D R A F T

FOR DISCUSSION ONLY

UNIFORM TRUST DECANTING ACT

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UNIFORM TRUST DECANTING ACT

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May 27, 2015

TRUST DECANTING ACT

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Prefatory Note

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

The act makes clear that the power to decant is a fiduciary power that must be exercised in accordance with the fiduciary duties of the authorized fiduciary. A fiduciary must administer a trust in good faith, in accordance with its terms (subject to the decanting power) and purposes, and in the interests of the beneficiaries. An exercise of decanting power must 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 better effectuate the settlor's broader purposes or the settlor's probable intent if the settlor had anticipated the circumstances at the time of decanting.

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

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

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

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

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

Further, the act permits a trustee to reasonably rely on a prior decanting under the law of the enacting state or a different state, even if a decanting done under the law of another state does not comply with all of the requirements of the state's uniform decanting statute. See Section 6.

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

The Uniform Trust Decanting Act also addresses in detail the extent to which charitable interests may be modified by decanting. The act does not permit decanting of wholly charitable trusts. See Section 3. With respect to charitable interests within trusts, the act protects any charitable deduction that may have been taken. See Section 19(b)(2). The act also balances protecting the settlor's charitable intent with the need to permit decanting of trusts that include contingent charitable interests.

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

The Uniform Trust Decanting Act provides a remedy for an imperfect attempted decanting, to avoid the uncertainty that would exist if an attempted decanting is later discovered to have failed to fully comply with the decanting statute. Section 22 of the act essentially reads out of the second-trust instrument any impermissible provision and reads into the second-trust instrument any required provision. This gives authorized fiduciaries exercising decanting power greater comfort that their intent will be implemented and not subject to challenge for an inadvertent misstep or technicality.

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

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

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

Sections 11 through 23 contain the heart of the decanting power and describe what modifications can be made by decanting. Section 11 delineates the decanting power when the authorized fiduciary has expanded discretion and Section 12 delineates the decanting power when the authorized fiduciary has limited discretion. Section 13 contains special rules to facilitate decanting into a special needs trust for a disabled beneficiary. Section 14 provides special rules to protect charitable interests.

Sections 15 through 20 generally provide limitations on the exercise of the decanting power. Section 15 addresses how express restrictions contained within the first-trust instrument may limit the decanting power. Sections 16, 17, and 18 impose limitations on an authorized fiduciary exercising the decanting power in ways that might be considered self-dealing. Section 19 imposes limitations on the decanting power that may be necessary to avoid disqualifying a trust for a particular tax benefit. Section 20 addresses limits on the duration of a trust, such as the rule against perpetuities.

Section 22 contains the remediation provision that is intended to salvage imperfect decantings. Section 23 authorizes under certain circumstances decanting of trusts for the care of a nonhuman animal.

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

TRUST DECANTING ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) "Appointive property" means the property or property interest subject to a power of appointment.

(2) "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 any applicable regulations.

(3) "Authorized fiduciary" means:

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

(B) a special fiduciary appointed under Section 9; or

(C) a special needs fiduciary under Section 13.

(4) "Beneficiary" means a person that:

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

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

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

(5) "Charitable organization" means:

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

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

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

(7) “Court” means the court in this state having jurisdiction in matters relating to trusts.

(8) “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.

(9) “Decanting power” or “the decanting power” means the power of an authorized fiduciary under this [act] to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

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

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

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

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

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

(15) “Noncontingent” means:

(A) not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur; and

(B) no person has discretion to distribute the property subject to the interest to any person other than the beneficiary or the beneficiary's estate.

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

(17) "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.

(18) "Powerholder" means a person in which a donor creates a power of appointment.

(19) "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 exercisable only after 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.

(20) "Qualified beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined:

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

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

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

(21) "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.

(22) "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.

(23) "Second trust" means:

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

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

(24) "Second-trust instrument" means the trust instrument for a second trust.

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

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

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

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

(27) "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) "Terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement.

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

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

In states in which the constitution, or other law, does not permit the phrase "as amended" when a federal statute is incorporated into state law, the phrase should be deleted in paragraphs (2) and (21).

In Section 2(7) the definition of "court" should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.

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 the discretion to distribute or to direct the trustee to distribute is held jointly by two or more trustees or other fiduciaries, the "authorized fiduciary" is such trustees or other fiduciaries collectively. If the authorized fiduciary is comprised of two or more fiduciaries, 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 2(4)(A) and (B) is identical to the definition found in Section 103(3) of the Uniform Trust Code. Section 2(4)(C) adds as a beneficiary a charitable organization expressly named to receive distributions from a trust. *Cf.* Uniform Trust Code § 110(a) and § 405(a). Thus an expressly identified charitable organization has the rights of a beneficiary under this act. Absent Section 2(4)(C) such charities would not be considered beneficiaries. Because a charitable interest is not created to benefit ascertainable charitable organizations but to benefit the community at large, persons receiving distributions from a charitable interest 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, powerholders are classified as beneficiaries under the Uniform Trust Code. Powerholders are included on the principle 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 Organization. The definition of "charitable organization" is based on the definition of "institution" in the Uniform Prudent Management of Institutional Funds Act (Section 2(4)), except that it excludes trusts.

Charitable Purpose. The definition of "charitable purpose" is similar to the definition in Section 405 of the Uniform Trust Code. The definition of charitable purpose follows that of Section 28 of the Restatement Third of Trusts and Section 2(1) of the Uniform Prudent Management of Institutional Funds Act. This definition derives from common law and ultimately the English Statute of Charitable Uses, enacted in 1601. 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, relating to the relief of poverty, or providing 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.

Decanting Power or The Decanting Power. The term "decanting power" or "the decanting power" means the power held by the authorized fiduciary (see Section 2(3)) 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.

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

Expanded Discretion. "Expanded discretion" is any discretion that is not limited to an ascertainable standard (see Section 2(2)) as used in Internal Revenue Code Section 2514(c)(1) or to a reasonably definite standard (see Section 2(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.

First Trust. 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 Instrument. See Section 2(11) for the definition of "first trust" and Section 2(29) 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.

Noncontingent. The term "noncontingent" is intended to describe interests that are certain to occur. An interest is not noncontingent if it is subject to the occurrence of a specified event that is not certain to occur. For example, if A's children who survive A are to receive trust assets upon A's death, the interests of A's children are not noncontingent, because each must survive A to take and they may not survive A. The interests of A's children are not noncontingent regardless of whether the requirement of survival is expressed as a condition precedent or a condition subsequent. Thus the result is the same if the gift upon A's death is to A's children in equal shares, but if any child predeceases A such child's share shall be distributed to such child's descendants in shares per stirpes.

An interest also is not noncontingent if it is subject to the exercise of discretion. Thus if a trustee has discretion to make distributions to A and A's descendants for their support and health care, the interests of A and A's descendants are not noncontingent.

An interest also is not noncontingent if a person has discretion to distribute the property subject to the interest to any person other than the beneficiary or the beneficiary's estate. Thus if a trust provides that all income shall be distributed annually to A, but gives the trustee discretion to distribute principal to B for B's support and medical care, A's interest is not noncontingent.

A current mandatory right to receive income, an annuity or a unitrust payment where the trustee has no discretion to make distributions to others is a noncontingent right.

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.

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 2(4) 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 7.

The qualified beneficiaries consist of the current beneficiaries (see Section 11(a)) and the presumptive remainder beneficiaries (see Section 11(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 2(20)(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 2(20)(B), and Section 2(20)(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 2(20)(C), because there is no presumptive remainder beneficiary under Section 2(20)(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 and 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 construed 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.

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 or another person 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 another trust presumably would require 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 2(23) for the definition of "second trust" and Section 2(29) 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 25 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.

Sign. The definition of "sign" is the same definition used in Section 2(8) of the Uniform Premarital and Marital Agreements Act.

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

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.

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 and clarifies that the trust instrument may only contain some of the terms of the trust. Other terms of the trust may be established by other evidence that would be admissible in a judicial proceeding. See Section 2(28). 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 25 of this act.

SECTION 3. SCOPE.

(a) Except as otherwise provided in subsections (b) and (c), this [act] applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

(b) This [act] does not apply to a trust held solely for charitable purposes.

(c) Subject to Section 15, a trust instrument may restrict or prohibit exercise of the decanting power.

(d) This [act] does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this state other than this [act], common law, a court order, or a nonjudicial-settlement agreement.

(e) This [act] does not affect the ability of a settlor to provide in a trust instrument for the distribution or appointment in further trust of the trust property or for modification of the trust instrument.

Comment

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

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 act does not permit decanting a trust held solely for charitable purposes (a "wholly charitable trust"). A private foundation structured as a trust would be a wholly charitable trust that could not be decanted pursuant to the act. To the extent a conservation easement or restricted gift is considered to be an express trust, such an interest would be a wholly charitable trust that could not be decanted pursuant to the act.

While a split interest trust such as a charitable remainder trust or charitable lead trust would not be a wholly charitable trust, in almost all cases the trustee of such a trust would not have discretion to distribute principal to a current beneficiary and therefore there would not be an authorized fiduciary (see Section 2(3)) who would have authority to exercise the decanting power under Section 11 or Section 12.

If an authorized fiduciary has discretion to distribute principal of a trust that is not a wholly charitable trust but that contains a charitable interest (see Section 14(a)(1)), the charitable interest may not be diminished and the authorized fiduciary may not change any charitable purpose set forth in the first trust. See subsection 14(c).

The Uniform Trust Decanting Act is not the exclusive way to decant a trust and is not the exclusive way to modify a trust. The terms of the trust instrument may grant a fiduciary or other person the power to modify the trust. This act does not supplant any authority granted under such a trust provision. Any such authority granted under the trust instrument does not affect the application of this act unless the trust instrument imposes an express restriction on the exercise of the decanting power under this act or other state statute authorizing a fiduciary to decant. See Section 15(b).

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

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

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. 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. 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.

SECTION 4. FIDUCIARY DUTY.

(a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

(b) This [act] does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this [act].

(c) Except as otherwise provided in a 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.

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 (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

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 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. 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.

An exercise of a decanting power must 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 better effectuate 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 include efficient administration of the trust. The settlor's purposes may also include achieving certain tax objectives or generally minimizing overall tax liabilities. The settlor's purposes often include avoiding fruitless, needless dissipation of the trust assets should a beneficiary develop dependencies such as substance abuse or gambling, have creditor problems, or otherwise be unfit to prudently manage assets that might be distributed from the trust.

The exercise of the decanting power need not be in accord with the literal terms of the first-trust instrument because decanting by definition is a modification of the terms of the first trust. Therefore subsection 4(c) 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. Nonetheless, the other terms of the first trust may provide insight into the purposes of the first trust and the settlor's probable intent under current circumstances.

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. For example, an authorized fiduciary may breach its fiduciary duties by decanting to permit self-dealing when such self-dealing is not in the interests of the beneficiaries. While Sections 16, 17 and 18 expressly prohibit making certain changes that benefit the authorized fiduciary and are not likely to be in the beneficiaries' interests, these sections do not include all of the changes that may be breaches of the authorized fiduciary's fiduciary duties.

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).

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.

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

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

(2) provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for purposes of:

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

(B) construction of terms of the trust; or

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

Comment

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

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.

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

Decanting is considered an administrative power because it deals with the powers of the trustee. *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 or more of administration, meaning or effect. "Meaning and effect" are the terms used in the Uniform Trust Code (see Section 107). "Construction" is the term used in the Restatement Second of Conflicts.

This act also applies if the trust instrument states that the law of the state governs for purposes of any one or more of administration, meaning or effect without the necessity of establishing that the law of the state in fact governs for such purpose.

Alternatively, it is sufficient if the trust has its 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 6. REASONABLE RELIANCE. A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this [act] or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

Comment

A trust previously administered in another jurisdiction or governed by the laws of another jurisdiction may have been previously decanted under the laws of such other jurisdiction. Section 6 allows a person to rely without liability on the prior decanting so long as such reliance is reasonable. The law of the other jurisdiction authorizing the decanting or modification must have been applicable to the trust pursuant to the conflict of law rules of such jurisdiction or, in the case of a decanting pursuant to a statute, by the terms of the statute. For example, the other jurisdiction may have a decanting statute that by its terms applies to trusts administered in such jurisdiction, and the trust was administered in such jurisdiction at the time of the decanting.

The decanting laws of more than one jurisdiction may apply to a trust, for example, if a trust is governed by the laws of one jurisdiction but administered in another jurisdiction. The act permits reasonable reliance on a decanting under the applicable law of another jurisdiction, even if the enacting state's decanting statute also could have applied to the trust. This avoids the difficulty of complying with the decanting laws of more than one jurisdiction, at least as far as the enacting state is concerned.

SECTION 7. NOTICE.

(a) In this section, a notice period begins on the day notice is given under subsection (c) and ends 59 days after the day notice is given.

(b) Except as otherwise provided in this [act], 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 give notice in a record of the intended exercise of the decanting power not later than [60] days before the exercise to:

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

(2) each qualified beneficiary of the first trust;

(3) each holder of a presently exercisable power of appointment over any part or all of the first trust;

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

(5) each other fiduciary of the first trust;

(6) each fiduciary of the second trust; and

(7) [the Attorney General], if Section 14(b) applies.

(d) [An authorized fiduciary is not required to 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 give notice under subsection (c) to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

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

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

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

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

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

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

(g) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file a petition under Section 9 with the court asserting that:

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

(2) Section 22 applies to the exercise of the decanting power.

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

Legislative Note: *In subsection (c)(7), "Attorney General" is placed in brackets to accommodate a jurisdiction that grants enforcement authority over charitable trusts to another* *designated official. The bracketed text in subsection (d) should be included when state law does not in all cases provide a representative for a minor beneficiary, so that notice is not required to be given to the minor personally.*

Comment

Generally a trustee is not required to provide notice to beneficiaries prior to exercising a discretionary power. This section is not intended to change the law in this regard except with respect to exercises of the decanting power. Because qualified beneficiaries are entitled to know the terms of the trust, 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 settlor, fiduciary or beneficiary has an objection to or may challenge the decanting. Any person entitled to notice under subsection 7(c) may petition the court under Section 9 for a determination of whether the proposed or attempted exercise of the decanting power is an abuse of discretion or does not otherwise comply with the act.

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) each settlor of the first trust (see Section 2(25)); (b) all qualified beneficiaries (see Section 2(20)); (c) each holder of a presently exercisable power of appointment, whether or not such holder is a qualified beneficiary; (d) any person who may remove or replace the authorized fiduciary; (e) all other fiduciaries of the first trust; (f) all fiduciaries of the second trust or trusts; and (g) the attorney general (or other state official empowered to enforce charitable trusts) if there is a charitable interest not held by an expressly identified charitable organization. If the authorized fiduciary is comprised of more than one fiduciary, notice should be given to any person who may remove or replace any of such fiduciaries. The term “replace” refers to the power to both remove and designate a successor for the authorized fiduciary, and does not refer to the power merely to designate a successor when a vacancy occurs.

Other notice provisions under state law may also apply to a decanting. Under Section 813(a) of the Uniform Trust Code, a trustee 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.

Subsection (c)(7) entitles the attorney general (or other state official empowered to enforce charitable trusts) to notice of an exercise of the decanting power with respect to a trust containing a charitable interest that is not held by an expressly identified charitable organization. Thus the attorney general receives notice when charities are not specifically named but are to be selected by the trustee.

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

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

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

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

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

[SECTION 8. REPRESENTATION.

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

(b) Consent of or waiver by a person 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 or waiver otherwise would become effective.

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

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

Legislative Note: *State law generally specifies when a beneficiary who is a minor or otherwise incapacitated may be represented by another party. State law also may specify 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 an incapacitated beneficiary or settlor, representation provisions should be included in the act.*

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

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 7.

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 7 or consent to certain modifications under Section 16 and Section 18. 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 consent on behalf of incapacitated beneficiaries or an incapacitated settlor, such rules should also apply for purposes of waiving the notice period under Section 7 or consenting to modifications under Section 16 or Section 18.

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

Subsection (d) 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.

SECTION 9. COURT INVOLVEMENT.

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

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

(2) appoint a special fiduciary and authorize the special fiduciary 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 a proposed or attempted exercise of the decanting power is ineffective because:

(A) after applying Section 22, the proposed or attempted exercise does not or did not comply with this [act]; or

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

(5) determine the extent to which Section 22 applies to a prior exercise of the decanting power;

(6) provide instructions to the trustee regarding the application of Section 22 to a prior exercise of the decanting power; or

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

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

(1) an increase in the fiduciary's compensation under Section 16; or

(2) a modification under Section 18 of a provision granting a person the right to remove or replace the fiduciary.

Legislative Note: *In a state with a limited jurisdiction court, it may be necessary to grant the power to the court to order remedial action for an ineffective attempted decanting.*

Comment

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

The decanting power, however, is a very broad discretionary power. Therefore, Section 9 provides that the authorized fiduciary, any person who would be entitled to notice of the exercise of the decanting power or any beneficiary may petition the court for certain purposes with respect to a prior decanting or a proposed decanting. 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, the settlor, a trustee remover, the attorney general with respect to a charitable interest that is not held by an expressly designated charity or a beneficiary. A successor beneficiary, even though such beneficiary is not entitled to notice under Section 7, could petition the court under Section 9.

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 authorized fiduciary. The authorized fiduciary need not have provided notice of a proposed decanting or even be the person proposing the decanting in order for the court to provide instructions. Such an instruction, however, would not create in the authorized fiduciary a duty to decant.

While generally the authorized fiduciary should decide whether or not to exercise the decanting power, and may seek instructions from the court when in doubt as to whether the proposed exercise is permitted and consistent with the authorized fiduciary's fiduciary duties, there may be times when the exercise of the decanting power is appropriate but the authorized fiduciary cannot or should not be the person to exercise the power. Under such circumstances the court may appoint a special fiduciary to determine if the decanting power should be exercised and, if so, to exercise the power. The terms of the appointment may limit the special fiduciary's power to determine whether a proposed exercise is appropriate or may grant the special fiduciary broader power to determine the scope of a decanting. The term of appointment may also limit the period of time during which the special fiduciary may act. For example, assume a trust permits discretionary principal distributions to the settlor's descendants subject to an ascertainable standard if a beneficiary is acting as trustee and subject to expanded discretion if a disinterested person is acting as trustee. If a beneficiary is acting as trustee and believes that an exercise of the decanting power under Section 11 may be appropriate, the trustee could request that the court appoint a disinterested person as special fiduciary to determine whether the decanting power should be exercised and, if so, to exercise the power. As another example, if the authorized fiduciary is a beneficiary of the first trust and it is appropriate to create a special needs trust for another beneficiary, but the decanting might incidentally increase the authorized fiduciary's interest in the trust, it may be advisable for the authorized fiduciary to request under subsection (a)(2) the appointment of a special fiduciary to decide whether to exercise the decanting power.

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

Comment

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

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

SECTION 11. DECANTING POWER UNDER EXPANDED DISCRETION.

(a) In this section:

(1) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

(2) "Successor beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined is not a qualified beneficiary. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(3) "Vested interest" means:

(A) a right to a mandatory distribution that is noncontingent as of the date of the exercise of the decanting power;

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

(C) a current and noncontingent 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;

(D) a presently exercisable general power of appointment; or

(E) a right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(b) Subject to subsection (c) and Section 14, an authorized fiduciary that has expanded 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) Subject to Section 13, 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 (d);

(2) include as a presumptive remainder beneficiary or 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 (d); or

(3) reduce or eliminate a vested interest.

(d) Subject to subsection (c)(3) and Section 14, 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 or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded discretion to distribute principal to the beneficiary;

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

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

(e) A power of appointment described in subsection (d)(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 different from the beneficiaries of the first trust.

(f) Subject to Section 14, a second trust under this section may be a trust created or administered under the law of any jurisdiction.

(g) If an authorized fiduciary has expanded 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.

Comment

Qualified beneficiaries comprise current beneficiaries and presumptive remainder beneficiaries. "Current beneficiary" 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 nongeneral limited power of appointment. Nor does the term include the objects of an unexercised inter vivos power of appointment.

"Presumptive remainder beneficiary" means a qualified beneficiary (see Section 2(20)) other than a current beneficiary. 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.

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 beneficiaries who might be termed "second line" or more remote remainder beneficiaries. It also includes unborn or unascertained beneficiaries who are beneficiaries by reason of being members of a class. It does not include, however, a person who is merely a holder of a power of appointment but not otherwise a beneficiary.

Under Section 11 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.

"Expanded discretion" is defined in Section 2(10). 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 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 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 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 11(g). With respect to the remainder of the trust, the authorized fiduciary may have the ability to decant under Section 12 or Section 13.

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 (f) of Section 11 and the other restrictions in Sections 14 through 20 and subject to the fiduciary duty in Section 4(a), 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 current rights that have come into effect with respect to the beneficiary; (6) change the standard for distributions; (7) add or eliminate a spendthrift provision; (8) extend the duration of a trust (subject to Section 20); (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. This prohibition on accelerating a remainder interest is included to avoid any argument under Internal Revenue Code Section 674 that the mere existence of a power to make a remainder beneficiary a current beneficiary causes the trust to be a grantor trust, whether or not the decanting power is ever exercised in such manner.

Section 11(c) prohibits the second trust from modifying or eliminating a presently exercisable general power of appointment. 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.

A power to withdraw from a trust is a power of appointment. *See* Restatement Third of Trusts § 56, Comment b. 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 restrictions in Section 11(c) do not apply to a decanting under Section 13. Section 13(c)(2).

Subsection (d)(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.

A decanting may not eliminate a beneficiary's mandatory rights to income, annuity or unitrust distributions if such rights are current rights, unless the trustee has discretion to distribute principal to another beneficiary. The decanting may eliminate mandatory rights to income, annuity or unitrust distributions if the right is not a current right.

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 a current right 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.

For example, a beneficiary's right to receive a portion of the principal of a trust upon attaining a certain age is a current right 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 a current right but the withdrawal rights at age 30 and 35 are not current rights.

A beneficiary's right to annual distributions of income is a current right 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 a current right if the beneficiary has not attained age 25. A beneficiary's right may be a current right even if such right will cease upon the occurrence of some event such as the beneficiary attaining age 30 without having graduated from a four-year college.

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 11.

Even if all conditions to such right have been met, the decanting may eliminate current mandatory rights to income, annuity or unitrust distributions that have come into effect with respect to such beneficiary 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.

A vested interest also includes a right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the occurrence of a specified event that may not occur or the exercise of discretion. Thus the right of a person to receive the trust property upon the termination of such trust if such person is then living would not be a vested interest. On the other hand, there would be a vested interest if upon termination the trust property passed to A or, if A were not living, to A's estate. Any interest with a condition is not a vested interest, regardless of whether the condition is a condition precedent or condition subsequent. For example, A does not have a vested interest if upon termination the trust property passes to A or A's estate, provided that A is then married or was married at the time of A's prior death.

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

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 12. DECANTING POWER UNDER LIMITED DISCRETION.

(a) In this section, "limited discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

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

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

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

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

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

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

(e) Subject to Section 14, a second trust under this section may be created or administered under the law of any jurisdiction.

(f) 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.

Comment

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. 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 interests of the child or of Charitable Organization A. Nonetheless, the settlor did entrust the authorized fiduciary with some discretion over principal distributions indicating some confidence in the trustee's judgment, justifying a limited decanting power in these situations.

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

If the first trust requires that a trust be distributed at age 35, a second trust that permits the beneficiary to withdraw any part or all of the trust at any time after age 35 would be substantially similar. A second trust that delayed the distribution to age 40 would not be substantially similar.

A testamentary power of appointment in favor of any person other than the beneficiary, the beneficiary's estate or the creditors of either is not substantially the same as a testamentary power of appointment in favor of any person including the beneficiary, the beneficiary's estate and the creditors of both, because the ability to use the assets to fulfill creditors' claims is a substantial difference.

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

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

Section 12 is intended to permit a severance of a trust if the beneficial interests in the second trust, in the aggregate, 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 testamentary trust created by A provides for discretionary distributions of income and principal to A's children for support, education and health care and A has three living children (B, C and D), the authorized fiduciary may exercise the decanting power under Section 12 to sever the trust into three equal trusts, one for each of B, C and D. The beneficial interest of each child in the second trusts is different because before the severance each child could conceivably receive discretionary distributions of more than one-third of the first trust and after the severance each child may only receive distributions from such child's second trust (one-third of the first trust). A child's interest is considered substantially similar, however, 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 second trust.

SECTION 13. TRUST FOR BENEFICIARY WITH DISABILITY.

(a) In this section:

(1) "Special needs fiduciary" means:

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

(B) if no trustee or fiduciary has discretion under subparagraph (A), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(C) if no trustee or fiduciary has discretion under subparagraphs (A) and (B), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(2) "Beneficiary with a disability" means a beneficiary of the first trust who the special needs fiduciary believes may qualify for governmental benefits based on disability,

whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated [incompetent].

(3) "Governmental benefits" means financial aid or services from a state, federal, or other public agency.

(4) "Special needs trust" means a trust the trustee believes would not be considered a resource for purposes of determining whether the beneficiary with a disability is eligible for governmental benefits.

(b) A special needs fiduciary may exercise the decanting power under Section 11 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded discretion if:

(1) a second trust is a special needs trust that benefits the beneficiary with a disability; and

(2) the special needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

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

(1) Notwithstanding Section 11(c)(2), the interest in the second trust of a beneficiary with a disability may:

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

(B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. Section 1396p(d)(4)(A)[, as amended].

(2) Section 11(c)(3) does not apply to the interests of the beneficiary with a disability.

(3) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.

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

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 (c)(1).

Comment

Section 13 permits an authorized fiduciary to exercise the decanting power over a trust that has a beneficiary with a disability to create a special needs trust that governmental benefits programs will not consider a "resource" for purposes of the eligibility of the beneficiary with a disability for those benefits. Many governmental benefit programs restrict eligibility for those programs to only persons of limited resources. These resources may include any assets from which the beneficiary with a disability has the right to compel a distribution or a withdrawal. Special needs trusts are drafted so as to limit the distribution rights of the beneficiary with a disability and thus better permit the beneficiary with a disability to qualify for governmental benefits. Under Section 13 the authorized fiduciary may modify the dispositive provisions for the beneficiary with a disability even if the authorized fiduciary has no discretion to make distributions.

The exercise of the decanting power must be in furtherance of the purposes of the first trust. Thus the decanting must effectuate better the settlor's broader purposes. In most cases, if the first trust did not anticipate the beneficiary's disability and the settlor's broader purpose was to provide for the beneficiary's support, a decanting that would permit the beneficiary with a disability to qualify for governmental benefits while still being eligible to receive discretionary distributions from the trust would further the purposes of the trust.

For example, assume the first trust was created and funded by A, requires all income to be distributed to the beneficiary after age 21, permits the trustee to distribute principal to the beneficiary pursuant to an ascertainable standard, permits the beneficiary to withdraw the trust principal at age 30, grants the beneficiary a testamentary general power of appointment, and upon the beneficiary's death distributes any unappointed property per stirpes to A's descendants then living. If the beneficiary is age 25 and is disabled, the authorized fiduciary may exercise the decanting power to distribute the principal of the first trust to a trust that provides only for distributions to the beneficiary in the trustee's absolute discretion and upon the beneficiary's death distributes the remaining trust assets per stirpes to A's descendants then living. The exercise of the decanting power may eliminate the beneficiary's right to income, the beneficiary's prospective right to withdraw the trust at age 30 and the beneficiary's power of appointment. The second trust may not, however, change the remainder beneficiaries. Section 13(c)(3).

The result is the same if the beneficiary is age 31 and thus has a right to withdraw the trust assets, because Section 13(c)(2) provides that Section 11(c)(3) does not apply to the interest of the beneficiary with a disability.

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

As another example, assume a trust was funded by the beneficiary, directly or indirectly, and provides for distributions of income to the beneficiary until age 30 and then provides for the remainder of the trust to be distributed to the beneficiary. The beneficiary is age 28. The authorized fiduciary may exercise the decanting power, and the second trust may be a "pooled trust" or a payback trust. Section 13(c)(1). The act does not require that the second trust be a "pooled trust" or a payback trust, but other state law may impose such a requirement.

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

Thus if the first trust has more than one current beneficiary, one of whom is a beneficiary with a disability, the authorized fiduciary may decant under Section 11 as if the authorized fiduciary had expanded discretion to distribute principal to the beneficiary with a disability, but may not alter the interest of the other beneficiaries except to the extent they are affected by the changes to the interest of the beneficiary with a disability. For example, assume the first trust was created and funded by A, continues for the rule against perpetuities period, requires that income be distributed per stirpes to A's descendants, and permits discretionary distributions of principal to A's descendants pursuant to an ascertainable standard. The exercise of the decanting power might, for example, distribute part of the principal of the first trust to a special needs trust solely for the benefit of the beneficiary with a disability (the "Special Needs Trust") and distribute the remaining principal to a trust solely for the benefit of the nondisabled beneficiaries (the "Non-Special Needs Trust"), the terms of which are otherwise identical to the terms of the first trust. The Special Needs Trust might give the trustee absolute discretion to make distributions to the beneficiary with a disability. Upon the death of the beneficiary with a disability, however, the remaining assets of the Special Needs Trust must be distributed to the Non-Special Needs Trust, because the decanting cannot change the interests of the non-disabled beneficiaries, except to the extent they are affected by the changes to the interest of the beneficiary with a disability. The non-disabled beneficiaries' remainder interests may be affected, for example, because the trustee of the Special Needs Trust may make distributions to the beneficiary with a disability in the trustee's absolute discretion and is not limited by an ascertainable standard. The Non-Special Needs Trust must have the same terms as the first trust, except that it may modify or eliminate the interest of the beneficiary with a disability. So, for example, the Non-Special Needs Trust might provide that no distributions would be made to the beneficiary with a disability unless the Special Needs Trust was exhausted.

SECTION 14. PROTECTION OF CHARITABLE INTERESTS.

(a) In this section:

(1) "Charitable interest" means an interest in a trust which:

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

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

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

(2) "Determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and which is unconditional or which will in all events be held for charitable purposes.

(3) "Unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986[, as amended,] on the date of the distribution if the charitable organization meets the requirement on the date of determination.

(b) If a first trust contains a determinable charitable interest, [the Attorney General] has the rights of a qualified beneficiary and may represent and bind the charitable interest.

(c) If a first trust contains a charitable interest, the second trusts, in the aggregate may not:

(1) diminish the charitable interest;

(2) diminish the interest of an expressly identified charitable organization that holds the charitable interest; or

(3) alter any charitable purpose stated in the first-trust instrument.

(d) If a first trust contains a determinable charitable interest, the second trusts that include charitable interests pursuant to subsection (c) must be administered under the law of this state unless:

(1) [the Attorney General], after receiving notice under Section 7, fails to object in a signed record delivered to the authorized fiduciary within the notice period;

(2) [the Attorney General] consents in a signed record to the second trusts being administered under the law of another jurisdiction; or

(3) the court approves the exercise of the decanting power.

Legislative Note: *In a state 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 (a)(3).*

In subsections (b) and (d), "Attorney General" is placed in brackets to accommodate a jurisdiction that grants enforcement authority over charitable trusts to another designated official.

Comment

The Uniform Trust Decanting Act does not permit the decanting of a trust held solely for charitable purposes (a "wholly charitable trust"). See Section 3(b). While a split interest trust such as a charitable remainder trust or a charitable lead trust is not a wholly charitable trust, in almost all cases the trustee of such a trust would not have discretion to distribute principal to a current beneficiary and therefore there would be no authorized fiduciary (see Section 2(3)) who would have authority to exercise the decanting power under Section 11 or Section 12.

Other trusts that could be decanted under Sections 11, 12 or 13, however, may contain charitable interests. Section 14 imposes special requirements and gives the Attorney General (or other state official that supervises charitable trusts) the rights of a qualified beneficiary when the first trust contains a determinable charitable interest. Generally, a determinable charitable interest is a charitable interest not subject to fiduciary discretion or any significant contingencies.

Charitable Interest. The term "charitable interest" includes an interest held by a charitable organization that makes the charitable organization a qualified beneficiary. Section 14(a)(1)(A). See Section 2(4)(C) defining the term "beneficiary" to include an expressly identified charitable organization that may or will receive distributions under the terms of a trust. See Section 2(20) defining a qualified beneficiary.

For example, a trust might provide for a certain amount to be distributed annually to Gentoos Need You, a charitable organization, and permit the trustee to make discretionary distributions of principal to the settlor's descendants. Upon the death of the settlor's last surviving child, $100,000 is to be paid to Gentoos Need You and the remainder to trusts for the settlor's grandchildren. The annuity interest and the remainder interest held by Gentoos Need You are both charitable interests because they are held by an expressly identified charitable organization and make the organization a qualified beneficiary.

The term "charitable interest" also includes an interest that can benefit only charitable organizations and that, if held by an expressly identified charitable organization, would make the charitable organization a qualified beneficiary. Section 14(a)(1)(B). For example, if the trustee is to distribute $50,000 from the trust each year for ten years to one or more charitable organizations selected by the trustee that protect Antarctica and its wildlife, the trustee also has discretion to distribute income and principal to individual beneficiaries, and at the end of ten years the trustee 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.

As another example, if the trustee may make discretionary principal distributions to the settlor's spouse, and upon the spouse's death is to distribute one-half of the principal to charitable organizations that protect the Arctic and its wildlife, and the other one-half to the settlor's descendants, there is a charitable interest in one-half of the remainder.

The term "charitable interest" 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 charitable organizations. Section 14(a)(1)(C).

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 Child A's death the trust distributes to Child A's descendants, or if none, to the settlor's descendants, or if none to the Manatee Preservation Fund, a charitable organization, and Child A or the settlor has one or more descendants living, the interest of the Manatee Preservation Fund does not make it a qualified beneficiary and therefore its interest is not a charitable interest.

Determinable Charitable Interest. An interest must meet three requirements to be a determinable charitable interest. Section 14(a)(2). First, the interest must be a charitable interest. Determinable charitable interests are a subset of charitable interests. Thus a remote contingent interest cannot be a determinable charitable interest.

Second, a determinable interest must be a right to a mandatory distribution. A mandatory distribution is a right that is not subject to the exercise of discretion. The mandatory distribution may be a right to income, principal or both. A mandatory distribution may be a right to a current distribution, for example, where a charitable organization is entitled to a certain portion of trust principal on a date that has already occurred and the distribution has not yet been made. A mandatory distribution also includes a right to periodic distributions of income, a specific dollar amount or a percentage of value of some or all of the trust property. A mandatory distribution also includes a right to receive an ascertainable part of the trust property currently or on the occurrence of a specified event or after the passage of a specified time.

This requirement would be met, for example, if a trust required the trustee to distribute to charitable organizations or for charitable purposes one-half of the trust's net income annually or, alternatively, one percent of the value of the trust's assets annually. It would also be met if the trustee was required to distribute ten percent of the trust principal to charitable organizations or for charitable purposes ten years after the settlor's death or alternatively upon the death of the settlor's surviving spouse. This requirement would not be met if the charitable distribution was subject to the trustee's discretion.

A mandatory distribution would also include a right of withdrawal held by a charitable organization.

The third and final requirement for a determinable charitable interest is that the charitable interest either must be unconditional or must in all events be held for charitable purposes. Unconditional generally means not subject to the occurrence of a specified event that may not occur. For example, assume the trustee is to distribute $100,000 annually to the Ornithology Institute, a charitable organization, but only if it uses the funds to search for the ivory billed woodpecker, and if it does not so use the funds, to Resurrect Extinct Species, a charitable organization, but only if it uses the funds to recreate the ivory billed woodpecker from genetic material, and if it does not so use the funds, to Woods for Woodpeckers, a charitable organization. The individual interests of Ornithology Institute, Resurrect Extinct Species, and Woods for Woodpeckers are each conditional. The charitable interest to receive $100,000 annually, in the aggregate, meets the third requirement because in all events it will be held for charitable purposes for one of the three charitable organizations.

A charitable interest is conditional (i.e., not an unconditional interest) if any person has discretion to distribute the interest to any person other than the charitable organization. For example, if the trustee is directed to distribute $200,000 annually to Lonely George Research Fund, a charitable organization, but has discretion to reduce or eliminate the charitable distribution if the trustee believes it would endanger the financial security of the settlor's children, the charitable interest is conditional and does not meet the third requirement. An interest, however, would not be conditional merely because the trustee had discretion to distribute principal to other beneficiaries even if the trustee could distribute all of the principal of the trust to other beneficiaries. For example, if the trustee is required to distribute $200,000 annually to Lonely George Research Fund and has discretion to distribute principal to the settlor's children, the charitable interest is nonconditional because so long as there are sufficient funds in the trust the charitable distribution must be made.

An interest held by a charitable organization is not conditional merely because it is subject to the requirement that the organization be in existence at the time the distribution is to be made. Further, an interest held by a charitable organization is not conditional merely because the organization must qualify as a charitable organization under a particular provision of the Internal Revenue Code, if the organization so qualifies on the date of determination.

For example, assume a trust provides for distributions for the education of the settlor's children and upon the youngest living child attaining age 28 distributes to Whale Whisperers, if it is then in existence and contributions to it qualify for a federal income tax charitable deduction. The interest of Whale Whisperers is unconditional if at the time of the determination Whale Whisperers is in existence and contributions to it qualify for the federal income tax deduction.

Attorney General Rights. Subsection (b) provides that if the first trust contains a determinable charitable interest, the attorney general may represent the interest and has all the rights of a qualified beneficiary. The attorney general is entitled to notice under Section 7(c)(7). The attorney general may petition the court under Section 9, consent to a change in the compensation of an authorized fiduciary under Section 16 or consent to a change in the identity of the person who may remove or replace the authorized fiduciary under Section 18.

If the determinable charitable interest is held by an expressly identified charitable organization, the organization is a qualified beneficiary, has the rights of a qualified beneficiary and may represent and bind itself. In such a case, either the attorney general or the organization could consent to a change in the compensation of an authorized fiduciary under Section 16 or consent to a change in the identity of the person who may remove or replace the authorized fiduciary under Section 18. If one of the attorney general or the organization consented, but the other affirmatively objected, the other could petition the court under Section 9 for a determination.

Preservation of Charitable Interests. If the first trust contains a charitable interest, whether or not determinable, the second trust may not diminish such interest. Section 14(c). If the interest is held by an expressly designated charitable organization, the second trust may not change the organization. *Id.* If the first-trust instrument sets forth a particular charitable purpose, the second trust may not change the charitable purpose. *Id.*

If a charitable trust indicates a particular charitable purpose, the exercise of the decanting power may not change the charitable purpose. Section 14(c). Thus if the first trust provides that upon A's death the remainder will be paid to Save Our Pets for the benefit and protection of dogs, the second trust may not change the purpose of the charitable gift to the benefit of cats. As another example, if the first trust provides that upon A's death the remainder will be distributed to such charities as the trustee selects for the purpose of preserving habitat for blue footed boobies, the second trust cannot change the charitable purpose to the protection of polar bears.

If an authorized fiduciary has limited discretion to distribute principal and exercises the decanting power under Section 12, Section 12(c) requires that the second trusts must grant each beneficiary of the first trust, including charitable organizations, beneficial interests that are substantially similar to such beneficiary's interests in the first trust. If the first trust contains a charitable interest that is not held by an expressly designated charitable organization, Section 12(c) does not apply but Section 14(c) requires that the second trust may not diminish the charitable interest and that any stated charitable purpose must remain the same.

For example, assume a trust permits discretionary income and principal distributions to the settlor's children for their support and health care, requires that the trustee distribute $25,000 each year to one or more charitable organizations selected by the trustee for the purpose of caring for stray, neglected and abused large dogs, gives the trustee discretion to make additional distributions to charitable organizations for the same purpose, and upon the death of the settlor's last surviving child the principal is to be distributed to charitable organizations selected by the trustee for the same purpose. The trustee has limited discretion to distribute principal and therefore may decant under Section 12, but not Section 11. The exercise of the decanting power may change administrative provisions and trustee provisions, but may not alter the beneficial interests of the children. Because the charitable interests are not held by an expressly designated charitable organization, they are not subject to Section 12(c). Section 14(c), however, requires that the second trust not diminish the charitable interests to the $25,000 annual distributions, to receive discretionary distributions and to the remainder interest. In addition, Section 14(c) requires that the charitable purpose remain the same. Thus the second trust could not change the charitable purpose to supporting dog parks for small dogs.

If the trust was as described above except that the trustee had discretion to make distributions to the children for their best interests, the trustee could exercise the decanting power under Section 11. Thus the trustee could eliminate or reduce the interest of one or more of the settlor's children. The decanting could not, however, diminish the charitable interests because Section 14(c) requires that the charitable interest not be diminished. The trustee could not, for example, grant a power of appointment to a child because such a power would diminish the charitable interests.

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 Howl at the Moon, a charitable organization for the peaceful co-existence of wolves and humans, the authorized fiduciary 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 fiduciary also could not exercise the decanting power to change the charitable remainder beneficiary from Howl at the Moon to another charitable organization. By contrast, the authorized fiduciary could exercise the decanting power to provide that when the youngest child attained age 25 the trust would be distributed to Howl at the Moon, because that would enhance the charitable interest.

Some state attorneys general (or other officials charged with protecting charitable interests) may be concerned that trusts with charitable interests will be moved out of their jurisdiction by decanting. Section 11(d) addresses this concern by requiring that the second trust be administered under the law of the enacting state unless the court approved the decanting or the Attorney General either approved the decanting or, after receiving notice, failed to object within the notice period.

SECTION 15. TRUST LIMITATION ON DECANTING.

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

(1) exercise of the decanting power; or

(2) exercise of a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

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

(1) exercise of the decanting power; or

(2) exercise of a power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

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

(d) Subject to subsections (a) and (b), an authorized fiduciary may exercise the decanting power under this [act] even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

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

Comment

A trust instrument may preclude the exercise of a decanting power under the act or any similar state statute with respect to the entire trust or with respect to one or more provisions of the trust. See Section 15(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 15(c).

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

SECTION 16. CHANGE IN COMPENSATION.

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

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

(2) the increase is approved by the court.

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

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

(2) the increase is approved by the court.

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

Comment

An exercise of the decanting power 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 check 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 16 expressly does not prohibit an increase in compensation arising incidentally because of other changes made by the exercise of the decanting power. For example, any increase in the compensation of the authorized fiduciary because the second trust may last longer than the first trust is incidental. Also incidental are any 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. Other incidental increases in the compensation of the authorized fiduciary may occur because of changes in investments, changes in the law governing the administration of the trust, changes in the identity of the authorized fiduciary, or changes in the duties of the authorized fiduciary.

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

SECTION 17. RELIEF FROM LIABILITY AND INDEMNIFICATION.

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

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

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

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

Comment

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

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

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

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

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 18. REMOVAL OR REPLACEMENT OF AUTHORIZED FIDUCIARY. An authorized fiduciary may not exercise the decanting power to modify a provision in the first-trust instrument granting another person power to remove or replace the fiduciary unless:

(1) the person holding the power consents to the modification in a signed record and the modification applies only to the person;

(2) the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

(3) the court approves the modification and the modification grants a substantially similar power to another person.

Comment

Section 18 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.

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

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

In exercising the decanting power to designate a different person to remove and replace the trustee, the authorized trustee should be alert to the tax consequences if the person so designated is not independent for tax purposes.

SECTION 19. TAX-RELATED LIMITATIONS.

(a) In this section:

(1) "Grantor trust" means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. Sections 671 through 677 or 26 U.S.C. Section 679[, as amended].

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

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

(4) "Qualified benefits property" means property subject to the minimum distribution requirements of 26 U.S.C. Section 401(a)(9)[, as amended,], and any applicable regulations, or to any similar requirements that refer to 26 U.S.C. Section 401(a)(9) or the regulations.

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

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

(2) If the first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for a charitable deduction for purposes of the 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 trust instrument for the trust to which the property was transferred, would have prevented the transfer 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 qualified.

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

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

(5) If the first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for a zero inclusion ratio for purposes of the

generation-skipping transfer tax under 26 U.S.C. Section 2642(c)[, as amended,] 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 26 U.S.C. Section 2642(c).

(6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. Section 401(a)(9)[, as amended,] and any applicable regulations, or any similar requirements that refer to 26 U.S.C. Section 401(a)(9) or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and Section 22 applies to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A)[, as amended,] the second trust may 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 under 26 U.S.C. Section 672(f)(2)(A)[, as amended].

(8) 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 a benefit arising from being a grantor trust. Subject to paragraph (9), a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

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

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

(9) Subject to paragraph (4):

(A) except as otherwise provided in paragraph (7), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(B) except as otherwise provided in paragraph (10), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

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

(A) the first trust and second trusts are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the second trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or

(B) the first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:

(i) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(ii) the first-trust instrument contains a provision granting the settlor or another person the power to cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

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 (a)(1) and (2) and subsection (b)(3), (4), (5), (6), and (7).*

Comment

Certain tax benefits granted under the Internal Revenue Code (the "Code") or state law are dependent upon a trust containing specific provisions. For example, a qualified terminable interest property ("QTIP") 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, it is important to ensure that charitable lead trusts and charitable remainder 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 at their inception.

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

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

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 11(c)(3) prohibiting the modification or elimination of a presently exercisable power of 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, to the extent not so expended passes to the donee upon attaining age 21, and, in the event of the donee's death, is payable to the estate of the donee or pursuant to a general power of appointment.

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

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

Subsection (b)(4) imposes a more stringent rule if the first trust is a QSST. 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. If the first trust owns S corporation stock and qualifies as an S corporation shareholder because it is a QSST, subsection (b)(4) requires that the second trust also be a QSST. If the first trust is a QSST, it is not sufficient that the second trust qualify to hold S corporation stock under another provision of the Code.

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 generally would not qualify for the GST annual exclusion. The Code 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. Section 11(c)(1) prohibits such an acceleration of a remainder 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. Section 19(b)(5) prohibits such a decanting if the benefit under Code Section 2542(c) was claimed.

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. These rules are found in Code Section 401(a)(9) and the corresponding regulations, and in other Code Sections that refer to Section 401(a)(9). For example, with IRAs, Code Section 408(a)(6) states: “Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.”

Under the rules in Code Section 401(a)(9), 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.

Subsection (b)(6) applies not only to any trust that is currently the beneficiary of an individual retirement account (“IRA”) or qualified benefit, but also to any successor trust. The need to apply subsection (b)(5) to successor trusts is demonstrated by the following example. Assume Trust A is the beneficiary of Parent’s $100,000 IRA. Child is the current beneficiary of Trust A and upon Child’s death the assets of Trust A will be distributed to Trusts X and Y for Child’s children. Trust A is not a “conduit trust,” but qualified to take IRA distributions over Child’s life expectancy because Trust A, and Trusts X and Y, have only individuals as beneficiaries and all future beneficiaries must be younger than Child. If Trusts X and Y permitted the exercise of a decanting power in any way that could result in the addition of charities or individuals older than Child as beneficiaries or permissible appointees, Trust A would not have qualified to take IRA distributions over Child C’s life expectancy. Therefore, the restrictions on decanting must apply to Trusts X and Y, as well as to Trust A. Trusts X and Y are indirect beneficiaries of the qualified benefit property.

If an attempted decanting violates subsection (b)(6), the qualified benefit property is deemed to be held as a separate share as of the date of the exercise of the decanting power. Holding the qualified benefit property as a separate share permits the remedial rules of Section 22 to apply only with respect to the qualified benefit property and its proceeds.

Generally, the grantor trust rules apply only to a "grantor" who is a citizen or resident of the United States or a domestic corporation. An exception to this rule applies if (a) the foreign grantor has the power to revest title to the trust property in the grantor and such power is exercisable (1) solely by the grantor without the approval or consent of any other person or (2) with the consent of a related or subordinate party who is subservient to the grantor, or (b) distributions may be made only to the grantor and the grantor's spouse during the life of the grantor. If a foreign trust qualifies as a grantor trust because of Code Section 672(f)(2)(A), subsection (b)(7) provides that the decanting power cannot be exercised to a second trust that does not meet the requirements of Code Section 672(f)(2)(A).

Subsection (b)(8) is a catch-all provision intended to preserve any tax benefits not specifically listed in Section 19 for which the first trust qualified if the first-trust instrument expressly indicates an intent to qualify for the tax benefit or is clearly designed to qualify for the tax benefit. Note that subsection (b)(8) does not address any tax benefits for which the trust may qualify in the future. For example, assume that the first trust was a credit shelter trust that was not subject to federal estate tax at the death of the first to die of a married couple because of the decedent's federal exclusion. Assume that an independent person may make discretionary distributions to the surviving spouse and descendants pursuant to expanded discretion. Also assume that the credit shelter trust was designed so that it would not be included in the surviving spouse's estate. The authorized fiduciary could decant and the second trust could grant the surviving spouse a general power of appointment that would cause inclusion in the surviving spouse's estate. Although the credit shelter trust was designed to be excluded from the surviving spouse's estate, such tax benefit is one that would occur, if at all, in the future at the surviving spouse's death; it is not a tax benefit claimed in the past. Therefore subsection (b)(8) does not prohibit such a modification. If the settlor's purposes include saving taxes, and causing inclusion in the spouse's estate may save more taxes by causing a basis adjustment at the surviving spouse's death even though the trust assets would then be included in the surviving spouse's estate, then such a decanting may be appropriate and is not prohibited by subsection (b)(8).

Subsection (b)(9) expressly permits an exercise of the decanting power to change the income tax status of the trust from a grantor trust to a nongrantor trust or vice versa. Although, absent subsection (b)(9), grantor trust status generally might be viewed as a tax benefit of the first trust, grantor trust status is treated differently under the act because the grantor does not necessarily intend that the grantor trust status be maintained until the grantor's death and because other desirable modifications of the trust may result in a loss of grantor trust status.

An exercise of the decanting power may cause a nongrantor trust to become a grantor trust either as a primary purpose of the exercise of the decanting power or as an incidental consequence of other changes made by the decanting. Subsection (b)(9)(B). It would be fundamentally unfair, however, to permit a decanting to impose on the settlor liability for the second trust's income taxes if the settlor objected to such liability. Therefore subsection (b)(9)(A) permits the settlor to block the decanting by objection during the notice period unless the settlor has the power at any time to cause the second trust to cease to be a grantor trust. The settlor receives prior notice of the exercise of the decanting power under Section 7(d)(1).

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

If a portion of a trust is a grantor trust and the remaining portion is a nongrantor trust, subsection (b)(10) applies to the portion that is a grantor trust.

SECTION 20. DURATION OF SECOND TRUST.

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

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

Comment

To implement the public policy of the state law applicable to the first trust, subsection (b) requires that any maximum perpetuity, accumulation, or suspension-of-the-power-of-alienation period (collectively referred to as a "perpetuities rule") applicable to the first trust apply to the second trust to the extent its assets are attributed to the first trust. This rule is also supported by pragmatic considerations. An exercise of a decanting power could inadvertently violate a perpetuities rule applicable to the old trust if the new trust does not comply with the same perpetuities rule. Even in states that have abolished the maximum perpetuity rule, the state may still impose another perpetuities rule (e.g., a suspension-of-the-power-of-alienation rule), the first trust may still be subject to a rule against perpetuities under prior law or the first trust 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.

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

Where the maximum term of the first trust is measured by reference to lives in being on the date the first trust became irrevocable, Section 20 does not preclude the second trust from using an expanded class of measuring lives so long as the expanded class were in being on the date the first trust became irrevocable. For example, assume the first trust is subject to State A's trust duration rule, which is a traditional rule against perpetuities that requires that an interest in a trust vest within twenty-one years of the last to die of lives in being when the trust became irrevocable. The first trust contains a perpetuities savings clause that requires the trust to terminate twenty-one years after the death of the survivor of the settlor's descendants living when the first trust was created. The second trust may replace the perpetuities savings clause with a provision that requires the trust to terminate twenty-one years after the death of the survivor of the descendants of any grandparent of the settlor who were living when the first trust was created.

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

If the first trust and the state law applicable to the first trust permitted the springing of the "Delaware Tax Trap" of Code Section 2041(a)(3), the second trust may also permit the springing of the Delaware Tax Trap.

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

If the authorized fiduciary attempts to decant Trust B into Trust A without providing either in Trust A or the decanting instrument that the portion of the trust attributable to Trust B must vest within the rule against perpetuities period applicable to Trust B, the decanting may still be valid. First, the statutes of State Z may contain a rule against perpetuities savings clause that will cause the trust to vest or terminate within the applicable rule against perpetuities period. Second, if there is no statutory savings clause, Section 22 of this act may apply to read into Trust A an appropriate savings clause with respect to the portion of the trust attributable to Trust B.

Section 20 does not address whether, if the decanting changes the place of administration for the trust or the law governing the trust, and the new jurisdiction has a more restrictive trust duration rule, the new jurisdiction may impose its maximum perpetuity, accumulation or suspension-of-the-power-of-alienation period on the second trust. The new jurisdiction may do so if the rule of the first jurisdiction is contrary to a strong public policy of the new jurisdiction. Thus if the first jurisdiction has no rule against perpetuities, and the second jurisdiction has a traditional rule against perpetuities, the second jurisdiction may but need not determine that its rule expresses a strong public policy against perpetual trusts.

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

SECTION 21. NEED TO DISTRIBUTE NOT REQUIRED. An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

SECTION 22. SAVINGS PROVISION.

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

(1) A provision in the second-trust instrument which is not permitted under this [act] is void to the extent necessary to comply with this [act].

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

(b) If a trustee or other fiduciary of a second trust discovers that subsection (a) applies to a prior exercise of the decanting power, the fiduciary shall take such appropriate corrective action as is consistent with the fiduciary's duties.

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 the second-trust instrument in part violates this act. Section 22(a) modifies the second-trust instrument to delete impermissible provisions in the second-trust instrument and to insert required provisions in the second-trust instrument. For example, if the second trust sets forth an impermissible rule against perpetuities period (*see* Section 20), the other modifications made by the decanting should be effective.

The remedial rules of this Section apply only to the least extent required to comply with this act. Thus if a provision in the second-trust instrument would be permissible with respect to some of the trust property but is impermissible with respect to other trust property, such provision will be void only as the trust property with respect to which it is impermissible. Further, any modification to a provision of the second-trust instrument that is required by Section 22 should be the modification that implements the intended modifications to the greatest extent permitted under the act.

For example, assume Trust holds $500,000 of marketable assets and is the beneficiary of Grantor's $100,000 IRA. Grantor's Child is the sole current beneficiary of Trust. Trust is qualified to use Child's life expectancy in determining the distribution period for the IRA because the Trust restricts all future beneficiaries, including appointees under any power of appointment and takers in default, to individuals younger than Child. The authorized fiduciary attempts to decant Trust to permit Child to appoint to her spouse. This is in violation of Section 19(b)(6) because if Child could appoint the IRA to a spouse who is older than Child, Trust would not have qualified to take IRA distributions over Child's life expectancy. Section 19(b)(6) causes the qualified benefit property and any reinvested distributions of the qualified benefit property to be treated as a separate share. Section 22 will void the power to appoint to a spouse only with respect to the qualified benefit property and any reinvested distributions of the qualified benefit property, and only if the spouse is (or could be) older than Child, because that is the least intrusive remediation required to comply with Section 19(b)(6).

As another example, assume the authorized fiduciary attempts to decant Trust to permit Child to appoint to her sibling. If Child's sibling is older than Child, this is in violation of Section 19(b)(6) because if Child could appoint the IRA to her older sibling, Trust would not have qualified to take IRA distributions over Child's life expectancy. Section 19(b)(6) causes the qualified benefit property and any reinvested distributions of the qualified benefit property to be treated as a separate share. Section 22 will void the power to appoint to a sibling only with respect to the qualified benefit property and any reinvested distributions of the qualified benefit property, which are treated as a separate share, and only if the sibling is older than Child, because that is the least intrusive remediation required to comply with Section 19(b)(6).

As yet another example, assume the authorized fiduciary attempts to decant Trust to change (1) the successor fiduciaries, (2) the manner in which the first trust instrument directed that the authorized fiduciary be compensated and (3) the identity of the person who can remove the authorized fiduciary (the "Remover"). The authorized fiduciary obtains the written consent of the qualified beneficiaries of the second trust, but does not obtain consent of the Remover or approval by the court. The changes to the successor fiduciaries will be effective. The change to the authorized fiduciary's compensation will also be effective because the requirements in Section 16(b) were met. The change to the identity of the Remover will not be effective because the Remover named in the first trust instrument did not consent. See Section 18.

SECTION 23. TRUST FOR CARE OF ANIMAL.

(a) In this section:

(1) "Animal trust" means a trust or an interest in a trust created to provide for the

care of one or more animals.

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

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

(c) A protector for an animal has the rights under this [act] of a qualified beneficiary.

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

Comment

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

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

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

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

Section 408 of the Uniform Trust Code provides that the property of an animal trust may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Although Section 23 permits the decanting of an animal trust, it mirrors the requirement of the Uniform Trust Code that the property of the animal trust may be applied only to its intended use for the period of time the first trust was intended to benefit the animals (usually the lives of the animals). Therefore, the authorized fiduciary cannot, by decanting, reduce the value of the animal trust; such a power is reserved only to the court. Further, the authorized fiduciary cannot divert assets of the animal trust to other beneficiaries of the trust.

Assume that Trust was established for the support of Double Trouble, a husky, after the death of Double Trouble's human companion. Trust directs that the Trust shall continue to maintain Double Trouble in her Alaskan house, which is owned by the Trust, under the care of Jody, a retired musher, and permits distributions of income and principal to maintain the house and for Double Trouble's best interests so long as Double Trouble is living. Upon the death of Double Trouble, Trust is distributed to the Husky Rescue Society, a charitable organization. Double Trouble is aging and the veterinarian advises a move to a warmer climate. The assets of the Trust are diminishing, and may not be sufficient to maintain the Alaskan house and pay for Double Trouble's care. Jody is aging too, and would prefer to care for Double Trouble in Jody's house in Hawaii. The authorized trustee may, with the consent of the protector, modify Trust to permit the sale of the Alaskan house and to permit Jody to care for Double Trouble in her Hawaii home. Notice of the decanting must be provided to the protector, the Husky Rescue Society and to the Attorney General. The second trust, however, may not add Jody as a beneficiary because such a modification would not be permitted under Section 11. Nor may the decanting provide that one year after the move to Hawaii, one-half of the principal will be distributed to Husky Rescue Society, because Section 23(d) requires that the trust property be applied only for its intended purpose (the care of Double Trouble) for the period the first trust benefitted the animal (the life of Double Trouble).

SECTION 24. TERMS OF SECOND TRUST. A reference in [this state's trust code] to a trust instrument or terms of the trust 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 25. SETTLOR.

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

(b) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, the intent of a settlor of the second trust, and the intent of the authorized fiduciary may be considered.

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

Comment

"Settlor" is defined in Section 2(25) of this act as the person who creates or contributes property of the trust, except as provided in Section 25. 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 25(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 25(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 26. LATER-DISCOVERED PROPERTY.

(a) Except as otherwise provided in subsection (c), if 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 power is part of the trust estate of the second trust.

(b) Except as otherwise provided in subsection (c), if 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 exercise of the decanting power remains part of the trust estate of the first trust.

(c) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the decanting power.

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

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

Chicago Bank makes a loan to the Trustee of First Trust, secured by First Trust's holdings of Fuchsia Corp. stock. The loan provides that Trustee is not personally liable. The Trustee decants First Trust and distributes all of its assets to Second Trust. Chicago Bank may enforce the loan against the property of Second Trust, including the Fuchsia Corp. stock, to the same extent it could have enforced the loan against the property of First Trust.

Assume instead that the Trustee of First Trust decanted and distributed all of the Fuchsia Corp. stock to Second Trust, and distributed all of the other assets of First Trust to Third Trust. Chicago Bank may enforce the loan against the Fuchsia Corp. stock held by Second Trust to the same extent it could have enforced the loan against the Fuchsia Corp. stock when it was held by First Trust. If prior to the decanting Chicago Bank could have enforced the loan against the property of First Trust other than the Fuchsia Corp. stock to the extent the value of the Fuchsia Corp. stock was insufficient to satisfy the loan, after the decanting Chicago Bank may enforce the loan, to the extent the Fuchsia Corp. stock is insufficient to satisfy the loan, against the other property of Second Trust and Third Trust to the extent it was attributable to the property of First Trust.

SECTION 28. 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 29. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. 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 30. 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 31. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

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