TRUST DECANTING ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

For February 22 – 23, 2014 Drafting Committee Meeting

Copyright ©2014
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter’s notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

February 3, 2014
TRUST DECANTING ACT
The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

STANLEY C. KENT, 90 S. Cascade Ave., Suite 1210, Colorado Springs, CO 80903, Chair
MARY M. ACKERLY, 782 Bantam Rd., P.O. Box 815, Bantam, CT 06750-0815
TURNEY P. BERRY, 500 W. Jefferson St., Suite 2800, Louisville, KY 40202
RHODA B. BILLINGS, 5525 Williams Rd., Lewisville, NC 27023
DAVID J. CLARK, 353 Bel Marin Keys Blvd., Suite 1, Novato, CA 94949
DAVID M. ENGLISH, University of Missouri-Columbia School of Law, 203 Hulston Hall, Columbia, MO 65211
MARC S. FEINSTEIN, 431 N. Phillips Ave., Suite 301, Sioux Falls, SD 57104
BRADLEY MYERS, University of North Dakota, 215 Centennial Dr., Law School Room 201, Stop 9003, Grand Forks, ND 58202-9003
MARK H. RAMSEY, P.O. Box 309, Claremore, OK 74018-0309
ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts Ave., Cambridge, MA 02138
SUZANNE BROWN WALSH, P.O. Box 271820, West Hartford, CT 06127
SUSAN T. BART, 1 S. Dearborn St., Chicago, IL 60603, Reporter

EX OFFICIO
HARRIET LANSING, 1 Heather Pl., St. Paul, MN 55102-3017, President
ELISA WHITE, 419 Natural Resources Dr., Little Rock, AR 72205, Division Chair

AMERICAN BAR ASSOCIATION ADVISORS
AMY HELLER, 340 Madison Ave., New York, NY 10173-1922, ABA Advisor

EXECUTIVE DIRECTOR
JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, Executive Director

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org
TRUST DECANTING ACT

TABLE OF CONTENTS

[ARTICLE] 1
GENERAL PROVISIONS

<table>
<thead>
<tr>
<th>SECTION</th>
<th>CONTENT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>101</td>
<td>SHORT TITLE</td>
<td>1</td>
</tr>
<tr>
<td>102</td>
<td>DEFINITIONS</td>
<td>1</td>
</tr>
<tr>
<td>103</td>
<td>APPLICATION</td>
<td>11</td>
</tr>
</tbody>
</table>

[ARTICLE] 2
EXERCISE OF POWER TO MAKE A DECANTING DISTRIBUTION

<table>
<thead>
<tr>
<th>SECTION</th>
<th>CONTENT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>201</td>
<td>NOTICE</td>
<td>11</td>
</tr>
<tr>
<td>202</td>
<td>COURT INVOLVEMENT</td>
<td>13</td>
</tr>
<tr>
<td>203</td>
<td>SIGNED RECORD</td>
<td>13</td>
</tr>
</tbody>
</table>

[ARTICLE] 3
DECANTING AUTHORITY

<table>
<thead>
<tr>
<th>SECTION</th>
<th>CONTENT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>301</td>
<td>DECANTING DISTRIBUTION IF EXPANDED DISCRETION</td>
<td>13</td>
</tr>
<tr>
<td>302</td>
<td>DECANTING DISTRIBUTION IF LIMITED DISCRETION</td>
<td>15</td>
</tr>
<tr>
<td>303</td>
<td>RESTRICTIONS</td>
<td>16</td>
</tr>
<tr>
<td>304</td>
<td>TAX RELATED LIMITATIONS</td>
<td>18</td>
</tr>
<tr>
<td>305</td>
<td>TERM OF THE SECOND TRUST</td>
<td>21</td>
</tr>
<tr>
<td>306</td>
<td>NEED TO DISTRIBUTE NOT REQUIRED</td>
<td>22</td>
</tr>
<tr>
<td>307</td>
<td>PARTIALLY IMPERMISSIBLE DECANTING</td>
<td>22</td>
</tr>
<tr>
<td>308</td>
<td>OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST</td>
<td>24</td>
</tr>
</tbody>
</table>

[ARTICLE] 4
EFFECT OF DECANTING DISTRIBUTION

<table>
<thead>
<tr>
<th>SECTION</th>
<th>CONTENT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>401</td>
<td>TERMS OF SECOND TRUST</td>
<td>25</td>
</tr>
<tr>
<td>402</td>
<td>SETTLOR</td>
<td>25</td>
</tr>
<tr>
<td>403</td>
<td>LATER DISCOVERED ASSETS</td>
<td>25</td>
</tr>
<tr>
<td>404</td>
<td>CONTRACTUAL RIGHTS</td>
<td>25</td>
</tr>
<tr>
<td>405</td>
<td>CONTRACTUAL OBLIGATIONS</td>
<td>26</td>
</tr>
</tbody>
</table>

[ARTICLE] 5
REMEDIES AND FIDUCIARY DUTIES

<table>
<thead>
<tr>
<th>SECTION</th>
<th>CONTENT</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>501</td>
<td>REMEDIES</td>
<td>27</td>
</tr>
<tr>
<td>502</td>
<td>NO DUTY TO DISTRIBUTE</td>
<td>27</td>
</tr>
<tr>
<td>503</td>
<td>FIDUCIARY DUTY</td>
<td>28</td>
</tr>
</tbody>
</table>
ARTICLE 6
REPRESENTATION

SECTION 601. REPRESENTATION: BASIC EFFECT.......................................................... 29
SECTION 602. REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY
POWER OF APPOINTMENT. ........................................................................................ 30
SECTION 603. REPRESENTATION BY FIDUCIARIES AND PARENTS....................... 31
SECTION 604. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY
IDENTICAL INTEREST.................................................................................................. 32
SECTION 605. APPOINTMENT OF REPRESENTATIVE. ............................................. 33

ARTICLE 7
MISCELLANEOUS

SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION....................... 34
SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND
NATIONAL COMMERCE ACT. .................................................................................... 34
SECTION 703. EFFECTIVE DATE. .................................................................................. 34
TRUST DECANTING ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Trust Decanting Act.

SECTION 102. DEFINITIONS. In this [act]

(1) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on the effective date of this [act].

(2) “Authorized trustee” means a fiduciary, other than the settlor, who has discretion under the terms of the first trust to distribute part or all of the principal of the first trust to one or more current beneficiaries. If there is more than one authorized trustee, “authorized trustee” means the authorized trustees collectively and if the authorized trustees are unable to reach a unanimous decision they may act by majority decision unless the terms of the trust provide otherwise. If a fiduciary, other than the settlor, has expanded discretion to distribute part or all of the principal of a trust and a different fiduciary has limited discretion to distribute part or all of the principal of the trust, the fiduciary having expanded discretion is the authorized trustee with respect to the part of the trust over which such fiduciary has expanded discretion.

(3) “Beneficiary” means a person that:

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

(B) in a capacity other than that of trustee, holds a power of appointment over
(4) “Code” means the United States Internal Revenue Code of 1986, as amended from time to time, including corresponding provisions of subsequent internal revenue laws.

(5) “Current beneficiary” means a beneficiary who, on the date such beneficiary’s qualification is determined, is a distributee or permissible distributee of trust income or principal.

(6) “Decanting distribution” means the distribution of part or all of the principal of a first trust to the second trust pursuant to this [act] as an exercise of an authorized trustee’s fiduciary discretion.

(7) “Decanting power” means the power granted to an authorized trustee pursuant to this [act] to make a decanting distribution.

(8) “Distribute” means making a payment to or for the benefit of a beneficiary of a trust.

(9) “Expanded discretion” means a discretionary distribution power that (A) is extended discretion, or (B) includes purposes such as best interests, welfare, comfort, or happiness. Any requirement to take into account other resources of the beneficiaries shall not be considered in determining whether a discretionary distribution power constitutes expanded discretion. “Expanded discretion” does not include a discretionary distribution power that is limited to an ascertainable standard or a reasonably definite standard.

(10) “Extended discretion” means a discretionary distribution power that is not limited or modified by the terms of the trust in any way.

(11) “First trust” means an existing irrevocable inter vivos or testamentary trust from which a decanting distribution may be or has been made.
“General power of appointment” means a power of appointment exercisable in favor of the powerholder, the powerholder’s estate, a creditor of the powerholder, or a creditor of the powerholder’s estate.

“[Guardian]” means a person appointed by the court [, a parent, or a spouse] to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem.

“Instrument” means a record.

“Irrevocable” means not revocable.

“Jurisdiction,” with respect to a geographic area, includes a State or Country.

“Limited discretion” means a discretionary distribution power that is not expanded discretion.

“Nongeneral power of appointment” means a power of appointment that is not a general power of appointment.

“Person” means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

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

“Powerholder” means a person in which a donor creates a power of appointment.

“Presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the relevant time. The term:

(A) includes a power of appointment not exercisable until the occurrence of a
specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

(i) the occurrence of the specified event;

(ii) the satisfaction of the ascertainable standard; or

(iii) the passage of the specified time; and

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

(23) “Presumptive remainder beneficiary” means a beneficiary who either (A) would be a distributee or a permissible distributee of trust income or principal if the trust terminated on that date, or (B) would be a distributee or a permissible distributee of trust income or principal if the interests of the current beneficiaries terminated on that date without causing the trust to terminate.

(24) “Principal” includes the accumulated and undistributed income of a trust at the time of the exercise of a decanting power that is not otherwise currently required to be distributed.

(25) “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined:

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

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

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

(26) “Reasonably definite standard” means a clearly measurable standard under which
the holder of a power is legally accountable.

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

(28) “Representative” is the person entitled to represent a beneficiary or other person pursuant to the trust instrument or applicable law [including the Trust Code].

(29) “Revocable” means, as applied to a trust, revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(30) “Second trust” means an irrevocable trust to which a decanting distribution is or will be made, including a restatement of the first trust or a trust executed by an authorized trustee for the purpose of receiving a decanting distribution. The second trust may be a trust created or administered under the laws of any jurisdiction, within or without the United States.

(31) “Settlor,” except as provided in Section 402, means a person, including a testator, who 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 that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.

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

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

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

(33) “Spendthrift provision” means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary’s interest.
(34) “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. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.

(35) “Successor beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined, is not a qualified beneficiary, including a person who may become a beneficiary in the future by reason of inclusion in a class. “Successor beneficiary” includes the holder of a presently exercisable general power of appointment but does not include a person who is a beneficiary only because such person holds any other power of appointment.

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

(37) “Trust instrument” means an instrument executed by the settlor to create a trust or executed by any other person to create a second trust that contains terms of the trust, including any amendments thereto.

(38) “Trustee” includes an original, additional, and successor trustee, and a cotrustee.

Comment

The definition of “ascertainable standard” is identical to the definition found in Section 103(2) of the Uniform Trust Code.

The definition of “authorized trustee” includes only a fiduciary. 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 discretion, the trustee will incur the tax effects of holding a general power of appointment whether or not the trustee also has a decanting power.

The definition of “beneficiary” is identical to the definition found in Section 103(3) of the Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. The term “beneficiary” includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. See Restatement (Third) of Trusts Section 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 126 cmt. c (1959).

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

A power of appointment is authority to designate the recipients of beneficial interests in property. See Restatement (Second) of Property: Donative Transfers Section 11.1 (1986). A power is either general or nongeneral and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder’s creditors, the power holder’s estate, or the creditors of the power holder’s estate. See Restatement (Second) of Property: Donative Transfers Section 11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder’s will or if its exercise is not effective for a specified period of time or until occurrence of some event. See Restatement (Second) of Property: Donative Transfers Section 11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of “beneficiary” excludes powers held by a trustee but not powers held by others in a fiduciary capacity.

The definition of “beneficiary” includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (see Uniform Trust Code Section 405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in the Uniform Code. However, pursuant to Uniform Trust Code Section 110(b), also granted rights of a qualified beneficiary under the Code are charitable organizations expressly designated to
receive distributions under the terms of a charitable trust but only if their beneficial interests are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust.

“Current beneficiary” is a subset of “qualified beneficiary” and means a beneficiary who, on the date the beneficiary’s qualification is determined, is a distributee or permissible distributee of trust income or principal.

The definition of “expanded discretion” includes both extended discretion, which may also be referred to as absolute discretion, and nonascertainable standards. Subpart (B) of the definition incorporates the standard used in the Treasury Regulations for a nonascertainable standard, but also adds the commonly used term “best interests.”

For an elaboration on “extended discretion,” see section 50 of the Restatement (Third) of Trusts.

The definition of “general power of appointment” is identical to the definition in Section 102(6) of the Uniform Powers of Appointment Act. The definition of “nongeneral power of appointment” is identical to the definition in Section 102(10) of the Uniform Powers of Appointment Act.

The definition of “guardian” is identical to the definition in Section 103(7) of the Uniform Trust Code.

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

The definition of “nongeneral power of appointment” is identical to the definition in Section 102(10) of the Uniform Power of Appointment Act.

The definition of “person” is identical to the definition of “person” in Section 102(12) of the Uniform Powers of Appointment Act. With one exception, this is the standard definition approved by the Uniform Law Commission. The exception is that the word “trust” has been added to the definition of “person”. Trust law in the United States is moving in the direction of viewing the trust as an entity, see Restatement (Third) of Trusts introductory note to Chapter 21, but does not yet do so. This definition differs slightly from the definition of “person” used in Section 103(10) of the Uniform Trust Code. The Uniform Trust Code defines “person” as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.”

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

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

The definition of “presently exercisable power of appointment” is identical to the definition in Section 102(15) of the Uniform Powers of Appointment Act.
The term “presumptive remainder beneficiary” is a subset of the term “qualified beneficiary”. “Presumptive remainder beneficiary” is a qualified beneficiary other than a “current beneficiary”.

The definition of “principal” is based upon the definition in Section 102 of the Uniform Principal and Income Act.

The definition of “qualified beneficiary” is identical to the definition in Section 103(13) of the Uniform Trust Code.

The qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a beneficiary’s interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of [Article 3 of the Uniform Trust Code] may be employed, including the possible appointment by the court of a representative to represent the beneficiary’s interest.

The qualified beneficiaries who take upon termination of the beneficiary’s interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive the trust property pursuant to the exercise of a power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator’s death and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

“Reasonably definite standard” means a clearly measurable standard under which the holder of a power is legally accountable. “Reasonably definite standard” includes an ascertainable standard but may also include standards that would not be considered ascertainable standards. A power to distribute principal for the education, support, maintenance, or health of the beneficiary; for the beneficiary’s reasonable support in comfort; or to enable the beneficiary to maintain the beneficiary’s accustomed standard of living; or to meet an emergency; would be a reasonably definite standard. A power to distribute principal for the pleasure, desire, or happiness of a beneficiary is not a reasonably definite standard. A reasonably definite standard need not require consideration of the needs and circumstances of the beneficiary. The entire context of a provision of a trust instrument granting a power should be considered in determining whether there is a reasonably definite standard. For example, if a trust instrument provides that the determination of the trustee shall be conclusive with respect to the exercise or nonexercise of a power, the power is not limited by a reasonably definite standard. The fact, however, that the governing instrument is phrased in discretionary terms is not in itself an indication that no reasonably definite standard exists. “Reasonably definite standard” is intended to parallel the definition of the term as used in Internal Revenue Code section 674(b) with respect to the grantor trust rules for income tax purposes.
The definition of “record” is identical to the definition in Section 102(16) of the Uniform Powers of Appointment Act. This is a standard definition approved by the Uniform Law Commission.

The definition of “revocable” is identical to the definition in Section 103(14) of the Uniform Trust Code. The definition clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor’s control. The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. Thus a revocable trust cannot be decanted even if the settlor becomes incapacitated. Modification of such a trust may be permitted under other provisions of the Trust Code or state law.

Note that the term “adverse interest” is not defined in the [act] or the Uniform Trust Code.

The definition of “second trust” includes (1) an irrevocable trust already in existence, whether created by the settlor of the first trust or a different settlor, (2) a “restatement” of the first trust which could be executed by the authorized trustee as the nominal grantor or (3) a new trust executed by the authorized trustee as the nominal settlor for the purpose of receiving a decanting distribution. A decanting distribution that is implemented by restating the first trust presumably would not require the issuance of a new tax identification number for the retitling of assets or a final income tax return for the trust. A decanting distribution to a newly created trust presumably would require that the new trust obtain a new tax identification number and that the assets be retitled. Further, if the first trust was terminated by reason of the decanting, a final income tax return for the first trust would be required.

The definition of “settlor” is identical to the definition in Section 103(15) of the Uniform Trust Code except that the definition in the [act] refers to the exception in Section 402, which clarifies that the settlor of the first trust is considered to be the settlor of the second trust to the extent of any decanting distribution.

The definition of “spendthrift provision” is identical to the definition in Section 103(16) of the Uniform Trust Code.

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

The term “successor beneficiary” means a beneficiary who has a future beneficial interest in a trust “vested or contingent, including a person who may become a beneficiary in the future by reason of inclusion in a class,” other than a beneficiary who is a qualified beneficiary. Thus it includes unborn beneficiaries and beneficiaries who might be termed “second line” or more remote remainder beneficiaries. It does not include, however, a person who is merely a holder of a power of appointment but not otherwise a beneficiary unless such person holds a presently exercisable general power of appointment. This exception in the definition precludes a trustee with expanded discretion from making a decanting distribution under Section 401 in a manner that would give the holder of a testamentary general power of appointment or a limited power of appointment a beneficial interest in the second trust.

The definition of “terms of the trust” is similar to the definition in Section 103(18) of
the Uniform Trust Code, except that it refers to the intent of the maker rather than the intent of the settlor. Usually, the maker of the instrument would be the settlor. In the case of a trust created by a decanting distribution, however, the maker of the instrument would usually be the authorized trustee.

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

The definition of “trustee” is the same as the definition in Section 103(20) of the Uniform Trust Code.

The definition of “trust instrument,” excluding the bracketed language, is identical to the definition found in Section 103(19) of the Uniform Trust Code. The bracketed language makes clear that where the second trust is a trust created by the trustee for the purpose of making a decanting distribution, such instrument is considered to be an “instrument” even though the trustee is not considered to be the settlor of the second trust.

SECTION 103. APPLICATION. This [act] is applicable to trusts in existence on the date of enactment or created on or after the date of enactment. This [act] shall be construed as pertaining to the administration of a trust and shall be applicable to any irrevocable trust that is administered under the law of this state or that is governed by the law of this state with respect to the meaning and effect of its terms, including a trust whose governing law for purposes of administration has been changed to the laws of this state.

Comment

The laws of different states may govern a trust for purposes of determining its validity, for purposes of construing the trust and for purposes of administration of the trust. The determination of the state law that governs for these purposes is also dependent upon whether the trust property consists of movables or land and whether the trust was created by a will or by an inter vivos instrument. See sections 267 through 279 of the Restatement (Second) of Conflict of Laws.

[ARTICLE] 2

EXERCISE OF POWER TO MAKE A DECANTING DISTRIBUTION

SECTION 201. NOTICE.

(a) Except as provided in Section 304, an authorized trustee may make a decanting
distribution without the consent of any person and without court approval, but an authorized
trustee shall provide notice in a record of the intended decanting distribution not later than [60
days] before such exercise (the “notice period”) to (i) the settlor of the first trust, if living; (ii)
each qualified beneficiary, determined as of the date notice is sent; (iii) any person who
currently has the right to remove or replace the authorized trustee; (iv) all other trustees of the
first trust; [and] (v) the trustees of the second trust [; and (vi) if the decanting distribution is
made under section 301 and materially and adversely affects the interests of a successor
beneficiary, such successor beneficiary]. The notice record shall (i) specify the manner in
which the trustee intends to exercise the power and the prospective effective date for the
decanting distribution and (ii) include a copy of the trust instrument for the first trust and a
copy of the trust instrument for the second trust. The decanting distribution may be made
before the expiration of the notice period if all persons entitled to receive notice waive the
notice period in a record. [An authorized trustee is not required to provide notice to a
qualified beneficiary who is a minor and has no representative.] An authorized trustee is not
required to provide notice to a person who is known to the authorized trustee but who cannot
be located by the authorized trustee after reasonable diligence or who is not known to the
authorized trustee. The right of a person to bring a claim that an exercise of the decanting
power was an abuse of discretion is not limited by the receipt of notice under this section,
waiver of the notice period, or the expiration of the notice period.

(b) A distribution to a second trust that was intended to be a decanting distribution
shall not be invalid because of the failure to provide notice to one or more persons under
subsection (a) if the authorized trustee acted in good faith in attempting to comply with
subsection (a). If a trustee discovers that notice was not provided to a person as required
under subsection (a), the trustee promptly shall provide such notice to the person upon such
discovery.

Comment

Generally a trustee is not required to provide notice to beneficiaries prior to exercising
a discretionary power. Nonetheless, qualified beneficiaries are entitled to know the terms of
the trust and therefore should receive notice of any change in the trust. Requiring prior notice
seems reasonable in light of the significant trust modifications that can be made by decanting
and practical, in that it helps determine if any beneficiaries may challenge the decanting.

SECTION 202. COURT INVOLVEMENT. The authorized trustee may petition
the court to approve a decanting distribution. In a contested judicial proceeding under this
section, the authorized trustee has the burden of proving that the proposed exercise of the
decanting power is in accordance with the purposes of the first trust. The costs of a petition
made in good faith shall be paid from the first trust regardless of whether or not the petition is
granted.

SECTION 203. SIGNED RECORD. The exercise of a power to make a decanting
distribution must be made by a record, signed by the authorized trustee [and the trustee of the
second trust], and filed with the records of the first trust and the second trust.

[ARTICLE] 3

DECANTING AUTHORITY

SECTION 301. DECANTING DISTRIBUTION IF EXPANDED DISCRETION.

An authorized trustee who has expanded discretion to distribute all or part of the principal of a
trust to one or more of the current beneficiaries may make a decanting distribution of the
principal subject to such expanded discretion to one or more second trusts.

(a) Each second trust may:

(1) include as current beneficiaries only one or more of the current

beneficiaries of the first trust.
(2) include as presumptive remainder beneficiaries and successor beneficiaries only one or more of the current beneficiaries, presumptive remainder beneficiaries and successor beneficiaries of the first trust.

(3) create a power of appointment in one or more of the current beneficiaries of the first trust to whom the authorized trustee has expanded discretion to distribute principal. Such power of appointment may be general or nongeneral, and the class of permissible appointees in favor of whom the beneficiary may exercise the power of appointment may be broader than or otherwise different from the beneficiaries of the first trust.³

(4) create a power of appointment in a powerholder other than one or more of the current beneficiaries of the first trust to whom the authorized trustee has expanded discretion to distribute principal only if the powerholder held such power of appointment under the first trust.

(b) The second trust may not modify or eliminate a presently exercisable power of withdrawal or presently exercisable general power of appointment.

Comments

Under Section 301 an authorized trustee who has expanded discretion to distribute all or part of the principal of a trust to one or more of the current beneficiaries may make a decanting distribution of the principal subject to such expanded discretion to a second trust. The second trust may contain any terms permissible for a trust subject only to the restrictions found in the act. Thus subject to subparts (1) through (4) of Section 301 and the other restrictions in Sections 304, 305, 306 and 309 and subject to the authorized trustee’s fiduciary duty in Section 503, the second trust may (1) eliminate (but not add) one or more current beneficiaries; (2) make a current beneficiary a remainder beneficiary; (3) eliminate (but not add) one or more presumptive remainder and successor beneficiaries; (4) make a presumptive remainder beneficiary a successor beneficiary, or vice versa; (5) add, limit or eliminate mandatory distributions of income, annuity amounts or unitrust amounts; (6) add or eliminate a spendthrift provision; (7) extend the duration of a trust; (8) alter or eliminate mandatory withdrawal rights that are not currently in existence; (9) change the jurisdiction of the trust and the law governing the administration of the trust; (10) eliminate or add powers of appointment; (11) change the trustee or trustee succession provisions; (12) change the powers of the trustee; (13) change administrative provisions of the trust. The second trust, however,
cannot make a remainder beneficiary a current beneficiary.

Section 301(b) prohibits the second trust from modifying or eliminating the presently exercisable power of withdrawal or presently exercisable general power of appointment. Thus if a beneficiary has already attained an age at which the beneficiary can withdraw all or a portion of the trust, the second trust may not modify or eliminate that right of withdrawal. If a Crummey withdrawal power is still in effect with respect to a prior contribution to the trust, the second trust cannot modify or eliminate the Crummey withdrawal right. The second trust could, however, eliminate the Crummey rights of withdrawal with respect to future contributions. Similarly, if a trust grants a beneficiary a right to withdraw the greater of 5% of the value of the trust or $5,000 each year, the second trust may not eliminate the right of withdrawal for the current year if it is presently in effect but may eliminate the 5 and 5 power for future years.

SECTION 302. DECANTING DISTRIBUTION IF LIMITED DISCRETION.

An authorized trustee who has limited discretion to distribute the principal of a trust to one or more current beneficiaries may make a decanting distribution to one or more second trusts. For purposes of this section,

(1) each beneficiary of the first trust must have beneficial interests in the second trusts that are, in the aggregate, substantially similar to the beneficial interests of the beneficiary in the first trust, and

(2) a power to make distributions for the benefit of a beneficiary shall be considered substantially the same as a power to make distributions to the beneficiary.

Comments

The power to make distributions for the benefit of the beneficiary when distributions are permitted to be made directly to such beneficiary is a codification of common law. Section 816 (21) of the Uniform Trust Code permits a trustee to pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated by paying it directly to the beneficiary or applying it for the beneficiary’s benefit, or by paying it to certain other persons on behalf of such beneficiary or to manage it as a separate fund on the beneficiary’s behalf subject to the beneficiary’s continuing right to withdraw the distribution. Section 302 (2) is similar, but does not require that the beneficiary be under a legal disability or incapacitated in order for a distribution made for the benefit of the beneficiary to be treated as substantially the same as a distribution to the beneficiary.
Section 302 is intended to permit a severance of a trust if the beneficial interests, in the aggregate, in the second trust are substantially similar to the beneficial interests in the first trust. For this purpose, an equal vertical division of a trust in which multiple beneficiaries have equal discretionary interests is considered to be substantially similar. For example, . . .

SECTION 303. RESTRICTIONS. The exercise of a decanting power is subject to the following restrictions:

(1) An authorized trustee may not exercise a decanting power to the extent that the first trust instrument expressly prohibit a modification of one or more provisions of the first trust instrument by decanting, but a general prohibition of the amendment or revocation of the first trust or a spendthrift clause shall not preclude the exercise of a decanting power. The second trust instrument must contain the same express prohibition on modifying one or more provisions of the trust instrument by decanting as are in the first trust.

(2) An authorized trustee may not exercise a decanting power to increase, or change the method of determining, the compensation of the authorized trustee unless the increase in, or change in the method of determining, that compensation has been consented to by all qualified beneficiaries or is approved by the court. An increase in compensation of the authorized trustee arising solely because the duration of the second trust is longer than the duration of the first trust is not considered an increase in, or a change in the method of determining, the compensation of the authorized trustee. No authorized trustee or other trustee may receive a commission or other compensation for exercising a decanting power, but may be compensated at a reasonable rate for the time spent considering and implementing the exercise of the decanting power.

(3) Except as provided in paragraphs (A) and (B), an authorized trustee may not exercise a decanting power to decrease a trustee’s liability, or to exculpate or indemnify a trustee from liability, to a greater extent than provided in the first trust.
(A) The second trust may divide and reallocate fiduciary powers among several fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and may indemnify or exonerate a fiduciary from liability for actions of another fiduciary, but may not reduce fiduciary liability in the aggregate.

(B) The second trust may indemnify the trustee of the first trust for any liabilities or claims that would have been payable out of the first trust if the decanting power had not been exercised.

(4) An authorized trustee may not exercise a decanting power to modify a provision granting another person the right to remove or replace the authorized trustee unless either (i) the person currently holding the right [and the qualified beneficiaries] consent to the modification or (ii) the court approves the modification and, in either case, the modification grants the right to another person who is independent of and nonsubservient\(^5\) to the authorized trustee.

Comment

The Uniform Trust Code permits the court to modify a trust, presumably including the terms of trustee compensation under Section 412 (Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively), Section 413 (Cy Pres), Section 414 (Modification or Termination of Uneconomic Trust), Section 415 (Reformation to Correct Mistakes) and Section 416 (Modification to Achieve Settlor’s Tax Objectives). Nonjudicial modification is permitted only under Section 411 under one alternative, which permits a noncharitable irrevocable trust to be modified or terminated upon consent of the settlor and all beneficiaries. Many states, however, have nonjudicial settlement acts that do not necessarily require the consent of the settlor and may only require the consent of certain beneficiaries for certain trust modifications. An exercise of decanting power, however, generally is an action taken by the authorized trustee that does not require beneficiary consent or court approval. The purpose of acquiring beneficiary consent or court approval to a change in the compensation of the authorized trustee is to place a more immediate check and balance on a trustee increasing its own compensation by decanting. In this context it does not seem necessary to require the consent of all beneficiaries. Obtaining the consent of qualified beneficiaries, who would generally be immediately impacted by a change in compensation, should be sufficient.

In the case of a change to a provision granting another person the right to remove or
replace the authorized trustee, tax issues could arise if the qualified beneficiaries could
consent to such a change. Therefore, subpart 303(3) of the [act] authorizes a modification of
a trustee removal provision only with either court approval or the consent of the person
currently holding the right to remove or replace the trustee. In other words, a trustee can
decant to a directed trust that divides the trustee responsibilities (i.e., jobs) among various
parties, but cannot eliminate the fiduciary duties that accompany those jobs. For example, an
investment advisor can be appointed and the trustee can be relieved of fiduciary liability for
the investment decisions so long as the investment advisor is acting in a fiduciary capacity
and has fiduciary liability for the investment decisions.

SECTION 304. TAX RELATED LIMITATIONS. The exercise of a decanting
down power is subject to the following limitations:

(1) If a prior transfer to the first trust qualified, or would have qualified but for this
[act], for a marital or charitable deduction for purposes of the federal income, gift, or estate
tax under the Code, or for purposes of a state income, gift, estate, or inheritance tax, the
second trust instrument must not include or omit any term that, if included in or omitted from
the first trust instrument, would have prevented the first trust from qualifying for that
deduction, or would have reduced the amount of the deduction, under the same provisions of
the Code or under the same provisions of the applicable state law under which the transfer to
the first trust qualified.

(2) If a prior transfer to the first trust qualified, or would have qualified but for this
[act] for the exclusion from the gift tax described in Section 2503(b) of the Code, including by
application of Section 2503(c) of the Code, the second trust instrument must not include or
omit a term that, if included in or omitted from the first trust instrument, would prevent the
transfer from qualifying under the same provisions of Section 2503 of the Code.

(3) If the assets of the first trust include shares of stock in an S corporation, as defined
in Section 1361 of the Code, and the first trust is, or if not for the provisions of this [act]
would be, a permitted shareholder under any provision of Section 1361 of the Code, an
authorized trustee may not exercise a decanting power to distribute part or all of the S
corporation stock to a second trust that is not a permitted shareholder under Section 1361(c)(2) of the Code. If the assets of the first trust include shares of stock in an S corporation, as defined in Section 1361 of the Code, and the first trust is, or but for this [act], would be a qualified subchapter S trust, the second trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter S trust.

(4) If a transfer to the first trust qualified, or would have qualified but for this [act], for a zero inclusion ratio for purposes of the federal generation-skipping transfer tax under Section 2642(c) of the Code, the second trust instrument must not include or omit a term that, if included in or omitted from the first trust instrument, would prevent the transfer to the first trust from qualifying.

(5) If the assets of the first trust include any interest subject to the minimum distribution rules of Section 401(a)(9) of the Code and the treasury regulations issued under that section, the second trust instrument must not include or omit any term that, if included in or omitted from the first trust instrument, would have shortened the maximum distribution period otherwise allowable under Section 401(a)(9) of the Code and the treasury regulations with respect to the interest under the first trust.

(6)(A) In this paragraph, “tax benefit” means any federal or state tax deduction, exemption, exclusion, or other tax benefit not otherwise listed in this section except for any benefit from having the settlor considered the owner under Subpart E of Part I of Subchapter J of Chapter 1 of Subtitle A of the Code.

(B) Subject to paragraph (7), if the first trust instrument expressly indicates an intention to qualify for a tax benefit or if the first trust instrument is clearly designed to enable the first trust to qualify for a tax benefit, and if the first trust did qualify, or if not for the
provisions of this [act] would have qualified, for the tax benefit, the second trust instrument
shall not include or omit a term that, if included in or omitted from the first trust instrument,
would have prevented the first trust from qualifying for the tax benefit.

(7) Subject to paragraph (3), an authorized trustee may exercise the decanting power
to a second trust as to which the settlor is not considered the owner under Subpart E of Part I
of Subchapter J of Chapter 1 of Subtitle A of the Code even if the settlor is considered the
owner of the first trust, or may make a decanting distribution to a second trust as to which the
settlor of the first trust is considered the owner under Subpart E of Part I of Subchapter J of
Chapter 1 of Subtitle A of the Code even if the settlor is not considered the owner of the first
trust. \(^6\) If a decanting distribution would adversely affect the taxation of the settlor, the
authorized trustee shall take into account the interests of the settlor as if the settlor were a
beneficiary of the first trust.

Comments

Certain tax benefits granted under the Internal Revenue Code are dependent upon a
trust containing specific provisions. For example, a qualified terminable interest property
marital trust or general power of appointment marital trust requires that the surviving spouse
be entitled for life to all income, and a general power of appointment marital trust also
requires that the surviving spouse have a general power of appointment. If a trustee had the
power to decant the old trust in a manner that deprived the surviving spouse of the requisite
income interest, or in the case of a general power of appointment marital trust, the requisite
general power of appointment, then arguably the old trust would not qualify for the marital
deduction from the inception of the trust. Similarly, a restriction prohibiting the trustee from
decanting in a way that would disqualify the trust for a charitable deduction or reduce the
amount of the deduction is important to ensure that charitable lead trusts, charitable remainder
trusts and other charitable trusts cannot be modified in a way that arguably would prevent
them from qualifying for the charitable deduction or that would reduce the amount of that
deduction, as could be the case if the trustee could decant in a way that reduced the charitable
interest in a split-interest trust.

Code section 2503(b) grants a gift tax annual exclusion for gifts of a “present interest.”
Present interests are often created in trusts by granting the beneficiary a Crummey right of
withdrawal over contributions to the trust. If a trustee could decant in a manner that
prematurely terminated a beneficiary’s existing Crummey right of withdrawal over a prior
contribution to the trust, then arguably the contribution would not qualify for the gift tax
annual exclusion. The restriction in subsection 301(b) prohibiting the modification or
elimination of a presently exercisable power of withdrawal also protects the annual exclusion
for a prior gift to a Crummey trust.

Code section 2503(c) provides another method for qualifying gifts to a trust for the
gift tax annual exclusion. Code section 2503(c) permits a gift tax annual exclusion for a gift
to a trust for an individual under age 21 provided that the property and its income may be
expended for the benefit of the donee before attaining age 21 and would to the extent not so
expended pass to the donee upon attaining age 21, and in the event the donee dies before
attaining age 21, will be payable to the estate of the donee or pursuant to a general power of
appointment.

In order for a trust to qualify as a QSST, (a) the terms of the trust must require that
during the life of the current income beneficiary there shall be only one income beneficiary
and (b) all of the income must be distributed to such beneficiary. Code section 1361(d)(3).
Thus it may be important that a trust intended to qualify as a QSST not be permitted to be
decanted into a trust that would not qualify as a QSST.

Code section 2642(c) grants a GST annual exclusion to gifts that qualify for the gift
tax annual exclusion but imposes two additional requirements for gifts to trusts. First, the
trust must be only for a single individual and second, if the individual dies before the
termination of the trust, the assets of the trust must be included in the gross estate of such
individual. Thus while gifts to trusts for multiple beneficiaries could qualify for the gift tax
annual exclusion through the use of Crummey withdrawal rights, such gifts would not qualify
for the GST annual exclusion. The 2642(c) restriction requiring a trust be for a single
individual could be violated through decanting if the statute permitted accelerating a
remainder interest to a current interest. The requirement that the trust be included in the gross
estate of the individual could perhaps be violated by decanting to a trust that was not
includible in the beneficiary’s gross estate.

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

SECTION 305. TERM OF THE SECOND TRUST. The second trust may have a
term that is longer than the term set forth in the first trust instrument, including a term
measured by the lifetime of a current beneficiary; but the second trust must be limited to the
same permissible period of the rule against perpetuities that applied to the first trust, or a
shorter period, unless the first trust instrument expressly permits the trustee to extend its
perpetuities period.

Comment

An exercise of a decanting power could inadvertently violate a rule against perpetuities period applicable to the old trust if the new trust does not comply with the same rule against perpetuities period. Even in states that have abolished the rule against perpetuities, the trust being decanted may still be subject to a rule against perpetuities under prior law or may be subject to a rule against perpetuities under the law of a different state. Further, if a trust is grandfathered from generation-skipping transfer ("GST") tax or has an exclusion ratio less than one, decanting to a trust that does not comply with the same rule against perpetuities period (or a federal rule against perpetuities period) may have adverse GST consequences.

SECTION 306. NEED TO DISTRIBUTE NOT REQUIRED. An authorized trustee may exercise the decanting power whether or not the authorized trustee would otherwise have made a distribution of principal at such time under the discretionary distribution standard in the terms of the first trust.

SECTION 307. PARTIALLY IMPERMISSIBLE DECANTING.

(a) For purposes of this section, a revised second trust instrument means the revised second trust instrument prepared in accordance with subsection (c).

(b) A distribution that was intended to be a decanting distribution to a second trust shall be effective to the greatest extent permissible under the [act]. To the extent of such distribution:

(1) Any provisions in the second trust instrument that are not permitted under this [act] shall be given no effect.

(2) Any provisions required to be in the second trust instrument to comply with this [act] that are not expressly contained in the second trust instrument shall be presumed to be included in the second trust instrument.

(3) Any provisions of the first trust instrument that were not permitted to be modified or eliminated by this [act] that are not contained in the second trust instrument shall
be presumed to be included in the second trust instrument.

(c) If a trustee of a second trust discovers that the copy of the second trust instrument that was provided under Section 201 did not accurately reflect the terms of the second trust instrument because of subsection (b), the trustee promptly shall prepare a revised second trust instrument that incorporates the changes required by subsection (b) and a record describing any corrective action that the trustee proposes to take for actions taken or not taken in reliance on the provisions of the second trust instrument as set forth in the notice provided under Section 201 and without regard to subsection (b). The trustee shall provide notice in a record of the revised second trust instrument and the proposed corrective action not later than [60 days] before taking such corrective action (the “notice period”) to (i) the settlor of the first trust, if living; (ii) each qualified beneficiary, determined as of the date notice is sent; (iii) any person who currently has the right to remove or replace the authorized trustee; (iv) all other trustees of the first trust; [and] (v) the trustees of the second trust [; and (vi) if the revised second trust instrument materially and adversely affects the interests of a successor beneficiary, such successor beneficiary]. The corrective action may be taken before the expiration of the notice period if all persons entitled to receive notice waive the notice period in a record. [An authorized trustee is not required to provide notice to a qualified beneficiary who is a minor and has no representative.] An authorized trustee is not required to provide notice to a person who is known to the authorized trustee but who cannot be located by the authorized trustee after reasonable diligence or who is not known to the authorized trustee.

(d) The trustee may petition the court to approve the revised second trust instrument and the proposed corrective action. The costs of a petition made in good faith shall be paid from the second trust.
Comment

In order to provide as much certainty as possible to the trustee and the beneficiaries with respect to the operative terms of a trust, an exercise of a decanting power should not be wholly invalid because of a technical violation of the decanting statute. For example, if the second trust sets forth an impermissible rule against perpetuities period (see Section 305), the other modifications made by the decanting should be effective.

Subsection 305(b) modifies the second trust instrument to delete impermissible provisions in the second trust instrument and to insert required provisions in the second trust instrument.

Although the trustee, upon discovering that subsection 305(b) applies, is required to provide notice of the corrected provisions of the second trust instrument to the same parties who would be required to receive notice of an exercise of a decanting power, such a notice of the corrected provisions of the second trust instrument would not start a new period for challenging the original decanting under Section 501 because the beneficiary had all of the information necessary to determine that the proposed original decanting was not in compliance with the [act]. A new period would start upon receiving the notice required under subsection 305(c) with respect to the particular revisions to the second trust instrument that the trustee makes to comply with Section 305 to the extent the trustee must exercise discretion to define such revisions and any corrective action taken by the trustee.

SECTION 308. OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST.

(a) This [act] shall not be construed to limit the right of any trustee or other person to distribute property in further trust, whether that power arises under the terms of the trust instrument, any other statute, common law, or a court order.

[(b) A decanting distribution may be made by a nonjudicial settlement agreement in accordance with [the nonjudicial settlement act].]

Comment

Section 111 of the Uniform Trust Code and statutes in many states permit certain matters regarding a trust to be resolved by a nonjudicial settlement agreement among the interested persons. Where the decanting distribution makes a change in the terms of the trust that could be a proper matter for a nonjudicial settlement agreement, the decanting distribution could be made in conjunction with a nonjudicial settlement agreement. Generally, the nonjudicial settlement agreement would prevent any subsequent challenges to the decanting. The tax consequences of having the beneficiaries consent to the nonjudicial settlement agreement should be considered.
[ARTICLE] 4

EFFECT OF DECANTING DISTRIBUTION

SECTION 401. TERMS OF SECOND TRUST. Any reference to the trust instrument or terms of the trust in [the trust code] includes the second trust instrument and the terms of the second trust that received a decanting distribution in accordance with this [act].

SECTION 402. SETTLOR. The settlor of a first trust is considered to be the settlor of the second trust with respect to the portion of the second trust distributed from the first trust in accordance with this [act].

SECTION 403. LATER DISCOVERED ASSETS. To the extent the authorized trustee does not provide otherwise at the time of a decanting distribution and the second trust does not provide otherwise:

(1) The distribution of all of the principal of the first trust to a second trust shall be deemed to include subsequently discovered assets otherwise belonging to the first trust and undistributed principal paid to or acquired by the first trust subsequent to the distribution to the second trust.

(2) The distribution of less than all of the principal of the first trust to a second trust does not include subsequently discovered assets belonging to the first trust and principal paid to or acquired by the first trust subsequent to the distribution to the second trust; those assets remain the assets of the first trust.

SECTION 404. CONTRACTUAL RIGHTS. To the extent the authorized trustee does not provide otherwise at the time of a decanting distribution:

(1) The distribution of all of the principal of the first trust to a second trust shall be deemed to include all contractual rights from contracts made by the trustee of the first trust
during the course of the administration of the trust to the extent such rights are assignable.

(2) The distribution of less than all of the principal of the first trust to the second trust shall include contractual rights made by the trustee of the first trust during the course of administration of the first trust only to the extent the trustee of the first trust assigns such rights to the second trust.

Comment

Generally, the trustee of a trust can maintain actions at law or suits in equity to enforce any contractual rights to which the trustee is entitled. See Restatement (Second) of Trusts Section 280. When a decanting power is exercised if all of the principal of the first trust is distributed to a second trust, the principal of the trust should include any contractual rights of the first trust to the extent that such rights are assignable. Where, however, the decanting distribution is of only a portion of the principal of the first trust, then the decanting distribution will not be deemed to include contractual rights unless the trustee of the first trust expressly assigns such rights to the second trust.

SECTION 405. CONTRACTUAL OBLIGATIONS. To the extent that a person to whom the trustee of the first trust has incurred a liability in the course of the administration of the first trust could reach the property of the first trust and apply it to the satisfaction of such person’s claim, such person can reach the property of the second trust to the extent the property of the second trust resulted from a decanting distribution from the first trust.

Comment

The Restatement (Second) of Trusts provides various situations in which a person to whom the trustee has incurred a liability in the course of the administration of a trust can by a proceeding in equity reach trust property and apply it to the satisfaction of such person’s claim. See Section 267 of the Restatement (Second) of Trusts. Section 268 provides that the creditor can reach trust property to the extent the creditor cannot obtain satisfaction of the claim out of the trustee’s individual property to the extent the trustee is entitled to exoneration out of the trust estate. Section 269 provides that a creditor who cannot obtain satisfaction out of the trustee’s individual property can by a proceeding in equity reach trust property to the extent the trust estate has benefitted. Section 270 permits the creditor to reach trust property if by the terms of the trust the settlor manifested an intention to confer such a power on the creditor. Section 271 permits a creditor to reach trust property on a contractual claim if the contract provides that the trustee shall not be personally liable upon the contract and the contract was properly made by the trustee in the administration of the trust. Section 271A
permits a creditor to obtain satisfaction out of the trust estate if it is equitable to permit him to do so.

It would be inequitable to permit a trust to evade contractual liabilities made by the trustee of the first trust to the extent the creditor would have been entitled to satisfaction out of the trust property.

[ARTICLE] 5

REMEDIES AND FIDUCIARY DUTIES

SECTION 501. REMEDIES. An authorized trustee who in good faith takes or omits to take an action under this [act], including petitioning the court under Section 302 or Section 307(c), is not liable to any beneficiary or other person. An act or omission by an authorized trustee under this [act] is presumed taken or omitted in good faith unless it is determined by the court to have been an abuse of discretion. If an authorized trustee in good faith takes or omits to take an action under this [act] and a beneficiary or other person opposes the act or omission, the person’s exclusive remedy is to obtain an order of the court directing the authorized trustee to exercise authority in accordance with this [act] in such manner as the court determines necessary or helpful to further the purposes of the trust, including prospectively to modify or reverse a prior exercise of the decanting power. Any claim by any beneficiary or other person that an act or omission by an authorized trustee under this [act] was an abuse of discretion is barred if not asserted in a proceeding commenced by or on behalf of the person within [two years] after the person received the notice required by Section 301 or a record sufficiently disclosing the decanting distribution such that the person knew or reasonably should have known of the claim.

SECTION 502. NO DUTY TO DISTRIBUTE. Nothing in this [act] is intended to create or imply a duty to exercise the decanting power, and no inference of a breach of fiduciary duty shall be made as a result of an authorized trustee not exercising the decanting
power. Notwithstanding any other provision of this [act], no authorized trustee or trustee has
a duty to inform beneficiaries about the applicability of this [act] or a duty to review the trust
to determine whether any action should be taken under this [act].

SECTION 503. FIDUCIARY DUTY. Except as provided in the following
sentence, the authorized trustee shall exercise a decanting power in good faith and in
accordance with the purposes of the first trust. An authorized trustee who has expanded
discretion to distribute the principal of a trust to one or more current beneficiaries shall
exercise the decanting power under Section 301 of the [act] in the interests of one or more of
such beneficiaries and shall have no duty of impartiality to the other beneficiaries. An
authorized trustee who has limited discretion to distribute the principal of a trust to one or
more current beneficiaries shall exercise the decanting power under Section 302 of the [act] in
the interests of the beneficiaries. Except as otherwise provided in the trust instrument, for
purposes of this [act] [including Section 801 and subsection 802(a) of the Uniform Trust
Code], the terms of the trust shall be deemed to include the decanting power granted in this
[act].

Comment

Although Section 801 of the Uniform Trust Code states that the trustee shall
administer a trust in good faith, in accordance with its terms and purposes and the interests of
the beneficiaries, Section 503 of the [act] does not require that the exercise of a decanting
power be in accord with the terms of the first trust. Nonetheless, an exercise of a 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 in place at the time of the decanting. The settlor’s purposes generally also
include efficient administration of the trust. The settlor’s purposes may also include
achieving certain tax objectives or generally minimizing overall tax liabilities.

Decanting may be appropriate in many situations in which judicial modification would
be appropriate such as (1) when modification, because of circumstances not anticipated by the
settlor, would further the purposes of the trust (see Section 412(a) of the Uniform Trust
Code); (2) when continuation of the trust on its existing terms would be impracticable or
wasteful or impair the trust’s administration (see Section 412(b) of the Uniform Trust Code); (3) to replace the trustee if the value of the trust is insufficient to justify the costs of administration (see Section 414(b) of the Uniform Trust Code); (4) to correct mistakes (see Section 415 of the Uniform Trust Code); (5) to achieve the settlor’s tax objectives (see Section 416 of the Uniform Trust Code); and (6) to combine or divide trusts (see Section 417 of the Uniform Trust Code).

The interests of a beneficiary is to be determined by the trustee in good faith, considering the purposes of the first trust, the circumstances existing at the time of the exercise of the decanting power, the provisions of the second trust, including tax consequences. The interests of a beneficiary is not as determined by the beneficiary. In the context of decanting, however, the interests of a beneficiary are not determined solely with respect to the terms of the first trust and thus Section 503 provides that the terms of the first trust shall be deemed to include the decanting power.

[[ARTICLE] 6

REPRESENTATION

General Comment

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators), and what is known as virtual representation. Sections 601 through 605 are taken from Article 3 of the Uniform Trust Code. This article may be omitted in states that have adopted the Uniform Trust Code or that have representation provisions in their trust laws. Representation is addressed in the Restatement (First) of Property §§ 180-186 (1936), but the coverage of this article is more complete.

Section 601 is the introductory section, laying out the scope of the article. The representation principles of this article apply for the giving of required notices. They apply for the giving of consents to certain actions.

Sections 602-605 cover the different types of representation. Section 602 deals with representation by the holder of a general testamentary power of appointment. Section 603 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. Section 604 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Section 605 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate.

SECTION 601. REPRESENTATION: BASIC EFFECT.

(a) Notice to a person who may represent and bind another person under this [article]
has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this [article] is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) A person who under this [article] may represent a settlor who lacks capacity may receive notice on the settlor’s behalf.

[(d) A settlor may not represent and bind a beneficiary under this [article].]

Comment

This section is general and introductory, laying out the scope of the article. It is derived from Section 301 of the Uniform Trust Code.

Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this article. Notice to the substitute has the same effect as if given directly to the other person.

Subsection (b) deals with the effect of a consent, whether by actual or virtual representation. A consent by a representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary’s behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries. Subsection (b) implements cases such as Barber v. Barber, 837 P.2d 714 (Alaska 1992), which held that a refusal to allow an objection by an adult competent remainder beneficiary violated due process.

SECTION 602. REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.
This section is derived from Section 302 of the Uniform Trust Code. This section specifies the circumstances under which a holder of a general testamentary power of appointment may receive notices on behalf of and otherwise represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise. Such representation is allowed except to the extent there is a conflict of interest with respect to the particular matter or dispute. Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust, oftentimes of a trust intended to qualify for the federal estate tax marital deduction. See I.R.C. § 2056(b)(5). Without the exception for conflict of interest, the holder of the power could act in a way that could enhance the holder’s income interests to the detriment of the appointees or takers in default, whoever they may be.

SECTION 603. REPRESENTATION BY FIDUCIARIES AND PARENTS. To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) a [conservator] may represent and bind the estate that the [conservator] controls;

(2) a [guardian] may represent and bind the ward if a [conservator] of the ward’s estate has not been appointed;

(3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) a trustee may represent and bind the beneficiaries of the trust;

(5) a personal representative of a decedent’s estate may represent and bind persons interested in the estate; and

(6) a parent may represent and bind the parent’s minor or unborn child if a [conservator] or [guardian] for the child has not been appointed.

This section is derived from Section 303 of the Uniform Trust Code. This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law. Paragraph (6), which allows parents to represent their children, is more recent, having originated in 1969 upon approval of the Uniform Probate Code. This section is not limited to
representation of beneficiaries. It also applies to representation of the settlor. Representation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the ward’s estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator. This grant of authority to act with respect to the ward’s trust interest may broaden the authority of a guardian in some States although not in States that have adopted the Section 1-403 of the Uniform Probate Code, from which this section was derived. Under the Uniform Trust Code, a “conservator” is appointed by the court to manage the ward’s property, a “guardian” to make decisions with respect to the ward’s personal affairs. See Section 103 of the Uniform Trust Code.

Paragraph (3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute.

SECTION 604. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

Comment

This section authorizes a person with a substantially identical interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section is derived from Section 304 of the Uniform Trust Code.

Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property § 185 cmt. b (1936).

Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor’s children as a class, with an adult child being able to represent the interests of children who are
either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindersmen with respect to approval of a trustee’s report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. See Restatement (First) of Property § 185 cmt. d (1936).

SECTION 605. APPOINTMENT OF REPRESENTATIVE.

(a) If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A [representative] may be appointed to represent several persons or interests.

(b) A [representative] may act on behalf of the individual represented with respect to any matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a [representative] may consider general benefit accruing to the living members of the individual’s family.

Comment

This section is derived from Section 305 of the Uniform Trust Code. In making decisions, a representative may consider general benefit accruing to living members of the family. “Representative” is placed in brackets in case the enacting jurisdiction prefers a different term. The court may appoint a representative to act for a person even if the person could be represented under another section of this article.

SECTION 606. REPRESENTATION OF CHARITY. If a trust provides a beneficial interest for one or more charities that are not specifically named or for charitable purposes that are not otherwise represented, such beneficial interest shall be considered to be
a beneficiary for purposes of the [act] and [the Attorney General] may represent and act on behalf of such beneficiary.

Comment

Trusts sometimes provide a charitable interest without specifically naming the charity by providing that the trustee or some other person may select the particular charity in the future. Alternatively, a trust may permit direct distributions for charitable purposes. The definition of beneficiary in Section 102(3) of the [act] and in the Uniform Trust Code would not consider charities or other persons who might receive such distributions as beneficiaries. May states, however, may want such charitable interest to be represented by the governmental agency responsible for supervising charitable trusts. In such cases there is no specific charity to represent such interest. In many states the Attorney General or some other governmental office authorized to enforce charitable trusts may be authorized to represent such charitable interest.]

[ARTICLE] 7

MISCELLANEOUS

SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

In applying and construing this uniform [act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. The [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersedes Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 703. EFFECTIVE DATE. This [act] takes effect . . .

If the defined term “Code” is used, future amendments to the Code sections will be included.

Could this be revised to also include a trustee who has discretion in the future to make distributions if no distributions are currently permitted?

Optional language:
The power of appointment granted to a beneficiary shall be limited to the same permissible period of the rule against perpetuities that applied to the first trust, or a shorter period, unless the first trust expressly permits the trustee to extend its perpetuities period.

4 Under a bifurcated statute, we could consider allowing limited decanting if there is discretion to distribute income or principal.

5 “Nonsubservient” is not defined.

6 A decanting statute that permits the conversion of a non-grantor trust to a grantor trust is potentially troubling in at least two respects. First, permitting such conversion allows a trustee to impose on the grantor of the trust a tax liability that the grantor did not voluntarily accept and that the grantor may not have the ability to eliminate. Second, a trustee does not owe fiduciary duties to the grantor, so how does a trustee resist a beneficiary request to benefit the beneficiaries by converting the trust to a grantor trust? Such a conversion would appear to be prohibited by the Arizona statute, which requires that any decanting “not adversely affect the tax treatment of the trust, the trustee, the settlor or the beneficiaries.” In contrast, the Illinois statute explicitly permits a decanting from a non-grantor trust to a grantor trust. The Texas statute permits decanting “regardless of whether the settlor is treated as the owner of either or both trusts under Sections 671-679.”

Although the New York statute does not explicitly authorize a conversion from a non-grantor trust to a grantor trust, the 2011 recommendation of the Surrogate’s Court Advisory Committee states: “There is nothing contained in the proposed provision that precludes the authorized trustee from paying assets from a non-grantor trust to a grantor trust.” New York Est. Powers & Trusts, Section 10-6.6. Most of the state decanting statutes are silent on this point, which presumably means that such a conversion is permitted.