows a trustee or beneficiary to seek the court's approval (or disapproval) of an action to decant. *See* § 36C-8-816.1(h) ("A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to a second trust pursuant to subsection (b) of this section."). The statute additionally permits an objecting beneficiary to bring an action for breach of trust if the beneficiary chooses to object to the decanting. *See* § 36C-8-816.1(f)(4).

[23] § 36C-8-816.1(b). The statute allows a trustee or beneficiary to seek court approval (or disapproval) of an action to decant. *See* § 36C-8-816.1(h) ("A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to a second trust pursuant to subsection (b) of this section.").

[24] § 36C-8-816.1(g).

[25] § 36C-8-816.1(d).