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NEVADA[1]

State Decanting Summary[2]

STATUTORY HISTORY	
Statutory citation	NEV. REV. STAT. § 163.556
Effective Date	10/1/09
Amendment Date(s)	10/1/11
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretion or authority to distribute income or principal[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, with restrictions[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?	Silent
8. New and old trust require same distribution standard?	Yes, in certain circumstances[9]
9. May trustee grant a power of appointment in new trust?	Yes, but only a general power[10]
10. Must new trust grant identical power of appointment as old trust?	Presumably no[11]
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[12]
13. Charitable deduction savings provision?	Yes[13]
14. Beneficiary/trustee savings provision?	Yes[14]
15. Other tax savings provisions?	2503(b-c)[15]
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, notice *may* be provided[16]
21. Is decanting prohibited if a beneficiary objects?	No
22. Court approval required to decant?	No, but may seek court approval[17]
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes[18]
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Boomerang provision[19]

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NEVADA STATUTE
NEV. REV. STAT. § 163.556

NRS 163.556 Circumstances under which trustee is authorized to appoint property of one testamentary trust or irrevocable trust to another trust.

1. Unless the terms of a testamentary instrument or irrevocable trust provide otherwise, a trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust for the benefit of one or more of those beneficiaries.

2. Notwithstanding subsection 1, a trustee may not appoint property of the original trust to a second trust if:

(a) The second trust includes a beneficiary who is not a beneficiary of the original trust. For purposes of this paragraph, a permissible appointee of a power of appointment exercised by a beneficiary of the second trust is not considered a beneficiary of the second trust.

(b) Appointing the property will reduce any current fixed income interest, annuity interest or unitrust interest of a beneficiary of the original trust. As used in this paragraph, "unitrust" has the meaning ascribed to it in NRS 164.700.

(c) A contribution made to the original trust qualified for a marital or charitable deduction for federal or state income, gift or estate taxes or qualified for a gift tax exclusion for federal or state tax purposes and the terms of the second trust include a provision which if included in the original trust would prevent the original trust from qualifying for the tax deduction or exclusion.

(d) The property to be appointed is subject to a power of withdrawal which is held by a beneficiary of the original trust and may be executed at the time of the proposed appointment, unless after the exercise of such appointment, the beneficiary of the original trust's power of withdrawal is unchanged with respect to the trust property.

(e) Property specifically allocated for one beneficiary of the original trust is no longer allocated for that beneficiary under either or both trusts, unless the beneficiary consents in writing.

(f) Property held for the benefit of one or more beneficiaries under both the original and the second trust has a lower value than the value of the property held for the benefit of the same beneficiaries under only the original trust, unless:

(1) The benefit provided is limited to a specific amount or periodic payments of a specific amount; and

(2) The value of the property held in either or both trusts for the benefit of one or more beneficiaries is actuarially adequate to provide the benefit.

(g) Under the second trust:

(1) Discretionary distributions may be made by the trustee to a beneficiary or group of beneficiaries of the original trust;

(2) Distributions are not limited by an ascertainable standard; and

(3) A beneficiary or group of beneficiaries has the power to remove and replace the trustee of the second trust with a beneficiary of the second trust or with a trustee that is related to or subordinate to a beneficiary of the second trust.

(h) A contribution made to the original trust qualified for a gift tax exclusion as described in section 2503(b) of the Internal Revenue Code, 26 U.S.C. § 2503(b), by reason of the application of section 2503(c) of the Internal Revenue Code, 26 U.S.C. § 2503(c), unless the second trust provides that the beneficiary's remainder interest must vest not later than the date upon which such interest would have vested under the terms of the original trust.

3. Notwithstanding the provisions of subsection 1, a trustee who is a beneficiary of the original trust may not exercise the authority to appoint property of the original trust to a second trust if:

(a) Under the terms of the original trust or pursuant to law governing the administration of the original trust:

(1) The trustee does not have discretion to make distributions to himself or herself;

(2) The trustee's discretion to make distributions to himself or herself is limited by an ascertainable standard, and under the terms of the second trust, the trustee's discretion to make distributions to himself or herself is not limited by the same ascertainable standard; or

(3) The trustee's discretion to make distributions to himself or herself can only be exercised with the consent of a cotrustee or a person holding an adverse interest and under the terms of the second trust the trustee's discretion to make distributions to himself or herself is not limited by an ascertainable standard and may be exercised without consent; or

(b) Under the terms of the original trust or pursuant to law governing the administration of the original trust, the trustee of the original trust does not have discretion to make distributions that will discharge the trustee's legal support obligations but under the second trust the trustee's discretion is not limited.

4. The provisions of subsection 3 do not prohibit a trustee who is not a beneficiary of the original trust from exercising the authority to appoint property of the original trust to a second trust pursuant to the provisions of subsection 1.

5. Before appointing property pursuant to subsection 1, a trustee may give notice of a proposed action pursuant to NRS 164.725 or may petition a court for approval pursuant to NRS 153.031, 164.015 or 164.725. Any notice of a proposed action or a petition for a court's approval must include the trustee's opinion of how the appointment of property will affect the trustee's compensation and the administration of other trust expenses.

6. The trust instrument of the second trust may:

(a) Grant a power of appointment to one or more of the beneficiaries of the second trust who are proper objects of the exercise of the power in the original trust. The power of appointment includes, without limitation, the power to appoint trust property to the holder of the power, the holder's creditors, the holder's estate, the creditors of the holder's estate or any other person.

(b) Provide that, at a time or occurrence of an event specified in the trust instrument, the remaining trust assets in the second trust must be held for the beneficiaries of the original trust upon terms and conditions that are substantially identical to the terms and conditions of the original trust.

7. The power to appoint the property of the original trust pursuant to subsection 1 must be exercised by a writing, signed by the trustee and filed with the records of the trust.

8. The exercise of the power to invade principal of the original trust pursuant to subsection 1 is considered the exercise of a power of appointment, other than power to appoint the property to the trustee, the trustee's creditors, the trustee's estate or the creditors of the trustee's estate and the provisions of NRS 111.1031 apply to such power of appointment.

9. The provisions of this section do not abridge the right of any trustee who has the power to appoint property which arises under any other law.

10. The provisions of this section do not impose upon a trustee a duty to exercise the power to appoint property pursuant to subsection 1.

11. The power to appoint property to another trust pursuant to subsection 1 is not a power to amend the trust and a trustee is not prohibited from appointing property to another trust pursuant to subsection 1 if the original trust is irrevocable or provides that it may not be amended.

12. A trustee's power to appoint property to another trust pursuant to subsection 1 is not limited by the existence of a spendthrift provision in the original trust.

13. A trustee exercising any power granted pursuant to this section may designate himself or herself or any other person permitted to act as a trustee as the trustee of the second trust.

14. The trustee of a second trust, resulting from the exercise of the power to appoint property to another trust pursuant to subsection 1, may also exercise the powers granted pursuant to this section with respect to the second trust.

15. As used in this section, "ascertainable standard" means a standard relating to an individual's health, education, support or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code, 26 U.S.C. § 2041(b)(1)(A) or 2514(c)(1), and any regulations of the United States Treasury promulgated thereunder.

(Added to NRS by 2009, 790; A 2011, 1467)

CH1 7747022v.1 June 16, 2013

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[1] Reviewed by Layne Rushforth 9/5/12.

[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 a testamentary instrument or irrevocable trust provide otherwise, a trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust for the benefit of one or more of those beneficiaries." § 163.556(1).

[4] An interested trustee may not decant if under the original trust the trustee does not have discretion to make distributions to himself or herself. § 163.556(3)(a)(1). If an interested trustee decants, generally the second trust must impose the same limits on the trustee's ability to make distributions to herself as the original trust. § 163.556(3).

[5] § 163.556(2)(b).

[6] § 163.556(2)(d).

[7] "[A] trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust for the benefit of *one or more of those beneficiaries*." § 163.556(1) (emphasis added). Decanting, however, is not permitted if: "property specifically allocated for one beneficiary of the original trust is no longer allocated for that beneficiary under either or both trusts, unless the beneficiary consents in writing," or "property held for the benefit of one or more beneficiaries under both the original and the second trust has a lower value than the value of the property held for the benefit of the same beneficiaries under only the original trust, unless: (1) The benefit provided is limited to a specific amount or periodic payments of a specific amount; and (2) The value of the property held in either or both trusts for the benefit of one or more beneficiaries is actuarially adequate to provide the benefit." § 163.556(2)(e); § 163.556(2)(f).

[8] § 163.556(1); § 163.556(6)(b).

[9] If there is an interested trustee, the distribution standard for making distributions to the trustee may need to remain the same. § 163.556(3).

[10] "The power of appointment includes, without limitation, the power to appoint trust property to the holder of the power, the holder's creditors, the holder's estate, the creditors of the holder's estate or any other person." § 163.556(6)(a).

[11] § 163.556(6)(a).

[12] § 163.556(2)(c).

[13] § 163.556(2)(c).

[14] If there is an interested trustee, generally the second trust must retain any restrictions on the trustee making distributions to herself. § 163.556(3). Further, if distributions are not limited by an ascertainable standard, the second trust cannot allow a beneficiary to replace the trustee with a beneficiary or a related or subordinate party. § 163.556(2)(g).

[15] § 163.556(2)(h).

[16] § 163.556(5).

[17] § 163.556(5).

[18] § 163.556(10).

[19] § 163.556(6)(b).