

D R A F T  
FOR DISCUSSION ONLY

# TRUST DECANTING ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAW

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For February 22 – 23, 2014 Drafting Committee Meeting

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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:

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111 N. Wabash Ave., Suite 1010

Chicago, Illinois 60602

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1 **TRUST DECANTING ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

6 **SECTION 102. DEFINITIONS.** In this [act]

7 (1) “Ascertainable standard” means a standard relating to an individual’s health,  
8 education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or  
9 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on the effective date of this  
10 [act].<sup>1</sup>

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

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

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

23 (B) in a capacity other than that of trustee, holds a power of appointment over

1 trust property.

2 (4) “Code” means the United States Internal Revenue Code of 1986, as amended from  
3 time to time, including corresponding provisions of subsequent internal revenue laws.

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

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

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

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

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

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

22 (11) “First trust” means an existing irrevocable inter vivos or testamentary trust from  
23 which a decanting distribution may be or has been made.

1           (12) “General power of appointment” means a power of appointment exercisable in  
2 favor of the powerholder, the powerholder’s estate, a creditor of the powerholder, or a creditor  
3 of the powerholder’s estate.

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

7           (14) “Instrument” means a record.

8           (15) “Irrevocable” means not revocable.

9           (16) “Jurisdiction,” with respect to a geographic area, includes a State or Country.

10          (17) “Limited discretion” means a discretionary distribution power that is not  
11 expanded discretion.

12          (18) “Nongeneral power of appointment” means a power of appointment that is not a  
13 general power of appointment.

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

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

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

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

23               (A) includes a power of appointment not exercisable until the occurrence of a

1 specified event, the satisfaction of an ascertainable standard, or the passage of a specified time  
2 only after:

3 (i) the occurrence of the specified event;

4 (ii) the satisfaction of the ascertainable standard; or

5 (iii) the passage of the specified time; and

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

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

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

15 (25) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's  
16 qualification is determined:

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

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

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

23 (26) "Reasonably definite standard" means a clearly measurable standard under which



1 the holder of a power is legally accountable.

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

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

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

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

13 (31) “Settlor,” except as provided in Section 402, means a person, including a testator,  
14 who creates, or contributes property to, a trust. If more than one person creates or contributes  
15 property to a trust, each person is a settlor of the portion of the trust property attributable to  
16 that person’s contribution except to the extent another person has the power to revoke or  
17 withdraw that portion.

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

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

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

22 (33) “Spendthrift provision” means a term of a trust that restrains both voluntary and  
23 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

1 distributions because such discretion would create gift and estate tax issues. In the unusual  
2 event that a trust does give an interested trustee unascertainable discretion, the trustee will  
3 incur the tax effects of holding a general power of appointment whether or not the trustee also  
4 has a decanting power.

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

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

24 A power of appointment is authority to designate the recipients of beneficial interests  
25 in property. *See* Restatement (Second) of Property: Donative Transfers Section 11.1 (1986).  
26 A power is either general or nongeneral and either presently exercisable or not presently  
27 exercisable. A general power of appointment is a power exercisable in favor of the holder of  
28 the power, the power holder’s creditors, the power holder’s estate, or the creditors of the  
29 power holder’s estate. *See* Restatement (Second) of Property: Donative Transfers Section  
30 11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power  
31 holder can currently create an interest, present or future, in an object of the power. A power  
32 of appointment is not presently exercisable if exercisable only by the power holder’s will or if  
33 its exercise is not effective for a specified period of time or until occurrence of some event.  
34 *See* Restatement (Second) of Property: Donative Transfers Section 11.5 (1986). Powers of  
35 appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of  
36 “beneficiary” excludes powers held by a trustee but not powers held by others in a fiduciary  
37 capacity.

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

1 receive distributions under the terms of a charitable trust but only if their beneficial interests  
2 are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust.

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

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

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

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

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

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

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

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

32 The definition of “power of appointment” is identical to the definition in Section  
33 102(13) of the Uniform Powers of Appointment Act.

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

36 The definition of “presently exercisable power of appointment” is identical to the  
37 definition in Section 102(15) of the Uniform Powers of Appointment Act.

1           The term “presumptive remainder beneficiary” is a subset of the term “qualified  
2 beneficiary”. “Presumptive remainder beneficiary” is a qualified beneficiary other than a  
3 “current beneficiary”.

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

6           The definition of “qualified beneficiary” is identical to the definition in Section  
7 103(13) of the Uniform Trust Code.

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

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

25           “Reasonably definite standard” means a clearly measurable standard under which the  
26 holder of a power is legally accountable. “Reasonably definite standard” includes an  
27 ascertainable standard but may also include standards that would not be considered  
28 ascertainable standards. A power to distribute principal for the education, support,  
29 maintenance, or health of the beneficiary; for the beneficiary’s reasonable support in comfort;  
30 or to enable the beneficiary to maintain the beneficiary’s accustomed standard of living; or to  
31 meet an emergency; would be a reasonably definite standard. A power to distribute principal  
32 for the pleasure, desire, or happiness of a beneficiary is not a reasonably definite standard. A  
33 reasonably definite standard need not require consideration of the needs and circumstances of  
34 the beneficiary. The entire context of a provision of a trust instrument granting a power  
35 should be considered in determining whether there is a reasonably definite standard. For  
36 example, if a trust instrument provides that the determination of the trustee shall be conclusive  
37 with respect to the exercise or nonexercise of a power, the power is not limited by a  
38 reasonably definite standard. The fact, however, that the governing instrument is phrased in  
39 discretionary terms is not in itself an indication that no reasonably definite standard exists.  
40 “Reasonably definite standard” is intended to parallel the definition of the term as used in  
41 Internal Revenue Code section 674(b) with respect to the grantor trust rules for income tax  
42 purposes.

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

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

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

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

22 The definition of “settlor” is identical to the definition in Section 103(15) of the  
23 Uniform Trust Code except that the definition in the [act] refers to the exception in Section  
24 402, which clarifies that the settlor of the first trust is considered to be the settlor of the  
25 second trust to the extent of any decanting distribution.

26 The definition of “spendthrift provision” is identical to the definition in Section  
27 103(16) of the Uniform Trust Code.

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

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

40 The definition of “terms of the trust” is similar to the definition in Section 103(18) of

1 the Uniform Trust Code, except that it refers to the intent of the maker rather than the intent of  
2 the settlor. Usually, the maker of the instrument would be the settlor. In the case of a trust  
3 created by a decanting distribution, however, the maker of the instrument would usually be  
4 the authorized trustee.

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

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

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

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

## 22 **Comment**

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

## 29 **[ARTICLE] 2**

### 30 **EXERCISE OF POWER TO MAKE A DECANTING DISTRIBUTION**

#### 31 **SECTION 201. NOTICE.**

32 (a) Except as provided in Section 304, an authorized trustee may make a decanting

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

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



1 under subsection (a), the trustee promptly shall provide such notice to the person upon such  
2 discovery.

### 3 **Comment**

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

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

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

## 18 **[ARTICLE] 3**

### 19 **DECANTING AUTHORITY**

#### 20 **SECTION 301. DECANTING DISTRIBUTION IF EXPANDED DISCRETION.**

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

24 (a) Each second trust may:

25 (1) include as current beneficiaries only one or more of the current  
26 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.<sup>3</sup>

(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,

1 cannot make a remainder beneficiary a current beneficiary.

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

### 13 **SECTION 302. DECANTING DISTRIBUTION IF LIMITED DISCRETION.**

14 An authorized trustee who has limited discretion to distribute the principal<sup>4</sup> of a trust to one or  
15 more current beneficiaries may make a decanting distribution to one or more second trusts.

16 For purposes of this section,

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

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

### 22 **Comments**

23 The power to make distributions for the benefit of the beneficiary when distributions  
24 are permitted to be made directly to such beneficiary is a codification of common law.  
25 Section 816 (21) of the Uniform Trust Code permits a trustee to pay an amount distributable  
26 to a beneficiary who is under a legal disability or who the trustee reasonably believes is  
27 incapacitated by paying it directly to the beneficiary or applying it for the beneficiary's  
28 benefit, or by paying it to certain other persons on behalf of such beneficiary or to manage it  
29 as a separate fund on the beneficiary's behalf subject to the beneficiary's continuing right to  
30 withdraw the distribution. Section 302 (2) is similar, but does not require that the beneficiary  
31 be under a legal disability or incapacitated in order for a distribution made for the benefit of  
32 the beneficiary to be treated as substantially the same as a distribution to the beneficiary.

1           Section 302 is intended to permit a severance of a trust if the beneficial interests, in the  
2 aggregate, in the second trust are substantially similar to the beneficial interests in the first  
3 trust. For this purpose, an equal vertical division of a trust in which multiple beneficiaries  
4 have equal discretionary interests is considered to be substantially similar. For example, . . .

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

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

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

23           (3) Except as provided in paragraphs (A) and (B), an authorized trustee may not  
24 exercise a decanting power to decrease a trustee's liability, or to exculpate or indemnify a  
25 trustee from liability, to a greater extent than provided in the first trust.

1 (A) The second trust may divide and reallocate fiduciary powers among  
2 several fiduciaries, including one or more trustees, distribution advisors, investment advisors,  
3 trust protectors, or other persons, and may indemnify or exonerate a fiduciary from liability  
4 for actions of another fiduciary, but may not reduce fiduciary liability in the aggregate.

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

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

#### 14 **Comment**

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

32 In the case of a change to a provision granting another person the right to remove or

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

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

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

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

25 (3) If the assets of the first trust include shares of stock in an S corporation, as defined  
26 in Section 1361 of the Code, and the first trust is, or if not for the provisions of this [act]  
27 would be, a permitted shareholder under any provision of Section 1361 of the Code, an  
28 authorized trustee may not exercise a decanting power to distribute part or all of the S

1 corporation stock to a second trust that is not a permitted shareholder under Section  
2 1361(c)(2) of the Code. If the assets of the first trust include shares of stock in an S  
3 corporation, as defined in Section 1361 of the Code, and the first trust is, or but for this [act],  
4 would be a qualified subchapter S trust, the second trust instrument must not include or omit a  
5 term that prevents the second trust from qualifying as a qualified subchapter S trust.

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

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

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

21 (B) Subject to paragraph (7), if the first trust instrument expressly indicates an  
22 intention to qualify for a tax benefit or if the first trust instrument is clearly designed to enable  
23 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.<sup>6</sup> 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



1 annual exclusion. The restriction in subsection 301(b) prohibiting the modification or  
2 elimination of a presently exercisable power of withdrawal also protects the annual exclusion  
3 for a prior gift to a Crummey trust.

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

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

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

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

34 **SECTION 305. TERM OF THE SECOND TRUST.** The second trust may have a  
35 term that is longer than the term set forth in the first trust instrument, including a term  
36 measured by the lifetime of a current beneficiary; but the second trust must be limited to the  
37 same permissible period of the rule against perpetuities that applied to the first trust, or a  
38 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

1 be presumed to be included in the second trust instrument.

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

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

1 **Comment**

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

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

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

20 **SECTION 308. OTHER AUTHORITY TO DISTRIBUTE IN FURTHER**  
21 **TRUST.**

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

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

27 **Comment**

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

1 [ARTICLE] 4

2 EFFECT OF DECANTING DISTRIBUTION

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

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

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

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

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

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

22 (1) The distribution of all of the principal of the first trust to a second trust shall be  
23 deemed to include all contractual rights from contracts made by the trustee of the first trust

1 during the course of the administration of the trust to the extent such rights are assignable.

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

#### 6 **Comment**

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

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

#### 20 **Comment**

21  
22 The Restatement (Second) of Trusts provides various situations in which a person to  
23 whom the trustee has incurred a liability in the course of the administration of a trust can by a  
24 proceeding in equity reach trust property and apply it to the satisfaction of such person's  
25 claim. *See* Section 267 of the Restatement (Second) of Trusts. Section 268 provides that the  
26 creditor can reach trust property to the extent the creditor cannot obtain satisfaction of the  
27 claim out of the trustee's individual property to the extent the trustee is entitled to exoneration  
28 out of the trust estate. Section 269 provides that a creditor who cannot obtain satisfaction out  
29 of the trustee's individual property can by a proceeding in equity reach trust property to the  
30 extent the trust estate has benefitted. Section 270 permits the creditor to reach trust property  
31 if by the terms of the trust the settlor manifested an intention to confer such a power on the  
32 creditor. Section 271 permits a creditor to reach trust property on a contractual claim if the  
33 contract provides that the trustee shall not be personally liable upon the contract and the  
34 contract was properly made by the trustee in the administration of the trust. Section 271A

1 permits a creditor to obtain satisfaction out of the trust estate if it is equitable to permit him to  
2 do so.

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

## 6 [ARTICLE] 5

### 7 REMEDIES AND FIDUCIARY DUTIES

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

23 **SECTION 502. NO DUTY TO DISTRIBUTE.** Nothing in this [act] is intended to  
24 create or imply a duty to exercise the decanting power, and no inference of a breach of  
25 fiduciary duty shall be made as a result of an authorized trustee not exercising the decanting

1 power. Notwithstanding any other provision of this [act], no authorized trustee or trustee has  
2 a duty to inform beneficiaries about the applicability of this [act] or a duty to review the trust  
3 to determine whether any action should be taken under this [act].

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

#### 16 **Comment**

17 Although Section 801 of the Uniform Trust Code states that the trustee shall  
18 administer a trust in good faith, in accordance with its terms and purposes and the interests of  
19 the beneficiaries, Section 503 of the [act] does not require that the exercise of a decanting  
20 power be in accord with the terms of the first trust. Nonetheless, an exercise of a decanting  
21 power should be in accordance with the purposes of the first trust. The purpose of decanting  
22 is not to disregard the settlor's intent but to modify the trust to effectuate better the settlor's  
23 broader purposes or the settlor's probable intent if the settlor had anticipated the  
24 circumstances in place at the time of the decanting. The settlor's purposes generally also  
25 include efficient administration of the trust. The settlor's purposes may also include  
26 achieving certain tax objectives or generally minimizing overall tax liabilities.

27 Decanting may be appropriate in many situations in which judicial modification would  
28 be appropriate such as (1) when modification, because of circumstances not anticipated by the  
29 settlor, would further the purposes of the trust (see Section 412(a) of the Uniform Trust  
30 Code); (2) when continuation of the trust on its existing terms would be impracticable or



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

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

## 14 **[[ARTICLE] 6**

### 15 **REPRESENTATION**

#### 16 **General Comment**

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

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

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

#### 36 **SECTION 601. REPRESENTATION: BASIC EFFECT.**

37 (a) Notice to a person who may represent and bind another person under this [article]

1 has the same effect as if notice were given directly to the other person.

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

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

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

## 8 **Comment**

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

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

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

## 24 **SECTION 602. REPRESENTATION BY HOLDER OF GENERAL**

25 **TESTAMENTARY POWER OF APPOINTMENT.** To the extent there is no conflict of  
26 interest between the holder of a general testamentary power of appointment and the persons  
27 represented with respect to the particular question or dispute, the holder may represent and  
28 bind persons whose interests, as permissible appointees, takers in default, or otherwise, are  
29 subject to the power.

1 **Comment**

2 This section is derived from Section 302 of the Uniform Trust Code. This section  
3 specifies the circumstances under which a holder of a general testamentary power of  
4 appointment may receive notices on behalf of and otherwise represent and bind persons  
5 whose interests are subject to the power, whether as permissible appointees, takers in default,  
6 or otherwise. Such representation is allowed except to the extent there is a conflict of interest  
7 with respect to the particular matter or dispute. Typically, the holder of a general  
8 testamentary power of appointment is also a life income beneficiary of the trust, oftentimes of  
9 a trust intended to qualify for the federal estate tax marital deduction. *See* I.R.C. §  
10 2056(b)(5). Without the exception for conflict of interest, the holder of the power could act in  
11 a way that could enhance the holder's income interests to the detriment of the appointees or  
12 takers in default, whoever they may be.

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

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

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

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

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

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

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

26 **Comment**

27 This section is derived from Section 303 of the Uniform Trust Code. This section  
28 allows for representation of persons by their fiduciaries (conservators, guardians, agents,  
29 trustees, and personal representatives), a principle that has long been part of the law.  
30 Paragraph (6), which allows parents to represent their children, is more recent, having  
31 originated in 1969 upon approval of the Uniform Probate Code. This section is not limited to

1 representation of beneficiaries. It also applies to representation of the settlor. Representation  
2 is not available if the fiduciary or parent is in a conflict position with respect to the particular  
3 matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking  
4 to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

5 Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of  
6 the ward's estate has not been appointed. Granting a guardian authority to represent the ward  
7 with respect to interests in the trust can avoid the need to seek appointment of a conservator.  
8 This grant of authority to act with respect to the ward's trust interest may broaden the  
9 authority of a guardian in some States although not in States that have adopted the Section 1-  
10 403 of the Uniform Probate Code, from which this section was derived. Under the Uniform  
11 Trust Code, a "conservator" is appointed by the court to manage the ward's property, a  
12 "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103 of  
13 the Uniform Trust Code.

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

#### 16 **SECTION 604. REPRESENTATION BY PERSON HAVING**

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

#### 22 **Comment**

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

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

33 Typically, the interests of the representative and the person represented will be  
34 identical. A common example would be a trust providing for distribution to the settlor's  
35 children as a class, with an adult child being able to represent the interests of children who are

1 either minors or unborn. Exact identity of interests is not required, only substantial identity  
2 with respect to the particular question or dispute. Whether such identity is present may  
3 depend on the nature of the interest. For example, a presumptive remaindermen may be able  
4 to represent alternative remaindermen with respect to approval of a trustee's report but not  
5 with respect to interpretation of the remainder provision or termination of the trust. Even if  
6 the beneficial interests of the representative and person represented are identical,  
7 representation is not allowed in the event of conflict of interest. The representative may have  
8 interests outside of the trust that are adverse to the interest of the person represented, such as a  
9 prior relationship with the trustee or other beneficiaries. *See* Restatement (First) of Property  
10 § 185 cmt. d (1936).

#### 11 **SECTION 605. APPOINTMENT OF REPRESENTATIVE.**

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

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

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

#### 22 **Comment**

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

28 **[SECTION 606. REPRESENTATION OF CHARITY.** If a trust provides a  
29 beneficial interest for one or more charities that are not specifically named or for charitable  
30 purposes that are not otherwise represented, such beneficial interest shall be considered to be

1 a beneficiary for purposes of the [act] and [the Attorney General] may represent and act on  
2 behalf of such beneficiary.

### 3 **Comment**

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

## 14 **[ARTICLE] 7**

### 15 **MISCELLANEOUS**

#### 16 **SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

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

#### 19 **SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**

20 **AND NATIONAL COMMERCE ACT.** The [act] modifies, limits, or supersedes the  
21 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.,  
22 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c),  
23 or authorize electronic delivery of any of the notices described in Section 103(b) of that act,  
24 15 U.S.C. Section 7003(b).

#### 25 **SECTION 703. EFFECTIVE DATE.** This [act] takes effect . . .

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<sup>1</sup> If the defined term “Code” is used, future amendments to the Code sections will be included.

<sup>2</sup> Could this be revised to also include a trustee who has discretion in the future to make distributions if no distributions are currently permitted?

<sup>3</sup> Optional language:

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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.

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

<sup>5</sup> “Nonsubservient” is not defined.

<sup>6</sup> 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.