

DRAFT
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TRUST DECANTING ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

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~~TRUST DECANTING ACT~~

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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~~June 6,~~ , 2014

TRUST DECANTING ACT

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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 26 U.S.C. Section 2041(b)(1)(A) [, as amended] or 26 U.S.C. Section 2514(c)(1)[, as amended,] and regulations issued thereunder.

(2) “Authorized fiduciary” means a trustee or other fiduciary, other than the settlor, that has discretion ~~under the terms of a first trust~~ to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries.

(3) “Beneficiary” means a person that:

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

(B) in a capacity other than that of trustee, holds a power of appointment over trust property; or

(C) is a charitable organization expressly designated to receive distributions under the terms of ~~a charitable~~the trust.

(4) “Charitable ~~trust~~interest” means an interest in a trust, ~~or portion of a trust, created for~~ that:

(A) is held by an expressly designated charitable organization and makes such charitable organization a qualified beneficiary;

(B) benefits only charitable organizations and that, if it were held by an expressly designated charitable organization, would make such charitable organization a qualified

beneficiary; or

(C) is held solely for charitable purposes and that, if it were held by an expressly designated charitable organization, would make such charitable organization a qualified beneficiary.

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

~~(56)~~ (56) “Current beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

~~(67)~~ (67) “Decanting power” means the power of an authorized fiduciary under this [act] to distribute property of the first trust to the second trust or to modify the terms of the first trust.

~~(78)~~ (78) “Distribute” means to make a payment to or for the benefit of a beneficiary.

~~(89)~~ (89) “Expanded discretion” means a discretionary distribution power that is not limited to an ascertainable standard or ~~a~~-reasonably definite standard.

~~(910)~~ (910) “First trust”, except as otherwise provided in Section ~~307(e), 115,~~ means an irrevocable trust over which an authorized fiduciary may exercise ~~the~~ decanting power.

~~(1011)~~ (1011) “First trust instrument”, except as otherwise provided in Section ~~307(e), 115,~~ means the trust instrument for a first trust.

~~(1112)~~ (1112) “General power of appointment” means a power of appointment exercisable in

favor of ~~the~~^a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

(~~12~~¹³) "Jurisdiction", with respect to a geographic area, includes a state or country.

(~~13~~¹⁴) "Nongeneral power of appointment" means a power of appointment that is not a general power of appointment.

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

(~~15~~¹⁶) "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.

(~~16~~¹⁷) "Powerholder" means a person in which a donor creates a power of appointment.

(~~17~~¹⁸) "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.

(~~18~~¹⁹) "Principal" includes the accumulated and undistributed income of a trust ~~that~~^{which} is not otherwise currently required to be distributed at the time of the exercise of ~~the~~

decanting power.

(1920) “Qualified beneficiary” means ~~a beneficiary that~~, on the date the beneficiary’s qualification is determined, a beneficiary that:

(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.

(2021) “Reasonably definite standard” means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C.

Section 674(b)(5)(A)[, as amended,] and any applicable regulations ~~issued thereunder~~.

(2122) “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.

(2223) “Revocable” means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(2324) “Second trust” means a modification under this [act] of a first trust or a trust to which a distribution of property is or may be made under this [act] ~~or a modification of the first trust under this [act]~~.

(2425) “Second trust instrument” means the trust instrument of a second trust.

(2526) “Settlor”, except as otherwise provided in Section ~~402,121~~, means a person, ~~including a testator~~, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the ~~portion~~part of the trust

property attributable to the person's contribution except to the extent another person has power to revoke or withdraw ~~that portion~~the part.

(~~26~~27) "Sign" means, with present intent to authenticate or adopt a record:

(~~1~~A) to execute or adopt a tangible symbol; or

(~~2~~B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(~~27~~28) "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.

(~~28~~29) "Successor beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined is not a qualified beneficiary, including a person that may become a beneficiary ~~in the future~~ by reason of inclusion in a class. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(~~29~~30) "Terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(~~30~~31) "Trust instrument" means a record executed by the settlor to create a trust or executed by any person to create a second trust that contains terms of the trust, including any amendments.

Legislative Note: A number of definitions in ~~Section 102 of the Trust Decanting Act~~this section are identical to the definitions in the Uniform Trust Code. A state that has adopted the Uniform Trust Code and is adopting ~~the Trust Decanting Act~~this act as part of the Trust Code can omit these definitions. If a state that has adopted the Uniform Trust Code is adopting ~~the Trust Decanting Act~~this act but is not incorporating it into the Uniform Trust Code, the legislation could either repeat the definitions of the terms in this act or ~~could~~ substitute where appropriate: "Term _____" has the same meaning as in Section _____ of the ~~{Uniform Trust Code}~~Uniform Trust Code. In states in which the constitution, or other law, does not permit the

phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subpart (1) and subpart (20).

Comment

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

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

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

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

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

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

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

tax issues. In the unusual event that a trust does give an interested trustee unascertainable 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.

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

Beneficiary. The definition of “beneficiary” in Section 102(3)(A) and (B) is identical to the definition found in Section 103(3) of the Uniform Trust Code. Section 102(3)(C) adds as a beneficiary a charitable organization expressly named to receive distributions from a charitable trust. *Cf.* Uniform Trust Code § 110(a) and § 405(a). Absent Section 102(3)(C) such charities would not be considered beneficiaries. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large, persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in the Uniform Trust Code. *See* Uniform Trust Code § 103, Comment.

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. A potential appointee of a power of appointment is not a beneficiary unless a presently exercisable power of appointment has been exercised in favor of such appointee. A person who merely incidentally benefits from the trust is not a beneficiary. *See* Restatement Third of Trusts § 48.

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.

~~*Charitable Trust.* The definition of “charitable trust” combines Section 103(4) and Section 405(a) of the Uniform Trust Code into one provision.~~*Interest.* A trust may be comprised entirely or in part of one or more charitable interests. The term includes an interest held by a charitable organization that makes the charitable organization a qualified beneficiary. See Section 102(3)(C) defining the term “beneficiary” to include a charitable organization expressly designated to receive distributions under the terms of a charitable trust. See Section 102(20) defining a qualified beneficiary.

The term also includes an interest that can benefit only charitable organizations and that, if held by an expressly designated charitable organization, would make the charitable organization a qualified beneficiary. For example, if the trustee is to distribute each year for ten years \$50,000 from the trust to one or more charitable organizations selected by the trustee, and

at the end of ten years is to distribute the remainder to the settlor's descendants, the \$50,000 annuity is a charitable interest because it may be distributed only to charitable organizations.

The term also includes an interest devoted solely to charitable purposes, even if the charitable purposes may be carried out directly by the trust rather than through distributions to other charitable organizations. Thus a private foundation established under a trust would be a charitable interest.

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

Charitable Purpose. The definition of "charitable purpose" is identical to the definition in the Model Protection of Charitable Assets Act. The definition of charitable purpose follows that of Uniform Trust Code § 405, Restatement (Third) of Trusts § 28 (2003), and Uniform Prudent Management of Institutional Funds Act § 2(1) (2006). This long-familiar standard in U.S. trust law derives from the English Statute of Charitable Uses, enacted in 1601. As used in this Act the definition means the definition of charitable purpose that has developed under the common law. A charitable purpose is a nonprofit purpose (and not a purpose for private benefit) that benefits an indefinite class of the public.

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

Current Beneficiary. "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 term includes the holder of a presently exercisable general power of appointment. The term does not include the holder of a testamentary general power of appointment or the holder of a limited power of appointment.

Nor does the term include the objects of an unexercised inter vivos power of appointment.

Decanting Power. The term “decanting power” means the power held by the authorized fiduciary (see Section 102(2)) in a fiduciary capacity to distribute all or part of the property of the first trust to a second trust or, alternatively, to modify the terms of the first trust to create the second trust. If the terms of the first trust are modified, it is not necessary to treat the second trust as a newly created, separate trust, thus avoiding the need to transfer title of the property of the first trust to the second trust.

First Trust. The first trust must be an irrevocable trust. The Act does not permit decanting of a revocable trust, even if the settlor is incapacitated and thus unable to exercise the power to amend or revoke. Section 5-411(a)(4) of the Uniform Guardianship and Protective Proceedings Act allows a conservator to amend (and revoke) the terms of a protected person’s revocable trust. Section 201(a)(1) of the Uniform Power of Attorney Act allows a settlor to grant a power to amend or revoke to an agent. Accordingly, while the settlor is alive, there are uniform rules for modifying a revocable trust. States that have not adopted these uniform rules may have other provisions for modification of a revocable trust when the settlor is incapacitated.

The terms “first trust” and “second trust” are relative to the particular exercise of the decanting power. Thus when the decanting power is exercised over Trust A to make a distribution to Trust B, Trust A is the first trust and Trust B is the second trust with respect to such exercise of the decanting power. If the decanting power is later exercised over Trust B to make a distribution to Trust C, then Trust B would be the first trust and Trust C the second trust with respect to such exercise of the decanting power. “First trust” includes only an irrevocable trust.

First Trust Instrument. See Section 102(9~~10~~) for the definition of “first trust” and Section 102(~~30~~~~31~~) for the definition of “trust instrument.”

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

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

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

Person. 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 in wording, but not in substance, 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.”

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

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

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

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

Qualified Beneficiary. The definition of “qualified beneficiary” is substantially the same as the definition in Section 103(13) of the Uniform Trust Code. Note, however, that the expanded definition of “beneficiary” in Section 102(3) includes charitable organizations expressly designated to receive distributions in charitable trusts. Such charitable organizations would be entitled to notice of an exercise of the decanting power under Section 201.

The qualified beneficiaries consist of the current beneficiaries (see Section 102(~~56~~)) and the presumptive remainder beneficiaries (see Section ~~304~~109(a)).

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

[When a trust has distributees or permissible distributees of trust income or principal who are in more than one generation of the descendants of a person and the trust continues after the deaths of the members of the most senior generation who are included among such distributees, Section 102(~~1920~~)(B) should be construed to include the distributees or permissible distributees after the interests of the most senior generation of such distributees terminate and subparagraph (C) would not ordinarily be applicable if there are any current beneficiaries who are not members of the most senior generation. Thus if a trust permits discretionary distributions to any of A’s descendants, and only terminates if A has no living descendants, in which case it is distributed to B, and A’s now living descendants are Child 1, Child 2, Grandchild 1A and Grandchild 1B, the presumptive remainder beneficiaries are Grandchild 1A and Grandchild 1B pursuant to Section 102(~~1920~~)(B), and Section 102(~~1920~~)(C) should not apply to cause B to be a presumptive remainder beneficiary. On the other hand, if A’s then living descendants were limited to Child 1 and Child 2, then B would be the presumptive remainder beneficiary under Section 102(~~1920~~)(C), because there is no presumptive remainder beneficiary under Section 102(~~1920~~)(B).]

Reasonably Definite Standard. “Reasonably definite standard” is defined in Treasury

Regulations Section 1.674(b)-1(b)(5). “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.

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

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

Record. 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.

Revocable. The definition of “revocable” is identical to the definition in Section 103(14) of the Uniform Trust Code.

Second Trust. 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 fiduciary as the nominal grantor, (3) the first trust as modified to create the second trust, or (4) a new trust executed by the authorized fiduciary as the nominal settlor for the purpose of decanting. A decanting that is implemented by “restating” or modifying the first trust presumably would not require the issuance of a new tax identification number or the retitling of property or a final income tax return for the trust. A decanting that distributes the property of the first trust to a newly created trust presumably would require that the new trust obtain a new tax identification number and that the property 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.

Second Trust Instrument. See Section 102(~~23~~24) for the definition of “second trust” and Section 102(~~30~~31) for the definition of “trust instrument.”

Settlor. The definition of “settlor” generally follows the definition in Section 103(15) of the Uniform Trust Code, but is modified by Section ~~402~~121 of this act to address the issue of who is the settlor of the second trust after the exercise of the decanting power. When more than

one person signs the trust instrument or funds a trust, generally the person funding the trust will be the settlor. *See* comments to Section 103 of the Uniform Trust Code. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. *Id.* A “settlor” includes a testator who creates a testamentary trust.

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

Successor Beneficiary. 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.

Terms of the Trust. The definition of “terms of the trust” is identical to the definition in Section 103(18) of the Uniform Trust Code. The definition of “settlor,” however, is modified by Section ~~402~~121 of the Trust Decanting Act to provide flexibility in determining the settlor’s intent with respect to a second trust.

Trust Instrument. 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 fiduciary or another person as the nominal settlor.

The definition of “trust instrument” incorporates the definition found in Section 103(19) of the Uniform Trust Code. The Uniform Trust Code definition is expanded to make clear that where the second trust is a trust created by the trustee for the purpose of decanting, such instrument is considered to be an “instrument” even though the trustee is not considered to be the settlor of the second trust for all purposes. *See* Section ~~402~~121 of this act.

SECTION 103. APPLICATION. This [act] applies to an irrevocable trust created before, on, or after [the effective date of this [act]] that:

(1) is governed by law of this state other than this [act] for purposes of:

(A) administration, including a trust whose governing law for purposes of administration has been changed to law of this state other than this [act]; or

~~(2) is governed by law of this state other than this [act] for purposes of~~ (B)

determining meaning or effect; or

~~(3)~~ (2) has a principal place of administration in this state, including a trust whose principal

place of administration has been changed to 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* Restatement Second of Conflict of Laws §§ 267-279; Uniform Trust Code § 107; *see also* Uniform Probate Code § 2-703.

Decanting can be considered an administrative power. *See* Comment a to the Restatement Second Conflict of Laws § 271 (testamentary trusts) and Comment a to § 272 (inter vivos trusts). Decanting, however, can alter the beneficial interests of a trust. In order to avoid having different rules for the application of the Trust Decanting Act depending upon whether the exercise of the decanting power changes administrative provision or beneficial interests, and the difficulty of drawing a distinct line between modifications that are administrative in nature and modifications that change beneficial interests, the act is intended to have broad application.

This act applies if the law of the state governs for purposes of any one of administration, meaning or effect.

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

SECTION 104. RECOGNITION OF OUT-OF-STATE DECANTING. A

distribution of part or all the principal of a trust to another trust or a modification of a trust validly made by a trustee or other fiduciary under the law of another jurisdiction is effective in this state and need not comply with this [act] even if this [act] otherwise could have applied to the ~~first~~ trust.

~~[ARTICLE] 2~~

~~EXERCISE OF DECANTING POWER~~

SECTION ~~201.105~~. NOTICE.

(a) In this section, ~~"notice period"~~refers to means the period beginning on the day notice is ~~provided~~given under subsection (c) and ending ~~on the [60] days laterth~~ day after the day notice is given.

(b) Except as otherwise provided in Sections ~~304~~112 and ~~306~~114, an authorized fiduciary may exercise ~~the~~ decanting power without the consent of any person and without court approval.

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

- (1) the settlor of the first trust, if living;
- (2) each qualified beneficiary of the first trust, determined as of the date notice is ~~provided~~given;
- (3) a person that currently has the right to remove or replace the authorized fiduciary;
- (4) ~~all~~any other ~~fiduciaries~~fiduciary of the first trust; [and]
- (5) the ~~fiduciaries~~fiduciary of the second trust[; and]
- (6) if the exercise of the ~~decanting~~ power is under Section ~~304~~109 and materially and adversely affects the interests of a successor beneficiary, the successor beneficiary].

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

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

(1) specify the manner in which ~~an~~the authorized fiduciary intends to exercise ~~the~~ decanting power and the proposed effective date for exercise of the ~~decanting~~ power; ~~and~~

(2) include a copy of the first trust instrument; and

(3) include a copy of all second trust instruments.

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

(g) The receipt of notice ~~under subsection (e)~~, waiver of the notice period, or expiration of the notice period under subsection (c) does not affect the right of a person to ~~bring a claim~~file a petition asserting that:

(1) ~~that~~ an attempted exercise of ~~the~~ decanting power is invalid because it did not comply with this [act] or was an abuse of discretion; or

(2) ~~that~~ Section ~~340~~118 applies to the exercise of the ~~decanting~~ power.

(h) An attempted exercise of ~~the~~ decanting power is not invalid because of the failure to give notice to one or more persons under subsection (c) if the authorized fiduciary acted in good faith to comply with subsection (c).

Comment

Generally a trustee is not required to provide notice to beneficiaries prior to exercising a discretionary power. ~~Nonetheless,~~This section is not intended to change the law in this regard except with respect to exercises of decanting power. Because qualified beneficiaries are entitled to know the terms of the trust ~~and therefore, they~~ should receive notice of any change in the terms of 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.

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

Notice must be given to (a) the settlor or settlors of the first trust (see Section 102(26)); (b) all qualified beneficiaries (see Section 102(20)); (c) any person who may remove or replace the authorized trustee; (d) all other fiduciaries of the first trust; (e) all fiduciaries of the second trust or trusts; and (f) any successor beneficiary whose interests are materially and adversely affected.

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

[SECTION ~~202~~106. REPRESENTATION.

(a) Notice to a person ~~that may~~with authority to represent and bind another person under a first trust instrument or [this state's trust code] has the same effect as if notice were given directly to the person represented.

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

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

[(d) The [Attorney General] has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state.]]

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

the act.

If ~~the Trust Decanting Act~~ this act is inserted into the state's Uniform Trust Code, Section ~~202.106~~ may be deleted.

Because states take various approaches to enforcement of charitable trusts, subsection (d) is placed in brackets.

Comment

Subsection (a) provides that the first trust instrument or general rules in the state's trust code or other law determine who may receive notice of an exercise of the decanting power on behalf of a minor beneficiary or an incapacitated beneficiary or settlor. It is similar to Section 301(a) of the Uniform Trust Code except that it expressly recognizes that if the first trust instrument authorizes certain persons to receive notice on behalf of incapacitated beneficiaries or an incapacitated settlor such rules should also apply for purposes of notice under Section 201.

Subsection (b) provides that the first trust instrument or general rules in the state's trust code or other law determine who may waive the notice period under Section 201 or consent to certain modifications under Section 304 and Section 306. It is similar to Section 301(b) of the Uniform Trust Code except that it expressly recognizes that if the first trust instrument authorizes certain persons to receive notice on behalf of incapacitated beneficiaries or an incapacitated settlor, such rules should also apply for purposes of waiving the notice period under Section 201. The bracketed language in subsection (b) may be included if state law permits a person to represent an adult competent beneficiary.

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

Subsection (d) is similar to Section 110(d) of the Uniform Trust Code and entitles the attorney general to notice of an exercise of the decanting power with respect to a charitable trust. "Attorney General" is placed in brackets to accommodate jurisdictions that grant enforcement authority over charitable trusts to another designated official. ~~Because states take various approaches to enforcement of charitable trusts, subsection (d) is placed in brackets.~~ Charitable organizations expressly designated to receive distributions under the terms of the trust may be qualified beneficiaries, but charities to be selected by the trustee would not be qualified beneficiaries. Subsection (d) is in brackets because some states may permit charitable organizations that are expressly designated in the trust to be the sole representatives of their interests.

SECTION ~~203.107~~. COURT INVOLVEMENT.

(a) On petition of an authorized fiduciary or person entitled to notice under Section ~~201.105~~(c), the court may:

(1) provide instructions to the fiduciary with respect to whether a proposed exercise of ~~the~~ decanting power is permitted under this [act] and consistent with the fiduciary duties of the fiduciary;

(2) with the consent of the fiduciary, ~~if any,~~ appoint a special fiduciary and ~~grant~~authorize the special fiduciary ~~the power~~ to determine whether the ~~decanting~~ power should be exercised under this [act] and to exercise the ~~decanting~~ power;

(3) approve an exercise of the ~~decanting~~ power;

(4) determine that an attempted exercise of the ~~decanting~~ power is invalid because:

(A) after applying Section ~~340~~118, the attempted exercise did not comply with this [act]; or ~~because it~~

(B) the attempted exercise was an abuse of the fiduciary's discretion;

(5) determine the extent to which Section ~~340~~118 applies to the exercise of the ~~decanting~~ power;

(6) provide instructions to the trustee with respect to the application of Section ~~340~~118; or

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

(b) On petition of an authorized fiduciary, the court may approve:

(1) ~~approve~~ an increase in the fiduciary's compensation under Section ~~304~~112;

and

(2) ~~approve~~ a modification of a provision granting a person the right to remove or replace the fiduciary under Section ~~306~~114.

(c) The court may not order an authorized fiduciary to exercise ~~the~~ decanting power.

Comment

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

The decanting power, however, is a very broad discretionary power. Therefore, Section 203 provides that the authorized fiduciary or any person who would be entitled to notice of the exercise of the decanting power may petition the court for certain purposes with respect to a prior decanting or a proposed decanting. ~~Such~~ The court may, but need not, take any of the actions described in this section.

A petition to the court may be brought by a qualified fiduciary, a trustee, a qualified beneficiary, the settlor, a trustee remover, or a beneficiary whose interests were adversely affected by the decanting.

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

Any such person may request instructions with respect to whether a proposed decanting complies with the act and is consistent with the fiduciary duties of the qualified fiduciary. Such an instruction, however, would not create in the authorized fiduciary a duty to decant.

Because the decanting power is a discretionary power and the authorized fiduciary has no duty under this act to decant, the court may not order the authorized fiduciary to decant. *See* Section 203(c). Other provisions of applicable law, however, may grant the court the authority to order the trust modification.

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

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee as provided in Section 706 of the Uniform Trust Code;

(8) reduce or deny compensation to the trustee;

(9) subject to Section 1012 of the Uniform Trust Code, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

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

SECTION ~~204. FORMALITIES~~108. REQUIREMENTS. An exercise of ~~the~~ decanting power must be made in a record that is signed by an authorized fiduciary and filed with the records of the first trust and second trust.

~~[ARTICLE]~~ 3

~~DECANTING AUTHORITY~~

SECTION ~~301.109.~~ DECANTING POWER ~~IF~~WITH EXPANDED DISCRETION.

(a) In this section, “presumptive remainder beneficiary” means a qualified beneficiary other than a current beneficiary.

(b) Subject to subsection (c), an authorized fiduciary that has expanded discretion to distribute the principal of the first trust to one or more ~~of the~~ current beneficiaries may exercise ~~the~~ decanting power over the principal of the first trust.

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

(1) include as a current beneficiary a person that is not a current beneficiary of the first trust,

except as otherwise provided in subsection (e);

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

(3) modify or eliminate a presently exercisable general power of appointment.

(d) In an exercise of ~~the~~ decanting power under this section, a second trust may not modify or eliminate any of the following rights of a current beneficiary of the first trust if the right is presently enforceable and the authorized fiduciary does not have discretion to make a principal distribution to another beneficiary:

(1) the right to a mandatory distribution of ~~income or~~ principal;

(2) the right, annually or more frequently, to a mandatory distribution of income, an annuity amount, or a percentage of value of some or all of the trust property; or

(3) the right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property.

(e) In an exercise of ~~the~~ decanting power under this section, a second trust may:

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

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

(3) create a power of appointment presently exercisable or exercisable at a future time in one or more of the current beneficiaries of the first trust to which the authorized fiduciary has expanded discretion to distribute principal;

(4) create a power of appointment in one or more of the presumptive remainder beneficiaries or successor beneficiaries of the first trust, but the power may be exercisable only after the

powerholder becomes a current beneficiary; and

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

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

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

Comments

“Expanded discretion” is any discretion that is not limited to an ascertainable standard (see Section 102(1)) as used in Internal Revenue Code Section 2514(c)(1) or to a reasonably definite standard (see Section 102(~~20~~21)) as used in Internal Revenue Code Section 674(b)(5)(A). The tax terms are used here, one from gift tax rules and one from income tax rules, because the definitions of these tax terms are generally clearer than the definitions of nontax terms sometimes used to describe different types of trustee discretion.

When a trustee is granted expanded discretion, that is an indication that the settlor intended to rely on the trustee’s judgment and discretion in making distributions. The settlor’s faith in the trustee’s judgment supports the assumption that the settlor would trust the trustee’s judgment in making modifications to the trust instrument in light of changed circumstances including the beneficiary’s circumstances and changes in tax and other laws.

The term “presumptive remainder beneficiary” is a subset of the term “qualified beneficiary.” “Presumptive remainder beneficiary” is a qualified beneficiary (see Section 102(~~19~~20)) other than a current beneficiary (see Section 102(~~56~~)). The presumptive remainder beneficiaries might be termed the first-line remainder beneficiaries. 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. A person who would have a presently exercisable general power of appointment if the trust terminated on that date or if the interests of the current beneficiaries terminated on that date without causing the trust to terminate is a presumptive remainder beneficiary.

Presumptive remainder beneficiaries can include takers in default of the exercise of a power of appointment. The term may sometimes 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.

Under Section ~~301~~109 an authorized fiduciary who has expanded discretion to distribute all or part of the principal of a trust to one or more of the current beneficiaries may exercise the decanting power over the principal subject to such expanded discretion. The Trust Decanting Act does not consider the decanting power to be a power of appointment because a power of appointment is defined as a power held in a nonfiduciary capacity and a decanting power is held in a fiduciary capacity. *See* Uniform Powers of Appointment Act § 102(13); Restatement Third of Trusts § 50, Comment a. Nonetheless, the decanting power under Section ~~301~~109 is in some ways analogous to the power to exercise a power of appointment to appoint the property in further trust.

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

The decanting power, like most discretionary distribution powers, can be exercised over all or part of the first trust. If it is exercised over only part of the first trust, the second trust would need to be a separate trust and could not be a continuation of the first trust.

If the decanting power is exercised over all of the first trust, but to more than one second trusts, then the second trusts would need to be separate trusts and could not be a continuation of the first trust.

If the authorized fiduciary has expanded discretion over only part of the first trust, the authorized fiduciary may exercise the decanting power under this section only over such part. *See* Section ~~301~~109(g). With respect to the remainder of the trust, the authorized fiduciary may have the ability to decant under Section ~~302~~110.

The second trust may contain any terms permissible for a trust subject only to the restrictions found in the act. Thus subject to subsections (c) and (d) of Section ~~301~~109 and the other restrictions in ~~Article 3~~Sections 111 through 116 and subject to the fiduciary duty in Section ~~501~~124(b), the second trust may (1) eliminate (but not add) one or more current beneficiaries; (2) make a current beneficiary a presumptive remainder beneficiary or a successor 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) alter or eliminate mandatory rights that are not currently in existence; (6) change the standard for distributions; (7) add or eliminate a spendthrift provision; (8) extend the duration of a trust; (9) change the jurisdiction of the trust and the law governing the administration of the trust; (10) eliminate, modify 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; (14)

add investment advisors, trust protectors or other fiduciaries; (15) divide a trust into more than one trust; and (16) consolidate trusts. The foregoing list merely provides examples and is not exhaustive. The second trust, however, cannot make a remainder beneficiary a current beneficiary.

Section ~~301~~[109](#)(c)(3) prohibits the second trust from modifying or eliminating a presently exercisable general power of appointment. A power to withdraw from a trust is a power of appointment. *See* Restatement Third of Trusts § 56, Comment b.

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

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 decanting may eliminate mandatory rights to income, annuity or unitrust distributions if the right is not presently enforceable. A right that is conditioned on the occurrence of a specified event, the satisfaction of an ascertainable standard or reasonably definite standard, or the passage of a specified time is presently enforceable only after the occurrence of the specified event, the satisfaction of an ascertainable standard or reasonably definite standard, or the passage of the specified time.

Thus a beneficiary's right to receive a portion of the principal of a trust upon attaining a certain age is presently enforceable if the beneficiary has attained such age even if the distribution has not yet been made from the trust. On the other hand, if a trust provides that all income should be distributed to A after she attains age 25, and A is age 23, the decanting distribution may eliminate A's mandatory income interest. If a trust provides that a beneficiary may withdraw one-third of the trust principal at age 25, one-third at age 30 and the remainder at age 35, if the beneficiary is age 28 but has not yet exercised the right to withdraw one-third at age 25, the right to withdraw such portion is presently enforceable but the withdrawal rights at age 30 and 35 are not presently enforceable.

A beneficiary's right to annual distributions of income is presently enforceable if there are no conditions to such income distributions that have not been met. A beneficiary's right to annual income distributions starting at age 25 is not presently enforceable if the beneficiary has not attained age 25. A beneficiary's right may be presently enforceable even if such right will cease upon the occurrence of some event such as the beneficiary's substance abuse.

The right to a mandatory distribution does not include a right to a distribution pursuant to a standard or a right to a distribution in the discretion of a fiduciary. Thus a right to receive distributions for “support and health care,” or for “best interests” would not be a mandatory distribution right for purposes of Section ~~301~~109.

Even if all conditions to such right have been met, the decanting may eliminate presently enforceable mandatory rights to income, annuity or unitrust distributions if the authorized fiduciary has discretion to make principal distributions to a beneficiary other than the beneficiary holding such mandatory right. For example, if the first trust provides for mandatory income distributions to A, but permits the authorized fiduciary to make discretionary principal distributions to A, B or C for their best interests, the decanting may eliminate A’s mandatory income interest. In such case the first trust indirectly gave the authorized fiduciary the ability to reduce or eliminate A’s income interest by making discretionary principal distributions to B or C.

On the other hand, if A is the sole current beneficiary of the trust and has a current mandatory right to income, the decanting cannot eliminate A’s right to income.

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

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

SECTION ~~302~~110. DECANTING POWER ~~IF~~WITH LIMITED DISCRETION.

(a) In this section, “limited discretion” means a discretionary distribution power that is not expanded discretion.

(b) An authorized fiduciary that has limited discretion to distribute the principal of a first trust to one or more current beneficiaries may exercise ~~the~~ decanting power over the principal of the first trust.

(c) The second trusts under this section must, in the aggregate, grant each beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficial interests of the beneficiary in the first trust. A power to make a distribution for the

benefit of a beneficiary under ~~the~~^a second trust is considered to be substantially the same as a power to make a distribution to the beneficiary under the first trust. For purposes of this subsection, a charitable interest that is not held by an expressly designated charitable organization shall be treated as if it were held by an expressly designated charitable organization.

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

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

Comments

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

The term "beneficiary" includes a charitable organization expressly designated to receive distributions under the terms of a trust. Section 102(3). Thus, for example, if a trust provides for distributions subject to an ascertainable standard to the settlor's child, and upon the child's death the remainder is to be distributed to Charitable Organization A, the decanting power cannot be exercised in a manner that substantially changes the interest of Charitable Organization A. The term "beneficiary," however, does not include an interest in a charitable trust where no charitable organization is expressly designated. Therefore, to ensure that such a charitable interest cannot be diminished, Section 110(c) provides that such an interest shall be treated as if it were held by an expressly designated charitable organization. For example, if a trust provides for distributions subject to an ascertainable standard to the settlor's child, and upon the child's death the remainder is to be distributed to such charitable organizations as the trustee selects, the decanting power cannot be exercised in a manner that diminishes the charitable interest. Section 110A contains other restrictions on decanting a charitable trust.

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~~^{whom} 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~~110(c) 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~~110 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 would usually be considered to be substantially similar. For example, if a trust provides for discretionary distributions of income and principal to A's children for support, education and health care and A is deceased and has three living children (B, C and D), the authorized fiduciary may exercise the decanting power under Section ~~302~~110 to sever the trust into three equal trusts, one for each of B, C and D. Although the beneficial interest of each child is different because before the severance each child could conceivably receive discretionary distributions of more than one-third of the trust and after the severance each child may only receive distributions from such child's trust (one-third of the first trust), a child's interest is substantially similar because the loss of the possibility of receiving distributions of more than one-third of the first trust is offset by the fact that after the severance the other children may not receive discretionary distributions from such child's trust.

SECTION ~~303.~~ TRUST PROHIBITION ON DECANTING 110A. CHARITABLE INTERESTS.

(a) If the first trust contains a charitable interest and the terms of the first trust expressly designate a particular charitable organization as the beneficiary of the interest, the second trusts must, in the aggregate, grant the charitable organization beneficial interests in the second trusts that are substantially similar to the beneficial interests of the charitable beneficiary in the first trust. If the first trust grants charitable interests to charitable organizations that are not expressly designated in the first trust, the second trusts must, in the aggregate, grant charitable organizations beneficial interests in the second trusts that are substantially similar in the aggregate to the beneficial interests of charitable organizations in the first trust.

(b) Subject to subsection (a), if a trust grants the authorized trustee the discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more charitable organizations, the exercise of decanting power may be in favor of one or more of

such charitable organizations. The selection must be consistent with the settlor's intent to the extent it can be ascertained.

(c) If the first trust contains a charitable interest and the terms of the first trust indicate a particular charitable purpose, the exercise of decanting power may not alter the charitable purpose.

(d) Subject to subsection (c) and notwithstanding Section 110(c), if a trust grants the authorized trustee the discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to charitable organizations not expressly designated for general charitable purposes, the exercise of decanting power may limit distributions to one or more particular charitable purposes. The selection must be consistent with the settlor's intent to the extent it can be ascertained.

Comments

It would be overly restrictive to prohibit decanting of any trust that contained a charitable interest or to prohibit any decanting that affected the charitable interest. Such a restriction could prohibit beneficial decanting of a trust merely because the trust contained a charitable interest and the decanting might incidentally impact the charitable interest. The Act instead takes the approach of protecting the charitable interest as a whole, protecting the interests of expressly named charitable organizations, and protecting any particular charitable purpose. Where the first trust gives the authorized trustee discretion to select among charitable organizations, the Act permits the decanting power to be exercised in such a manner. Where the first trust does not specify a particular charitable organization and a particular charitable purpose, the Act permits the decanting power to be exercised in a manner that expressly defines a particular charitable purpose.

Where a trust expressly designates a charitable organization as a beneficiary, the named charitable organization is a beneficiary under Section (3) and will be a qualified beneficiary if it meets the definition in Section 102(20). In addition Section 106(d), if included in the Act adopted by a state, grants the [Attorney General] the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in the enacting state. If a trust that contains a charitable interest is decanted, the second trust must grant each expressly designated charitable organization substantially similar interests to the charitable organization's interests in the first trust, even if the decanting power is being exercised under Section 109. Section 110A(a). This protects the interests of the expressly named charitable organizations without requiring that they incur legal expenses to protect their interests.

Thus if a trust gave the trustee expanded discretion to make distributions to the settlor's children for best interests, and upon the death of the surviving child provided for the remaining assets to be distributed to Charitable Organization A, the authorized trustee could not exercise the decanting power to provide that each child would receive an equal share of the trust assets when the youngest child attained age 25, because that would diminish the charitable interest. The authorized trustee could exercise the decanting power to provide that when the youngest child attained age 25 the trust would be distributed to Charitable Organization A, because the interest of Charitable Organization A would be increased and not diminished. Further, the authorized trustee could not exercise the decanting power to change the charitable remainder beneficiary from Charitable Organization A to Charitable Organization B.

If a charitable trust does not expressly designate a charitable organization, but instead gives the authorized trustee discretion to select charitable organizations to receive distributions, Section 110A(a) requires that the charitable interests in the second trust or trusts, the aggregate, be substantially similar to the charitable interest in the first trust. Thus if a trust has both individual beneficiaries and a charitable interest that would make a charitable organization a qualified beneficiary if the interest were held by a particular charitable organization, the authorized trustee may not exercise the decanting power to diminish the charitable interest. The authorized trustee could, however, exercise the decanting power to designate one or more particular charitable organizations to receive such charitable interest, so long as the selection is consistent with the settlor's intent to the extent it can be ascertained. Section 110A(b). In such cases the settlor gave the authorized trustee the power to select charitable organizations and the exercise of the decanting power is an exercise of the discretion already granted to the authorized trustee. If the enacting state includes Section 106(d), the state's [Attorney General] will receive notice of the proposed decanting.

For example, if a trust gave the trustee expanded discretion to make distributions to the settlor's children for best interests, and upon the death of the surviving child provided for the remaining assets to be distributed to such charitable organizations as the trustee selected, the authorized trustee could not exercise the decanting power to provide that each child would receive an equal share of the trust assets when the youngest child attained age 25, because that would diminish the charitable interest. The authorized trustee could exercise the decanting power to provide that when the youngest child attained age 25 the trust would be distributed to such charitable organization as the trustee selected, because the charitable interest would be increased and not diminished. Further, the authorized trustee could exercise the decanting power to designate Charitable Organization A as the charitable remainder beneficiary. Section 110A(b).

If a charitable trust indicates a particular charitable purpose, the exercise of the decanting power may not change the charitable purpose. Section 110A(c). Under Section 405 of the Uniform Trust Code, if the terms of a charitable trust do not indicate a particular charitable purpose, the court may select one or more charitable purposes. Under Section 413 of the Uniform Trust Code, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

If a charitable trust indicates a general charitable intent and permits the authorized trustee to select the charitable organizations to receive distributions, thus allowing the authorized trustee to effectively select the charitable purposes, the decanting power may be exercised by the authorized trustee to specify one or more particular charitable purposes. Section 110A(d).

SECTION 111. TRUST PROHIBITION ON DECANTING.

(a) Subject to subsection (b), an authorized fiduciary may not exercise the decanting power to the extent the first trust instrument expressly prohibits the exercise of the decanting power or expressly prohibits a distribution of part or all of the principal of the trust to another trust or a modification of the trust by the fiduciary or trustee under applicable law. A second trust instrument must contain the same express prohibition as the first trust instrument.

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

(c) If a first trust instrument expressly imposes a requirement or restriction not included in this [act] on the exercise of a power granted by applicable ~~state~~ law to a trustee or other fiduciary to distribute part or all of the principal of a trust to another trust or to modify a trust, the requirement or restriction also applies to the exercise of ~~the~~ decanting power. The second trust instrument must contain the same express requirement or restriction on the exercise of the ~~decanting~~ power as the first trust instrument.

Comments

A trust instrument may preclude the exercise of a decanting power under the act or any similar state statute with respect to the entire trust or with respect to one or more provisions of the trust. *See* Section ~~303~~111(a). The exercise of a decanting power, however, is not prohibited by a statement that the trust is irrevocable or unamendable, or by a spendthrift provision. *See* Section ~~303~~111(b).

An irrevocable trust may provide in the trust instrument a mechanism for modifying the trust, for example, by granting a trust protector the power to modify the trust. The fact that a trust instrument provides such a mechanism for modification does not preclude the application of this act. Any requirements or restrictions contained in the trust instrument for such modification

mechanism do not apply to an exercise of a decanting power under this act unless such requirements or restrictions expressly apply to an exercise of a decanting power under this act or a similar state statute.

SECTION ~~304.112~~. CHANGE IN COMPENSATION.

(a) ~~If This subsection applies if~~ a first trust instrument specifies an authorized fiduciary's compensation, ~~the fiduciary may not exercise the decanting power to increase the fiduciary's compensation beyond the specified compensation unless the increase in compensation has been.~~ Unless an increase in the fiduciary's compensation is consented to by all qualified beneficiaries of the second trust in a signed record or the increase is approved by the court, the fiduciary may not exercise decanting power to increase the fiduciary's compensation beyond the specified compensation.

(b) ~~If This subsection applies if~~ a first trust instrument does not specify an authorized fiduciary's compensation, Unless an increase in the fiduciary's compensation is consented to by all qualified beneficiaries of the second trust in a signed record or the increase is approved by the court, the fiduciary may not exercise ~~the~~ decanting power to increase the fiduciary's compensation above the compensation permitted by [this state's trust code] ~~unless the increase in compensation has been consented to by all qualified beneficiaries of the second trust in a signed record or the increase is approved by the court.~~

(c) An increase in an authorized fiduciary's compensation arising solely because the duration of the second trust is longer than the duration of the first trust is not ~~considered~~ an increase in the fiduciary's compensation for purposes of subsections (a) and (b).

(d) An authorized fiduciary may receive reasonable compensation for the time spent considering and implementing the exercise of ~~the~~ decanting power, and such compensation is not an increase in the fiduciary's compensation for purposes of subsections (a) and (b). Reasonable expenses incurred by the fiduciary in considering ~~and~~ implementing the exercise of the ~~decanting~~

power may be paid from the first trust.

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 the decanting power, however, generally is an action taken by the authorized fiduciary that does not require beneficiary consent or court approval. The purpose of requiring beneficiary consent or court approval to a change in the compensation of the authorized fiduciary is to place a more immediate check and balance on an authorized fiduciary 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.

Section ~~304~~112 expressly does not prohibit an increase in compensation arising solely because the second trust may last longer than the first trust. Section ~~304~~112 also is not intended to prohibit increases in compensation that may arise because the second trust may have a greater value in the future than the first trust would have had, for example, because property is retained in the trust longer or smaller distributions are made.

Subsection (d) is intended to address the fact that the authorized trustee may be required to spend an extraordinary amount of time in evaluating a potential exercise of decanting power, particularly when an exercise of the power is suggested by a beneficiary. In such cases, and regardless of whether the authorized trustee ultimately exercises decanting power, the authorized trustee may be compensated for the extra time devoted to the issue at a reasonable rate and to the extent the time spent is reasonable. Reasonableness is determined as provided under state law for fiduciary compensation or similar issues. The authorized trustee's reasonable expenses may also be paid from the first trust.

SECTION ~~305~~113. EXCULPATION AND INDEMNIFICATION.

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

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

[(c) A 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~~relieve a fiduciary from liability for an action of another fiduciary. The second trust may not reduce fiduciary liability in the aggregate.]

Legislative Note: Subsection ~~305~~113(c) is for ~~states~~a state that ~~have~~has a directed trust ~~statutes~~statute.

Comment

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

The terms of the second trust may reduce an authorized fiduciary's liability indirectly, for example, by modifying the rules for approving accounts or expressly permitting the retention of certain property. While such provisions may not violate Section ~~305~~113, they could under certain circumstances violate the authorized fiduciary's general fiduciary duties. For example, while it may be appropriate in the second trust to expressly permit the retention of a residence used by a current beneficiary of the trust, it may not be appropriate to permit the retention of all of the current trust property without any liability.

An authorized fiduciary 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 authorized fiduciary 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 ~~306. TRUSTEE~~114. AUTHORIZED FIDUCIARY REMOVAL.

(a) Except as otherwise provided in subsection (b), an authorized fiduciary may not

exercise ~~the~~ decanting power to modify a provision granting another person the right to remove or replace the fiduciary.

(b) An authorized fiduciary may exercise ~~the~~ decanting power to modify a provision granting another person the right to remove or replace the fiduciary if one of the following applies:

(1) the person currently holding the right consents to the modification in a ~~record~~ signed ~~by the person~~ record, but the modification applies only to the person;

(2) the person currently holding the right and the qualified beneficiaries consent to the modification in a ~~record~~ signed ~~by the person and the qualified beneficiaries~~ record and the modification grants the right to another person that is independent of and nonsubservient to the fiduciary; or

(3) the court approves the modification and the modification grants the right to another person that is independent of and nonsubservient to the fiduciary.

Comment

~~Therefore~~, Section ~~306~~ 114 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. Unless the qualified beneficiaries also consent to such change, the person currently holding the right to remove the authorized fiduciary may only consent to the modification of the right with respect to himself or herself and cannot consent to the modification of such right with respect to any successor remover. For example, if a trust provides that the authorized fiduciary may be removed by X, so long as X is living and not incapacitated, and after X is deceased or incapacitated, by Y, X may consent to a modification that would permit the authorized fiduciary to be removed only by the joint agreement of X and Z and only with 90 days' prior notice, but such modification would not affect Y's power of removal after X is deceased or incapacitated unless Y also consents to the modification or unless the qualified beneficiaries consent to such change.

SECTION ~~307~~ 115. TAX ~~-~~RELATED LIMITATIONS.

(a) In this section:

(1) "First trust" includes a trust that was distributed to the first trust or a

predecessor trust or was modified to create the first trust or a predecessor trust by a trustee or other fiduciary under this [act] or under the law of another jurisdiction.

(2) “First trust instrument” includes the trust instrument of a trust described in paragraph (1).

(3) “Internal Revenue Code” means the United States Internal Revenue Code of 1986[, as amended],~~including corresponding provisions of a subsequent internal revenue law.~~

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

(1) If a transfer to a 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 Internal Revenue Code or 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 the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer to the first trust qualified.

(2) If a 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 Internal Revenue Code, including by application of Section 2503(c) of the Internal Revenue Code, the second trust instrument must not include or omit a term that, if included in or omitted from the first trust instrument, would ~~have prevented~~prevent the transfer from qualifying under the same provisions of Section 2503 of the Internal Revenue Code.

(3) If the property of the first trust includes shares of stock in an S corporation, as defined in Section 1361 of the Internal Revenue Code, and the first trust is, or but for this [act] would be, a permitted shareholder under any provision of Section 1361 of the Internal Revenue

Code, an authorized fiduciary may exercise the ~~decanting~~ power with respect to part or all of the S corporation stock only if the second trust is a permitted shareholder under Section 1361(c)(2) of the Internal Revenue Code. If the property of the first trust includes shares of stock in an S corporation, ~~as defined in Section 1361 of the Internal Revenue Code,~~ and the first trust is, or but for this [act] would be, a qualified subchapter S trust within the meaning of Section 1361 of the Internal Revenue Code, 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 Internal Revenue Code, the second trust instrument must not include or omit a term that, if included in or omitted from the first trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under Section 2642(c) of the Internal Revenue Code.

(5) If the property of the first trust includes an interest subject to the minimum distribution rules of Section 401(a)(9) of the Internal Revenue 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 Internal Revenue Code and the treasury regulations with respect to the interest under the first trust.

(6) In this paragraph, “tax benefit” means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for the benefit from having the settlor considered the owner under Sections 671 through 679 of the Internal Revenue Code. Subject to paragraph (7), if a second trust instrument must not include or omit a

term that, if included in or omitted from the first trust instrument, would prevent the first trust from qualifying for a tax benefit if:

(A) the first trust instrument expressly indicates an intent to qualify for a tax benefit; ~~or if~~

(B) the first trust instrument clearly is designed to enable the first trust to qualify for a tax benefit; and ~~if the first trust qualified, or but for this [act], would have qualified,~~
~~for the tax benefit, the second trust instrument must 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):

(A) the second trust may be a trust as to which the settlor is not considered the owner under Sections 671 through 679 of the Internal Revenue Code, even if the settlor is considered the owner of the first trust; and

(B) the second trust may be a trust as to which the settlor of the first trust is considered the owner under Sections 671 through 679 of the Internal Revenue Code, even if the settlor is not considered the owner of the first trust.

~~(c) In this section:~~

~~(1) “First trust” includes a trust that was distributed to the first trust or a predecessor trust or was modified to create the first trust or a predecessor trust by a trustee or other fiduciary under this [act] or under the law of another jurisdiction.~~

~~(2) “First trust instrument” includes the trust instrument of a trust described in paragraph (1).~~

Legislative Note: In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection 115(a)(3).

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 exercisable alone and in all events. If a trustee had the power to decant the 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 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 Section ~~301~~109(c) prohibiting the modification or elimination of a presently exercisable power of ~~withdrawal~~appointment 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 § 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 zero inclusion ratio, essentially 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 property 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 Section 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 ~~307~~115(~~eb~~)(6) ensures that the tax limitations apply even if a trust is the subject of serial exercises of a decanting power under this act or a similar state statute.

SECTION ~~308~~116. TERM OF SECOND TRUST.

(a) Subject to subsection (b), a second trust may have a term that is the same as, shorter than, or longer than the term of the first trust.

(b) ~~If applicable state law requires that the interests in a first trust vest within or that a power of alienation over the interests not be suspended beyond a period measured from the date the first trust became irrevocable, including any period measured by lives in being on the date the first trust became irrevocable, the interests in the second trust, to the extent attributable to the exercise of the decanting power, must vest within or the power of alienation may not be suspended beyond the period~~ The term of a second trust may not exceed any maximum perpetuity, accumulation, or suspension-of-the-power-of-alienation period applicable under state law to the first trust. If the maximum period of the first trust is measured by lives in being on the date the first trust became irrevocable, the class of measuring lives may be expanded to include another life in being on the date the first trust became irrevocable if the life in being could have been included in the first trust under applicable state law.

Comment

To implement the public policy of the state law applicable to the first trust, the term of the second trust may not exceed any maximum perpetuity, accumulation, or suspension-of-the-power-of-alienation period applicable to the first trust. This rule is also supported by pragmatic considerations. 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 inclusion 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 ~~309.117~~. NEED TO DISTRIBUTE NOT REQUIRED. An authorized fiduciary may exercise ~~the~~ decanting power whether ~~or not~~ the fiduciary ~~would~~ otherwise would have made a distribution of principal at the time of the exercise under the discretionary distribution standard of the first trust.

SECTION ~~310.118~~. PARTIALLY IMPERMISSIBLE DECANTING.

(a) In this section, “revised second trust instrument” means a revised second trust instrument prepared in accordance with subsection (c).

(b) An attempted exercise of ~~the~~ decanting power under this [act] is effective to the greatest extent permissible under this [act]. The following rules apply to the principal of the first trust subject to the attempted exercise of the ~~decanting~~ power:

(1) A provision in the second trust instrument ~~that~~which is not permitted under this [act] ~~has no effect~~is void.

(2) A provision required to be in the second trust instrument to comply with this [act] which is not contained expressly ~~contained~~ in the second trust instrument is ~~presumed~~deemed to be included in the second trust instrument.

(3) A provision of the first trust instrument which is not permitted to be modified

or eliminated by this [act] ~~which~~and is not contained in the second trust instrument is ~~presumed~~deemed 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 provided under Section ~~201(e)~~105 did not accurately reflect the terms of the second trust instrument after applying subsection (b), the trustee shall:

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

(2) take corrective action consistent with this [act] which the trustee considers advisable for an action taken or not taken in reliance on the copy of the second trust instrument ~~as set forth in the notice~~previously provided under Section ~~201(e) and without regard to~~ ~~subsection (b)~~105; and

(3) provide notice in a record of the revised second trust instrument and the corrective action to the persons entitled to notice of the exercise of ~~the~~ decanting power under Section ~~201~~105(c), if the persons are living on the date of the notice under this paragraph, and to the persons ~~who~~that would be entitled to notice under Section ~~201~~105(c) if the authorized fiduciary exercised the ~~decanting~~ power on the date of the notice under this paragraph.

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 ~~308~~116), the other modifications made by the decanting should be effective.

~~Subsection 310~~Section 118(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.

SECTION ~~311.119~~. OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST.

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

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

Legislative Note: Subsection (b) should be included in states a state that ~~have statutes~~has a statute authorizing nonjudicial settlement agreements (sometimes called virtual representation agreements). Those statutes generally permit certain beneficiaries of a trust to approve an exercise of a power by a trustee and thus would permit certain beneficiaries to approve an exercise of the decanting power. In some cases the modification made by an exercise of the decanting power could also have been made by a virtual representation agreement, and in those cases an exercise of the decanting power sometimes might be combined with a nonjudicial settlement agreement.

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 makes a change in the terms of the trust that could be a proper matter for a nonjudicial settlement agreement, the decanting 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~~

SECTION ~~401.120~~. TERMS OF SECOND TRUST. A reference to a trust instrument or terms of the trust in [~~this~~the state's trust code] includes a second trust instrument and the terms of the second trust.

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

SECTION ~~402.121~~ 402.121. SETTLOR.

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

(b) For purposes of determining settlor intent with respect to a second trust, ~~“settlor” may include~~ in addition to or in place of the intent of the settlor of the first trust, the intent of the following persons may be considered:

- (1) the authorized fiduciary of the first trust if the second trust is a modification of the first trust or was created ~~for purposes of the~~to exercise ~~of the~~ decanting power; or
- (2) the settlor ~~who~~that funded an existing trust that is the second trust with respect to exercising the ~~exercise of the decanting~~ power.

Legislative Note: Conforming amendments may be required to ~~this~~the state’s trust code.

Comment

“Settlor” is defined in Section 102(~~2526~~) of this act as the person who creates or contributes property of the trust, except as provided in Section ~~402.121~~ 402.121. The comments to Section 102 and the comments to Section 103 of the Uniform Trust Code generally consider the person who funded a trust as the settlor and would not treat as the settlor a nominal grantor, meaning a person who signs the trust instrument to create the trust but who does not contribute the property to the trust (except perhaps for nominal funding).

When a new trust instrument is created for purposes of serving as the second trust for a decanting, the second trust instrument may be signed by the trustee of the first trust, a beneficiary, the settlor of the first trust, an attorney for the settlor, the trustee or a beneficiary of the first trust, or some other person. Under these circumstances, the creator of the second trust generally will not be the settlor of the second trust unless such person funded the first trust or is the authorized fiduciary exercising the decanting power.

For most purposes, when a trust is decanted the settlor of the first trust should be considered the settlor of the second trust to the extent of the decanting. If the second trust is a pre-existing trust funded by a different settlor, then the original settlor of the second trust would continue to be considered the settlor over the portion of the trust property attributable to that person’s contribution and the original settlor of the first trust would be considered the settlor of the portion of the second trust property attributable to the decanting. This general rule of Section ~~402.121~~ 402.121(a) would apply for purposes of determining who holds the rights granted to the settlor,

who must consent when the settlor's consent is required for an action and for tax purposes. For example, under the Uniform Trust Code this rule would apply for purposes of Section 113 (Insurable Interest), Section 301(d) (limiting the ability of a settlor to represent a beneficiary), Section 405(a) (enforcement of a charitable trust), Section 411 (modification of a trust with the settlor's intent), Section 505 (Creditor's Claims), Section 706(a) (request to remove a trustee), and Section 814 (limiting certain discretionary powers).

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

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

Section ~~402~~121(b) may also apply in other contexts for determining the purposes and material purposes of the trust. The material purposes of the trust may, for example, be relevant in determining whether a nonjudicial settlement agreement is valid. Settlor intent is relevant in determining a trust's purposes and material purposes.

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

SECTION ~~403~~122. LATER -DISCOVERED PROPERTY. Unless an authorized fiduciary provides otherwise at the time of an exercise of ~~the~~ decanting power or a second trust provides otherwise, the following rules apply:

(1) If the exercise of the ~~decanting~~ power was intended to distribute all the principal of ~~the~~ first trust to one or more second trusts, later ~~discovered~~ property otherwise belonging to the first trust and property paid to or acquired by the first trust after the exercise of the ~~decanting~~ power is owned by the second trust.

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

SECTION ~~404.123~~. OBLIGATIONS. If a person to which ~~the~~ trustee of a first trust has incurred a liability in the course of administration of the first trust could reach the property of the first trust and apply it to the satisfaction of the person's claim, the person may reach the property of the second trust to the extent the property of the second trust resulted from an exercise of ~~the~~ decanting power over the first trust.

Comment

It would be inequitable to permit a trust to evade 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. This Section may apply to contractual claims, obligations arising from ownership or control of trust property and to torts committed in the course of administering a trust. *Cf.* Uniform Trust Code § 1010(c).

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* Restatement Second of Trusts § 267. 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~~45~~ permits a creditor to obtain satisfaction out of

the trust estate if it is equitable to permit him to do so.

[ARTICLE] 5

FIDUCIARY DUTY

SECTION ~~501~~.124. FIDUCIARY DUTY.

(a) This [act] does not create or imply a duty to exercise the decanting power or a duty to inform beneficiaries about the applicability of this [act]. An inference of breach of fiduciary duty may not be made as a result of an authorized fiduciary failing to exercise ~~the~~ decanting power.

(b) An authorized fiduciary in exercising ~~the~~ decanting power shall act in accordance with the fiduciary duties of the fiduciary.

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

Legislative Note: Section 801 of the Uniform Trust Code provides that the trustee shall administer a trust in accordance with its terms. Section 802(a) of the Uniform Trust Code provides that a trustee shall administer a trust solely in the interests of the beneficiaries. If a state has adopted the Uniform Trust Code, the bracketed language in subsection 124(c) should be included to make clear that the terms of the trust include the decanting power and that the interests of the beneficiaries takes into account the decanting power.

Comment

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

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

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

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

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

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

Except as noted below, in exercising the decanting power, the authorized fiduciary is subject to the same fiduciary duties as in exercising any other discretionary power. For example, Section 801 of the Uniform Trust Code provides that the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries. Section 76 of the Restatement Third of Trusts provides that a trustee has a duty to administer the trust diligently and in good faith, in accordance with the terms of the trust and applicable law. Section 814(a) of the Uniform Trust Code provides that a trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

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.

The exercise of the decanting power need not be in accord with the terms of the first trust

instrument because decanting by definition is a modification of the terms of the first trust. Therefore, Section 501 provides that the terms of the first trust shall be deemed to include the decanting power for purposes of determining the fiduciary duties of the authorized fiduciary.

Section 802 of the Uniform Trust Code and Section 78 of the Restatement Third of Trusts impose a duty of loyalty on the trustee. Thus in exercising a decanting power the trustee cannot place the trustee's own interests over those of the beneficiaries.

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

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

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* Uniform Trust Code § 412(a) and Restatement Third of Trusts § 66); (2) when continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration (*see* Uniform Trust Code § 412(b)); (3) to replace the trustee if the value of the trust is insufficient to justify the costs of administration (*see* Uniform Trust Code § 414(b)); (4) to correct mistakes (*see* Uniform Trust Code § 415); (5) to achieve the settlor's tax objectives (*see* Uniform Trust Code § 416); and (6) to combine or divide trusts (*see* Uniform Trust Code § 417 and Restatement Third of Trusts § 68).

~~[ARTICLE]~~ 6

MISCELLANEOUS

SECTION ~~601.125.~~ 125. 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 ~~602.126.~~ 126. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. ~~The~~This [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 supersede 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 ~~603~~127. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

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

SECTION ~~604~~128. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

SECTION ~~605~~129. EFFECTIVE DATE. This [act] takes effect

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Rendering set	Standard

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Padding cell	

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