SIDLEY AUSTIN LLP
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TEXAS[1]
State Decanting Summary[2]

STATUTORY HISTORY	
Statutory citation	H.B. 2913 (will be section 112.071 - 112.087, Texas Property Code)
Effective Date	09/01/13
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	*Unlimited discretion:* Full discretion not limited in any manner[3]
	Limited discretion: Limited power to distribute principal[4]
2. Limitation on trustee who may decant?	No, but interested trustee limited to an ascertainable standard[5]
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity or unitrust[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:* Probably not[10]
	Limited discretion: No[11]
7. May remainder beneficiaries' interests be accelerated?	*Unlimited discretion:* Presumably yes[12]
	Limited discretion: No[13]
8. New and old trust require same distribution standard?	*Unlimited discretion:* Presumably no[14]
	Limited discretion: Yes[15]
9. May trustee grant a power of appointment in new trust?	*Unlimited discretion:* Yes[16]
	Limited discretion: Yes; must be identical[17]
10. Must new trust grant identical power of appointment as old trust?	*Unlimited discretion:* No[18]
	Limited discretion: Yes[19]
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[20]
13. Charitable deduction savings provision?	Yes[21]
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b)[22], 2642(c)[23], S corp[24], 401(a)(9)[25], catch-all[26]
16. Non-grantor trust to grantor trust conversion permitted?	Yes[27]
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes[28]
18. May trustee increase trustee commission?	Sometimes[29]
19. Other restrictions	May not materially impair beneficiary rights[30]; trustee liability[31]; trustee removal[32]
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Yes, 30 days[33]
21. Is decanting prohibited if a beneficiary objects?	No[34]
22. Court approval required to decant?	No, unless attorney general objects[35]
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes[36]
24. Provision that trustee has no duty to consider decanting?	Yes[37]
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	Yes[38]
MISCELLANEOUS	
27. Other unique considerations?	Later discovered assets[39]; codification of common law[40]

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TEXAS H.B. No. 2913

SUBCHAPTER D. DISTRIBUTION OF TRUST PRINCIPAL IN FURTHER TRUST

Sec. 112.071. DEFINITIONS. In this subchapter:

(1) "Authorized trustee" means a person, other than the settlor, who has authority under the terms of a first trust to distribute the principal of the trust to or for the benefit of one or more current beneficiaries.

(2) "Charity" means a charitable entity or a charitable trust, as those terms are defined by Section 123.001.

(3) "Current beneficiary," with respect to a particular date, means a person who is receiving or is eligible to receive a distribution of income or principal from a trust on that date.

(4) "First trust" means an existing irrevocable inter vivos or testamentary trust all or part of the principal of which is distributed in further trust under Section 112.072 or 112.073.

(5) "Full discretion" means the power to distribute principal to or for the benefit of one or more of the beneficiaries of a trust that is not limited or modified by the terms of the trust in any way, including by restrictions that limit distributions to purposes such as the best interests, welfare, or happiness of the beneficiaries.

(6) "Limited discretion" means a limited or modified power to distribute principal to or for the benefit of one or more beneficiaries of a trust.

(7) "Presumptive remainder beneficiary," with respect to a particular date, means a beneficiary of a trust on that date who, in the absence of notice to the trustee of the exercise of the power of appointment and assuming that any other powers of appointment under the trust are not exercised, would be eligible to receive a distribution from the trust if:

(A) the trust terminated on that date; or

(B) the interests of all beneficiaries currently eligible to receive income or principal from the trust ended on that date without causing the trust to terminate.

(8) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates and includes income of the trust that, at the time of the exercise of a power of distribution under Section 112.072 or 112.073, is not currently required to be distributed.

(9) "Second trust" means any irrevocable trust to which principal is distributed under Section 112.072 or 112.073.

(10) "Successor beneficiary" means a beneficiary other than a current or presumptive remainder beneficiary. The term does not include a potential appointee under a power of appointment held by a beneficiary.

Sec. 112.072. DISTRIBUTION TO SECOND TRUST: TRUSTEE WITH FULL DISCRETION.

(a) An authorized trustee who has the full discretion to distribute the principal of a trust may distribute all or part of the principal of that trust in favor of a trustee of a second trust for the benefit of one or more current beneficiaries of the first trust who are eligible to receive income or principal from the trust and for the benefit of one or more successor or presumptive remainder beneficiaries of the first trust who are eligible to receive income or principal from the trust.

(b) The authorized trustee may, in connection with the exercise of a power of distribution under this section, grant a power of appointment, including a currently exercisable power of appointment, in the second trust to one or more of the current beneficiaries of the first trust who, at the time the power of appointment is granted, is eligible to receive the principal outright under the terms of the first trust.

(c) If the authorized trustee grants a power of appointment to a beneficiary under Subsection (b), the class of permissible appointees in whose favor the beneficiary may appoint under that power may be broader or different than the current, successor, and presumptive remainder beneficiaries of the first trust.

(d) If the beneficiaries of the first trust are described as a class of persons, the beneficiaries of the second trust may include one or more persons who become members of that class after the distribution to the second trust.

(e) The authorized trustee shall exercise a power to distribute under this section in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.

Sec. 112.073. DISTRIBUTION TO SECOND TRUST: TRUSTEE WITH LIMITED DISCRETION.

(a) An authorized trustee who has limited discretion to distribute the principal of a trust may distribute all or part of the principal of that trust in favor of a trustee of a second trust as provided by this section.

(b) The current beneficiaries of the second trust must be the same as the current beneficiaries of the first trust, and the successor and presumptive remainder beneficiaries of the second trust must be the same as the successor and presumptive remainder beneficiaries of the first trust.

(c) The second trust must include the same language authorizing the trustee to distribute the income or principal of the trust that was included in the first trust.

(d) If the beneficiaries of the first trust are described as a class of persons, the beneficiaries of the second trust must include all persons who become members of that class after the distribution to the second trust.

(e) If the first trust grants a power of appointment to a beneficiary of the trust, the second trust must grant the power of appointment to the beneficiary in the second trust, and the class of permissible appointees under that power must be the same as the class of permissible appointees under the power granted by the first trust.

(f) The authorized trustee shall exercise a power of distribution under this section in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.

Sec. 112.074. NOTICE REQUIRED.

(a) An authorized trustee may exercise a power of distribution under Section 112.072 or 112.073 without the consent of the settlor or beneficiaries of the first trust and without court approval if the trustee provides to all of the current beneficiaries and presumptive remainder beneficiaries written notice of the trustee's decision to exercise the power.

(b) For the purpose of determining who is a current beneficiary or presumptive remainder beneficiary entitled to the notice, a beneficiary is determined as of the date the notice is sent. A beneficiary includes a person entitled to receive property under the terms of the first trust.

(c) In addition to the notice required under Subsection (a), the authorized trustee shall give written notice of the trustee's decision to the attorney general if:

(1) a charity is entitled to notice;

(2) a charity entitled to notice is no longer in existence;

(3) the trustee has the authority to distribute trust assets to one or more charities that are not named in the trust instrument; or

(4) the trustee has the authority to make distributions for a charitable purpose described in the trust instrument, but no charity is named as a beneficiary for that purpose.

(d) If the beneficiary has a court-appointed guardian or conservator, the notice required to be given by this section must be given to that guardian or conservator. If the beneficiary is a minor for whom no guardian or conservator has been appointed, the notice required to be given by this section must be given to a parent of the minor.

(e) The authorized trustee is not required to provide the notice to a beneficiary who:

(1) is known to the trustee and cannot be located by the trustee after reasonable diligence;

(2) is not known to the trustee;

(3) waives the requirement of the notice under this section; or

(4) is a descendant of a beneficiary to whom the trustee has given notice if the beneficiary and the beneficiary's ancestor have similar interests in the trust and no apparent conflict of interest exists between them.

(f) The notice required under Subsection (a) must:

(1) include a statement that:

(A) the authorized trustee intends to exercise the power of distribution;

(B) the beneficiary has the right to object to the exercise of the power; and

(C) the beneficiary may petition a court to approve, modify, or deny the exercise of the trustee's power to make a distribution under this subchapter;

(2) describe the manner in which the trustee intends to exercise the power;

(3) specify the date the trustee proposes to distribute the first trust to the second trust;

(4) include the name and mailing address of the trustee;

(5) include copies of the agreements of the first trust and the proposed second trust;

(6) be given not later than the 30th day before the proposed date of distribution to the second trust; and

(7) be sent by registered or certified mail, return receipt requested, or delivered in person, unless the notice is waived in writing by the person to whom notice is required to be given.

Sec. 112.075. WRITTEN INSTRUMENT REQUIRED. A distribution under Section 112.072 or 112.073 must be made by a written instrument that is signed and acknowledged by the authorized trustee and filed with the records of the first trust and the second trust.

Sec. 112.076. REFERENCE TO TRUST TERMS. A reference to the governing instrument or terms of the governing instrument of a trust includes the terms of a second trust to which that trust's principal was distributed under this subchapter.

Sec. 112.077. SETTLOR OF SECOND TRUST.

(a) Except as provided by Subsection (b), the settlor of a first trust is considered to be the settlor of a second trust established under this subchapter.

(b) If a settlor of a first trust is not also the settlor of a second trust into which principal of that first trust is distributed, the settlor of the first trust is considered the settlor of the portion of the second trust distributed to the second trust from that first trust under this subchapter.

Sec. 112.078. COURT-ORDERED DISTRIBUTION.

(a) An authorized trustee may petition a court to order a distribution under this subchapter.

(b) If the authorized trustee receives a written objection to a distribution under this subchapter from a beneficiary before the proposed effective date of the distribution specified in the notice provided to the beneficiary under Section 112.074, the trustee or the beneficiary may petition a court to approve, modify, or deny the exercise of the trustee's power to make a distribution under this subchapter.

(c) If the authorized trustee receives a written objection to the distribution from the attorney general not later than the 30th day after the date the notice required by Section 112.074 was received by the attorney general, the trustee may not make a distribution under Section 112.072 or 112.073 without petitioning a court to approve or modify the exercise of the trustee's power to make a distribution under this subchapter.

(d) In a judicial proceeding under this section, the authorized trustee may present the trustee's reasons for supporting or opposing a proposed distribution, including whether the trustee believes the distribution would enable the trustee to better carry out the purposes of the trust.

(e) The authorized trustee has the burden of proving that the proposed distribution furthers the purposes of the trust, is in accordance with the terms of the trust, and is in the interests of the beneficiaries.

Sec. 112.079. DIVIDED DISCRETION. If an authorized trustee has full discretion to distribute the principal of a trust and another trustee has limited discretion to distribute principal under the trust instrument, the authorized trustee having full discretion may exercise the power to distribute the trust's principal under Section 112.072.

Sec. 112.080. LATER DISCOVERED ASSETS. To the extent the authorized trustee does not provide otherwise:

(1) the distribution of all of the principal of a first trust to a second trust includes subsequently discovered assets otherwise belonging to the first trust and principal paid to or acquired by the first trust after the distribution of the first trust's principal to the second trust; and

(2) the distribution of part of the principal of a first trust to a second trust does not include subsequently discovered assets belonging to the first trust or principal paid to or acquired by the first trust after the distribution of principal from the first trust to the second trust, and those assets or that principal remain the assets or principal of the first trust.

Sec. 112.081. OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST NOT LIMITED. This subchapter may not be construed to limit the power of an authorized trustee to distribute property in further trust under the terms of the governing instrument of a trust, other law, or a court order.

Sec. 112.082. NEED FOR DISTRIBUTION NOT REQUIRED. An authorized trustee may exercise the power to distribute principal to a second trust under Section 112.072 or 112.073 regardless of whether there is a current need to distribute principal under the terms of the first trust.

Sec. 112.083. DUTIES NOT CREATED.

(a) This subchapter does not create or imply a duty for an authorized trustee to exercise a power to distribute principal, and impropriety may not be inferred as a result of the trustee not exercising a power conferred by Section 112.072 or 112.073.

(b) An authorized trustee does not have a duty to inform beneficiaries about the availability of the authority provided by this subchapter or a duty to review the trust to determine whether any action should be taken under this subchapter.

Sec. 112.084. CERTAIN DISTRIBUTIONS PROHIBITED.

(a) Except as provided by Subsection (b), an authorized trustee may not exercise a power to distribute principal of a trust otherwise provided by Section 112.072 or 112.073 if the distribution is expressly prohibited by the terms of the governing instrument of the trust.

(b) A general prohibition of the amendment or revocation of a trust or a provision that constitutes a spendthrift clause does not preclude the exercise of a power to distribute principal of a trust under Section 112.072 or 112.073.

Sec. 112.085. EXCEPTIONS TO POWER OF DISTRIBUTION. An authorized trustee may not exercise a power to distribute principal of a trust under Section 112.072 or 112.073 to:

(1) reduce, limit, or modify a beneficiary's current, vested right to:

(A) receive a mandatory distribution of income or principal;

(B) receive a mandatory annuity or unitrust interest;

(C) withdraw a percentage of the value of the trust; or

(D) withdraw a specified dollar amount from the trust;

(2) materially impair the rights of any beneficiary of the trust;

(3) materially limit a trustee's fiduciary duty under the trust or as described by Section 111.0035;

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

(5) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the distribution power under Section 112.072 or 112.073; or

(6) reduce, limit, or modify in the second trust a perpetuities provision included in the first trust, unless expressly permitted by the terms of the first trust.

Sec. 112.086. TAX-RELATED LIMITATIONS.

(a) The authorized trustee may not distribute the principal of a trust under Section 112.072 or 112.073 in a manner that would prevent a contribution to that trust from qualifying for or that would reduce the exclusion, deduction, or other federal tax benefit that was originally claimed for that contribution, including:

(1) the annual exclusion under Section 2503(b), Internal Revenue Code of 1986;

(2) a marital deduction under Section 2056(a) or 2523(a), Internal Revenue Code of 1986;

(3) the charitable deduction under Section 170(a), 642(c), 2055(a), or 2522(a), Internal Revenue Code of 1986;

(4) direct skip treatment under Section 2642(c), Internal Revenue Code of 1986; or

(5) any other tax benefit for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code of 1986.

(b) Notwithstanding Subsection (a), an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either or both trusts under Sections 671-679, Internal Revenue Code of 1986.

(c) If S corporation stock is held in trust, an authorized trustee may not distribute all or part of that stock under Section 112.072 or 112.073 to a second trust that is not a permitted shareholder under Section 1361(c)(2), Internal Revenue Code of 1986.

(d) If an interest in property that is subject to the minimum distribution rules of Section 401(a)(9), Internal Revenue Code of 1986, is held in trust, an authorized trustee may not distribute the trust's interest in the property to a second trust under Section 112.072 or 112.073 if the distribution would shorten the minimum distribution period applicable to the property.

Sec. 112.087. COMPENSATION OF TRUSTEE. (a) Except as provided by Subsection (b) and unless a court, on application of the authorized trustee, directs otherwise, the trustee may not exercise a power under Section 112.072 or 112.073 solely to change trust provisions regarding the determination of the compensation of any trustee.

(b) An authorized trustee, in connection with the exercise of a power under Section 112.072 or 112.073 for another valid and reasonable purpose, may bring the trustee's compensation into conformance with reasonable limits authorized by state law.

(c) The compensation payable to an authorized trustee of the first trust may continue to be paid to the trustee of the second trust during the term of the second trust and may be determined in the same manner as the compensation would have been determined in the first trust.

(d) An authorized trustee may not receive a commission or other compensation for the distribution of a particular asset from a first trust to a second trust under Section 112.072 or 112.073.

* * * * * * * *

SECTION 8. The legislature intends Subchapter D, Chapter 112, Property Code, as added by this Act, to be a codification of the common law of this state in effect before the effective date of this Act.

SECTION 9.

(a) Except as otherwise expressly provided by a trust, a will creating a trust, or this section, the changes in law made by this Act apply to a trust existing or created on or after September 1, 2013.

(b) For a trust existing on September 1, 2013, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2013.

(c) Section 115.002, Property Code, as amended by this Act, applies only to a court action commenced on or after the effective date of this Act. An action commenced before the effective date of this Act is

governed by the law in effect immediately before that date, and the former law is continued in effect for that purpose.

SECTION 10. This Act takes effect September 1, 2013.

CH1 7730150v.2 July 29, 2013

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[1] Reviewed by Melissa J. Willms 8/4/13.

[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] § 112.072. Full discretion means a power to distribute principal that is "not limited or modified by the terms of the trust in any way, including by restrictions that limit distributions to purposes such as the best interests, welfare, or happiness of the beneficiaries." §112.071(5).

[4] § 112.073. Limited discretion is defined as a "limited or modified power to distribute principal." § 112.071(6).

[5] § 113.029 provides:

> (b) Subject to Subsection (d), and unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply:
>
> (1) a person, other than a settlor, who is a beneficiary and trustee, trustee affiliate, or discretionary power holder of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's, the trustee affiliate's, or the discretionary power holder's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's, the trustee affiliate's, or the discretionary power holder's individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986; and
>
> (2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

[6] § 112.085(1).

[7] § 112.085(1).

[8] If the trustee has unlimited discretion, the power may be exercised in favor of one or more current beneficiaries and one or more successor or presumptive remainder beneficiaries who are eligible to receive income or principal from the trust. § 112.072(a). "Current beneficiary" is defined in § 112.071(3). "Presumptive remainder beneficiary" is defined in § 112.071(7). "Successor beneficiary" is defined in § 112.071(10). Restricting the successor and presumptive remainder beneficiaries only to those "eligible to receive income or principal from the trust" seems to effectively restrict decanting to current beneficiaries.

[9] § 112.073.

[10] The statute seems intended to permit the second trust to include as beneficiaries remainder beneficiaries of the first trust. However, the statute literally includes only remainder beneficiaries "who are eligible to receive income or principal from the trust." § 112.072(a). Arguably, this phrase is superfluous and should be read as "who will be eligible to receive income or principal [when they become current beneficiaries]."

[11] The beneficiaries, including successor and presumptive remainder beneficiaries, must remain the same.

[12] The statute permits the second trust to benefit one or more successor or presumptive remainder beneficiaries and does not limit their interests to remainder interests.

[13] The beneficiaries must remain the same.

[14] The statute does not require the same distribution standard.

[15] The second trust must include the same language authorizing distributions.

[16] § 112.072(b), (c).

[17] § 112.073(e).

[18] § 112.072(b), (c).

[19] § 112.073(e).

[20] § 112.086(a)(2).

[21] § 112.086(a)(3).

[22] § 112.086(a)(1).

[23] § 112.086(a)(4).

[24] § 112.086(c).

[25] § 112.086(d).

[26] § 112.086(a)(5).

[27] § 112.086(b).

[28] § 112.085(6).

[29] Unless the court approves, the decanting may not be for the sole purpose of changing trustee compensation, but if the decanting is for another valid and reasonable purpose, it may bring the trustee's compensation in conformance with reasonable limits authorized by state law. § 112.087.

[30] The decanting may not "materially impair the rights of any beneficiary of the trust" or "materially limit a trustee's fiduciary duty under the trust or as described by Section 111.0035." § 112.085(2), (3). The seemingly broad power to decant granted in § 112.072 to eliminate beneficiaries and change distribution rights if the trustee has unlimited discretion arguably is considerably limited if the rights of a beneficiary cannot be materially impaired.

[31] § 112.085(4).

[32] § 112.085(5).

[33] § 112.074.

[34] A beneficiary has a right to object (§ 112.074(f)(1)(B)). If the trustee receives an objection before the effective date for the decanting, the beneficiary may bring a court action to block the decanting but the decanting may proceed without court approval (§ 112.078(b)) unless the attorney general objects (§ 112.078(c)).

[35] § 112.074(a); § 112.078(c). The trustee may seek court approval. § 112.078(a). Court approval may be required to change trustee compensation. § 112.087.

[36] The trustee must exercise the decanting power "in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries." § 112.072(e); § 112.073(f).

[37] § 112.083.

[38] The application of the decanting statute to trusts in existence on September 1, 2013 is unclear. The Act states that "the changes in law made by this Act apply to a trust 'existing or created on or after September 1, 2013,' " but that for a trust existing on September 1, 2013, the changes in law made by the Act apply "only to an act or omission relating to the trust that occurs on or after September 1, 2013." The Act also states that it is a codification of common law.

[39] § 112.080.

[40] See Section 8 of Act.