

D R A F T
FOR DISCUSSION ONLY

TRUST DECANTING ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

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February 6, 2015

TRUST DECANTING ACT

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TRUST DECANTING ACT

Prefatory Note

The Uniform Trust Decanting Act is promulgated in the midst of a rising tide of state decanting statutes. These statutes represent one of several recent innovations in trust law that seek to make trusts more flexible so that the settlor's material purposes can best be carried out under current circumstances. A decanting statute provides flexibility by statutorily expanding discretion already granted to the trustee to permit the trustee to modify the trust either directly or by distributing its assets to another trust. While some trusts expressly grant the trustee or another person a power to modify or decant the trust, a statutory provision can better describe the power granted, impose limits on the power to protect the beneficiaries and the settlor's intent, protect against inadvertent tax consequences, provide procedural rules for exercising the power and provide for appropriate remedies. While decanting may be permitted in some cases under common law in some states, in many states it is unclear whether common law decanting is permitted, and if it is, the circumstances in which it is permitted and the parameters within which it may be exercised.

The act makes clear that the power to decant is a fiduciary power that must be exercised in accordance with the fiduciary duties of the authorized fiduciary. A fiduciary must administer a trust in good faith, in accordance with its terms (subject to the decanting power) and purposes, and in the interests of the beneficiaries. An exercise of decanting power should be in accordance with the purposes of the first trust. The purpose of decanting is not to disregard the settlor's intent but to modify the trust to effectuate better the settlor's broader purposes or the settlor's probable intent if the settlor had anticipated the circumstances at the time of decanting.

As a fiduciary power, the decanting power may be exercised without consent or approval of the beneficiaries or the court, except in the case of a few specific modifications that may benefit the fiduciary personally. Nonetheless, qualified beneficiaries are entitled to notice and may petition the court if they believe the authorized fiduciary has breached its fiduciary duty. Further, the authorized fiduciary, another fiduciary, a beneficiary or the settlor may petition the court for instructions, approval of an exercise of decanting power, a determination that the authorized fiduciary breached its fiduciary duties or a determination that the attempted decanting is invalid.

Need for Uniformity. Trusts may be governed by the laws of different states for purposes of validity, meaning and effect, and administration. The place in which a trust is administered may move from state to state. It often may be difficult to determine the state in which a trust is administered if a trust has co-trustees domiciled in different states or has a corporate trustee that performs different trust functions in different states. As a result it may sometimes be unclear whether a particular state's decanting statute applies to a trust and sometimes more than one state's decanting statute may apply to a trust. A uniform statute can eliminate conflicts between different state statutes. It can also minimize issues about whether one state will recognize a decanting that occurred under a different state's statute.

Currently there is limited guidance on the income, gift, and generation-skipping transfer tax implications of decanting. A uniform statute may provide common ground for the

1 promulgation of tax guidance.

2 ***Innovations.*** The Uniform Trust Decanting Act contains a number of innovations, in
3 addition to borrowing concepts from existing state decanting statutes.

4 The act, like some state statutes, intentionally applies broadly to trusts that have a
5 principal place of administration in the state, trusts that are governed by the law of the state for
6 administration and trusts that are governed by the law of the state for purposes of determining
7 meaning or effect. See Section 5. By casting a wide net for applicability, questions about
8 whether a state's uniform statute applies to a particular trust may be minimized.

9 Further, the act expressly gives effect to a decanting validly performed under the law of a
10 different state, even if the decanting does not comply with all of the requirements of the state's
11 uniform decanting statute. See Section 6.

12 The Uniform Trust Decanting Act grants discretionary authority to the authorized
13 fiduciary to modify a trust without categorizing such authority as a power of appointment. By
14 recognizing that the decanting power is a power to modify the trust, the act is then free to permit
15 an exercise of decanting power to be structure either as a modification of the trust or as a transfer
16 of assets of the first trust to a separate second trust. Decantings that are structured as
17 modifications may avoid the need to retitle assets and to terminate the first trust for income tax
18 purposes. Further, decantings that are structured as modifications may avoid thorny questions
19 such as whether a decanting of a QTIP trust requires a new QTIP election.

20 The Uniform Trust Decanting Act also addresses in detail the extent to which charitable
21 interests may be modified by decanting. The act does not permit decanting of wholly charitable
22 trusts. See Section 3. With respect to charitable interests within trusts, the act protects any
23 charitable deduction that may have been taken. See Section 18(b)(1). The act also balances
24 protecting the settlor's charitable intent with the need to permit decanting of trusts that include
25 contingent charitable interests.

26 The act also delineates the role of the court in greater detail than in the existing state
27 statutes. While decanting generally does not require court approval, the authorized fiduciary
28 may wish to seek instructions or approval from the court to confirm that the decanting is not an
29 abuse of discretion. A fiduciary may also wish to seek court instructions as to the effect of a
30 prior decanting, particularly if the prior decanting may be in some way flawed. A few state
31 statutes permit a special fiduciary to be appointed to exercise decanting power where the statute
32 does not permit the acting trustee to decant. The act borrows the concept of a special fiduciary
33 but does not restrict its use to cases in which the acting trustee is not permitted to decant.

34 The Uniform Trust Decanting Act provides a remedy for an imperfect attempted
35 decanting, to avoid the uncertainty that would exist if an attempted decanting is later discovered
36 to have failed to fully comply with the decanting statute. Section 21 of the act essentially reads
37 out of the second-trust instrument any impermissible provision and reads into the second-trust
38 instrument any required provision. This gives authorized fiduciaries exercising decanting power
39 greater comfort that their intent will be implemented and not subject to challenge for an
40 inadvertent misstep or technicality.

1 The act borrows from some of the state statutes a provision that deals with the disposition
2 of later discovered property. See Section 26. This provision ensures that if property was not
3 retitled at the time of the decanting, it will be owned by the trust that most likely was intended to
4 receive it. The act also includes a provision that recognizes that the liabilities of the first trust
5 pass with the trust property to the second trust. See Section 27.

6 **Overview of the Act.** Sections 1 through 6 of the act deal with the scope and application
7 of the act, fiduciary duty and definitions. Section 2 contains definitions. Section 3 addresses the
8 types of trusts to which the act applies (or does not apply) and Section 5 describes the
9 connections to the adopting state that are sufficient for a trust to utilize the act. Section 4
10 addresses fiduciary duty in exercising or not exercising the decanting power. Section 6
11 addresses the validity of decantings performed under other states' laws.

12 Sections 7 through 10 of the act deal with the procedures for exercising the decanting
13 power. Section 7 sets forth the notice requirements for decanting. Section 8 is an optional
14 provision dealing with representation of beneficiaries, including the representation of certain
15 charitable interests by the state's attorney general or other appropriate officer. Section 9
16 describes the authority of the court with respect to decanting. Section 10 describes the
17 formalities for decanting.

18 Sections 11 through 23 contain the heart of the decanting power and describe what
19 modifications can be made by decanting. Section 11 delineates the decanting power when the
20 authorized fiduciary has expanded discretion and Section 12 delineates the decanting power
21 when the authorized fiduciary has limited discretion. Section 13 contains special rules to
22 facilitate decanting into a supplemental needs trust for a disabled beneficiary. Sections 14
23 through 19 generally provide limitations on the exercise of the decanting power. Section 14
24 addresses limitations contained within the first-trust instrument. Sections 15, 16, and 17 impose
25 limitations on an authorized fiduciary exercising decanting power in ways that might be
26 considered self-dealing. Section 18 imposes limitations on the decanting power that may be
27 necessary to avoid disqualifying a trust for a particular tax benefit. Section 19 addresses limits
28 on the duration of a trust, such as the rule against perpetuities.

29 Section 21 contains the remediation provision that is intended to salvage imperfect
30 decantings. Section 22 makes clear that the Uniform Trust Decanting Act is in addition to and
31 does not supplant any authority to decant that may be contained in the trust instrument or under
32 common law. Section 23 authorizes under certain circumstances decanting of trusts for the care
33 of a nonhuman animal.

34 Sections 24 through 32 contain miscellaneous provisions. These provisions include
35 Section 25, which recognizes that when a trust has been decanted it may no longer be obvious
36 who is the settlor for different purposes. Section 26 deals with later-discovered property and
37 Section 27 deals with obligations of the first trust.

1 **TRUST DECANTING ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Trust Decanting Act.

3 **SECTION 2. DEFINITIONS.** In this [act]:

4 (1) “Ascertainable standard” means a standard relating to an individual’s health,
5 education, support, or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A)[, as
6 amended,] or 26 U.S.C. Section 2514(c)(1)[, as amended,] and any applicable regulations.

7 (2) “Authorized fiduciary”, except as otherwise provided in Section 13, means a trustee
8 or other fiduciary, other than the settlor, that has discretion to distribute or direct a trustee to
9 distribute part or all of the principal of the first trust to one or more current beneficiaries.

10 (3) “Beneficiary” means a person that:

11 (A) has a present or future, vested or contingent, beneficial interest in a trust;

12 (B) holds a power of appointment over trust property; or

13 (C) is an expressly identified charitable organization which will or may receive
14 distributions under the terms of the trust.

15 (4) “Charitable interest” means an interest in a trust which:

16 (A) is held by an expressly identified charitable organization and makes the
17 organization a qualified beneficiary;

18 (B) benefits only charitable organizations and, if held by an expressly identified
19 charitable organization, would make the organization a qualified beneficiary; or

20 (C) is held solely for charitable purposes and, if held by an expressly identified
21 charitable organization, would make the organization a qualified beneficiary.

22 (5) “Charitable organization” means:

23 (A) a person, other than an individual, organized and operated exclusively for
24 charitable purposes; or

1 (B) a government or governmental subdivision, agency, or instrumentality, to the
2 extent it holds funds exclusively for a charitable purpose.

3 (6) “Charitable purpose” means the relief of poverty, the advancement of education or
4 religion, the promotion of health, governmental or municipal purposes, or other purposes the
5 achievement of which is beneficial to the community.

6 (7) “Decanting power” means the power of an authorized fiduciary under this [act] to
7 distribute property of the first trust to the second trust or to modify the terms of the first trust.

8 (8) “Expanded discretion” means a discretionary distribution power that is not limited to
9 an ascertainable standard or a reasonably definite standard.

10 (9) “First trust” means a trust over which an authorized fiduciary may exercise the
11 decanting power.

12 (10) “First-trust instrument” means the trust instrument for a first trust.

13 (11) “General power of appointment” means a power of appointment exercisable in favor
14 of a powerholder, the powerholder’s estate, a creditor of the powerholder, or a creditor of the
15 powerholder’s estate.

16 (12) “Jurisdiction”, with respect to a geographic area, includes a state or country.

17 (13) “Person” means an individual, estate, trust, business or nonprofit entity, public
18 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
19 entity.

20 (14) “Power of appointment” means a power that enables a powerholder acting in a
21 nonfiduciary capacity to designate a recipient of an ownership interest in or another power of
22 appointment over the appointive property. The term does not include a power of attorney.

23 “Appointive property” means the property or property interest subject to a power of appointment.

1 (15) “Powerholder” means a person in which a donor creates a power of appointment.

2 (16) “Presently exercisable power of appointment” means a power of appointment
3 exercisable by the powerholder at the relevant time. The term:

4 (A) includes a power of appointment exercisable only after the occurrence of a
5 specified event, the satisfaction of an ascertainable standard, or the passage of a specified time;
6 and

7 (B) does not include a power exercisable only at the powerholder’s death.

8 (17) “Qualified beneficiary” means a beneficiary that on the date the beneficiary’s
9 qualification is determined:

10 (A) is a distributee or permissible distributee of trust income or principal;

11 (B) would be a distributee or permissible distributee of trust income or principal if
12 the interests of the distributees described in subparagraph (A) terminated on that date without
13 causing the trust to terminate; or

14 (C) would be a distributee or permissible distributee of trust income or principal if
15 the trust terminated on that date.

16 (18) “Reasonably definite standard” means a clearly measurable standard under which a
17 holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section
18 674(b)(5)(A)[, as amended,] and any applicable regulations.

19 (19) “Record” means information that is inscribed on a tangible medium or that is stored
20 in an electronic or other medium and is retrievable in perceivable form.

21 (20) “Second trust” means:

22 (A) a modification under this [act] of a first trust; or

23 (B) a trust to which a distribution of property is or may be made under this [act].

(21) “Second-trust instrument” means the trust instrument for a second trust.

(22) “Settlor”, except as otherwise provided in Section 25, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person’s contribution except to the extent another person has power to revoke or withdraw that portion.

(23) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(24) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(25) “Terms of the trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(26) “Trust instrument” means a record executed by the settlor to create the trust or executed by any person to create a second trust that contains some or all of the terms of the trust, including any amendments.

Legislative Note: A number of definitions in this section are identical to the definitions in the Uniform Trust Code. A state that has adopted the Uniform Trust Code and is adopting this act as part of the Trust Code can omit these definitions. If a state that has adopted the Uniform Trust Code is adopting this act but is not incorporating it into the Uniform Trust Code, the legislation could either repeat the definitions of the terms in this act or substitute where appropriate: “_____” has the same meaning as in Section _____ of the Uniform Trust Code.

In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in paragraphs (1)

and (18).

Comment

Ascertainable Standard. The definition of “ascertainable standard” is similar to the definition found in Section 103(2) of the Uniform Trust Code, but also includes the regulations to the cited sections of the Internal Revenue Code.

A power that is limited to health, education, support or maintenance is limited to an ascertainable standard. Treas. Reg. § 25.2514-1(c)(2). Other powers limited to an ascertainable standard include “support in reasonable comfort,” “maintenance in health and reasonable comfort,” “support in the beneficiary’s accustomed manner of living,” “education, including college and professional education” and “medical, dental, hospital and nursing expenses and expenses of invalidism.” A power to make distributions for comfort, welfare, happiness or best interests is not limited to an ascertainable standard. In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust other income or resources before the power can be exercised.

A reasonably definite standard includes distributions for education, health, support or maintenance. Treas. Reg. § 1.674(b)-1(b)(5). It also includes distributions to meet an accustomed manner of living or to meet an emergency. A reasonably definite standard does not include distributions for the pleasure, desire or happiness of a beneficiary. Internal Revenue Code Section 674(d) uses the variant term “reasonably definite *external* standard”. Treasury Regulation Section 25.2511-1(g)(2) uses the terms “reasonably fixed or ascertainable standard” and “reasonably definite standard” interchangeably.

The entire context of the document should be considered in determining whether the standard is ascertainable or reasonably definite. For example, if the trust instrument provides that the determination of the trustee is conclusive with respect to the exercise of the standard, the power is not ascertainable or reasonably definite.

A power to make distributions “as the trustee deems advisable” or in the trustee’s “sole and absolute discretion” without further limitation is not subject to an ascertainable standard or a reasonably definite standard.

Authorized Fiduciary. The definition of “authorized fiduciary” includes only a person acting in a fiduciary capacity. Only a fiduciary, subject to fiduciary duties, should have the power to decant. A distribution director who is not a fiduciary should not have the power to decant.

The definition excludes a settlor acting as a trustee. If a settlor is a trustee of an irrevocable trust, gift and estate tax problems could result if the settlor had a decanting power. The definition does not exclude a beneficiary who is acting as a trustee (an “interested trustee”) because the act only permits a trustee with expanded discretion to decant in a manner that would change beneficial interests. Typically trusts will not give an interested trustee unascertainable discretion over discretionary distributions because such discretion would create gift and estate tax issues. In the unusual event that a trust does give an interested trustee unascertainable

1 discretion, the trustee will incur the tax effects of holding a general power of appointment
2 whether or not the trustee also has a decanting power.

3 If more than one authorized fiduciary is acting, the trust instrument or state law will
4 generally provide whether they must act unanimously or whether they may act by majority or
5 some other percentage vote. For example, Section 703(a) of the Uniform Trust Code provides
6 that trustees who are unable to reach unanimous decision may act by majority decision.

7 *Beneficiary.* The definition of “beneficiary” in Section 2(3)(A) and (B) is identical to the
8 definition found in Section 103(3) of the Uniform Trust Code. Section 2(3)(C) adds as a
9 beneficiary a charitable organization expressly named to receive distributions from a trust. *Cf.*
10 Uniform Trust Code § 110(a) and § 405(a). Thus an expressly identified charitable organization
11 has the rights of a beneficiary under this act. Absent Section 2(3)(C) such charities would not be
12 considered beneficiaries. Because a charitable interest is not created to benefit ascertainable
13 charitable organizations but to benefit the community at large, persons receiving distributions
14 from a charitable interest are not beneficiaries as that term is defined in the Uniform Trust Code.
15 *See* Uniform Trust Code § 103, Comment.

16 In addition to living and ascertained individuals, beneficiaries may be unborn or
17 unascertained. The term “beneficiary” includes not only beneficiaries who received their
18 interests under the terms of the trust but also beneficiaries who received their interests by other
19 means, including by assignment, exercise of a power of appointment, resulting trust upon the
20 failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease
21 of a named beneficiary, or upon termination of the trust. A potential appointee of a power of
22 appointment is not a beneficiary unless a presently exercisable power of appointment has been
23 exercised in favor of such appointee. A person who merely incidentally benefits from the trust is
24 not a beneficiary. *See* Restatement Third of Trusts § 48.

25 While the holder of a power of appointment is not considered a trust beneficiary under
26 the common law of trusts, holders of powers are classified as beneficiaries under the Uniform
27 Trust Code. Holders of powers are included on the assumption that their interests are significant
28 enough that they should be afforded the rights of beneficiaries. A power of appointment as used
29 in state trust law and the Uniform Trust Code is as defined in state property law and not federal
30 tax law although there is considerable overlap between the two definitions.

31 *Charitable Interest.* A trust may be comprised entirely or in part of one or more
32 charitable interests. Wholly charitable trusts are not subject to this act. *See* Section 3. A trust
33 that contains a charitable interest and that gives the authorized fiduciary discretion over principal
34 distributions is subject to this act. The term “charitable interest” includes an interest held by a
35 charitable organization that makes the charitable organization a qualified beneficiary. *See*
36 Section 2(3)(C) defining the term “beneficiary” to include an expressly identified charitable
37 organization that may or will receive distributions under the terms of a charitable trust. *See*
38 Section 2(17) defining a qualified beneficiary.

39 The term also includes an interest that can benefit only charitable organizations and that,
40 if held by an expressly identified charitable organization, would make the charitable organization
41 a qualified beneficiary. For example, if the authorized fiduciary is to distribute each year for ten

1 years \$50,000 from the trust to one or more charitable organizations selected by the trustee, the
2 authorized fiduciary also has discretion to distribute principal to individual beneficiaries, and at
3 the end of ten years the authorized fiduciary is to distribute the remainder to the settlor's
4 descendants, the \$50,000 annuity is a charitable interest because it may be distributed only to
5 charitable organizations.

6 The term also includes an interest devoted solely to charitable purposes, even if the
7 charitable purposes may be carried out directly by the trust rather than through distributions to
8 charitable organizations.

9 The term does not include charitable interests are only contingent, successor interests that
10 are not equivalent to the interests held by qualified beneficiaries. For example, if a trust permits
11 distributions to Child A, and upon A's death the trust is to be distributed to charitable
12 organizations selected by the trustee, the remainder interest is a charitable interest. If the
13 charitable interest were held by an expressly identified charitable organization, the charitable
14 organization would be a qualified beneficiary. On the other hand, if a trust permits distributions
15 to Child A, and upon Child A's death the trust distributes to Child A's descendants, or if none, to
16 the settlor's descendants, or if none to Charitable Organization Z, and Child A or the settlor has
17 one or more descendants living, the interest of Charitable Organization Z does not make Z a
18 qualified beneficiary and therefore Z's interest is not a charitable interest.

19 *Charitable Organization.* The definition of "charitable organization" is based on the
20 definition of "institution" in the Uniform Prudent Management of Institutional Funds Act
21 (Section 2(4)), except that it excludes trusts.

22 *Charitable Purpose.* The definition of "charitable purpose" is identical to the definition
23 in Section 405 of the Uniform Trust Code. The definition of charitable purpose follows that of
24 Section 28 of the Restatement Third of Trusts and Section 2(1) of the Uniform Prudent
25 Management of Institutional Funds Act. This definition derives from common law and
26 ultimately the English Statute of Charitable Uses, enacted in 1601. A charitable purpose is a
27 nonprofit purpose (and not a purpose for private benefit) that benefits an indefinite class of the
28 public.

29 The definition includes purposes "beneficial to the community" because that concept is
30 part of the traditional definition of charitable purposes. The definition means purposes
31 considered charitable and not merely beneficial. Many activities and organizations, such as social
32 welfare organizations, cooperative associations, and business entities, benefit the community.
33 Nonetheless, these organizations and the activities they carry on are not charitable within the
34 meaning of the Act because their earnings inure to the benefit of private persons such as
35 members or shareholders. *Attorney General v. Weymouth Agricultural & Industrial Society*, 400
36 Mass. 475, 479, 509 N.E.2d 1193, 1195 (1987). The definition of charitable has long been
37 limited to those beneficial purposes that fit within one of the other categories of charitable, for
38 example educational, that relate to the relief of poverty, or that provide some general good such
39 as improvement of the environment. By using the standard definition, the act intends to include
40 the case law that has developed around the term "charitable" in trust law. See the comment to
41 Section 2(2) of the Model Protection of Charitable Assets Act.

1 *Decanting Power.* The term “decanting power” means the power held by the authorized
2 fiduciary (see Section 2(2)) in a fiduciary capacity to distribute all or part of the property of the
3 first trust to a second trust or, alternatively, to modify the terms of the first trust to create the
4 second trust. If the terms of the first trust are modified, it is not necessary to treat the second
5 trust as a newly created, separate trust, thus avoiding the need to transfer title of the property of
6 the first trust to the second trust.

7 If all of the property of the first trust is distributed pursuant to an exercise of the
8 decanting power to a separate second trust, then the first trust would terminate. The termination
9 of the first trust may impose certain duties on the trustee such as providing reports to the
10 beneficiaries and filing final income tax returns.

11 *Expanded Discretion.* “Expanded discretion” is any discretion that is not limited to an
12 ascertainable standard (see Section 2(1)) as used in Internal Revenue Code Section 2514(c)(1) or
13 to a reasonably definite standard (see Section 2(18)) as used in Internal Revenue Code Section
14 674(b)(5)(A). The tax terms are used here, one from gift tax rules and one from income tax
15 rules, because the definitions of these tax terms are generally clearer than the definitions of
16 nontax terms sometimes used to describe different types of trustee discretion.

17 *First Trust.* The terms “first trust” and “second trust” are relative to the particular
18 exercise of the decanting power. Thus when the decanting power is exercised over Trust A to
19 make a distribution to Trust B, Trust A is the first trust and Trust B is the second trust with
20 respect to such exercise of the decanting power. If the decanting power is later exercised over
21 Trust B to make a distribution to Trust C, then Trust B would be the first trust and Trust C the
22 second trust with respect to such exercise of the decanting power.

23 *First-Trust Instrument.* See Section 2(9) for the definition of “first trust” and Section
24 2(26) for the definition of “trust instrument.”

25 *General Power of Appointment.* The definition of “general power of appointment” is
26 identical to the definition in Section 102(6) of the Uniform Powers of Appointment Act.

27 *Jurisdiction.* The definition of “jurisdiction” is identical to the definition in Section
28 103(9) of the Uniform Trust Code.

29 *Nongeneral Power of Appointment.* The definition of “nongeneral power of
30 appointment” is identical to the definition in Section 102(10) of the Uniform Powers of
31 Appointment Act.

32 *Person.* The definition of “person” is identical to the definition of “person” in Section
33 102(12) of the Uniform Powers of Appointment Act. With one exception, this is the standard
34 definition approved by the Uniform Law Commission. The exception is that the word “trust” has
35 been added to the definition of “person.” Trust law in the United States is moving in the
36 direction of viewing the trust as an entity, see Restatement Third of Trusts introductory note to
37 Chapter 21, but does not yet do so. This definition differs slightly in wording, but not in
38 substance, from the definition of “person” used in Section 103(10) of the Uniform Trust Code.
39 The Uniform Trust Code defines “person” as “an individual, corporation, business trust, estate,
40 trust, partnership, limited liability company, association, joint venture, government;

1 governmental subdivision, agency, or instrumentality; public corporation, or any other legal or
2 commercial entity.”

3 *Power of Appointment.* The definition of “power of appointment” is identical to the
4 definition in Section 102(13) of the Uniform Powers of Appointment Act.

5 *Powerholder.* The definition of “powerholder” is identical to the definition in Section
6 102(14) of the Uniform Powers of Appointment Act.

7 *Presently Exercisable Power of Appointment.* The definition of “presently exercisable
8 power of appointment” is identical to the definition in Section 102(15) of the Uniform Powers of
9 Appointment Act.

10 *Qualified Beneficiary.* The definition of “qualified beneficiary” is substantially the same
11 as the definition in Section 103(13) of the Uniform Trust Code. Note, however, that the
12 expanded definition of “beneficiary” in Section 2(3) includes charitable organizations expressly
13 designated to receive distributions in charitable trusts. Such charitable organizations would be
14 entitled to notice of an exercise of the decanting power under Section 7.

15 The qualified beneficiaries consist of the current beneficiaries (see Section 11(a)) and the
16 presumptive remainder beneficiaries (see Section 11(a)).

17 The holder of a presently exercisable general power of appointment is a qualified
18 beneficiary. A person who would have a presently exercisable general power of appointment if
19 the trust terminated on that date or if the interests of the current beneficiaries terminated on that
20 date without causing the trust to terminate is also a qualified beneficiary.

21 [When a trust has distributees or permissible distributees of trust income or principal who
22 are in more than one generation of the descendants of a person and the trust continues after the
23 deaths of the members of the most senior generation who are included among such distributees,
24 Section 2(17)(B) should be construed to include the distributees or permissible distributees after
25 the interests of the most senior generation of such distributees terminate and subparagraph (C)
26 would not ordinarily be applicable if there are any current beneficiaries who are not members of
27 the most senior generation. Thus if a trust permits discretionary distributions to any of A’s
28 descendants, and only terminates if A has no living descendants, in which case it is distributed to
29 B, and A’s now living descendants are Child 1, Child 2, Grandchild 1A and Grandchild 1B, the
30 presumptive remainder beneficiaries are Grandchild 1A and Grandchild 1B pursuant to Section
31 2(17)(B), and Section 2(17)(C) should not apply to cause B to be a presumptive remainder
32 beneficiary. On the other hand, if A’s then living descendants were limited to Child 1 and Child
33 2, then B would be the presumptive remainder beneficiary under Section 2(17)(C), because there
34 is no presumptive remainder beneficiary under Section 2(17)(B).]

35 *Reasonably Definite Standard.* “Reasonably definite standard” is defined in Treasury
36 Regulations Section 1.674(b)-1(b)(5). “Reasonably definite standard” includes an ascertainable
37 standard but may also include standards that would not be considered ascertainable standards. A
38 power to distribute principal for the education, support, maintenance, or health of the
39 beneficiary; for the beneficiary’s reasonable support in comfort; or to enable the beneficiary to
40 maintain the beneficiary’s accustomed standard of living; or to meet an emergency; would be a

1 reasonably definite standard. A power to distribute principal for the pleasure, desire, or
2 happiness of a beneficiary is not a reasonably definite standard. A reasonably definite standard
3 need not require consideration of the needs and circumstances of the beneficiary. The entire
4 context of a provision of a trust instrument granting a power should be considered in determining
5 whether there is a reasonably definite standard. For example, if a trust instrument provides that
6 the determination of the trustee shall be conclusive with respect to the exercise or nonexercise of
7 a power, the power is not limited by a reasonably definite standard. The fact, however, that the
8 governing instrument is phrased in discretionary terms is not in itself an indication that no
9 reasonably definite standard exists.

10 Internal Revenue Code Section 674(d) uses the term “reasonably definite external
11 standard.” The term “reasonably definite external standard” appears to have the same meaning
12 as “reasonably definite standard.” See Treas. Reg. § 1.674(d)-1.

13 The terms are also construed by case law regarding Internal Revenue Code Sections 2036
14 and 2038.

15 *Record.* The definition of “record” is identical to the definition in Section 102(16) of the
16 Uniform Powers of Appointment Act. This is a standard definition approved by the Uniform
17 Law Commission.

18 *Second Trust.* The definition of “second trust” includes (1) an irrevocable trust already in
19 existence, whether created by the settlor of the first trust or a different settlor, (2) a “restatement”
20 of the first trust which could be executed by the authorized fiduciary as the nominal grantor, (3)
21 the first trust as modified to create the second trust, or (4) a new trust executed by the authorized
22 fiduciary or another person as the nominal settlor for the purpose of decanting. A decanting that
23 is implemented by “restating” or modifying the first trust presumably would not require the
24 issuance of a new tax identification number or the retitling of property or a final income tax
25 return for the trust. A decanting that distributes the property of the first trust to a newly created
26 trust presumably would require that the new trust obtain a new tax identification number and that
27 the property be retitled. Further, if the first trust was terminated by reason of the decanting, a
28 final income tax return for the first trust would be required.

29 *Second-Trust Instrument.* See Section 2(20) for the definition of “second trust” and
30 Section 2(26) for the definition of “trust instrument.”

31 *Settlor.* The definition of “settlor” generally follows the definition in Section 103(15) of
32 the Uniform Trust Code, but is modified by Section 25 of this act to address the issue of who is
33 the settlor of the second trust after the exercise of the decanting power. When more than one
34 person signs the trust instrument or funds a trust, generally the person funding the trust will be
35 the settlor. See comments to Section 103 of the Uniform Trust Code. Should more than one
36 person contribute to a trust, all of the contributors will ordinarily be treated as settlors in
37 proportion to their respective contributions, regardless of which one signed the trust instrument.
38 *Id.* A “settlor” includes a testator who creates a testamentary trust.

39 *Sign.* The definition of “sign” is the same definition used in Section 2(8) of the Uniform
40 Premarital and Marital Agreements Act.

1 *State.* The definition of “state” is identical to the definition in Section 103(17) of the
2 Uniform Trust Code.

3 *Terms of the Trust.* The definition of “terms of the trust” is identical to the definition in
4 Section 103(18) of the Uniform Trust Code. The definition of “settlor,” however, is modified by
5 Section 25 of the act to provide flexibility in determining the settlor’s intent with respect to a
6 second trust.

7 *Trust Instrument.* The definition of “trust instrument” is the same as the definition in
8 Section 103(19) of the Uniform Trust Code, except that it expressly includes any second trust. If
9 the second trust is created for purposes of decanting, the second trust may be executed by the
10 authorized fiduciary or another person as the nominal settlor.

11 The definition of “trust instrument” incorporates the definition found in Section 103(19)
12 of the Uniform Trust Code. The Uniform Trust Code definition is expanded to make clear that
13 where the second trust is a trust created by the trustee for the purpose of decanting, such
14 instrument is considered to be an “instrument” even though the trustee is not considered to be the
15 settlor of the second trust for all purposes. See Section 25 of this act.

16 **SECTION 3. SCOPE.**

17 (a) Except as otherwise provided in subsection (b), this [act] applies to all express trusts
18 that are not revocable by the settlor without the consent of the trustee or a person holding an
19 adverse interest.

20 (b) This [act] does not apply to a trust that is held solely for charitable purposes and that
21 has as beneficiaries only charitable organizations.

22 **Comment**

23 The Trust Decanting Act does not apply to a trust revocable by the settlor without the
24 consent of the trustee or a person holding an adverse interest, even if the settlor is incapacitated
25 and thus unable to exercise the power to amend or revoke. Thus the act does not apply to a
26 revocable trust as that term is defined in Section 103(14) of the Uniform Trust Code.

27 Section 5-411(a)(4) of the Uniform Guardianship and Protective Proceedings Act allows
28 a conservator to amend (and revoke) the terms of a protected person’s revocable trust. Section
29 201(a)(1) of the Uniform Power of Attorney Act allows a settlor to grant a power to amend or
30 revoke to an agent. Accordingly, while the settlor is alive, there are uniform rules for modifying
31 a revocable trust. States that have not adopted these uniform rules may have other provisions for
32 modification of a revocable trust when the settlor is incapacitated.

33 The act does not permit decanting a trust held solely for charitable purposes that has as
34 beneficiaries only charitable organizations (a “wholly charitable trust”). A private foundation

1 structured as a trust would be a wholly charitable trust that could not be decanted pursuant to the
2 act. To the extent a conservation easement or restricted gift is considered to be an express trust,
3 such an interest would be a wholly charitable trust that could not be decanted pursuant to the act.

4 While a split interest trust such as a charitable remainder trust or charitable lead trust
5 would not be a wholly charitable trust, in almost all cases the trustee of such a trust would not
6 have discretion to distribute principal to a current beneficiary and therefore there would not be an
7 authorized fiduciary (see Section 2(2)) who would have authority to exercise the decanting
8 power under Section 11 or Section 12.

9 If an authorized fiduciary has limited discretion to distribute principal of a trust that is not
10 a wholly charitable trust but that contains a charitable interest (see Section 2(4)), the interest of
11 any charitable beneficiary in the second trust must be substantially similar to such beneficiary's
12 interest in the first trust and the authorized fiduciary may not change any charitable purpose (see
13 Section 2(6)) set forth in the first trust. See subsection 12(e).

14 **SECTION 4. FIDUCIARY DUTY.**

15 (a) In exercising the decanting power, an authorized fiduciary shall act in accordance
16 with its fiduciary duties.

17 (b) This [act] does not create or imply a duty to exercise the decanting power or to inform
18 beneficiaries about the applicability of this [act]. A breach of fiduciary duty may not be inferred
19 from authorized fiduciary's failure to exercise the decanting power.

20 (c) Except as otherwise provided in the first-trust instrument, for purposes of this [act]
21 [and Sections 801 and 802(a) of the Uniform Trust Code], the terms of the first trust are deemed
22 to include the decanting power.

23 **Legislative Note:** Section 801 of the Uniform Trust Code provides that the trustee shall
24 administer a trust in accordance with its terms. Section 802(a) of the Uniform Trust Code
25 provides that a trustee shall administer a trust solely in the interests of the beneficiaries. If a
26 state has adopted the Uniform Trust Code, the bracketed language in subsection (c) should be
27 included to make clear that the terms of the trust include the decanting power and that the
28 interests of the beneficiaries takes into account the decanting power.

29 **Comment**

30 Except as noted below, in exercising the decanting power, the authorized fiduciary is
31 subject to the same fiduciary duties as in exercising any other discretionary power. For example,
32 Section 801 of the Uniform Trust Code provides that the trustee shall administer the trust in good
33 faith, in accordance with its terms and purposes and the interests of the beneficiaries. Section

1 814(a) of the Uniform Trust Code provides that a trustee shall exercise a discretionary power in
2 good faith and in accordance with the terms and purposes of the trust and the interests of the
3 beneficiaries. Section 76 of the Restatement Third of Trusts provides that a trustee has a duty to
4 administer the trust diligently and in good faith, in accordance with the terms of the trust and
5 applicable law.

6 An exercise of a decanting power should be in accordance with the purposes of the first
7 trust. The purpose of decanting is not to disregard the settlor's intent but to modify the trust to
8 effectuate better the settlor's broader purposes or the settlor's probable intent if the settlor had
9 anticipated the circumstances in place at the time of the decanting. The settlor's purposes
10 generally also include efficient administration of the trust. The settlor's purposes may also
11 include achieving certain tax objectives or generally minimizing overall tax liabilities. The
12 settlor's purposes often would include avoiding fruitless, needless dissipation of the trust assets
13 should a beneficiary develop dependencies such as substance abuse or gambling, have creditor
14 problems, or otherwise be unfit to prudently manage assets that might be distributed from the
15 trust.

16 The exercise of the decanting power need not be in accord with the literal terms of the
17 first-trust instrument because decanting by definition is a modification of the terms of the first
18 trust. Therefore subsection 4(c) provides that the terms of the first trust shall be deemed to
19 include the decanting power for purposes of determining the fiduciary duties of the authorized
20 fiduciary. Nonetheless, the terms of the first trust may provide insight into the purposes of the
21 first trust and the settlor's probable intent under current circumstances.

22 Section 802 of the Uniform Trust Code and Section 78 of the Restatement Third of Trusts
23 impose a duty of loyalty on the trustee. Thus in exercising a decanting power the trustee cannot
24 place the trustee's own interests over those of the beneficiaries. For example, an authorized
25 fiduciary may breach its fiduciary duties by decanting to permit self-dealing when such self-
26 dealing is not in the interests of the beneficiaries. While Sections 15, 16 and 17 expressly
27 prohibit making certain changes that benefit the authorized fiduciary and are not likely to be in
28 the beneficiaries' interests, these sections do not include all of the changes that may be breaches
29 of the authorized fiduciary's fiduciary duties.

30 Section 803 of the Uniform Trust Code and Section 79 of the Restatement Third of Trusts
31 impose a duty to treat the beneficiaries impartially. The duty to act impartially does not mean
32 that the trustee must treat the beneficiaries equally. Rather the trustee must treat the beneficiaries
33 equitably in light of the purposes and terms of the trust.

34 Section 804 of the Uniform Trust Code imposes a duty to administer the trust as a
35 prudent person would and to exercise reasonable care, skill and caution. *See also* Restatement
36 Third of Trusts: Prudent Investor Rule § 227.

37 Decanting may be appropriate in many situations in which judicial modification would be
38 appropriate such as (1) when modification, because of circumstances not anticipated by the
39 settlor, would further the purposes of the trust (*see* Uniform Trust Code § 412(a) and
40 Restatement Third of Trusts § 66); (2) when continuation of the trust on its existing terms would
41 be impracticable or wasteful or impair the trust's administration (*see* Uniform Trust Code

§ 412(b)); (3) to replace the trustee if the value of the trust is insufficient to justify the costs of administration (*see* Uniform Trust Code § 414(b)); (4) to correct mistakes (*see* Uniform Trust Code § 415); (5) to achieve the settlor's tax objectives (*see* Uniform Trust Code § 416); and (6) to combine or divide trusts (*see* Uniform Trust Code § 417 and Restatement Third of Trusts § 68).

The Trust Decanting Act does not impose a duty on the authorized fiduciary to decant. To impose a duty on the authorized fiduciary to consider whether any possible decanting could improve the administration of the trust or further the trust purposes would create unfair risks and burdens for fiduciaries and also might, in some situations, present impartiality issues. A trustee cannot possibly consider all the possible ways in which a trust could be improved by decanting. While this act does not create a presumption in favor of the terms of the first trust, an authorized fiduciary generally should not be penalized for not modifying the terms of the trust.

There may be, however, circumstances in which the authorized fiduciary or trustee has a duty under general trust law to seek a deviation from the terms of the trust even if the authorized fiduciary or trustee does not have a duty to exercise a decanting power. Subsection 66(2) of the Restatement Third of Trusts provides:

(2) If a trustee knows or should know of circumstances that justify judicial action under Subsection (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.

While subsection 66(2) is literally limited to deviations involving administrative provisions, Comment e to subsection 66(2) extends the trustee's duty to distribution provisions when the trustee is actually aware that a purpose of the settlor would be jeopardized by adhering to the existing provision regarding distributions.

The Reporter's Note to Comment e to subsection 66(2) of the Restatement Third of Trusts notes that the situations that might result in a duty to seek a deviation if the trustee has actual knowledge of the circumstances include extraordinary needs of the life beneficiary or irresponsibility of a potential distributee. *See* Illustration 2 in the Comments on subsection 66(1) of the Restatement Third of Trusts and the last paragraph of the Reporter's Note to Comment b to Section 66 of the Restatement Third of Trusts. In the Reporter's Notes to Comment b of Section 66 of the Restatement Third of Trusts, the Reporter notes that there may be a duty to seek deviation when there would be substantial distributions to beneficiaries who are legally competent to manage funds but practically at serious risk of squandering those distributions due, for example, to substance addiction or gambling. Although the Trust Decanting Act does not impose a duty to decant, an exercise of the decanting power would usually be an appropriate exercise of the authorized fiduciary's discretion in such circumstances. *See also* Restatement Third of Trusts § 87.

Where the trustee has a duty to seek a deviation and the appropriate deviation could be achieved by an exercise of the decanting power, the trustee could fulfill such duty by an exercise of the decanting power rather than seeking a judicial deviation.

1 **SECTION 5. APPLICATION; CHOICE OF LAW.** This [act] applies to a trust
2 created before, on, or after [the effective date of this [act]] that:

3 (1) has its principal place of administration in this state, including a trust whose principal
4 place of administration has been changed to this state; or

5 (2) provides by its terms that it is governed by the law of this state or is governed by the
6 law of this state for purposes of:

7 (A) administration, including a trust whose governing law for purposes of
8 administration has been changed to the law of this state;

9 (B) construction of the terms of the trust instrument; or

10 (C) determining the meaning or effect of terms of the trust instrument.

11 **Comment**

12 Because the authorized fiduciary by decanting is exercising a power over the first trust,
13 the requirements in Section 5 apply to the first trust. It is irrelevant whether the second trust is
14 governed by the law of the state or administered in the state.

15 The laws of different states may govern a trust for purposes of determining its validity,
16 for purposes of construing the trust and for purposes of administration of the trust. The
17 determination of the state law that governs for these purposes is also dependent upon whether the
18 trust property consists of movables or land and whether the trust was created by a will or by an
19 inter vivos instrument. *See* Restatement Second of Conflict of Laws §§ 267-279; Uniform Trust
20 Code § 107; *see also* Uniform Probate Code § 2-703.

21 To provide greater certainty about whether the act applies to a trust, Section 5(2) provides
22 that the act applies to a trust that by its terms provides that it is governed by the law of the
23 enacting state, without further inquiry as to whether the law of the enacting state actually applies.
24 The act also applies where the law of the enacting state actually governs any of administration of
25 the trust, construction of the terms of the trust, or determining the meaning or effect of terms of
26 the trust, whether or not the trust instrument expressly so states.

27 Decanting is considered an administrative power because it deals with the powers of the
28 trustee. *See* Comment a to the Restatement Second Conflict of Laws § 271 (testamentary trusts)
29 and Comment a to § 272 (inter vivos trusts). Decanting, however, can alter the beneficial
30 interests of a trust. In order to avoid having different rules for the application of the Trust
31 Decanting Act depending upon whether the exercise of the decanting power changes
32 administrative provision or beneficial interests, and the difficulty of drawing a distinct line
33 between modifications that are administrative in nature and modifications that change beneficial

1 interests, the act is intended to have broad application.

2 This act applies if the law of the state governs for purposes of any one of administration,
3 meaning or effect. “Meaning and effect” are the terms used in the Uniform Trust Code (see
4 Section 107). “Construction” is the term used in the Restatement Second of Conflicts.

5 Alternatively, it is sufficient if the trust has a principal place of administration in the
6 state. See Section 108 of the Uniform Trust Code with respect to the principal place of
7 administration of a trust. While a change of principal place of administration will usually change
8 the law governing the administration of the trust, that is not the result under all circumstances.
9 To avoid the difficulties of determining whether the law governing administration has changed
10 when the principal place of administration has changed, the act applies to any trust with a
11 principal place of administration in the state, regardless of what state law governs its
12 administration and meaning and effect.

13 **SECTION 6. RECOGNITION OF OUT-OF-STATE DECANTING.** A distribution
14 validly made by a trustee or other fiduciary under the law of another jurisdiction of part or all of
15 the principal of a trust to another trust or a modification of a trust validly made by a trustee or
16 other fiduciary under the law of another jurisdiction is effective in this state and need not comply
17 with this [act], even if this [act] otherwise could have applied to the trust, if at the time of the
18 distribution from or modification of the trust:

- 19 (1) the jurisdiction was the principal place of administration for the trust;
- 20 (2) the law of the jurisdiction governed the trust for purposes of administration,
21 construction of the terms of the trust instrument, or the meaning or effect of the terms of the trust
22 instrument.

23 **Comment**

24 A trust previously administered in another jurisdiction or governed by the laws of another
25 jurisdiction may have been previously decanted under the laws of such other jurisdiction.
26 Section 6 recognizes such a decanting as valid if it was valid under the other jurisdiction’s laws,
27 whether statutory or common law. The law of the other jurisdiction authorizing the decanting or
28 modification must have been applicable to the trust by the terms of the statute or pursuant to the
29 conflict of law rules of such jurisdiction. For example, the other jurisdiction may have a
30 decanting statute that by its terms applies to trusts administered in such jurisdiction, and the
31 trust was administered in such jurisdiction at the time of the decanting. In addition, to ensure
32 that the other jurisdiction has a basis for applying its decanting or modification rules to the trust,
33 Section 6 also requires that at the time of the decanting or modification the jurisdiction was the

1 principal place of administration for the trust or its law governed the trust for purposes of
2 administration or meaning and effect.

3 The decanting laws of more than one jurisdiction may apply to a trust, for example, if a
4 trust is governed by the laws of one jurisdiction but administered in another jurisdiction. The act
5 recognizes a decanting validly performed under the applicable law of another jurisdiction, even if
6 the enacting state's decanting statute also could have applied to the trust. This avoids the
7 difficulty of complying with the decanting laws of more than one jurisdiction, at least as far as
8 the enacting state is concerned. To ensure that the other jurisdiction has a basis for applying its
9 decanting or modification rules to the trust, Section 6 also requires that the other jurisdiction be
10 the principal place of administration for the trust, or that the laws of the other jurisdiction govern
11 the trust for purposes of administration or meaning and effect.

12 **Reporter's Comment**

13 Even if a state enacts a non-uniform decanting statute, it would be helpful to include a
14 provision similar to Section 6 to make clear that the state will recognize a decanting that is valid
15 under another state's statute, even if the state's decanting statute also could have applied to such
16 trust.

17 **SECTION 7. NOTICE.**

18 (a) In this section, a notice period begins on the day notice is given under subsection (c)
19 and ends 60 days after the day notice is given.

20 (b) Except as otherwise provided in Sections 15, 17, and 18(b)(8), an authorized fiduciary
21 may exercise the decanting power without the consent of any person and without court approval.

22 (c) Except as otherwise provided in subsection (f), an authorized fiduciary shall give
23 notice in a record of the intended exercise of the decanting power not later than [60] days before
24 the exercise to:

25 (1) the settlor of the first trust, if living or then in existence;

26 (2) each qualified beneficiary of the first trust;

27 (3) each person that currently has the right to remove or replace the authorized
28 fiduciary;

29 (4) each other fiduciary of the first trust;

30 (5) each fiduciary of the second trust; and

1 (6) [the Attorney General] if the first trust contains a charitable interest that is not
2 held by an expressly identified charitable organization.

3 (d) [An authorized fiduciary is not required to give notice under subsection (c) to a
4 qualified beneficiary who is a minor and has no representative. The] [An] authorized fiduciary is
5 not required to give notice under subsection (c) to a person that is not known to the fiduciary or
6 is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

7 (e) A notice under subsection (c) must:

8 (1) specify the manner in which the authorized fiduciary intends to exercise the
9 decanting power;

10 (2) specify the proposed effective date for exercise of the power;

11 (3) include a copy of the first-trust instrument; and

12 (4) include a copy of all second-trust instruments.

13 (f) The decanting power may be exercised before expiration of the notice period under
14 subsection (c) if all persons entitled to receive notice waive the period in a signed record.

15 (g) The receipt of notice, waiver of the notice period, or expiration of the notice period
16 does not affect the right of a person to file a petition with the court asserting that:

17 (1) an attempted exercise of the decanting power is invalid because it did not
18 comply with this [act] or was an abuse of discretion or breach of fiduciary duty; or

19 (2) Section 21 applies to the exercise of the power.

20 (h) An exercise of the decanting power is not ineffective because of the failure to give
21 notice to one or more persons under subsection (c) if the authorized fiduciary acted with
22 reasonable care to comply with subsection (c).

23 **Legislative Note:** In subsection (c)(6), “Attorney General” is placed in brackets to
24 accommodate jurisdictions that grant enforcement authority over charitable trusts to another

1 *designated official. The first sentence of subsection 7(d) should be included when state law does*
2 *not always provide a representative for a minor beneficiary so that notice is not required to be*
3 *given to the minor personally. The states should insert the appropriate term for the appropriate*
4 *court in subsection (g).*

5 **Comment**

6 Generally a trustee is not required to provide notice to beneficiaries prior to exercising a
7 discretionary power. This section is not intended to change the law in this regard except with
8 respect to exercises of the decanting power. Because qualified beneficiaries are entitled to know
9 the terms of the trust, they should receive notice of any change in the terms of the trust.
10 Requiring prior notice seems reasonable in light of the significant trust modifications that can be
11 made by decanting and practical, in that it helps determine if any settlor, fiduciary or beneficiary
12 has an objection to or may challenge the decanting. Any person entitled to notice under
13 subsection 7(c) may petition the court under Section 9 for a determination of whether the
14 proposed or attempted exercise of the decanting power is an abuse of discretion or does not
15 otherwise comply with the act.

16 If a qualified beneficiary is a minor, incapacitated, or unknown, or a beneficiary whose
17 identity or location is not reasonably ascertainable, the representation principles of applicable
18 state law may be employed.

19 Notice must be given to (a) the settlor or settlors of the first trust (see Section 4(23));
20 (b) all qualified beneficiaries (see Section 4(18)); (c) any person who may remove or replace the
21 authorized fiduciary; (d) all other fiduciaries of the first trust; (e) all fiduciaries of the second
22 trust or trusts; and (f) the attorney general (or other state official empowered to enforce
23 charitable trusts) if there is a charitable interest not held by an expressly identified charitable
24 organization.

25 Other notice provisions under state law may also apply to a decanting. Under Section
26 813(a) of the Uniform Trust Code, a trustee shall keep the qualified beneficiaries of the trust
27 reasonably informed about the administration of the trust and of the material facts necessary for
28 them to protect their interests. An exercise of the decanting power is a material fact. If the
29 second trust is newly created for purposes of decanting, state law may require notice of the
30 creation of the trust to certain beneficiaries. For example, Section 813 of the Uniform Trust
31 Code requires a trustee, within 60 days after accepting a trusteeship, to notify the qualified
32 beneficiaries of the acceptance and of the trustee's name, address, and telephone number. In
33 addition, if the exercise of the decanting power results in a distribution of property, the
34 distribution would be considered a disbursement that should be reported on the accounting of the
35 first trust. If the exercise of the decanting power results in the termination of the first trust, state
36 law or the trust instrument may require a final accounting.

37 Subsection (c)(6) entitles the attorney general (or other state official empowered to
38 enforce charitable trusts) to notice of an exercise of the decanting power with respect to a trust
39 containing a charitable interest that is not held by an expressly identified charitable organization.
40 Thus the attorney general receives notice when charities are not specifically named but are to be
41 selected by the trustee.

1 When the first trust designates a charitable organization that is no longer in existence,
2 there is no expressly identified charitable organization and the attorney general should receive
3 notice. Similarly, when the first trust contains a description that is ambiguous and could describe
4 more than one organization, there is no expressly identified charitable organization and the
5 attorney general should receive notice. In such a case, however, if the description could identify
6 only a very limited number of organizations, the authorized fiduciary may also provide notice to
7 such organizations.

8 Subsection (d) provides that notice need not be given to a person who is not known to the
9 fiduciary or who is known to the fiduciary but cannot be located by the fiduciary after reasonable
10 diligence. "Reasonable care" is used in Section 1007 of the Uniform Trust Code. Section 1007
11 provides that a trustee who has exercised reasonable care to ascertain the happening of an event
12 that affects the administration of a trust is not liable for a loss resulting from the trustee's lack of
13 knowledge.

14 Although the act does not limit the amount of time that may pass between the giving of
15 notice and the exercise of the decanting power, if the exercise of the power does not occur within
16 a reasonable period of time from the proposed effective date set forth in the notice, a new notice
17 should be given with a new notice period. Further, the authorized fiduciary's duties to keep
18 beneficiaries and interested persons informed about the trust may require the authorized fiduciary
19 to inform such persons if the decanting is not completed as proposed or when the decanting has
20 been completed.

21 If after notice is given and before the decanting power is exercised, relevant facts change
22 in a manner that entitles an additional person to receive notice, unless such additional person can
23 be represented by another person who has already received notice, notice should be provided to
24 such additional person. A new notice period should begin to run, unless such additional person
25 waives the notice period.

26 Although under Section 7(h) an exercise of the decanting power will not be ineffective
27 because of the failure to provide the required notice to one or more persons, provided that the
28 authorized fiduciary acted with reasonable care, the act does not override the court's ability to
29 address breaches of fiduciary duty and to fashion appropriate remedies.

30 **[SECTION 8. REPRESENTATION.]**

31 (a) Notice to a person with authority to represent and bind another person under a first-
32 trust instrument or [this state's trust code] has the same effect as notice given directly to the
33 person represented.

34 (b) Consent of a person with authority to represent and bind another person under a first-
35 trust instrument or [this state's trust code] is binding on the person represented unless the person
36 represented objects to the representation before the consent otherwise would become effective.

1 (c) A person with authority to represent and bind another person under a first-trust
2 instrument or [this state's trust code] may file a petition under Section 9 on behalf of the person
3 represented.

4 (d) A settlor may not represent or bind a beneficiary under this [act].

5 [(e) If the first trust contains a charitable interest that is not held by an expressly
6 identified charitable organization, [the Attorney General] has the rights of a qualified beneficiary
7 and may represent and bind the charitable interest.]]

8 **Legislative Note:** State law generally provides when a beneficiary who is a minor or otherwise
9 incapacitated may be represented by another party. State law also may provide when an
10 incapacitated settlor may be represented by another party. These provisions with respect to
11 trusts may be contained in the state's trust code. For example, Article 3 of the Uniform Trust
12 Code provides rules for representation. If state law does not already provide for representation
13 of incapacitated beneficiaries and settlors, representation provisions should be included in the
14 act.

15
16 *If this act is inserted into the state's Uniform Trust Code, Section 8 may be deleted.*
17

18 *Because states take various approaches to enforcement of charitable trusts, subsection*
19 *(e) is placed in brackets. If subsection (e) is included, the Attorney General or other state*
20 *official empowered to enforce charitable trusts may waive the notice period under Section 7(f),*
21 *consent to a change in the authorized fiduciary's compensation under Section 15, consent to a*
22 *change in the person holding a right to remove an authorized fiduciary under Section 17, or*
23 *petition the court under Section 9.*

24 **Comment**

25 Subsection (a) provides that the first-trust instrument or general rules in the state's trust
26 code or other law determine who may receive notice of an exercise of the decanting power on
27 behalf of a minor beneficiary or an incapacitated beneficiary or settlor. It is similar to Section
28 301(a) of the Uniform Trust Code except that it expressly recognizes that if the first-trust
29 instrument authorizes certain persons to receive notice on behalf of incapacitated beneficiaries or
30 an incapacitated settlor such rules should also apply for purposes of notice under Section 7.

31 Subsection (b) provides that the first-trust instrument or general rules in the state's trust
32 code or other law determine who may waive the notice period under Section 7 or consent to
33 certain modifications under Section 15 and Section 17. It is similar to Section 301(b) of the
34 Uniform Trust Code except that it expressly recognizes that if the first-trust instrument
35 authorizes certain persons to consent on behalf of incapacitated beneficiaries or an incapacitated
36 settlor, such rules should also apply for purposes of waiving the notice period under Section 7 or
37 consenting to modifications under Section 15 or Section 17.

1 Subsection (c) makes clear that a person who represents another may file a court petition
2 under Section 9 on behalf of the person represented. This includes the attorney general with
3 respect to a charitable interest that is not held by an expressly identified charitable organization.

4 Subsection (d) is similar to optional subsection (d) of Section 301 of the Uniform Trust
5 Code, which was added to the Uniform Trust Code because of a concern that allowing a settlor to
6 represent a beneficiary could cause the trust to be included in the settlor's estate.

7 Subsection (e) provides that if the first trust contains a charitable interest not held by an
8 expressly identified charitable organization, the attorney general represents the interest and has
9 all the rights of a qualified beneficiary. The attorney general is entitled to notice under Section
10 7(c)(6). The attorney general may petition the court under Section 9, consent to a change in the
11 compensation of an authorized fiduciary under Section 15 or consent to a change in the identity
12 of the person who may remove or replace the authorized fiduciary under Section 17.

13 **SECTION 9. COURT INVOLVEMENT.**

14 (a) On application of an authorized fiduciary, a person entitled to notice under Section
15 7(c), or a beneficiary, the [appropriate court] may:

16 (1) provide instructions to the authorized fiduciary regarding whether a proposed
17 exercise of the decanting power is permitted under this [act] and consistent with the fiduciary
18 duties of the authorized fiduciary;

19 (2) with the consent of the authorized fiduciary, appoint a special fiduciary and
20 authorize the special fiduciary to determine whether the power should be exercised under this
21 [act] and to exercise the power;

22 (3) approve an exercise of the power;

23 (4) determine that a proposed or attempted exercise of the power is invalid
24 because:

25 (A) after applying Section 21, the proposed or attempted exercise does not
26 or did not comply with this [act]; or

27 (B) the proposed or attempted exercise would be or was an abuse of the
28 fiduciary's discretion or a breach of fiduciary duty;

(5) determine the extent to which Section 21 applies to a prior exercise of the power;

(6) provide instructions to the trustee regarding the application of Section 21 to a prior exercise of the power; or

(7) subject to subsection (c), order other appropriate relief to carry out the purposes of this [act].

(b) On application of an authorized fiduciary, the [appropriate court] may approve:

(1) an increase in the fiduciary's compensation; and

(2) a modification of a provision granting a person the right to remove or replace the fiduciary under Section 17.

(c) This [act] does not grant the [appropriate court] power to order an authorized fiduciary to exercise the decanting power.

(d) If the [appropriate court] appoints a special fiduciary pursuant to subsection (a), the special fiduciary:

(A) is the authorized fiduciary;

(B) may exercise the decanting power as if the special fiduciary had expanded discretion, if any person acting as fiduciary of the trust would have expanded discretion; and

(C) may exercise the decanting power as if the special fiduciary had limited discretion, if no person acting as fiduciary of the trust would have expanded discretion.

Legislative Note: States should insert the appropriate term for the appropriate court in subsections (a), (b), (c) and (d). In a state with limited jurisdiction courts, it may be necessary to grant the power to the court to order remedial action for an ineffective attempted decanting.

Comment

Decanting by definition is an exercise of fiduciary discretion and is not an alternative basis for a court modification of the trust.

1 The decanting power, however, is a very broad discretionary power. Therefore, Section 9
2 provides that the authorized fiduciary, any person who would be entitled to notice of the exercise
3 of the decanting power or any beneficiary may petition the court for certain purposes with
4 respect to a prior decanting or a proposed decanting. The court may, but need not, take any of
5 the actions described in this section.

6 A petition to the court may be brought by a qualified fiduciary, a trustee, the settlor, a
7 trustee remover, the attorney general with respect to a charitable interest that is not held by an
8 expressly designated charity or a beneficiary. A successor beneficiary, even though such
9 beneficiary is not entitled to notice under Section 7, could petition the court under Section 9.

10 Any such person may request that the court approve an exercise of the decanting power.
11 Such approval should be granted if the decanting complies with this act and is not an abuse of the
12 trustee's discretion.

13 Any such person may request instructions with respect to whether a proposed decanting
14 complies with the act and is consistent with the fiduciary duties of the authorized fiduciary. The
15 authorized fiduciary need not have provided notice of a proposed decanting or even be the
16 person proposing the decanting in order for the court to provide instructions. Such an
17 instruction, however, would not create in the authorized fiduciary a duty to decant.

18 While generally the authorized fiduciary should decide whether or not to exercise the
19 decanting power, and may seek instructions from the court when in doubt as to whether the
20 proposed exercise is permitted and consistent with the authorized fiduciary's fiduciary duties,
21 there may be times when the exercise of the decanting power is appropriate but the authorized
22 fiduciary cannot or should not be the person to exercise the power. Under such circumstances
23 the court may appoint a special fiduciary to determine if the decanting power should be exercised
24 and, if so, to exercise the power. Because decanting is a discretionary power of the authorized
25 fiduciary, not a means of judicial modification, a special fiduciary may be appointed only with
26 the consent of the authorized fiduciary. For example, assume a trust permits discretionary
27 principal distributions to the settlor's descendants subject to an ascertainable standard if a
28 beneficiary is acting as trustee and subject to expanded discretion if a disinterested person is
29 acting as trustee. If a beneficiary is acting as trustee and believes that an exercise of the
30 decanting power under Section 11 may be appropriate, the trustee could request that the court
31 appoint a disinterested person as special fiduciary to determine whether the decanting power
32 should be exercised and, if so, to exercise the power. As another example, if the authorized
33 fiduciary is a beneficiary of the first trust and it is appropriate to create a supplemental needs
34 trust for another beneficiary, but the decanting might incidentally increase the authorized
35 fiduciary's interest in the trust, it may be advisable for the authorized fiduciary to request under
36 subsection (a)(2) the appointment of a special fiduciary to decide whether to exercise the
37 decanting power.

38 Because the decanting power is a discretionary power and the authorized fiduciary has no
39 duty under this act to decant, the court may not order the authorized fiduciary to decant. *See*
40 Section 9(c). Other provisions of applicable law, however, may grant the court the authority to
41 order the trust modification. In addition, other provisions of applicable law may permit the
42 trustee and beneficiaries to modify the trust through nonjudicial settlement agreements. The

1 decanting power, however, is premised in the power of the authorized fiduciary to make
2 discretionary distributions of principal. The decanting power extrapolates that the settlor, having
3 entrusted the authorized fiduciary with discretion over trust principal, would trust the authorized
4 fiduciary to modify the trust to respond to current circumstances.

5 This Section supplements any other powers the court may have to provide instructions to
6 the authorized fiduciary or the trustee, to direct the authorized fiduciary or the trustee, to remove
7 the authorized fiduciary or the trustee, or to remedy a breach of trust that has occurred or may
8 occur. For example, under Section 1001 of the Uniform Trust Code, to remedy a breach of trust
9 that has occurred or may occur, the court may:

- 10 (1) compel the trustee to perform the trustee's duties;
- 11 (2) enjoin the trustee from committing a breach of trust;
- 12 (3) compel the trustee to redress a breach of trust by paying money, restoring property, or
13 other means;
- 14 (4) order a trustee to account;
- 15 (5) appoint a special fiduciary to take possession of the trust property and administer the
16 trust;
- 17 (6) suspend the trustee;
- 18 (7) remove the trustee as provided in Section 706 of the Uniform Trust Code;
- 19 (8) reduce or deny compensation to the trustee;
- 20 (9) subject to Section 1012 of the Uniform Trust Code, void an act of the trustee, impose
21 a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and
22 recover the property or its proceeds; or
- 23 (10) order any other appropriate relief.

24 Alternatively, there may be times that the refusal of the authorized fiduciary to exercise
25 the decanting power is grounds for removal of the fiduciary. For example, Section 706(b)(3) and
26 (4) of the Uniform Trust Code provide that the court may remove a trustee if (a) because of
27 unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the
28 court determines that removal of the trustee best serves the interests of the beneficiaries; or (b)
29 there has been a substantial change of circumstances or removal is requested by all of the
30 qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all
31 of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable
32 cotrustee or successor trustee is available.

33 **SECTION 10. FORMALITIES.** An exercise of the decanting power must be made in
34 a record signed by an authorized fiduciary.

1 **Comment**

2 Once the authorized fiduciary has provided the requisite notice of a proposed decanting
3 under Section 7 and the notice period has either passed or been waived as provided in Section
4 7(f), then on or about the proposed effective date for the exercise of the decanting power the
5 authorized fiduciary may effectuate the decanting by a signed record. The signed record should
6 identify the first trust and the second trust(s) and should state which assets of the first trust are
7 being distributed to each of the second trusts and which assets, if any, remain in the first trust. In
8 the case of an exercise of the decanting power that is structured as a modification of the first
9 trust, the signed record required by Section 10 may be the same instrument setting forth the
10 terms of the modified trust. Where the decanting is structured as a distribution to a separate
11 second trust, generally the signed record required by Section 10 will be a separate instrument
12 from the second-trust instrument.

13 Other actions may be required to formally complete the transfer of assets from the first
14 trust to the second trust, such as retitling accounts, executing deeds, and signing assignments.

15 **SECTION 11. DECANTING POWER UNDER EXPANDED DISCRETION.**

16 (a) In this section:

17 (1) “Current beneficiary” means a beneficiary that on the date the beneficiary’s
18 qualification is determined is a distributee or permissible distributee of trust income or principal.
19 The term includes the holder of a presently exercisable general power of appointment but does
20 not include a person that is a beneficiary only because the person holds any other power of
21 appointment.

22 (2) “Noncontingent” means not subject to a contingency.

23 (3) “Presumptive remainder beneficiary” means a qualified beneficiary other than
24 a current beneficiary.

25 (4) “Subject to a contingency” means:

26 (A) subject to the occurrence of a specified event, the passage of a
27 specified time, or the exercise of discretion; or

28 (B) any person has discretion to make a distribution of trust property to a
29 person other than the beneficiary.

1 (5) “Successor beneficiary” means a beneficiary that on the date the beneficiary’s
2 qualification is determined is not a qualified beneficiary. The term does not include a person that
3 is a beneficiary only because the person holds a power of appointment that is not a general power
4 of appointment.

5 (6) “Vested interest” means:

6 (A) a current and noncontingent right to a mandatory distribution of
7 principal;

8 (B) a current and noncontingent right, annually or more frequently, to a
9 mandatory distribution of income, a specified dollar amount, or a percentage of value of some or
10 all of the trust property;

11 (C) a current and noncontingent right, annually or more frequently, to
12 withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust
13 property;

14 (D) a presently exercisable general power of appointment; and

15 (E) a noncontingent, unconditional right to receive an ascertainable part of
16 the trust property on the trust’s termination.

17 (b) Subject to subsections (c) and (f), an authorized fiduciary that has expanded discretion
18 to distribute the principal of the first trust to one or more current beneficiaries may exercise the
19 decanting power over the principal of the first trust.

20 (c) In an exercise of the decanting power under this section, a second trust may not:

21 (1) include as a current beneficiary a person that is not a current beneficiary of the
22 first trust, except as otherwise provided in subsection (e);

23 (2) include as a presumptive remainder beneficiary or successor beneficiary a

1 person that is not a current beneficiary, presumptive remainder beneficiary, or successor
2 beneficiary of the first trust, except as otherwise provided in subsection (e); or

3 (3) reduce or eliminate a vested interest.

4 (d) Subject to subsection (c), in an exercise of the decanting power under this section, a
5 second trust may:

6 (1) retain a power of appointment granted in the first trust;

7 (2) omit a power of appointment granted in the first trust, other than a presently
8 exercisable general power of appointment;

9 (3) create a power of appointment if the powerholder is a current beneficiary of
10 the first trust to which the authorized fiduciary has expanded discretion to distribute principal;

11 (4) create a power of appointment over which the powerholder is a presumptive
12 remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power
13 may take effect only after the powerholder becomes, or would have become if then living, a
14 current beneficiary; and

15 (5) be a trust created or administered under the law of any jurisdiction.

16 (e) A power of appointment described in subsection (d)(1) through (4) may be general or
17 nongeneral. The class of permissible appointees in favor of which the power may be exercised
18 may be broader than or otherwise different from the beneficiaries of the first trust.

19 (f) If all current beneficiaries are charitable organizations, a trustee may not exercise the
20 decanting power under this section over the interests of the current beneficiaries but may
21 exercise the decanting power over the interests of the current beneficiaries under Section 12.

22 (g) If an authorized fiduciary has expanded discretion to distribute part but not all of the
23 principal of the first trust, the fiduciary may exercise the decanting power under this section over

1 that part of the principal of the first trust.

2 **Comment**

3 Qualified beneficiaries comprise current beneficiaries and presumptive remainder
4 beneficiaries. “Current beneficiary” means a beneficiary who, on the date the beneficiary’s
5 qualification is determined, is a distributee or permissible distributee of trust income or principal.
6 The term includes the holder of a presently exercisable general power of appointment. The term
7 does not include the holder of a testamentary general power of appointment or the holder of a
8 limited power of appointment. Nor does the term include the objects of an unexercised inter
9 vivos power of appointment.

10 “Presumptive remainder beneficiary” means a qualified beneficiary (see Section 2(17))
11 other than a current beneficiary. The presumptive remainder beneficiaries might be termed the
12 first-line remainder beneficiaries. These are the beneficiaries who would become eligible to
13 receive distributions were the event triggering the termination of a beneficiary’s interest or of the
14 trust itself to occur on the date in question. Such a terminating event will typically be the death
15 or deaths of the beneficiaries currently eligible to receive the income. A person who would have
16 a presently exercisable general power of appointment if the trust terminated on that date or if the
17 interests of the current beneficiaries terminated on that date without causing the trust to terminate
18 is a presumptive remainder beneficiary.

19 Presumptive remainder beneficiaries can include takers in default of the exercise of a
20 power of appointment. The term may sometimes include the persons entitled to receive the trust
21 property pursuant to the exercise of a power of appointment. Because the exercise of a
22 testamentary power of appointment is not effective until the testator’s death and probate of the
23 will, the qualified beneficiaries do not include appointees under the will of a living person. Nor
24 would the term include the objects of an unexercised inter vivos power.

25 The term “successor beneficiary” means a beneficiary who has a future beneficial interest
26 in a trust, vested or contingent, including a person who may become a beneficiary in the future
27 by reason of inclusion in a class, other than a beneficiary who is a qualified beneficiary. Thus it
28 includes beneficiaries who might be termed “second line” or more remote remainder
29 beneficiaries. It also includes unborn or unascertained beneficiaries who are beneficiaries by
30 reason of being members of a class. It does not include, however, a person who is merely a
31 holder of a power of appointment but not otherwise a beneficiary.

32 Under Section 11 an authorized fiduciary who has expanded discretion to distribute all or
33 part of the principal of a trust to one or more of the current beneficiaries may exercise the
34 decanting power over the principal subject to such expanded discretion.

35 “Expanded discretion” is defined in Section 2(8). When a trustee is granted expanded
36 discretion, that is an indication that the settlor intended to rely on the trustee’s judgment and
37 discretion in making distributions. The settlor’s faith in the trustee’s judgment supports the
38 assumption that the settlor would trust the trustee’s judgment in making modifications to the trust
39 instrument in light of changed circumstances including the beneficiary’s circumstances and
40 changes in tax and other laws.

1 The decanting power can be exercised by either an actual distribution of property to one
2 or more second trusts or by modifying the terms of the first trust to create the second trust with
3 or without an actual distribution of property. If the decanting power is exercised by modifying
4 the terms of the first trust, the trustee could either treat the second trust created by such
5 modification as a new trust, in which case the second trust would obtain a separate tax
6 identification number and the property of the first trust would need to be transferred to the
7 second trust, or alternatively treat the second trust as a continuation of the first trust, in which
8 case no new tax identification number should be required and the property of the first trust would
9 not need to be retitled.

10 The decanting power, like most discretionary distribution powers, can be exercised over
11 all or part of the first trust. If it is exercised over only part of the first trust, the second trust
12 would need to be a separate trust and could not be a continuation of the first trust. If the
13 decanting power is exercised over all of the first trust, but to more than one second trusts, then
14 the second trusts would need to be separate trusts and could not be a continuation of the first
15 trust.

16 If the authorized fiduciary has expanded discretion over only part of the first trust, the
17 authorized fiduciary may exercise the decanting power under this section only over such part.
18 See Section 11(g). With respect to the remainder of the trust, the authorized fiduciary may have
19 the ability to decant under Section 12 or Section 13.

20 The second trust may contain any terms permissible for a trust subject only to the
21 restrictions found in the act. Thus subject to subsections (c) and (f) of Section 11 and the other
22 restrictions in Sections 14 through 19 and subject to the fiduciary duty in Section 4(a), the
23 second trust may (1) eliminate (but not add) one or more current beneficiaries; (2) make a current
24 beneficiary a presumptive remainder beneficiary or a successor beneficiary; (3) eliminate (but
25 not add) one or more presumptive remainder and successor beneficiaries; (4) make a
26 presumptive remainder beneficiary a successor beneficiary, or vice versa; (5) alter or eliminate
27 mandatory rights that are not current rights that have come into effect with respect to the
28 beneficiary; (6) change the standard for distributions; (7) add or eliminate a spendthrift
29 provision; (8) extend the duration of a trust (subject to Section 19); (9) change the jurisdiction of
30 the trust and the law governing the administration of the trust; (10) eliminate, modify or add
31 powers of appointment; (11) change the trustee or trustee succession provisions; (12) change the
32 powers of the trustee; (13) change administrative provisions of the trust; (14) add investment
33 advisors, trust protectors or other fiduciaries; (15) divide a trust into more than one trust; and
34 (16) consolidate trusts. The foregoing list merely provides examples and is not exhaustive.

35 The second trust, however, cannot make a remainder beneficiary a current beneficiary.
36 This prohibition on making a remainder beneficiary a current beneficiary is included to avoid
37 any argument under Internal Revenue Code Section 674 that the mere existence of a power to
38 accelerate a remainder interest causes the trust to be a grantor trust, whether or not the decanting
39 power is ever exercised in such manner.

40 Section 11(c) prohibits the second trust from modifying or eliminating a presently
41 exercisable general power of appointment. A power to withdraw from a trust is a power of
42 appointment. *See* Restatement Third of Trusts § 56, Comment b.

1 A power of appointment is presently exercisable if it is exercisable at the time in
2 question. Typically, a presently exercisable power of appointment is exercisable at the time in
3 question during the powerholder's life and also at the powerholder's death, e.g., by the
4 powerholder's will. Thus, a power of appointment that is exercisable "by deed or will" is a
5 presently exercisable power. To take another example, a power of appointment exercisable by
6 the powerholder's last unrevoked instrument in writing is a presently exercisable power, because
7 the powerholder can make a present exercise irrevocable by explicitly so providing in the
8 instrument exercising the power. *See* Restatement Third of Property: Wills and Other Donative
9 Transfers § 17.4, Comment a.

10 Subsections (d) and (e) permit the second trust to retain or omit a power of appointment
11 included in the first trust, or to create powers of appointment in one or more current beneficiaries
12 of the first trust. If the first trust permits the authorized fiduciary to make discretionary
13 distributions of income or principal to the settlor's child A, and upon A's death the remainder is
14 allocated for the settlor's descendants per stirpes, to be held in further trust for each such
15 descendants, the second trust could grant A a lifetime and/or testamentary power, general or
16 nongeneral. For example, the second trust could grant A a lifetime power to appoint to A's
17 descendants, spouse and charitable organizations and a testamentary power to appoint to A's
18 estate or to the creditors of A's estate. The second trust also could provide that each descendant
19 of the settlor for whom a trust is established at A's death will have an inter vivos or a
20 testamentary, general or limited, power of appointment. The second trust could even provide
21 that A's now living children, D and E, have powers of appointment that they may exercise in
22 their Wills, but that will only take effect upon A's death or, if later, their deaths.

23 Subsection (d)(3) makes clear that persons who are not otherwise beneficiaries of the first
24 trust may be permissible appointees of a power of appointment granted to a current beneficiary.

25 Thus if a beneficiary has already attained an age at which the beneficiary can withdraw
26 all or a portion of the trust, the second trust may not modify or eliminate that right of withdrawal.
27 If a Crummey withdrawal power is still in effect with respect to a prior contribution to the trust,
28 the second trust cannot modify or eliminate the Crummey withdrawal right.

29 A decanting may not eliminate a beneficiary's mandatory rights to income, annuity or
30 unitrust distributions if such rights are current rights that have come into effect with respect to
31 the beneficiary, unless the trustee has discretion to distribute principal to another beneficiary.
32 The decanting may eliminate mandatory rights to income, annuity or unitrust distributions if the
33 right is not a current right or has not come into effect with respect to the beneficiary. A right that
34 is conditioned on the occurrence of a specified event, the satisfaction of an ascertainable standard
35 or reasonably definite standard, or the passage of a specified time, is a current right that has
36 come into effect with respect to the beneficiary only after the occurrence of the specified event,
37 the satisfaction of an ascertainable standard or reasonably definite standard, or the passage of the
38 specified time.

39 Thus a beneficiary's right to receive a portion of the principal of a trust upon attaining a
40 certain age is a current right that has come into effect with respect to the beneficiary if the
41 beneficiary has attained such age even if the distribution has not yet been made from the trust.
42 On the other hand, if a trust provides that all income should be distributed to A after she attains

1 age 25, and A is age 23, the decanting distribution may eliminate A's mandatory income interest.
2 If a trust provides that a beneficiary may withdraw one-third of the trust principal at age 25, one-
3 third at age 30 and the remainder at age 35, if the beneficiary is age 28 but has not yet exercised
4 the right to withdraw one-third at age 25, the right to withdraw such portion is a current right that
5 has come into effect with respect to the beneficiary but the withdrawal rights at age 30 and 35 are
6 not current rights that have come into effect with respect to the beneficiary.

7 A beneficiary's right to annual distributions of income is a current right that has come
8 into effect with respect to the beneficiary if there are no conditions to such income distributions
9 that have not been met. A beneficiary's right to annual income distributions starting at age 25 is
10 not a current right that has come into effect with respect to the beneficiary if the beneficiary has
11 not attained age 25. A beneficiary's right may be a current right that has come into effect with
12 respect to the beneficiary even if such right will cease upon the occurrence of some event such as
13 the beneficiary's substance abuse.

14 The right to a mandatory distribution does not include a right to a distribution pursuant to
15 a standard or a right to a distribution in the discretion of a fiduciary. Thus a right to receive
16 distributions for "support and health care," or for "best interests" would not be a mandatory
17 distribution right for purposes of Section 11.

18 Even if all conditions to such right have been met, the decanting may eliminate current
19 mandatory rights to income, annuity or unitrust distributions that have come into effect with
20 respect to such beneficiary if the authorized fiduciary has discretion to make principal
21 distributions to a beneficiary other than the beneficiary holding such mandatory right. For
22 example, if the first trust provides for mandatory income distributions to A, but permits the
23 authorized fiduciary to make discretionary principal distributions to A, B or C for their best
24 interests, the decanting may eliminate A's mandatory income interest. In such case the first trust
25 indirectly gave the authorized fiduciary the ability to reduce or eliminate A's income interest by
26 making discretionary principal distributions to B or C.

27 If a trust gave the trustee expanded discretion to make distributions to the settlor's
28 children for best interests, and upon the death of the surviving child provided for the remaining
29 assets to be distributed to Charitable Organization A, the authorized fiduciary could exercise the
30 decanting power to provide that each child would receive an equal share of the trust assets when
31 the youngest child attained age 25. Alternatively, the authorized fiduciary could exercise the
32 decanting power to provide that when the youngest child attained age 25 the trust would be
33 distributed to Charitable Organization A. The authorized fiduciary, however, could not exercise
34 the decanting power to change the charitable remainder beneficiary from Charitable
35 Organization A to Charitable Organization B.

36 If a trust gave the authorized fiduciary expanded discretion to make distributions to such
37 one or more charitable organizations selected by the authorized fiduciary as the authorized
38 fiduciary deemed appropriate, and then upon the tenth anniversary directed that the remainder be
39 distributed to the settlor's descendants in share per stirpes, the charitable interest could not be
40 decanted under Section 11, but could only be decanted under Section 12, which would require
41 that the charitable interest in the second trust be substantially similar to the charitable interest in
42 the first trust.

1 Subsection (f) does not permit an authorized fiduciary to decant the current interests in a
2 trust under Section 11 if all the current beneficiaries are charitable organizations. If a trust
3 provides for an annuity to be paid annually to Charitable Organization Z, permits the authorized
4 fiduciary also to make discretionary distributions of income or principal to Charitable
5 Organization Z and on the twentieth anniversary of the trust provides for the remainder to be
6 distributed to such of individuals H, I and J as are then living, the current charitable interests
7 could not be decanted under Section 11 but could be decanted under Section 12, which would
8 require that Z's interests in the second trust be substantially similar to Z's interests in the first
9 trust. The authorized fiduciary, however, could decant the remainder interest under Section 11 to
10 provide that the remainder will pass to H or to H's estate.

11 Sometimes state law may provide more than one method for making the same
12 modification to a trust. For example, a combination of trusts or a division of a trust that would
13 be permitted under Section 417 of the Uniform Trust Code may also be accomplished under this
14 act through decanting. When a desired modification could be accomplished by decanting or by
15 another method, the trustee may select either method.

16 **SECTION 12. DECANTING POWER UNDER LIMITED DISCRETION.**

17 (a) In this section, "limited discretion" means a discretionary distribution power that is
18 not expanded discretion.

19 (b) An authorized fiduciary that has limited discretion to distribute the principal of the
20 first trust to one or more current beneficiaries may exercise the decanting power over the
21 principal of the first trust. If the first trust has no current beneficiaries other than charitable
22 organizations and the authorized fiduciary has discretion to distribute principal to one or more
23 charitable organizations or for charitable purposes, the authorized fiduciary may exercise the
24 decanting power over the principal of the first trust.

25 (c) Second trusts under this section, in the aggregate, must grant each beneficiary of the
26 first trust beneficial interests in the second trusts which are substantially similar to the beneficial
27 interests of the beneficiary in the first trust.

28 (d) A power to make a distribution under a second trust for the benefit of a beneficiary
29 who is an individual is substantially similar to a power to make a distribution to the beneficiary
30 under the first trust. A distribution is for the benefit of a beneficiary if:

1 (1) the distribution is applied for the benefit of the beneficiary;

2 (2) the beneficiary is under a legal disability or the trustee reasonably believes the
3 beneficiary is incapacitated and the distribution is made as permitted under [this state's trust
4 code]; or

5 (3) the distribution is made as permitted under the terms of the first-trust
6 instrument and the second-trust instrument for the benefit of the beneficiary.

7 (e) If the first trust includes a charitable interest, second trusts under this section must, in
8 the aggregate, include a charitable interest that is substantially similar to the charitable interest in
9 the first trust. If the first trust contains a charitable interest and the terms of the first trust
10 indicate a particular charitable purpose for the interest, the exercise of the decanting power may
11 not alter the charitable purpose.

12 (f) A second trust under this section may be a trust created or administered under the law
13 of any jurisdiction.

14 (g) If an authorized fiduciary has limited discretion to distribute part but not all of the
15 principal of the first trust, the fiduciary may exercise the decanting power under this section over
16 that part of the principal of the first trust.

17 **Comment**

18 When the authorized fiduciary has limited discretion to make distributions of principal,
19 the authorized fiduciary may exercise the decanting power to effect modifications in
20 administrative provisions, including trustee succession provisions, but may not materially change
21 the dispositive provisions of the trust. This section requires the beneficial provisions of the
22 second trust to be substantially the same as in the first trust, because the settlor did not choose to
23 give the authorized fiduciary expanded discretion. Nonetheless, the settlor did entrust the
24 authorized fiduciary with some discretion over principal distributions indicating some confidence
25 in the trustee's judgment.

26 Thus, for example, if a trust provides for distributions subject to an ascertainable standard
27 to the settlor's child, and upon the child's death the remainder is to be distributed to Charitable
28 Organization A, the decanting power cannot be exercised in a manner that substantially changes
29 the interests of the child or of Charitable Organization A.

1 “Substantially similar” means that there is no material change in a beneficiary’s
2 beneficial interests except as provided in subsection (d). A distribution standard that was more
3 restrictive or more expansive would not be substantially similar. Thus if the first trust permitted
4 distributions for support, health care and education, the beneficial interests would not be
5 substantially similar if the second trust permitted distributions only for support and health care.
6 If the first trust, however, permitted distributions for education without elaboration with respect
7 to what was included within the term, the second trust might define education to include college,
8 graduate school and vocational schools.

9 If the first trust requires that a trust be distributed at age 35, a second trust that permits
10 the beneficiary to withdraw any part or all of the trust at any time after age 35 would be
11 substantially similar.

12 Changes to a fiduciary’s administrative powers or investment powers, changes in a
13 fiduciary, changes in jurisdiction or the state law governing the administration of the trust are not
14 material changes in a beneficiary’s beneficial interests, even though such changes may have
15 incidental effects on the beneficial interest. For example, changing the trustee from one person
16 to another could impact how the trustee exercises discretionary distribution authority, but is not a
17 material change because the trustee’s discretion is subject to the same standard and the trustee is
18 subject to fiduciary duties.

19 Section 12(d), which permits distributions to be made for the benefit of the beneficiary
20 instead of directly to such beneficiary, in part reflects existing law and in part expands existing
21 law. Section 816(21) of the Uniform Trust Code permits a trustee to pay an amount distributable
22 to a beneficiary who is under a legal disability or who the trustee reasonably believes is
23 incapacitated by paying it directly to the beneficiary or applying it for the beneficiary’s benefit,
24 or by paying it to certain other persons on behalf of such beneficiary or to manage it as a separate
25 fund on the beneficiary’s behalf subject to the beneficiary’s continuing right to withdraw the
26 distribution. Section 12(d)(1) permits an amount distributable to a beneficiary to be applied for
27 the beneficiary’s benefit, but does not require that the beneficiary be under a legal disability or
28 incapacitated. Section 12(d)(2) permits an amount distributable to a beneficiary who is under a
29 legal disability or whom the trustee reasonable believes is incapacitated to be paid as permitted
30 under the state’s trust code. Under the Uniform Trust Code, as noted above, the trustee pay such
31 amount to certain other persons such as a conservator or guardian on behalf of the beneficiary.
32 Section 12(d)(3) recognizes that the first-trust instrument may contain certain provisions
33 authorizing the trustee to pay amounts distributable to beneficiaries to certain persons on their
34 behalf or in certain ways. If the second-trust instrument also contains the same provisions, they
35 are another permissible way to make distributions to a beneficiary because they were authorized
36 by the settlor.

37 Section 12 is intended to permit a severance of a trust if the beneficial interests, in the
38 aggregate, in the second trust are substantially similar to the beneficial interests in the first trust.
39 For this purpose, an equal vertical division of a trust in which multiple beneficiaries have equal
40 discretionary interests would usually be considered to be substantially similar. For example, if a
41 trust provides for discretionary distributions of income and principal to A’s children for support,
42 education and health care and A is deceased and has three living children (B, C and D), the
43 authorized fiduciary may exercise the decanting power under Section 12 to sever the trust into

1 three equal trusts, one for each of B, C and D. Although the beneficial interest of each child is
2 different because before the severance each child could conceivably receive discretionary
3 distributions of more than one-third of the trust and after the severance each child may only
4 receive distributions from such child's trust (one-third of the first trust), a child's interest is
5 substantially similar because the loss of the possibility of receiving distributions of more than
6 one-third of the first trust is offset by the fact that after the severance the other children may not
7 receive discretionary distributions from such child's trust.

8 Where a trust expressly designates a charitable organization as a beneficiary, the named
9 charitable organization is a beneficiary under Section 2(3) and will be a qualified beneficiary if it
10 meets the definition in Section 2(17). If a trust that contains a charitable interest is decanted
11 under Section 12, the second trust must grant each expressly identified charitable organization
12 substantially similar interests to the charitable organization's interests in the first trust.

13 The term "beneficiary," however, does not include an interest in a charitable trust where
14 no charitable organization is expressly designated. Therefore Section 12(e) provides that the
15 charitable interests in the second trust must be substantially similar to the charitable interests in
16 the first trust. For example, if a trust does not expressly identify a charitable organization, but
17 instead gives the authorized fiduciary discretion to select charitable organizations to receive
18 distributions, the charitable interests in the second trust or trusts, the aggregate, must be
19 substantially similar to the charitable interest in the first trust.

20 If a charitable trust indicates a particular charitable purpose, the exercise of the decanting
21 power may not change the charitable purpose. Section 12(e). Thus if the first trust provides that
22 upon A's death the remainder will be paid to Save Our Pets for the benefit and protection of
23 dogs, the second trust may not change the purpose of the charitable gift to the benefit of cats. As
24 another example, if the first trust provides that upon A's death the remainder will be distributed
25 to such charities as the trustee selects for the purpose of preserving habitat for blue footed
26 boobies, the second trust cannot change the charitable purpose to the protection of polar bears.

27 **SECTION 13. SUPPLEMENTAL NEEDS TRUSTS.**

28 (a) In this section:

29 (1) "Authorized fiduciary" means:

30 (A) a trustee or other fiduciary, other than the settlor, that has discretion to
31 distribute part or all of the principal of the first trust to one or more current beneficiaries;

32 (B) if there is not a trustee or fiduciary described in subparagraph (A), a
33 trustee or other fiduciary, other than the settlor, that has discretion to distribute part or all of the
34 income of the first trust to one or more current beneficiaries; or

35 (C) if there is not a trustee or fiduciary described in subparagraph (A) or

1 (B), a trustee or other fiduciary, other than the settlor, that is required to distribute part or all of
2 the income or principal of the first trust to one or more current beneficiaries.

3 (2) “Beneficiary with a disability” means a beneficiary of the first trust who the
4 authorized fiduciary determines has a disability that substantially impairs the beneficiary's ability
5 to provide for the beneficiary’s own care or custody and may qualify the beneficiary for
6 governmental benefits, whether or not the beneficiary currently receives governmental benefits
7 or has been adjudicated [incompetent].

8 (3) “Governmental benefits” means financial aid or services from any state,
9 federal, or other public agency.

10 (4) “Supplemental needs trust” means a trust the trustee believes would not count
11 as a resource for purposes of determining whether the beneficiary with a disability is eligible for
12 governmental benefits.

13 (b) The authorized fiduciary may exercise the decanting power under Section 11 over the
14 principal of the first trust as if the fiduciary had authority to distribute principal to the beneficiary
15 with a disability subject to expanded discretion if:

16 (1) the beneficiary with a disability is a beneficiary of the first trust;

17 (2) the second trust is a supplemental needs trust of which the beneficiary with a
18 disability is a beneficiary; and

19 (3) the authorized fiduciary determines that the exercise of the decanting power
20 will further the purposes of the first trust.

21 (c) In an exercise of the decanting power under this section, the following rules apply:

22 (1) To the extent the first trust was funded, directly or indirectly, by a beneficiary
23 with a disability or the beneficiary has a presently exercisable general power of appointment over

1 the first trust, notwithstanding section 11(c)(2), the beneficiary's interest in the second trust
2 must:

3 (A) be a pooled trust as defined by Medicaid law for the benefit of the
4 beneficiary under 42 U.S.C. Section 1396p(d)(4)(C)[, as amended]; or

5 (B) if the beneficiary is under age 65, contain payback provisions
6 complying with Medicaid reimbursement requirements of Medicaid law under 42 U.S.C. Section
7 1396p(d)(4)(A)[, as amended].

8 (2) Section 11(d)(2) and (3) does not apply to the beneficiary's interests in the
9 first trust.

10 (3) Except as affected by any changes to the beneficiary's interests made pursuant
11 to this section, the beneficial interest in the second trust of each beneficiary that is not a
12 beneficiary with a disability must be substantially similar to the beneficiary's beneficial interest
13 in the first trust.

14 ***Legislative Note:*** In subsection (a)(2), substitute for "incompetent" the appropriate term for a
15 judicial determination of disability or incompetency.

16 *In states in which the constitution, or other law, does not permit the phrase "as*
17 *amended" when federal statutes are incorporated into state law, the phrase should be deleted in*
18 *subsection (c)(1).*

19 **Comment**

20 Section 13 permits an authorized fiduciary to exercise the decanting power over a trust
21 that has a disabled beneficiary to create a supplemental needs trust that governmental benefits
22 programs will not consider a "resource" for purposes of the disabled beneficiary's eligibility for
23 those benefits. Many governmental benefit programs restrict eligibility for those programs only
24 to persons of limited resources. These resources may include any assets from which the disabled
25 beneficiary has the right to compel a distribution or a withdrawal. Supplemental needs trusts are
26 drafted so as to limit the disabled beneficiary's distribution rights and thus better permit the
27 disabled beneficiary to qualify for governmental benefits. Under Section 13 the authorized
28 fiduciary may modify the dispositive provisions for the disabled beneficiary even if the
29 authorized fiduciary has no discretion to make distributions.

30 The exercise of the decanting power must be in furtherance of the purposes of the first

1 trust. Thus the decanting must effectuate better the settlor's broader purposes. In most cases, if
2 the first trust did not anticipate the disability of the beneficiary and the settlor had a broad
3 purpose of providing for the beneficiary's support, a decanting that would permit the disabled
4 beneficiary to qualify for governmental benefits while still being eligible to receive discretionary
5 distributions from the trust would further the purposes of the trust.

6 For example, assume the first trust was created and funded by A, requires all income to
7 be distributed to the beneficiary after age 21, permits the trustee to distribute principal to the
8 beneficiary pursuant to an ascertainable standard, permits the beneficiary to withdraw the trust
9 principal at age 30, grants the beneficiary a testamentary general power of appointment, and
10 upon the beneficiary's death distributes any unappointed property per stirpes to A's descendants
11 then living. If the beneficiary is age 25 and is disabled, the authorized fiduciary may exercise the
12 decanting power to distribute the principal of the first trust to a trust that provides only for
13 distributions to the beneficiary in the trustee's absolute discretion and upon the beneficiary's
14 death distributes the remaining trust assets per stirpes to A's descendants then living. The
15 exercise of the decanting power may eliminate the beneficiary's right to income, the
16 beneficiary's prospective right to withdraw the trust at age 30 and the beneficiary's power of
17 appointment. The second trust may not, however, change the remainder beneficiaries.

18 If in the above example the authorized fiduciary had no discretion to distribute principal,
19 the authorized fiduciary could still decant to a supplemental needs trust. The trustee would be
20 considered the authorized fiduciary under Section 13(a)(1).

21 If in the above example the beneficiary is age 31 and thus has a right to withdraw the
22 trust assets, which is a presently exercisable general power of appointment, the exercise of the
23 decanting power could not eliminate the beneficiary's right of withdrawal and thus it would not
24 be possible to create a supplemental needs trust. Section 11(c)(3).

25 As another example, assume a trust was funded by the beneficiary, directly or indirectly,
26 and provides for distributions of income to the beneficiary until age 30 and then provides for the
27 remainder of the trust to be distributed to the beneficiary. The beneficiary is age 28. The
28 authorized fiduciary may exercise the decanting power, but the second trust must be a "pooled
29 trust" or a payback trust. Section 13(c)(1).

30 Subsection (c)(3) generally requires that any beneficial interests of beneficiaries other
31 than the disabled beneficiary be substantially similar to their interests in the first trust except to
32 the extent they are affected by changes to the disabled beneficiary's interest. The disability of
33 the beneficiary creates a justification for permitting a modification of the disabled beneficiary's
34 interest even when the trustee has limited or no discretion, but does not justify changing the
35 interests of other beneficiaries. The modifications to the disabled beneficiary's interest,
36 however, might affect the amount or timing of the other beneficiaries' interests.

37 For example, if the first trust has more than one current beneficiary, one of whom is a
38 disabled beneficiary, the authorized fiduciary may decant under Section 11 as if the authorized
39 fiduciary had expanded discretion to distribute principal to the disabled beneficiary, but may not
40 alter the interest of the other beneficiaries except to the extent they are affected by the changes to
41 the disabled beneficiary's interest. Assume the first trust was created and funded by A,

continues for the rule against perpetuities period, requires that income be distributed per stirpes to A's descendants, and permits discretionary distributions of principal to A's descendants pursuant to an ascertainable standard. The exercise of the decanting power might, for example, distribute part of the principal of the first trust to a supplemental needs trust solely for the benefit of the disabled beneficiary (the "SNT Trust") and distribute the remaining principal to a trust solely for the benefit of the nondisabled beneficiaries (the "Second Trust"). The SNT Trust might give the trustee absolute discretion to make distributions to the disabled beneficiary. Upon the death of the disabled beneficiary, the remaining assets of the SNT Trust must be distributed to the Second Trust, because the decanting cannot change the interests of the non-disabled beneficiaries, except to the extent they are affected by the changes to the disabled beneficiary's interests. The non-disabled beneficiaries' remainder interests may be affected, for example, because the trustee of the SNT Trust may make distributions to the disabled beneficiary in the trustee's absolute discretion and is not limited by an ascertainable standard. The Second Trust must have the same terms as the first trust, except that it may modify or eliminate the disabled beneficiary's interest. So, for example, the Second Trust might provide that no distributions would be made to the disabled beneficiary unless the SNT Trust was exhausted.

SECTION 14. TRUST LIMITATION ON DECANTING.

(a) An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits:

- (1) exercise of the decanting power; or
- (2) exercise of a power granted by state statute to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(b) Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly apply to:

- (1) exercise of the decanting power; or
- (2) exercise of a power granted by state statute to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(c) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude the exercise of the decanting power.

(d) Subject to subsections (a) and (b), the authorized fiduciary may exercise the decanting

power even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

(e) If the first-trust instrument contains any express prohibition described in subsection (a) or an express restriction described in subsection (b), that provision must be included in the second-trust instrument.

Comment

A trust instrument may preclude the exercise of a decanting power under the act or any similar state statute with respect to the entire trust or with respect to one or more provisions of the trust. *See* Section 14(a). The exercise of a decanting power, however, is not prohibited by a statement that the trust is irrevocable or unamendable, or by a spendthrift provision. *See* Section 14(c).

An irrevocable trust may provide in the trust instrument a mechanism for modifying the trust, for example, by granting a trust protector the power to modify the trust. The fact that a trust instrument provides such a mechanism for modification does not preclude the application of this act. Any requirements or restrictions contained in the trust instrument for such modification mechanism do not apply to an exercise of a decanting power under this act unless such requirements or restrictions expressly apply to an exercise of a decanting power under this act or a similar state statute.

SECTION 15. CHANGE IN COMPENSATION.

(a) If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation beyond the specified compensation unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the [appropriate court].

(b) If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by [this state's trust code] unless:

1 (1) all qualified beneficiaries of the second trust consent to the increase in a
2 signed record; or

3 (2) the increase is approved by the [appropriate court].

4 (c) A change in an authorized fiduciary's compensation which is incidental to other
5 changes made by the exercise of the decanting power is not an increase in the fiduciary's
6 compensation for purposes of subsections (a) and (b).

7 **Legislative Note:** A state should insert the appropriate term for the appropriate court in
8 subsections (a)(2) and (b)(2).

9 **Comment**

10 An exercise of the decanting power generally is an action taken by the authorized
11 fiduciary that does not require beneficiary consent or court approval. The purpose of requiring
12 beneficiary consent or court approval to a change in the compensation of the authorized fiduciary
13 is to place a more immediate check and balance on an authorized fiduciary increasing its own
14 compensation by decanting. In this context it does not seem necessary to require the consent of
15 all beneficiaries. Obtaining the consent of qualified beneficiaries, who would generally be
16 immediately impacted by a change in compensation, should be sufficient.

17 Section 15 expressly does not prohibit an increase in compensation arising incidentally
18 because of other changes made by the exercise of the decanting power. For example, any
19 increase in the compensation of the authorized fiduciary because the second trust may last longer
20 than the first trust is incidental. Also incidental are any increases in compensation that may arise
21 because the second trust may have a greater value in the future than the first trust would have
22 had, for example, because property is retained in the trust longer or smaller distributions are
23 made. Other incidental increases in the compensation of the authorized fiduciary may occur
24 because of changes in investments, changes in the law governing the administration of the trust,
25 changes in the identity of the authorized fiduciary, or changes in the duties of the authorized
26 fiduciary.

27 The authorized fiduciary may be required to spend an extraordinary amount of time in
28 evaluating a potential exercise of the decanting power, particularly when an exercise of the
29 power is suggested by a beneficiary, or in exercising the decanting power. In such cases, and
30 regardless of whether the authorized fiduciary ultimately exercises the decanting power, the
31 authorized fiduciary may be entitled to additional compensation under the trust instrument or
32 under state law. The authorized fiduciary may also be entitled to have reasonable expenses
33 related to evaluating a potential exercise of the decanting power or in exercising the decanting
34 power paid from the first trust. See Sections 708 and 709 of the Uniform Trust Code.

SECTION 16. RELIEF FROM LIABILITY INDEMNIFICATION.

(a) Except as otherwise provided in [subsection] [subsections] (b)[, (c), and (d)], a second-trust instrument may not include a provision that relieves an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

(b) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

[(c) A second-trust instrument may not reduce fiduciary liability in the aggregate.

(d) Subject to subsection (c), a second-trust instrument may divide and reallocate fiduciary powers among several fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary.]

Legislative Note: Subsections (c) and (d) are for a state that has a directed trust statute.

Comment

An authorized fiduciary should not be permitted to decant in order to insert in the second-trust instrument a provision directly exculpating the authorized fiduciary or indemnifying the authorized fiduciary except to the extent such provision was contained in the first-trust instrument or applicable law would have provided such exculpation or indemnification. Nonetheless, decanting may appropriately reduce the authorized fiduciary's liability indirectly. For example, if the second trust is subject to the law of a different state, the law governing the second trust may provide additional protection to the authorized fiduciary.

The terms of the second trust may reduce an authorized fiduciary's liability indirectly, for example, by modifying the rules for approving accounts or expressly permitting the retention of certain property. While such provisions may not violate Section 16, they could under certain circumstances violate the authorized fiduciary's general fiduciary duties. For example, while it may be appropriate in the second trust to expressly permit the retention of a residence used by a current beneficiary of the trust, it may not be appropriate to permit the retention of all of the current trust property without any liability.

Subsection (b) recognizes that the trustee of the first trust may be unwilling to distribute

1 the assets of the first trust to the second trust unless it is indemnified for any liability or claim
2 that may become payable from the first trust after its assets are distributed. Subsection (b) is
3 consistent with Section 27, which provides that decanting does not relieve the trust property from
4 any liability that otherwise attaches to the trust property.

5 The indemnification described in subsection (b) may be contained in the second-trust
6 instrument or may be contained in the record exercising the decanting power.

7 An authorized fiduciary can decant to a directed trust that divides the trustee
8 responsibilities (i.e., jobs) among various parties, but cannot eliminate the fiduciary duties that
9 accompany those jobs. For example, an investment advisor can be appointed and the authorized
10 fiduciary can be relieved of fiduciary liability for the investment decisions so long as the
11 investment advisor is acting in a fiduciary capacity and has fiduciary liability for the investment
12 decisions.

13 **SECTION 17. REMOVAL OR REPLACEMENT OF AUTHORIZED**

14 **FIDUCIARY.** An authorized fiduciary may not exercise the decanting power to modify a
15 provision in the first-trust instrument granting another person the power to remove or replace the
16 fiduciary unless:

17 (1) the person holding the power to remove or replace consents to the modification in a
18 signed record and the modification applies only to the person;

19 (2) the person holding the power to remove or replace and the qualified beneficiaries
20 consent to the modification in a signed record and the modification grants a substantially similar
21 power to another person; or

22 (3) the [appropriate court] approves the modification and the modification grants a
23 substantially similar power to remove or replace the authorized fiduciary to another person.

24 **Legislative Note:** A state should insert the appropriate term for the appropriate court in
25 subparagraph (3).

26 **Comment**

27 Section 17 authorizes a modification of a trustee removal provision only with either court
28 approval or the consent of the person currently holding the right to remove or replace the trustee.
29 Unless the qualified beneficiaries also consent to such change, the person currently holding the
30 right to remove the authorized fiduciary may only consent to the modification of the right with
31 respect to himself or herself and cannot consent to the modification of such right with respect to

1 any successor remover. For example, if a trust provides that the authorized fiduciary may be
2 removed by X, so long as X is living and not incapacitated, and after X is deceased or
3 incapacitated, by Y, X may consent to a modification that would permit the authorized fiduciary
4 to be removed only by the joint agreement of X and Z and only with 90 days' prior notice, but
5 such modification would not affect Y's power of removal after X is deceased or incapacitated
6 unless Y also consents to the modification or unless the qualified beneficiaries consent to such
7 change.

8 Alternatively, X and the qualified beneficiaries could consent to a modification that
9 would permit the authorized fiduciary to be removed by Z, or if Z were not willing and able to
10 act, by W. Y would not need to consent to such modification if X and the qualified beneficiaries
11 consent to it.

12 The power to remove or replace the authorized fiduciary may be given to another person
13 without the consent of the person currently holding the right if the court approves the
14 modification.

15 [Caution that may want an independent person as remover for tax reasons.]

16 **SECTION 18. TAX-RELATED LIMITATIONS.**

17 (a) In this section:

18 (1) "Grantor trust" means a trust as to which the settlor of the first trust is
19 considered the owner under 26 U.S.C. Sections 671 through 679 or 26 U.S.C. Section 679[, as
20 amended].

21 (2) "Internal Revenue Code" means the United States Internal Revenue Code of
22 1986[, as amended].

23 (3) "Nongrantor trust" means a trust that is not a grantor trust.

24 (b) An exercise of the decanting power is subject to the following limitations:

25 (1) If the first trust contains property that qualified, or would have qualified but
26 for provisions of this [act] other than this section, for a marital or charitable deduction for
27 purposes of the income, gift, or estate tax under the Internal Revenue Code or a state income,
28 gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that,
29 if included in or omitted from the trust instrument for the trust to which the property was

1 transferred, would have prevented the transfer from qualifying for the deduction, or would have
2 reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or
3 state law under which the transfer qualified.

4 (2) If the first trust contains property that qualified, or would have qualified but
5 for provisions of this [act] other than this section, for the exclusion from the gift tax described in
6 26 U.S.C. Section 2503(b)[, as amended,] including by application of Section 2503(c), the
7 second-trust instrument must not include or omit a term that, if included in or omitted from the
8 trust instrument for the trust to which such property was transferred, would have prevented the
9 transfer from qualifying under the same provisions of Section 2503.

10 (3) If the property of the first trust includes shares of stock in an S corporation, as
11 defined in 26 U.S.C. Section 1361[, as amended,] and the first trust is, or but for the provisions
12 of this [act] other than this section would be, a permitted shareholder under any provision of
13 Section 1361 of the Internal Revenue Code, an authorized fiduciary may exercise the power with
14 respect to part or all of the S-corporation stock only if the second trust is a permitted shareholder
15 under Section 1361(c)(2). If the property of the first trust includes shares of stock in an S
16 corporation and the first trust is, or but for the provisions of this [act] other than this section,
17 would be, a qualified subchapter-S trust within the meaning of Section 1361, the second-trust
18 instrument must not include or omit a term that prevents the second trust from qualifying as a
19 qualified subchapter-S trust.

20 (4) If the first trust contains property that qualified, or would have qualified but
21 for the provisions of this [act] other than this section, for a zero inclusion ratio for purposes of
22 the generation-skipping transfer tax under 26 U.S.C. Section 2642(c)[, as amended,] the second-
23 trust instrument must not include or omit a term that, if included in or omitted from the first-trust

1 instrument, would have prevented the transfer to the first trust from qualifying for a zero
2 inclusion ratio under Section 2642(c).

3 (5) If the property of the first trust includes an interest subject to the minimum
4 distribution rules of 26 U.S.C. Section 401(a)(9)[, as amended,] and regulations promulgated
5 under that section, the second-trust instrument may not include or omit any term that, if included
6 in or omitted from the first-trust instrument, would have shortened the maximum distribution
7 period otherwise allowable under Section 401(a)(9) and regulations promulgated under that
8 section with respect to the interest under the first trust.

9 (6) If the first trust qualifies as a grantor trust because of the application of 26
10 U.S.C. Section 672(f)(2)(A)[, as amended,] the second trust may not include or omit a term that,
11 if included in or omitted from the first-trust instrument, would have prevented the first trust from
12 qualifying under that provision of the Internal Revenue Code.

13 (7) In this paragraph, “tax benefit” means a federal or state tax deduction,
14 exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit
15 from being a grantor trust. Subject to paragraph (8), a second-trust instrument may not include
16 or omit a term that, if included in or omitted from the first-trust instrument, would have
17 prevented the qualification for a tax benefit if:

18 (A) the first-trust instrument expressly indicates an intent to qualify for a
19 tax benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for a
20 tax benefit; and

21 (B) the transfer of property held by the first trust or the first trust qualified,
22 or but for the provisions of this [act] other than this Section, would have qualified for the tax
23 benefit.

1 (8) Subject to paragraphs (3) and (9):

2 (A) the second trust may be a nongrantor trust, even if the first trust is a
3 grantor trust; and

4 (B) the second trust may be a grantor trust, even if the first trust is a
5 nongrantor trust.

6 (9) The authorized fiduciary may not exercise the decanting power if the settlor
7 objects in a signed record delivered to the fiduciary within the notice period and:

8 (A) the first trust is a nongrantor trust and the second trust is a grantor
9 trust, unless:

10 (i) the settlor does not have the power at all times to cause the
11 second trust to cease to be a grantor trust; or

12 (ii) the first trust contains a provision granting the settlor or
13 another person the power to cause the first trust to cease to be a grantor trust and the second trust
14 contains the same power; or

15 (B) the first trust and second trusts are both grantor trusts, and the second
16 trust does not contain the same provisions as the first trust granting the settlor or another person
17 the power to cause the second trust to cease to be a grantor trust.

18 **Legislative Note:** *In states in which the constitution, or other law, does not permit the phrase*
19 *“as amended” when federal statutes are incorporated into state law, the phrase should be*
20 *deleted in subsection (a)(1) and (2) and subsection (b)(2), (3), (4), (5) and (6).*

21
22 **Comment**

23 Certain tax benefits granted under the Internal Revenue Code (the “Code”) or state law
24 are dependent upon a trust containing specific provisions. For example, a qualified terminable
25 interest property (“QTIP”) marital trust or general power of appointment marital trust requires
26 that the surviving spouse be entitled for life to all income, and a general power of appointment
27 marital trust also requires that the surviving spouse have a general power of appointment
28 exercisable alone and in all events. If a trustee had the power to decant the trust in a manner that

1 deprived the surviving spouse of the requisite income interest, or in the case of a general power
2 of appointment marital trust, the requisite general power of appointment, then arguably the trust
3 would not qualify for the marital deduction from the inception of the trust. Similarly, it is
4 important to ensure that charitable lead trusts and charitable remainder trusts cannot be modified
5 in a way that arguably would prevent them from qualifying for the charitable deduction or that
6 would reduce the amount of that deduction at their inception.

7 Subsection (b)(1) protects the marital and charitable deduction. For example, for
8 property to qualify as qualified terminable interest property, the surviving spouse must have a
9 qualifying income interest for life and a QTIP election must be made. Code § 2056(b)(7)(B)(i).
10 The surviving spouse has a qualifying income interest for life if the surviving spouse is entitled
11 to all the income from the property payable annually or at more frequent intervals and no person
12 has a power to appoint any part of the property to any person other than the surviving spouse.
13 Code § 2056(b)(7)(B)(ii). If the first trust is a trust with respect to which a QTIP election was
14 made, subsection (b)(1) prohibits decanting the property to a trust that does not give the
15 surviving spouse a qualifying income interest for life. For example, if the trustee had expanded
16 discretion to distribute principal to the surviving spouse, the trustee could not decant to give the
17 surviving spouse a lifetime power of appointment in favor of descendants. Both Section 11(d)(2)
18 and Section 18(b)(1) would prohibit the trustee from decanting in a manner that would alter the
19 surviving spouse's income interest.

20 As another example, assume the first trust qualified for the marital deduction under Code
21 section 2056(b)(5) because the surviving spouse is entitled for life to all the income, the
22 surviving spouse has a testamentary power of appointment in favor of her estate, and no person
23 has any power to appoint other than to the surviving spouse, and the trustee also has a power to
24 make discretionary distributions to the surviving spouse subject to expanded discretion.
25 Subsection (b)(1) prohibits decanting to a second trust that does not give the surviving spouse a
26 right to all income or that gives any person a power to appoint to anyone other than the surviving
27 spouse. Subsection (b)(1) also requires that the second trust qualify for the marital deduction
28 under the same section of the Code, section 2056(b)(5). It is not sufficient that the second trust
29 qualify for the marital deduction under another section of the Code. Although Code section
30 2056(b)(5) requires that the trust give the surviving spouse a power to appoint to either herself or
31 her estate, the second trust could give the surviving spouse a lifetime power to appoint to herself
32 instead of a testamentary power in favor of her estate, or could expand her testamentary power to
33 include persons other than her estate as potential appointees, because the second trust would still
34 qualify for the marital deduction under Code section 2056(b)(5). If the first trust, however, gave
35 the surviving spouse a lifetime general power of appointment, the authorized fiduciary could not
36 decant in a manner that eliminated such power of appointment. Section 11(c)(3).

37 Code section 2503(b) grants a gift tax annual exclusion for gifts of a "present interest."
38 Present interests are often created in trusts by granting the beneficiary a Crummey right of
39 withdrawal over contributions to the trust. If a trustee could decant in a manner that prematurely
40 terminated a beneficiary's existing Crummey right of withdrawal over a prior contribution to the
41 trust, then arguably the contribution would not qualify for the gift tax annual exclusion. The
42 restriction in subsection 11(c)(3) prohibiting the modification or elimination of a presently
43 exercisable power of appointment also protects the annual exclusion for a prior gift to a
44 Crummey trust.

1 Code section 2503(c) provides another method for qualifying gifts to a trust for the gift
2 tax annual exclusion. Code section 2503(c) permits a gift tax annual exclusion for a gift to a
3 trust for an individual under age 21 provided that the property and its income may be expended
4 for the benefit of the donee before attaining age 21, to the extent not so expended passes to the
5 donee upon attaining age 21, and, in the event of the donee's death, is payable to the estate of the
6 donee or pursuant to a general power of appointment.

7 Assume, for example that the first trust permitted distributions of income and principal
8 subject to expanded discretion to A, provided that the trust property should be distributed to A at
9 age 21 and directed that the trust be distributed to A's estate if A died prior to age 21. A is age
10 19. The authorized fiduciary could decant to a second trust that, instead of distributing the
11 property to A at age 21, provided A a right to withdraw the trust property for 60 days and that,
12 instead of distributing the property to A's estate, gave A a general testamentary power of
13 appointment. Such a decanting is permitted because the second trust would still qualify under
14 Code section 2503(c). The authorized fiduciary could not decant to a trust that did not permit it
15 to withdraw the assets until age 30 or that neither gave A a testamentary general power of
16 appointment nor directed distribution of the property to A's estate.

17 Under Code section 1361, only certain types of trusts are permitted to own S corporation
18 stock. If the first trust owns S corporation stock, the second trust must also qualify to own S
19 corporation stock under Code section 1361(c)(2). If the first trust qualifies because it is an
20 election small business trust (and "ESBT"), the second trust may either be an ESBT or may
21 qualify to hold S corporation stock because it is a grantor trust or a qualified subchapter S trust (a
22 "QSST"). Similarly, if the first trust owns S corporation stock and is a grantor trust, the second
23 trust may qualify to hold S corporation stock by being a grantor trust, an ESBT or a QSST.

24 Subsection (b)(3) imposes a more stringent rule if the first trust is a QSST. In order for a
25 trust to qualify as a QSST, (a) the terms of the trust must require that during the life of the
26 current income beneficiary there shall be only one income beneficiary and (b) all of the income
27 must be distributed to such beneficiary. Code § 1361(d)(3). Thus it may be important that a
28 trust intended to qualify as a QSST not be permitted to be decanted into a trust that would not
29 qualify as a QSST. If the first trust owns S corporation stock and qualifies as an S corporation
30 shareholder because it is a QSST, subsection (b)(3) requires that the second trust also be a QSST.
31 If the first trust is a QSST, it is not sufficient that the second trust qualify to hold S corporation
32 stock under another provision of the Code.

33 Code section 2642(c) grants a zero inclusion ratio, essentially a "GST annual exclusion",
34 to gifts that qualify for the gift tax annual exclusion but imposes two additional requirements for
35 gifts to trusts. First, the trust must be only for a single individual and second, if the individual
36 dies before the termination of the trust, the property of the trust must be included in the gross
37 estate of such individual. Thus while gifts to trusts for multiple beneficiaries could qualify for
38 the gift tax annual exclusion through the use of Crummey withdrawal rights, such gifts would not
39 qualify for the GST annual exclusion. The Code section 2642(c) restriction requiring a trust be
40 for a single individual could be violated through decanting if the statute permitted accelerating a
41 remainder interest to a current interest. The requirement that the trust be included in the gross
42 estate of the individual could perhaps be violated by decanting to a trust that was not includible
43 in the beneficiary's gross estate.

1 Complicated rules determine when the life expectancy of a trust beneficiary can be
2 considered in determining the required minimum distribution rules when a trust is the beneficiary
3 of a qualified retirement plan or IRA. Under these rules, only trusts with certain provisions and
4 restrictions permit the life expectancy of the beneficiary to be used to determine required
5 minimum distributions. If a trustee could decant to a trust that would not meet these
6 requirements, then arguably the old trust would not qualify from the inception to use the life
7 expectancy of the beneficiary.

8 Generally, the grantor trust rules apply only to a “grantor” who is a citizen or resident of
9 the United States or a domestic corporation. An exception to this rule applies if (a) the grantor
10 has the power to revest title to the trust property in the grantor and such power is exercisable (1)
11 solely by the grantor without the approval or consent of any other person or (2) with the consent
12 of a related or subordinate party who is subservient to the grantor, or (b) distributions may be
13 made only to the grantor and the grantor’s spouse during the life of the grantor. If a trust
14 qualifies as a grantor trust because of Code section 672(f)(2)(A), the decanting power cannot be
15 exercised to a second trust that does not meet the requirements of Code section 672(f)(2)(A).

16 Subsection (b)(8) expressly permits an exercise of the decanting power to change the
17 income tax status of the trust from a grantor trust to a nongrantor trust or vice versa. Although,
18 absent subsection (b)(8), grantor trust status might be viewed as a tax benefit of the first trust,
19 grantor trust status is treated differently under the act because the grantor does not necessarily
20 intend that the grantor trust status be maintained until the grantor’s death and because other
21 desirable modifications of the trust may result in a loss of grantor trust status.

22 Subsection (b)(7) is a catch-all provision intended to preserve any tax benefits not
23 specifically listed in Section 18 for which the first trust qualified if the first-trust instrument
24 expressly indicates an intent to qualify for the tax benefit or is clearly designed to qualify for the
25 tax benefit. Note that subsection (b)(7) does not address any tax benefits for which the trust may
26 qualify in the future. For example, assume that the first trust was a credit shelter trust that was
27 not subject to federal estate tax at the death of the first to die of a married couple because of the
28 decedent’s federal exclusion. Assume that an independent person is acting as trustee and the
29 credit shelter trust permits discretionary distributions to the surviving spouse and descendants
30 pursuant to expanded discretion. Also assume that the credit shelter trust was designed so that it
31 would not be included in the surviving spouse’s estate. The authorized fiduciary could decant
32 and the second trust could grant the surviving spouse a general power of appointment that would
33 cause inclusion in the surviving spouse’s estate. Although the credit shelter trust was designed to
34 be excluded from the surviving spouse’s estate, such tax benefit is one that would occur, if at all,
35 in the future at the surviving spouse’s death; it is not a tax benefit claimed in the past. Therefore
36 subsection (b)(7) does not prohibit such a modification. If the settlor’s purposes include saving
37 taxes, and causing inclusion in the spouse’s estate may save more taxes by causing a basis
38 adjustment at the surviving spouse’s death even though the trust assets would then be included in
39 the surviving spouse’s estate, then such a decanting may be appropriate and is not prohibited by
40 subsection (b)(7).

41 An exercise of the decanting power may cause a nongrantor trust to become a grantor
42 trust either as a primary purpose of the exercise of the decanting power or as an incidental
43 consequence of other changes made by the decanting. Subsection (b)(8)(B). It would be

1 fundamentally unfair, however, to permit a decanting to impose on the settlor liability for the
2 second trust's income taxes if the settlor objected to such liability. Therefore, subsection
3 (b)(9)(A) permits the settlor to block the decanting by objection during the notice period unless
4 the settlor has the power at any time to cause the second trust to cease to be a grantor trust. The
5 settlor receives prior notice of the exercise of the decanting power under Section 7(d)(1).

6 Where the first trust is a grantor trust, often the settlor or another person has the power to
7 cause the trust to cease to be a grantor trust. This power permits the settlor or someone acting on
8 the settlor's behalf to relieve the settlor of the income tax liability for the trust. If the second
9 trust is a grantor trust and does not contain the same provisions permitting the grantor trust
10 treatment to be "turned off," the settlor may block the proposed decanting by objecting during
11 the notice period. Subsection (b)(9)(A).

12 If a portion of a trust is a grantor trust and the remaining portion is a nongrantor trust,
13 subsection (b)(9) applies to the portion that is a grantor trust.

14 **SECTION 19. DURATION OF SECOND TRUST.**

15 (a) Subject to subsection (b), a second trust may have a term that is the same as or
16 different from the term of the first trust.

17 (b) To the extent that property of a second trust is attributable to property of the first trust,
18 the second trust is subject to any maximum perpetuity, accumulation, or suspension-of-the-
19 power-of-alienation rules that were applicable to property of the first trust.

20 **Comment**

21 To implement the public policy of the state law applicable to the first trust, subsection (b)
22 requires that any maximum perpetuity, accumulation, or suspension-of-the-power-of-alienation
23 period applicable to the first trust apply to the second trust to the extent its assets are attributed to
24 the first trust. This rule is also supported by pragmatic considerations. An exercise of a
25 decanting power could inadvertently violate a rule against perpetuities period applicable to the
26 old trust if the new trust does not comply with the same rule against perpetuities period. Even in
27 states that have abolished the rule against perpetuities, the trust being decanted may still be
28 subject to a rule against perpetuities under prior law or may be subject to a rule against
29 perpetuities under the law of a different state. Further, if a trust is grandfathered from
30 generation-skipping transfer ("GST") tax or has an inclusion ratio less than one, decanting to a
31 trust that does not comply with the same rule against perpetuities period (or a federal rule against
32 perpetuities period) may have adverse GST consequences.

33 Thus if the first trust was created in a state with a traditional rule against perpetuities, the
34 authorized fiduciary may not exercise the decanting power to change the governing law to a state
35 with no rule against perpetuities and to eliminate the rule against perpetuities applicable to the
36 first trust.

1 Where the maximum term of the first trust is measured by reference to lives in being on
2 the date the first trust became irrevocable, Section 19 does not preclude the second trust from
3 using an expanded class of measuring lives so long as the expanded class were in being on the
4 date the first trust became irrevocable. For example, assume the first trust is subject to State A's
5 trust duration rule, which is a traditional rule against perpetuities that requires that an interest in a
6 trust vest within twenty-one years of the last to die of lives in being when the trust became
7 irrevocable. The first trust contains a perpetuities savings clause that requires the trust to
8 terminate twenty-one years after the death of the survivor of the settlor's descendants living
9 when the first trust was created. The second trust may replace the perpetuities savings clause
10 with a provision that requires the trust to terminate twenty-one years after the death of the
11 survivor of the descendants of any grandparent of the settlor who were living when the first trust
12 was created.

13 As another example, assume the first trust is subject to State A's trust duration rule,
14 which is a traditional rule against perpetuities, but which permits a trust to opt out of the rule
15 against perpetuities. The first trust does not opt out of the rule against perpetuities. The second
16 trust may opt out of the rule against perpetuities if the first trust could have done so.

17 If the first trust and the state law applicable to the first trust permitted the springing of the
18 Delaware Tax Trap, the second trust may also permit the springing of the Delaware Tax Trap.

19 The second trust may terminate earlier than the trust duration rule applicable to the first
20 trust would require. Assume Trust A and Trust B are both subject to State Z's trust duration rule,
21 which is a traditional rule against perpetuities. Both trusts were created by the same settlor and
22 contain a perpetuities savings clause that requires the termination of the trust twenty-one years
23 after the death of the survivor of the settlor's descendants living on the date the trust was created.
24 Trust A was created on June 6, 1966. Trust B was created May 5, 1955. Trust A may be
25 decanted into Trust B because Trust B will terminate prior to the rule against perpetuities
26 applicable to Trust A. Trust B may be decanted into Trust A if Trust A is modified to provide, or
27 the decanting instrument provides, that the portion of Trust A attributable to the addition of the
28 assets of Trust B must vest within the rule against perpetuities period applicable to Trust B. The
29 trustee could segregate the assets Trust A receives from the decanting of Trust B, in which case
30 discretionary distributions could be made from either share as the trustee determines.
31 Alternatively, the trustee could determine the fractional share of the total assets attributable to
32 Trust B, based upon values at the time of decanting, and such fractional share of Trust A will be
33 subject to the rule against perpetuities period applicable to Trust B.

34 If the authorized fiduciary attempts to decant Trust B into Trust A without providing
35 either in Trust A or the decanting instrument that the portion of the trust attributable to Trust B
36 must vest within the rule against perpetuities period applicable to Trust B, the decanting may still
37 be valid. First, the statutes of State Z may contain a rule against perpetuities savings clause that
38 will cause the trust to vest or terminate within the applicable rule against perpetuities period.
39 Second, if there is no statutory savings clause, Section 21 of this act may apply to read into Trust
40 A an appropriate savings clause with respect to the portion of the trust attributable to Trust B.

41 Section 19 does not address whether, if the decanting changes the place of administration
42 for the trust or the law governing the trust, and the new jurisdiction has a more restrictive trust

1 duration rule, the new jurisdiction may impose its maximum perpetuity, accumulation or
2 suspension-of-the-power-of-alienation period on the second trust. The new jurisdiction may do
3 so if the rule of the first jurisdiction is contrary to a strong public policy of the new jurisdiction.
4 Thus if the first jurisdiction has no rule against perpetuities, and the second jurisdiction has a
5 traditional rule against perpetuities, the second jurisdiction may but need not determine that its
6 rule expresses a strong public policy against perpetual trusts.

7 Subsection (a) provides that, except as provided by subsection (b), the second trust may
8 have a term that is the same as or different from the term of the first trust. Thus the term of the
9 second trust may be longer than or shorter than the term of the first trust.

10 **SECTION 20. NEED TO DISTRIBUTE NOT REQUIRED.** An authorized fiduciary
11 may exercise the decanting power whether or not under the first trust's discretionary distribution
12 standard the fiduciary would have made or could have been compelled to make a discretionary
13 distribution of principal at the time of the exercise.

14 **SECTION 21. PARTIALLY IMPERMISSIBLE DECANTING.**

15 (a) In this section, "revised second-trust instrument" means an instrument prepared in
16 accordance with subsection (c).

17 (b) If exercise of the decanting power would be valid under this [act] except that the
18 second-trust instrument in part does not comply with this [act], the exercise of the decanting
19 power is valid and the following rules apply to the principal of the first trust subject to the
20 exercise of the power:

21 (1) A provision in the second-trust instrument which is not permitted under this
22 [act] is void.

23 (2) A provision required by this [act] to be in the second-trust instrument which is
24 not contained in the instrument is deemed to be included in the instrument.

25 (c) If a trustee of a second trust discovers that the copy of the second-trust instrument
26 provided under Section 7 did not accurately reflect the terms of the instrument after applying
27 subsection (b), the trustee shall:

1 (1) prepare a revised instrument that complies with subsection (b);

2 (2) take corrective action the trustee considers advisable to the extent the trust was
3 not administered according to the terms of the instrument after application of subsection (b); and

4 (3) give notice in a record of the revised instrument and the corrective action to
5 the persons entitled to notice of the exercise of the decanting power under Section 7(c), if the
6 persons are living on the date of the notice under this paragraph, and to the persons that would be
7 entitled to notice under Section 7(c) if the authorized fiduciary exercised the power on the date of
8 the notice under this paragraph.

9 **Comment**

10 In order to provide as much certainty as possible to the trustee and the beneficiaries with
11 respect to the operative terms of a trust, an exercise of a decanting power should not be wholly
12 invalid because of a technical violation of the decanting statute. For example, if the second trust
13 sets forth an impermissible rule against perpetuities period (*see* Section 19), the other
14 modifications made by the decanting should be effective.

15 Section 21(b) modifies the second-trust instrument to delete impermissible provisions in
16 the second-trust instrument and to insert required provisions in the second-trust instrument.

17 **SECTION 22. OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST.**

18 [(a)] This [act] does not limit the right of a trustee, powerholder, or other person to
19 distribute or appoint property in further trust or to modify a trust, whether that power arises
20 under the terms of the trust instrument, a law of this state other than this [act], common law, or a
21 court order.

22 [(b)] An exercise of the decanting power may be made pursuant to a nonjudicial-
23 settlement agreement in accordance with [this state's nonjudicial-settlement act].]

24 ***Legislative Note:*** *Subsection (b) should be included in a state that has a statute authorizing*
25 *nonjudicial-settlement agreements, sometimes called virtual representation agreements.*

26 **Comment**

27
28 The Uniform Trust Decanting Act is not the exclusive way to decant a trust and is not the

1 exclusive way to modify a trust. The terms of the trust instrument may grant a fiduciary or other
2 person the power to modify the trust. This act does not supplant any authority granted under
3 such a trust provision. Any such authority granted under the trust instrument does not affect the
4 application of this act unless the trust instrument imposes an express restriction on the exercise
5 of the decanting power under this act or other state statute authorizing a fiduciary to decant. See
6 Section 14(b).

7 A decanting statute of another state may apply to a trust and, even if this act could also
8 apply to the trust, this act does not supplant the right of a trustee to decant under the statute of
9 such other state. Thus in some situations a fiduciary may have the option of decanting under this
10 act or the decanting statute of another state. See Section 6.

11 Common law in some states may permit a trustee to decant. This act does not supplant
12 any right to decant under common law. Thus in some cases a fiduciary may have the option of
13 decanting under this act or under common law.

14 Section 111 of the Uniform Trust Code and statutes in many states permit certain matters
15 regarding a trust to be resolved by a nonjudicial-settlement agreement among the interested
16 persons. Those statutes generally permit certain beneficiaries of a trust to approve an exercise of
17 a power by a trustee and thus would permit certain beneficiaries to approve an exercise of the
18 decanting power. In some cases the modification made by an exercise of the decanting power
19 could also have been made by a virtual representation agreement, and in those cases an exercise
20 of the decanting power sometimes might be combined with a nonjudicial-settlement agreement.
21 Generally, the nonjudicial-settlement agreement would prevent any subsequent challenges to the
22 decanting. The tax consequences of having the beneficiaries consent to the nonjudicial-
23 settlement agreement should be considered.

24 **SECTION 23. TRUST FOR CARE OF ANIMAL.**

25 (a) In this section:

26 (1) "Animal trust" means a trust or an interest in a trust created to provide for the
27 care of one or more animals.

28 (2) "Protector" means a person appointed in an animal trust to enforce the trust on
29 behalf of the animal or, if no person is appointed, a person appointed by the court.

30 (b) Decanting power may be exercised over an animal trust that has a protector to the
31 extent the trust could be decanted under this [act] as if each animal that benefits from the trust
32 were an individual if the protector consents to the exercise of the decanting power in a signed
33 record.

1 (c) For purposes of this section, a protector may receive notice and represent the interest
2 of the animal that benefits from the trust.

3 (d) Notwithstanding any other provision of this [act], if the first trust is an animal trust, in
4 an exercise of the decanting power, a second trust must provide that trust property may be
5 applied only to its intended purpose for the period the first trust benefitted the animal.

6 **Comment**

7 Section 408 of the Uniform Trust Code permits a trust to be created for one or more
8 animals who are alive during the settlor's lifetime. In this section, the term "animal" should be
9 construed to mean nonhuman animals, including pets and domesticated animals.

10 The Uniform Trust Code provides that an animal trust may be enforced by a person
11 appointed in the terms of the trust or, if no such person is appointed, by a person appointed by
12 the court. Section 110B(a)(2) incorporates that concept in the definition of "protector."

13 One impediment to applying decanting to an animal trust is that animal trusts often do not
14 technically have a beneficiary because the definition of "beneficiary" is restricted to a person
15 who has a particular interest in the trust. A definition of the term "person" does not include a
16 nonhuman animal. This impediment is resolved by treating the animal as if it were a person so
17 that the animal trust does have a beneficiary for purposes of the decanting power. The extent of
18 the decanting power would then depend upon the amount of discretion that the authorized
19 fiduciary has to make distributions to the animal and to any other person. If the trustee has
20 expanded discretion, then the decanting power could be exercised under Section 11 of the [act].
21 If the trustee only has limited discretion to make distributions to the animal, then the decanting
22 power can be exercised under Section 12 of the [act].

23 The second impediment to exercising a decanting power over an animal trust is
24 identifying a person who can receive notice of the decanting on behalf of the animal and
25 challenge the decanting if appropriate. This impediment is resolved because an animal trust will
26 usually have a person who is designated to enforce the trust on behalf of the animal. Section
27 408(b) of the Uniform Trust Code provides that such a trust may be enforced by a person
28 appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the
29 court. Thus if an animal trust did not designate a person to enforce the trust on behalf of the
30 animal, the trustee could request that the court appoint such a person and then proceed with any
31 exercise of the decanting power.

32 Section 408 of the Uniform Trust Code provides that the property of an animal trust may
33 be applied only to its intended use, except to the extent the court determines that the value of the
34 trust property exceeds the amount required for the intended use. Although Section 110B permits
35 the decanting of an animal trust, it mirrors the requirement of the Uniform Trust Code that the
36 property of the animal trust may be applied only to its intended use for the period of time the first
37 trust was intended to benefit the animals (usually the lives of the animals). Therefore, the

1 authorized fiduciary cannot, by decanting, reduce the value of the animal trust; such a power is
2 reserved only to the court. Further, the authorized fiduciary cannot divert assets of the animal
3 trust to other beneficiaries of the trust.

4 **SECTION 24. TERMS OF SECOND TRUST.** A reference to a trust instrument or
5 terms of the trust in [this state's trust code] includes a second-trust instrument and the terms of
6 the second trust.

7 *Legislative Note: Conforming amendments may be required to this state's trust code.*

8 **SECTION 25. SETTLOR.**

9 (a) For purposes of law of this state other than this [act] and subject to subsection (b), the
10 settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of
11 the principal of the first trust subject to the exercise of the decanting power.

12 (b) In addition to or in place of the intent of the settlor of a first trust, the intent of the
13 following persons may be considered to determine settlor intent with respect to a second trust:

14 (1) the authorized fiduciary of the first trust if the second trust is a modification of
15 the first trust or was created to exercise the decanting power; or

16 (2) the settlor that funded a trust that is the second trust with respect to exercising
17 the power.

18 *Legislative Note: Conforming amendments may be required to the state's trust code.*

19 **Comment**

20 "Settlor" is defined in Section 2(22) of this act as the person who creates or contributes
21 property of the trust, except as provided in Section 25. The comments to Section 102 and the
22 comments to Section 103 of the Uniform Trust Code generally consider the person who funded a
23 trust as the settlor and would not treat as the settlor a nominal grantor, meaning a person who
24 signs the trust instrument to create the trust but who does not contribute the property to the trust
25 (except perhaps for nominal funding).

26 When a new trust instrument is created for purposes of serving as the second trust for a
27 decanting, the second-trust instrument may be signed by the trustee of the first trust, a
28 beneficiary, the settlor of the first trust, an attorney for the settlor, the trustee or a beneficiary of
29 the first trust, or some other person. Under these circumstances, the creator of the second trust

1 generally will not be the settlor of the second trust unless such person funded the first trust or is
2 the authorized fiduciary exercising the decanting power.

3 For most purposes, when a trust is decanted the settlor of the first trust should be
4 considered the settlor of the second trust to the extent of the decanting. If the second trust is a
5 pre-existing trust funded by a different settlor, then the original settlor of the second trust would
6 continue to be considered the settlor over the portion of the trust property attributable to that
7 person's contribution and the original settlor of the first trust would be considered the settlor of
8 the portion of the second trust property attributable to the decanting. This general rule of Section
9 25(a) would apply for purposes of determining who holds the rights granted to the settlor, who
10 must consent when the settlor's consent is required for an action and for tax purposes. For
11 example, under the Uniform Trust Code this rule would apply for purposes of Section 113
12 (Insurable Interest), Section 301(d) (limiting the ability of a settlor to represent a beneficiary),
13 Section 405(a) (enforcement of a charitable trust), Section 411 (modification of a trust with the
14 settlor's intent), Section 505 (Creditor's Claims), Section 706(a) (request to remove a trustee),
15 and Section 814 (limiting certain discretionary powers).

16 For purposes of determining the settlor's intent or purpose in creating a trust, or whether
17 the settlor did not anticipate certain circumstances, it may sometimes be appropriate to consider
18 the intent of the original settlor of the second trust. For example, if a decanting distribution is
19 made to a pre-existing trust with property of its own, the intent of the original settlor of the
20 second trust may be more relevant in construing, modifying or reforming the second-trust
21 instrument after the decanting distribution. In such a case, the decanting distribution adopts the
22 language of the second-trust instrument, which is most appropriately construed with respect to
23 the intent of the creator of such trust. When a decanting distribution is made to a second trust
24 created by the authorized fiduciary for the purposes of decanting, or when the decanting is a
25 modification of the first trust, the intent of the authorized fiduciary may be most relevant in later
26 construing the terms of the second trust. The intent of the settlor of the first trust may still be
27 relevant, however, because the decanting would have been made to better carry out the purposes
28 of the first trust. Further, to the extent the second trust does not modify the terms of the first
29 trust, the intent of the settlor of the first trust may be relevant in construing such terms.

30 Under the Uniform Trust Code, Section 402(b) would apply with respect to Section 412
31 (Modification or Termination Because of Unanticipated Circumstances), Section 415
32 (Reformation to Correct Mistakes) and Section 416 (Modification to Achieve Settlor's Tax
33 Objectives). For example, under Section 412 of the Uniform Trust Code, a court may make
34 certain trust modifications if because of "circumstances not anticipated by the settlor,
35 modification or termination will further the purposes of the trust." The modification, to the
36 extent practicable, is to be made in "accordance with the settlor's probable intention." Thus
37 where the authorized fiduciary of the first trust, or some other person, has created the second
38 trust, the intent of the maker of the second trust may be relevant in determining, with respect to
39 the second trust, what circumstances were not anticipated by the settlor and what would be the
40 settlor's probable intent.

41 Section 25(b) may also apply in other contexts for determining the purposes and material
42 purposes of the trust. The material purposes of the trust may, for example, be relevant in
43 determining whether a nonjudicial settlement agreement is valid. Settlor intent is relevant in

1 determining a trust's purposes and material purposes.

2 Under the Uniform Trust Code, Section 813(b)(3) requires a trustee to provide notice to
3 qualified beneficiaries of the identity of the settlor of the trust.

4 **SECTION 26. LATER-DISCOVERED PROPERTY.** Unless an authorized fiduciary
5 otherwise provides at the time of an exercise of the decanting power or a second trust otherwise
6 provides, the following rules apply:

7 (1) If exercise of the power was intended to distribute all the principal of the first trust to
8 one or more second trusts, later-discovered property otherwise belonging to the first trust and
9 property paid to or acquired by the first trust after the exercise of the power is part of the trust
10 estate of the second trust.

11 (2) If exercise of the power was intended to distribute less than all the principal of the
12 first trust to one or more second trusts, later-discovered property belonging to the first trust or
13 property paid to or acquired by the first trust after exercise of the decanting power remains part
14 of the trust estate of the first trust.

15 **SECTION 27. OBLIGATIONS.** A debt, liability, or other obligation enforceable
16 against property of a first trust is enforceable to the same extent against that property when held
17 by a second trust after exercise of the decanting power.

18 **Comment**

19
20 It would be inequitable to permit a trust to evade liabilities made by the trustee of the first
21 trust to the extent the creditor would have been entitled to satisfaction out of the trust property.
22 This Section may apply to contractual claims, obligations arising from ownership or control of
23 trust property and to torts committed in the course of administering a trust. *Cf.* Uniform Trust
24 Code § 1010(c).

25 The Restatement Second of Trusts provides various situations in which a person to whom
26 the trustee has incurred a liability in the course of the administration of a trust can by a
27 proceeding in equity reach trust property and apply it to the satisfaction of such person's claim.
28 *See* Restatement Second of Trusts § 267. Section 268 provides that the creditor can reach trust
29 property to the extent the creditor cannot obtain satisfaction of the claim out of the trustee's
30 individual property to the extent the trustee is entitled to exoneration out of the trust estate.

1 Section 269 provides that a creditor who cannot obtain satisfaction out of the trustee's individual
2 property can by a proceeding in equity reach trust property to the extent the trust estate has
3 benefitted. Section 270 permits the creditor to reach trust property if by the terms of the trust the
4 settlor manifested an intention to confer such a power on the creditor. Section 271 permits a
5 creditor to reach trust property on a contractual claim if the contract provides that the trustee
6 shall not be personally liable upon the contract and the contract was properly made by the trustee
7 in the administration of the trust. Section 271A permits a creditor to obtain satisfaction out of
8 the trust estate if it is equitable to permit him to do so.

9 [Comment on what happens if there are multiple second trusts.]

10 **SECTION 28. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
11 applying and construing this uniform act, consideration must be given to the need to promote
12 uniformity of the law with respect to its subject matter among states that enact it.

13 **SECTION 29. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
14 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
15 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
16 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
17 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
18 Section 7003(b).

19 **[SECTION 30. SEVERABILITY.** If any provision of this [act] or its application to
20 any person or circumstance is held invalid, the invalidity does not affect other provisions or
21 applications of this [act] which can be given effect without the invalid provision or application,
22 and to this end the provisions of this [act] are severable.]

23 ***Legislative Note:** Include this section only if this state lacks a general severability statute or a*
24 *decision by the highest court of this state stating a general rule of severability.*

25 **SECTION 31. REPEALS; CONFORMING AMENDMENTS.**

26 (a)

27 (b)

28 (c)

1 **SECTION 32. EFFECTIVE DATE.** This [act] takes effect