

DRAFT
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TRUST DECANTING ACT

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TRUST DECANTING ACT

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ON UNIFORM STATE LAWS

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June 6, 2014

TRUST DECANTING ACT

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1 **TRUST DECANTING ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

5 **SECTION 102. DEFINITIONS.** In this [act]:

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

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

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

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

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

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

18 (4) “Charitable trust” means a trust, or portion of a trust, created for the relief of poverty,
19 the advancement of education or religion, the promotion of health, governmental or municipal
20 purposes, or other purposes the achievement of which is beneficial to the community.

21 (5) “Current beneficiary” means a beneficiary that on the date the beneficiary’s
22 qualification is determined is a distributee or permissible distributee of trust income or principal.
23 The term includes the holder of a presently exercisable general power of appointment but does

1 not include a person that is a beneficiary only because the person holds any other power of
2 appointment.

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

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

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

8 (9) “First trust”, except as otherwise provided in Section 307(c), means an irrevocable
9 trust over which an authorized fiduciary may exercise the decanting power.

10 (10) “First trust instrument”, except as otherwise provided in Section 307(c), means the
11 trust instrument for a first trust.

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

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

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

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

21 (15) “Power of appointment” means a power that enables a powerholder acting in a
22 nonfiduciary capacity to designate a recipient of an ownership interest in or another power of

1 appointment over the appointive property. The term does not include a power of attorney.

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

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

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

8 (i) the occurrence of the specified event;

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

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

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

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

14 (19) “Qualified beneficiary” means a beneficiary that, on the date the beneficiary’s
15 qualification is determined:

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

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

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

22 (20) “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 regulations issued thereunder.

(21) “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.

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

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

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

(25) “Settlor”, except as otherwise provided in Section 402, 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:

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

(2) to attach 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) “Successor beneficiary” means a beneficiary that on the date the beneficiary’s

1 qualification is determined is not a qualified beneficiary, including a person that may become a
2 beneficiary in the future by reason of inclusion in a class. The term does not include a person
3 that is a beneficiary only because the person holds a nongeneral power of appointment.

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

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

10 ***Legislative Note:*** A number of definitions in Section 102 of the Trust Decanting Act are identical
11 to the definitions in the Uniform Trust Code. A state that has adopted the Uniform Trust Code
12 and is adopting the Trust Decanting Act as part of the Trust Code can omit these definitions. If a
13 state that has adopted the Uniform Trust Code is adopting the Trust Decanting Act but is not
14 incorporating it into the Uniform Trust Code, the legislation could either repeat the definitions
15 of the terms in this act or could substitute where appropriate: “Term” has the same meaning as
16 in Section ____ of the [Uniform Trust Code].
17

18 **Comment**

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

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

31 A reasonably definite standard includes distributions for education, health, support or
32 maintenance. Treas. Reg. § 1.674(b)-1(b)(5). It also includes distributions to meet an
33 accustomed manner of living or to meet an emergency. A reasonably definite standard does not
34 include distributions for the pleasure, desire or happiness of a beneficiary. Internal Revenue

1 Code Section 674(d) uses the variant term “reasonably definite *external* standard. Treasury
2 Regulation Section 25.2511-1(g)(2) uses the terms “reasonably fixed or ascertainable standard”
3 and “reasonably definite standard” interchangeably.

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

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

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

15 The definition excludes a settlor acting as a trustee. If a settlor is a trustee of an
16 irrevocable trust, gift and estate tax problems could result if the settlor had a decanting power.
17 The definition does not exclude a beneficiary who is acting as a trustee (an “interested trustee”)
18 because the act only permits a trustee with expanded discretion to decant in a manner that would
19 change beneficial interests. Typically trusts will not give an interested trustee unascertainable
20 discretion over discretionary distributions because such discretion would create gift and estate
21 tax issues. In the unusual event that a trust does give an interested trustee unascertainable
22 discretion, the trustee will incur the tax effects of holding a general power of appointment
23 whether or not the trustee also has a decanting power.

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

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

36 In addition to living and ascertained individuals, beneficiaries may be unborn or
37 unascertained. The term “beneficiary” includes not only beneficiaries who received their
38 interests under the terms of the trust but also beneficiaries who received their interests by other
39 means, including by assignment, exercise of a power of appointment, resulting trust upon the

1 failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease
2 of a named beneficiary, or upon termination of the trust. A potential appointee of a power of
3 appointment is not a beneficiary unless a presently exercisable power of appointment has been
4 exercised in favor of such appointee. A person who merely incidentally benefits from the trust is
5 not a beneficiary. *See* Restatement Third of Trusts § 48.

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

12 *Charitable Trust.* The definition of “charitable trust” combines Section 103(4) and
13 Section 405(a) of the Uniform Trust Code into one provision.

14 *Current Beneficiary.* “Current beneficiary” is a subset of “qualified beneficiary” and
15 means a beneficiary who, on the date the beneficiary’s qualification is determined, is a
16 distributee or permissible distributee of trust income or principal. The term includes the holder
17 of a presently exercisable general power of appointment. The term does not include the holder
18 of a testamentary general power of appointment or the holder of a limited power of appointment.
19 Nor does the term include the objects of an unexercised inter vivos power of appointment.

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

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

33 *First Trust Instrument.* See Section 102(9) for the definition of “first trust” and Section
34 102(30) for the definition of “trust instrument.”

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

37 *Jurisdiction.* The definition of “jurisdiction” is identical to the definition in Section
38 103(9) of the Uniform Trust Code.

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

4 *Person.* The definition of “person” is identical to the definition of “person” in Section
5 102(12) of the Uniform Powers of Appointment Act. With one exception, this is the standard
6 definition approved by the Uniform Law Commission. The exception is that the word “trust” has
7 been added to the definition of “person.” Trust law in the United States is moving in the
8 direction of viewing the trust as an entity, see Restatement Third of Trusts introductory note to
9 Chapter 21, but does not yet do so. This definition differs slightly in wording, but not in
10 substance, from the definition of “person” used in Section 103(10) of the Uniform Trust Code.
11 The Uniform Trust Code defines “person” as “an individual, corporation, business trust, estate,
12 trust, partnership, limited liability company, association, joint venture, government;
13 governmental subdivision, agency, or instrumentality; public corporation, or any other legal or
14 commercial entity.”

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

17 *Powerholder.* The definition of “powerholder” is identical to the definition in Section
18 102(14) of the Uniform Powers of Appointment Act.

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

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

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

29 The qualified beneficiaries consist of the current beneficiaries (see Section 102(5)) and
30 the presumptive remainder beneficiaries (see Section 301(a)).

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

35 [When a trust has distributees or permissible distributees of trust income or principal who
36 are in more than one generation of the descendants of a person and the trust continues after the
37 deaths of the members of the most senior generation who are included among such distributees,
38 Section 102(19)(B) should be construed to include the distributees or permissible distributees

1 after the interests of the most senior generation of such distributees terminate and subparagraph
2 (C) would not ordinarily be applicable if there are any current beneficiaries who are not members
3 of the most senior generation. Thus if a trust permits discretionary distributions to any of A's
4 descendants, and only terminates if A has no living descendants, in which case it is distributed to
5 B, and A's now living descendants are Child 1, Child 2, Grandchild 1A and Grandchild 1B, the
6 presumptive remainder beneficiaries are Grandchild 1A and Grandchild 1B pursuant to Section
7 102(19)(B), and Section 102(19)(C) should not apply to cause B to be a presumptive remainder
8 beneficiary. On the other hand, if A's then living descendants were limited to Child 1 and Child
9 2, then B would be the presumptive remainder beneficiary under Section 102(19)(C), because
10 there is no presumptive remainder beneficiary under Section 102(19)(B).]

11 *Reasonably Definite Standard.* "Reasonably definite standard" is defined in Treasury
12 Regulations Section 1.674(b)-1(b)(5). "Reasonably definite standard" includes an ascertainable
13 standard but may also include standards that would not be considered ascertainable standards. A
14 power to distribute principal for the education, support, maintenance, or health of the
15 beneficiary; for the beneficiary's reasonable support in comfort; or to enable the beneficiary to
16 maintain the beneficiary's accustomed standard of living; or to meet an emergency; would be a
17 reasonably definite standard. A power to distribute principal for the pleasure, desire, or
18 happiness of a beneficiary is not a reasonably definite standard. A reasonably definite standard
19 need not require consideration of the needs and circumstances of the beneficiary. The entire
20 context of a provision of a trust instrument granting a power should be considered in determining
21 whether there is a reasonably definite standard. For example, if a trust instrument provides that
22 the determination of the trustee shall be conclusive with respect to the exercise or nonexercise of
23 a power, the power is not limited by a reasonably definite standard. The fact, however, that the
24 governing instrument is phrased in discretionary terms is not in itself an indication that no
25 reasonably definite standard exists.

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

29 The terms are also delineated by case law regarding Internal Revenue Code Sections
30 2036 and 2038.

31 *Record.* The definition of "record" is identical to the definition in Section 102(16) of the
32 Uniform Powers of Appointment Act. This is a standard definition approved by the Uniform
33 Law Commission.

34 *Revocable.* The definition of "revocable" is identical to the definition in Section 103(14)
35 of the Uniform Trust Code.

36 *Second Trust.* The definition of "second trust" includes (1) an irrevocable trust already in
37 existence, whether created by the settlor of the first trust or a different settlor, (2) a "restatement"
38 of the first trust which could be executed by the authorized fiduciary as the nominal grantor, (3)
39 the first trust as modified to create the second trust, or (4) a new trust executed by the authorized
40 fiduciary as the nominal settlor for the purpose of decanting. A decanting that is implemented by

1 “restating” or modifying the first trust presumably would not require the issuance of a new tax
2 identification number or the retitling of property or a final income tax return for the trust. A
3 decanting that distributes the property of the first trust to a newly created trust presumably would
4 require that the new trust obtain a new tax identification number and that the property be retitled.
5 Further, if the first trust was terminated by reason of the decanting, a final income tax return for
6 the first trust would be required.

7 *Second Trust Instrument.* See Section 102(23) for the definition of “second trust” and
8 Section 102(30) for the definition of “trust instrument.”

9 *Settlor.* The definition of “settlor” generally follows the definition in Section 103(15) of
10 the Uniform Trust Code, but is modified by Section 402 of this act to address the issue of who is
11 the settlor of the second trust after the exercise of the decanting power. When more than one
12 person signs the trust instrument or funds a trust, generally the person funding the trust will be
13 the settlor. See comments to Section 103 of the Uniform Trust Code. Should more than one
14 person contribute to a trust, all of the contributors will ordinarily be treated as settlors in
15 proportion to their respective contributions, regardless of which one signed the trust instrument.
16 *Id.*

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

19 *Successor Beneficiary.* The term “successor beneficiary” means a beneficiary who has a
20 future beneficial interest in a trust, vested or contingent, including a person who may become a
21 beneficiary in the future by reason of inclusion in a class, other than a beneficiary who is a
22 qualified beneficiary. Thus it includes unborn beneficiaries and beneficiaries who might be
23 termed “second line” or more remote remainder beneficiaries. It does not include, however, a
24 person who is merely a holder of a power of appointment but not otherwise a beneficiary.

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

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

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

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

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

(2) is governed by law of this state other than this [act] for purposes of determining meaning or effect; or

(3) has a principal place of administration in this state, including a trust whose principal place of administration has been changed to this state.

Comment

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

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

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

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

1 administration and meaning and effect.

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

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

7 **[ARTICLE] 2**

8 **EXERCISE OF DECANTING POWER**

9 **SECTION 201. NOTICE.**

10 (a) In this section, "notice period" refers to the period beginning on the day notice is
11 provided under subsection (c) and ending [60] days later.

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

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

17 (1) the settlor of the first trust, if living;

18 (2) each qualified beneficiary of the first trust, determined as of the date notice is
19 provided;

20 (3) a person that currently has the right to remove or replace the authorized
21 fiduciary;

22 (4) all other fiduciaries of the first trust; [and]

23 (5) the fiduciaries of the second trust[; and]

1 (6) if the exercise of the decanting power is under Section 301 and materially and
2 adversely affects the interests of a successor beneficiary, the successor beneficiary].

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

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

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

11 (2) include a copy of the first and second trust instruments.

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

14 (g) The receipt of notice under subsection (c), waiver of the notice period, or expiration
15 of the notice period does not affect the right of a person to bring a claim:

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

18 (2) that Section 310 applies to the exercise of the decanting power.

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

22 **Comment**

23 Generally a trustee is not required to provide notice to beneficiaries prior to exercising a

1 discretionary power. Nonetheless, qualified beneficiaries are entitled to know the terms of the
2 trust and therefore should receive notice of any change in the trust. Requiring prior notice seems
3 reasonable in light of the significant trust modifications that can be made by decanting and
4 practical, in that it helps determine if any beneficiaries may challenge the decanting.

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

8 Other notice provisions under state law may also apply to a decanting. Under Section
9 813(a) of the Uniform Trust Code, a trust shall keep the qualified beneficiaries of the trust
10 reasonably informed about the administration of the trust and of the material facts necessary for
11 them to protect their interests. An exercise of the decanting power is a material fact. If the
12 second trust is newly created for purposes of decanting, state law may require notice of the
13 creation of the trust to certain beneficiaries. For example, Section 813 of the Uniform Trust
14 Code requires a trustee, within 60 days after accepting a trusteeship, to notify the qualified
15 beneficiaries of the acceptance and of the trustee's name, address, and telephone number. In
16 addition, if the exercise of the decanting power results in a distribution of property, the
17 distribution would be considered a disbursement that should be reported on the accounting of the
18 first trust. If the exercise of the decanting power results in the termination of the first trust, state
19 law or the trust instrument may require a final accounting.

20 **SECTION 202. REPRESENTATION.**

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

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

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

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

30 ***Legislative Note:*** State law generally will provide for when a beneficiary who is a minor or
31 otherwise incapacitated may be represented by another party. State law also may provide when
32 an incapacitated settlor may be represented by another party. These provisions with respect to
33 trusts may be contained in the state's trust code. For example, Article 3 of the Uniform Trust

1 *Code provides rules for representation. If state law does not already provide for representation*
2 *of incapacitated beneficiaries and settlors, then representation provisions should be included in*
3 *the act.*

4
5 *If the Trust Decanting Act is inserted into the state's Uniform Trust Code, Section 202*
6 *may be deleted.*

7 **Comment**

8 Subsection (a) provides that the first trust instrument or general rules in the state's trust
9 code or other law determine who may receive notice of an exercise of the decanting power on
10 behalf of a minor beneficiary or an incapacitated beneficiary or settlor. It is similar to Section
11 301(a) of the Uniform Trust Code except that it expressly recognizes that if the first trust
12 instrument authorizes certain persons to receive notice on behalf of incapacitated beneficiaries or
13 an incapacitated settlor such rules should also apply for purposes of notice under Section 201.

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

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

25 Subsection (d) is similar to Section 110(d) of the Uniform Trust Code and entitles the
26 attorney general to notice of an exercise of the decanting power with respect to a charitable trust.
27 "Attorney General" is placed in brackets to accommodate jurisdictions that grant enforcement
28 authority over charitable trusts to another designated official. Because states take various
29 approaches to enforcement of charitable trusts, subsection (d) is placed in brackets.

30 **SECTION 203. COURT INVOLVEMENT.**

31 (a) On petition of an authorized fiduciary or person entitled to notice under Section
32 201(c), the court may:

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

1 duties of the fiduciary;

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

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

6 (4) determine that an attempted exercise of the decanting power is invalid because
7 after applying Section 310, it did not comply with this [act] or because it was an abuse of the
8 fiduciary's discretion;

9 (5) determine the extent to which Section 310 applies to the exercise of the
10 decanting power;

11 (6) provide instructions to the trustee with respect to the application of Section
12 310; or

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

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

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

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

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

20 **Comment**

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

23 The decanting power, however, is a very broad discretionary power. Therefore, Section
24 203 provides that the authorized fiduciary or any person who would be entitled to notice of the
25 exercise of the decanting power may petition the court for certain purposes with respect to a prior

1 decanting or a proposed decanting. Such actions may be brought by a qualified fiduciary, a
2 trustee, a qualified beneficiary, the settlor, a trustee remover, or a beneficiary whose interests
3 were adversely affected by the decanting.

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

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

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

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

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

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

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

[ARTICLE] 3

DECANTING AUTHORITY

SECTION 301. DECANTING POWER IF EXPANDED DISCRETION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 (4) create a power of appointment in one or more of the presumptive remainder
18 beneficiaries or successor beneficiaries of the first trust, but the power may be exercisable only
19 after the powerholder becomes a current beneficiary; and

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

21 (f) A power of appointment described in subsection (e)(1) through (4) may be general or
22 nongeneral. The class of permissible appointees in favor of which the power may be exercised

1 may be broader than or otherwise different from the beneficiaries of the first trust.

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

5 **Comments**

6
7 “Expanded discretion” is any discretion that is not limited to an ascertainable standard
8 (see Section 102(1)) as used in Internal Revenue Code Section 2514(c)(1) or to a reasonably
9 definite standard (see Section 102(20)) as used in Internal Revenue Code Section 674(b)(5)(A).
10 The tax terms are used here, one from gift tax rules and one from income tax rules, because the
11 definitions of these tax terms are generally clearer than the definitions of nontax terms
12 sometimes used to describe different types of trustee discretion.
13

14 When a trustee is granted expanded discretion, that is an indication that the settlor
15 intended to rely on the trustee’s judgment and discretion in making distributions. The settlor’s
16 faith in the trustee’s judgment supports the assumption that the settlor would trust the trustee’s
17 judgment in making modifications to the trust instrument in light of changed circumstances
18 including the beneficiary’s circumstances and changes in tax and other laws.
19

20 The term “presumptive remainder beneficiary” is a subset of the term “qualified
21 beneficiary.” “Presumptive remainder beneficiary” is a qualified beneficiary (see Section
22 102(19)) other than a current beneficiary (see Section 102(5)). The presumptive remainder
23 beneficiaries might be termed the first-line remainder beneficiaries. These are the beneficiaries
24 who would become eligible to receive distributions were the event triggering the termination of a
25 beneficiary’s interest or of the trust itself to occur on the date in question. Such a terminating
26 event will typically be the death or deaths of the beneficiaries currently eligible to receive the
27 income. A person who would have a presently exercisable general power of appointment if the
28 trust terminated on that date or if the interests of the current beneficiaries terminated on that date
29 without causing the trust to terminate is a presumptive remainder beneficiary.
30

31 Presumptive remainder beneficiaries can include takers in default of the exercise of a
32 power of appointment. The term may sometimes include the persons entitled to receive the trust
33 property pursuant to the exercise of a power of appointment. Because the exercise of a
34 testamentary power of appointment is not effective until the testator’s death and probate of the
35 will, the qualified beneficiaries do not include appointees under the will of a living person. Nor
36 would the term include the objects of an unexercised inter vivos power.
37

38 Under Section 301 an authorized fiduciary who has expanded discretion to distribute all
39 or part of the principal of a trust to one or more of the current beneficiaries may exercise the
40 decanting power over the principal subject to such expanded discretion. The Trust Decanting
41 Act does not consider the decanting power to be a power of appointment because a power of

1 appointment is defined as a power held in a nonfiduciary capacity and a decanting power is held
2 in a fiduciary capacity. *See* Uniform Powers of Appointment Act § 102(13); Restatement Third
3 of Trusts § 50, Comment a. Nonetheless, the decanting power under Section 301 is in some
4 ways analogous to the power to exercise a power of appointment to appoint the property in
5 further trust.

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

16
17 The decanting power, like most discretionary distribution powers, can be exercised over
18 all or part of the first trust. If it is exercised over only part of the first trust, the second trust
19 would need to be a separate trust and could not be a continuation of the first trust.
20 If the decanting power is exercised over all of the first trust, but to more than one second trusts,
21 then the second trusts would need to be separate trusts and could not be a continuation of the first
22 trust.

23
24 If the authorized fiduciary has expanded discretion over only part of the first trust, the
25 authorized fiduciary may exercise the decanting power under this section only over such part.
26 *See* Section 301(g). With respect to the remainder of the trust, the authorized fiduciary may have
27 the ability to decant under Section 302.

28 The second trust may contain any terms permissible for a trust subject only to the
29 restrictions found in the act. Thus subject to subsections (c) and (d) of Section 301 and the other
30 restrictions in Article 3 and subject to the fiduciary duty in Section 501(b), the second trust may
31 (1) eliminate (but not add) one or more current beneficiaries; (2) make a current beneficiary a
32 presumptive remainder beneficiary or a successor beneficiary; (3) eliminate (but not add) one or
33 more presumptive remainder and successor beneficiaries; (4) make a presumptive remainder
34 beneficiary a successor beneficiary, or vice versa; (5) alter or eliminate mandatory rights that are
35 not currently in existence; (6) change the standard for distributions; (7) add or eliminate a
36 spendthrift provision; (8) extend the duration of a trust; (9) change the jurisdiction of the trust
37 and the law governing the administration of the trust; (10) eliminate, modify or add powers of
38 appointment; (11) change the trustee or trustee succession provisions; (12) change the powers of
39 the trustee; (13) change administrative provisions of the trust; (14) add investment advisors, trust
40 protectors or other fiduciaries; (15) divide a trust into more than one trust; and (16) consolidate
41 trusts. The foregoing list merely provides examples and is not exhaustive. The second trust,
42 however, cannot make a remainder beneficiary a current beneficiary.

43
44 Section 301(c)(3) prohibits the second trust from modifying or eliminating a presently
45 exercisable general power of appointment. A power to withdraw from a trust is a power of

1 appointment. *See* Restatement Third of Trusts § 56, Comment b.
2

3 A power of appointment is presently exercisable if it is exercisable at the time in
4 question. Typically, a presently exercisable power of appointment is exercisable at the
5 time in question during the powerholder's life and also at the powerholder's death, e.g.,
6 by the powerholder's will. Thus, a power of appointment that is exercisable "by deed or
7 will" is a presently exercisable power. To take another example, a power of
8 appointment exercisable by the powerholder's last unrevoked instrument in writing is a
9 presently exercisable power, because the powerholder can make a present exercise
10 irrevocable by explicitly so providing in the instrument exercising the power. *See*
11 Restatement Third of Property: Wills and Other Donative Transfers § 17.4, Comment a.
12

13 Thus if a beneficiary has already attained an age at which the beneficiary can withdraw
14 all or a portion of the trust, the second trust may not modify or eliminate that right of withdrawal.
15 If a Crummey withdrawal power is still in effect with respect to a prior contribution to the trust,
16 the second trust cannot modify or eliminate the Crummey withdrawal right.
17

18 The decanting may eliminate mandatory rights to income, annuity or unitrust
19 distributions if the right is not presently enforceable. A right that is conditioned on the
20 occurrence of a specified event, the satisfaction of an ascertainable standard or reasonably
21 definite standard, or the passage of a specified time is presently enforceable only after the
22 occurrence of the specified event, the satisfaction of an ascertainable standard or reasonably
23 definite standard, or the passage of the specified time.
24

25 Thus a beneficiary's right to receive a portion of the principal of a trust upon attaining a
26 certain age is presently enforceable if the beneficiary has attained such age even if the
27 distribution has not yet been made from the trust. On the other hand, if a trust provides that all
28 income should be distributed to A after she attains age 25, and A is age 23, the decanting
29 distribution may eliminate A's mandatory income interest. If a trust provides that a beneficiary
30 may withdraw one-third of the trust principal at age 25, one-third at age 30 and the remainder at
31 age 35, if the beneficiary is age 28 but has not yet exercised the right to withdraw one-third at
32 age 25, the right to withdraw such portion is presently enforceable but the withdrawal rights at
33 age 30 and 35 are not presently enforceable.
34

35 A beneficiary's right to annual distributions of income is presently enforceable if there
36 are no conditions to such income distributions that have not been met. A beneficiary's right to
37 annual income distributions starting at age 25 is not presently enforceable if the beneficiary has
38 not attained age 25. A beneficiary's right may be presently enforceable even if such right will
39 cease upon the occurrence of some event such as the beneficiary's substance abuse.
40

41 The right to a mandatory distribution does not include a right to a distribution pursuant to
42 a standard or a right to a distribution in the discretion of a fiduciary. Thus a right to receive
43 distributions for "support and health care," or for "best interests" would not be a mandatory
44 distribution right for purposes of Section 301.
45

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

10
11 On the other hand, if A is the sole current beneficiary of the trust and has a current
12 mandatory right to income, the decanting cannot eliminate A's right to income.

13
14 Subsection (e)(3) makes clear that persons who are not otherwise beneficiaries of the first
15 trust may be permissible appointees of a power of appointment granted to a current beneficiary.

16
17 Sometimes state law may provide more than one method for making the same
18 modification to a trust. For example, a combination of trusts or a division of a trust that would
19 be permitted under Section 417 of the Uniform Trust Code may also be accomplished under this
20 act through decanting. When a desired modification could be accomplished by decanting or by
21 another method, the trustee may select either method.

22 23 **SECTION 302. DECANTING POWER IF LIMITED DISCRETION.**

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

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

29 (c) The second trusts must, in the aggregate, grant each beneficiary of the first trust
30 beneficial interests in the second trusts that are substantially similar to the beneficial interests of
31 the beneficiary in the first trust. A power to make a distribution for the benefit of a beneficiary
32 under the second trust is considered to be substantially the same as a power to make a
33 distribution to the beneficiary under the first trust.

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

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

6 **Comments**

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

15 The power to make distributions for the benefit of the beneficiary when distributions are
16 permitted to be made directly to such beneficiary is a codification of common law. Section
17 816(21) of the Uniform Trust Code permits a trustee to pay an amount distributable to a
18 beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated
19 by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by paying it
20 to certain other persons on behalf of such beneficiary or to manage it as a separate fund on the
21 beneficiary's behalf subject to the beneficiary's continuing right to withdraw the distribution.
22 Section 302(c) is similar, but does not require that the beneficiary be under a legal disability or
23 incapacitated in order for a distribution made for the benefit of the beneficiary to be treated as
24 substantially the same as a distribution to the beneficiary.

25 Section 302 is intended to permit a severance of a trust if the beneficial interests, in the
26 aggregate, in the second trust are substantially similar to the beneficial interests in the first trust.
27 For this purpose, an equal vertical division of a trust in which multiple beneficiaries have equal
28 discretionary interests would usually be considered to be substantially similar. For example, if a
29 trust provides for discretionary distributions of income and principal to A's children for support,
30 education and health care and A is deceased and has three living children (B, C and D), the
31 authorized fiduciary may exercise the decanting power under Section 302 to sever the trust into
32 three equal trusts, one for each of B, C and D. Although the beneficial interest of each child is
33 different because before the severance each child could conceivably receive discretionary
34 distributions of more than one-third of the trust and after the severance each child may only
35 receive distributions from such child's trust (one-third of the first trust), a child's interest is
36 substantially similar because the loss of the possibility of receiving distributions of more than
37 one-third of the first trust is offset by the fact that after the severance the other children may not

1 receive discretionary distributions from such child's trust.

2 **SECTION 303. TRUST PROHIBITION ON DECANTING.**

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

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

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

17 **Comments**

18 A trust instrument may preclude the exercise of a decanting power under the act or any
19 similar state statute with respect to the entire trust or with respect to one or more provisions of
20 the trust. *See* Section 303(a). The exercise of a decanting power, however, is not prohibited by a
21 statement that the trust is irrevocable or unamendable, or by a spendthrift provision. *See* Section
22 303(b).

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

1 a similar state statute.

2 **SECTION 304. CHANGE IN COMPENSATION.**

3 (a) If a first trust instrument specifies an authorized fiduciary's compensation, the
4 fiduciary may not exercise the decanting power to increase the fiduciary's compensation beyond
5 the specified compensation unless the increase in compensation has been consented to by all
6 qualified beneficiaries of the second trust in a signed record or the increase is approved by the
7 court.

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

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

16 (d) An authorized fiduciary may receive reasonable compensation for the time spent
17 considering and implementing the exercise of the decanting power. Reasonable expenses
18 incurred by the fiduciary in considering and implementing the exercise of the decanting power
19 may be paid from the first trust.

20 **Comment**

21 The Uniform Trust Code permits the court to modify a trust, presumably including the
22 terms of trustee compensation under Section 412 (Modification or Termination Because of
23 Unanticipated Circumstances or Inability to Administer Trust Effectively), Section 413 (Cy
24 Pres), Section 414 (Modification or Termination of Uneconomic Trust), Section 415
25 (Reformation to Correct Mistakes) and Section 416 (Modification to Achieve Settlor's Tax
26 Objectives). Nonjudicial modification is permitted only under Section 411 under one alternative,

1 which permits a noncharitable irrevocable trust to be modified or terminated upon consent of the
2 settlor and all beneficiaries. Many states, however, have nonjudicial settlement acts that do not
3 necessarily require the consent of the settlor and may only require the consent of certain
4 beneficiaries for certain trust modifications. An exercise of the decanting power, however,
5 generally is an action taken by the authorized fiduciary that does not require beneficiary consent
6 or court approval. The purpose of requiring beneficiary consent or court approval to a change in
7 the compensation of the authorized fiduciary is to place a more immediate check and balance on
8 an authorized fiduciary increasing its own compensation by decanting. In this context it does not
9 seem necessary to require the consent of all beneficiaries. Obtaining the consent of qualified
10 beneficiaries, who would generally be immediately impacted by a change in compensation,
11 should be sufficient.

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

17 **SECTION 305. EXCULPATION AND INDEMNIFICATION.**

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

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

24 [(c) A second trust may divide and reallocate fiduciary powers among several fiduciaries,
25 including one or more trustees, distribution advisors, investment advisors, trust protectors, or
26 other persons, and may indemnify or exonerate a fiduciary from liability for an action of another
27 fiduciary. The second trust may not reduce fiduciary liability in the aggregate.]

28 ***Legislative Note:*** Subsection 305(c) is for states that have directed trust statutes.

29 **Comment**

30 An authorized fiduciary should not be permitted to decant in order to insert in the second
31 trust instrument a provision directly exculpating the authorized fiduciary or indemnifying the

1 authorized fiduciary except to the extent such provision was contained in the first trust
2 instrument or applicable law would have provided such exculpation or indemnification.
3 Nonetheless, decanting may appropriately reduce the authorized fiduciary's liability indirectly.
4 For example, if the second trust is subject to the law of a different state, the law governing the
5 second trust may provide additional protection to the authorized fiduciary.

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

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

19 **SECTION 306. TRUSTEE REMOVAL.**

20 (a) Except as otherwise provided in subsection (b), an authorized fiduciary may not
21 exercise the decanting power to modify a provision granting another person the right to remove
22 or replace the fiduciary.

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

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

28 (2) the person currently holding the right and the qualified beneficiaries consent to
29 the modification in a record signed by the person and the qualified beneficiaries and the
30 modification grants the right to another person that is independent of and nonsubservient to the

1 fiduciary; or

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

4 **Comment**

5 Therefore, Section 306 authorizes a modification of a trustee removal provision only with
6 either court approval or the consent of the person currently holding the right to remove or replace
7 the trustee. Unless the qualified beneficiaries also consent to such change, the person currently
8 holding the right to remove the authorized fiduciary may only consent to the modification of the
9 right with respect to himself or herself and cannot consent to the modification of such right with
10 respect to any successor remover. For example, if a trust provides that the authorized fiduciary
11 may be removed by X, so long as X is living and not incapacitated, and after X is deceased or
12 incapacitated, by Y, X may consent to a modification that would permit the authorized fiduciary
13 to be removed only by the joint agreement of X and Z and only with 90 days' prior notice, but
14 such modification would not affect Y's power of removal after X is deceased or incapacitated
15 unless Y also consents to the modification or unless the qualified beneficiaries consent to such
16 change.

17 **SECTION 307. TAX RELATED LIMITATIONS.**

18 (a) In this section, "Internal Revenue Code" means the United States Internal Revenue
19 Code of 1986[, as amended], including corresponding provisions of a subsequent internal
20 revenue law.

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

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

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

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

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

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

7 (6) In this paragraph, “tax benefit” means a federal or state tax deduction,
8 exemption, exclusion, or other benefit not otherwise listed in this section, except for the benefit
9 from having the settlor considered the owner under Sections 671 through 679 of the Internal
10 Revenue Code. Subject to paragraph (7), if the first trust instrument expressly indicates an intent
11 to qualify for a tax benefit or if the first trust instrument clearly is designed to enable the first
12 trust to qualify for a tax benefit, and if the first trust qualified, or but for this [act] would have
13 qualified, for the tax benefit, the second trust instrument must not include or omit a term that, if
14 included in or omitted from the first trust instrument, would have prevented the first trust from
15 qualifying for the tax benefit.

16 (7) Subject to paragraph (3):

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

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

1 (c) In this section:

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

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

7 **Comments**

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

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

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

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

6 Code section 2642(c) grants a zero inclusion ratio, essentially a GST annual exclusion, to
7 gifts that qualify for the gift tax annual exclusion but imposes two additional requirements for
8 gifts to trusts. First, the trust must be only for a single individual and second, if the individual
9 dies before the termination of the trust, the property of the trust must be included in the gross
10 estate of such individual. Thus while gifts to trusts for multiple beneficiaries could qualify for
11 the gift tax annual exclusion through the use of Crummey withdrawal rights, such gifts would not
12 qualify for the GST annual exclusion. The Section 2642(c) restriction requiring a trust be for a
13 single individual could be violated through decanting if the statute permitted accelerating a
14 remainder interest to a current interest. The requirement that the trust be included in the gross
15 estate of the individual could perhaps be violated by decanting to a trust that was not includible
16 in the beneficiary's gross estate.

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

24 Section 307(c) ensures that the tax limitations apply even if a trust is the subject of serial
25 exercises of a decanting power under this act or a similar state statute.

26 **SECTION 308. TERM OF SECOND TRUST.**

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

29 (b) If applicable state law requires that the interests in a first trust vest within or that a
30 power of alienation over the interests not be suspended beyond a period measured from the date
31 the first trust became irrevocable, including any period measured by lives in being on the date
32 the first trust became irrevocable, the interests in the second trust, to the extent attributable to the
33 exercise of the decanting power, must vest within or the power of alienation may not be

suspended beyond the period. If the period is measured by lives in being on the date the first trust became irrevocable, the class may be expanded to include another life in being on the date the first trust became irrevocable if the life in being could have been included in the first trust under applicable state law.

Comment

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

SECTION 309. NEED TO DISTRIBUTE NOT REQUIRED. An authorized fiduciary may exercise the decanting power whether or not the fiduciary would otherwise have made a distribution of principal at the time of the exercise under the discretionary distribution standard of the first trust.

SECTION 310. PARTIALLY IMPERMISSIBLE DECANTING.

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

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

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

(2) A provision required to be in the second trust instrument to comply with this

1 [act] which is not expressly contained in the second trust instrument is presumed to be included
2 in the second trust instrument.

3 (3) A provision of the first trust instrument which is not permitted to be modified
4 or eliminated by this [act] which is not contained in the second trust instrument is presumed to be
5 included in the second trust instrument.

6 (c) If a trustee of a second trust discovers that the copy of the second trust instrument
7 provided under Section 201(c) did not accurately reflect the terms of the second trust instrument
8 after applying subsection (b), the trustee shall:

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

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

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

18 **Comment**

19 In order to provide as much certainty as possible to the trustee and the beneficiaries with
20 respect to the operative terms of a trust, an exercise of a decanting power should not be wholly
21 invalid because of a technical violation of the decanting statute. For example, if the second trust
22 sets forth an impermissible rule against perpetuities period (*see* Section 308), the other
23 modifications made by the decanting should be effective.

24 Subsection 310(b) modifies the second trust instrument to delete impermissible
25 provisions in the second trust instrument and to insert required provisions in the second trust
26 instrument.

SECTION 311. OTHER AUTHORITY TO DISTRIBUTE IN FURTHER TRUST.

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

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

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

Comment

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

[ARTICLE] 4

EFFECT OF DECANTING

SECTION 401. TERMS OF SECOND TRUST. A reference to a trust instrument or terms of the trust in [this state's trust code] includes a second trust instrument and the terms of the second trust.

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

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

(2) the settlor who funded an existing trust that is the second trust with respect to the exercise of the decanting power.

Comment

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.

37

1 example, under the Uniform Trust Code this rule would apply for purposes of Section 113
2 (Insurable Interest), Section 301(d) (limiting the ability of a settlor to represent a beneficiary),
3 Section 405(a) (enforcement of a charitable trust), Section 411 (modification of a trust with the
4 settlor's intent), Section 505 (Creditor's Claims), Section 706(a) (request to remove a trustee),
5 and Section 814 (limiting certain discretionary powers).

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

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

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

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

37 **SECTION 403. LATER DISCOVERED PROPERTY.** Unless an authorized
38 fiduciary provides otherwise at the time of an exercise of the decanting power or a second trust

provides otherwise, the following rules apply:

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

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

SECTION 404. OBLIGATIONS. If a person to which the trustee of a first trust has incurred a liability in the course of administration of the first trust could reach the property of the first trust and apply it to the satisfaction of the person's claim, the person may reach the property of the second trust to the extent the property of the second trust resulted from an exercise of the decanting power over the first trust.

Comment

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

The Restatement Second of Trusts provides various situations in which a person to whom the trustee has incurred a liability in the course of the administration of a trust can by a proceeding in equity reach trust property and apply it to the satisfaction of such person's claim. *See* Restatement Second of Trusts § 267. Section 268 provides that the creditor can reach trust property to the extent the creditor cannot obtain satisfaction of the claim out of the trustee's individual property to the extent the trustee is entitled to exoneration out of the trust estate. Section 269 provides that a creditor who cannot obtain satisfaction out of the trustee's individual property can by a proceeding in equity reach trust property to the extent the trust estate has benefitted. Section 270 permits the creditor to reach trust property if by the terms of the trust the settlor manifested an intention to confer such a power on the creditor. Section 271 permits a

1 creditor to reach trust property on a contractual claim if the contract provides that the trustee
2 shall not be personally liable upon the contract and the contract was properly made by the trustee
3 in the administration of the trust. Section 271A permits a creditor to obtain satisfaction out of
4 the trust estate if it is equitable to permit him to do so.

5 **[ARTICLE] 5**

6 **FIDUCIARY DUTY**

7 **SECTION 501. FIDUCIARY DUTY.**

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

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

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

17 **Comment**

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

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

28 (2) If a trustee knows or should know of circumstances that justify
29 judicial action under Subsection (1) with respect to an administrative provision,
30 and of the potential of those circumstances to cause substantial harm to the

1 trust or its beneficiaries, the trustee has a duty to petition the court for
2 appropriate modification of or deviation from the terms of the trust.

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

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

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

23 Except as noted below, in exercising the decanting power, the authorized fiduciary is
24 subject to the same fiduciary duties as in exercising any other discretionary power. For example,
25 Section 801 of the Uniform Trust Code provides that the trustee shall administer the trust in good
26 faith, in accordance with its terms and purposes and the interests of the beneficiaries. Section 76
27 of the Restatement Third of Trusts provides that a trustee has a duty to administer the trust
28 diligently and in good faith, in accordance with the terms of the trust and applicable law. Section
29 814(a) of the Uniform Trust Code provides that a trustee shall exercise a discretionary power in
30 good faith and in accordance with the terms and purposes of the trust and the interests of the
31 beneficiaries.

32 An exercise of a decanting power should be in accordance with the purposes of the first
33 trust. The purpose of decanting is not to disregard the settlor's intent but to modify the trust to
34 effectuate better the settlor's broader purposes or the settlor's probable intent if the settlor had
35 anticipated the circumstances in place at the time of the decanting. The settlor's purposes
36 generally also include efficient administration of the trust. The settlor's purposes may also
37 include achieving certain tax objectives or generally minimizing overall tax liabilities.

38 The exercise of the decanting power need not be in accord with the terms of the first trust
39 instrument because decanting by definition is a modification of the terms of the first trust.
40 Therefore, Section 501 provides that the terms of the first trust shall be deemed to include the

1 decanting power for purposes of determining the fiduciary duties of the authorized fiduciary.

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

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

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

12 Decanting may be appropriate in many situations in which judicial modification would be
13 appropriate such as (1) when modification, because of circumstances not anticipated by the
14 settlor, would further the purposes of the trust (*see* Uniform Trust Code § 412(a) and
15 Restatement Third of Trusts § 66); (2) when continuation of the trust on its existing terms would
16 be impracticable or wasteful or impair the trust's administration (*see* Uniform Trust Code §
17 412(b)); (3) to replace the trustee if the value of the trust is insufficient to justify the costs of
18 administration (*see* Uniform Trust Code § 414(b)); (4) to correct mistakes (*see* Uniform Trust
19 Code § 415); (5) to achieve the settlor's tax objectives (*see* Uniform Trust Code § 416); and (6)
20 to combine or divide trusts (*see* Uniform Trust Code § 417 and Restatement Third of Trusts §
21 68).

22 [ARTICLE] 6

23 MISCELLANEOUS

24 **SECTION 601. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
25 applying and construing this uniform act, consideration must be given to the need to promote
26 uniformity of the law with respect to its subject matter among states that enact it.

27 **SECTION 602. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
28 **AND NATIONAL COMMERCE ACT.** The [act] modifies, limits, or supersedes the
29 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
30 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
31 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15

1 U.S.C. Section 7003(b).

2 **[SECTION 603. SEVERABILITY.** If any provision of this [act] or its application to
3 any person or circumstance is held invalid, the invalidity does not affect other provisions or
4 applications of this [act] which can be given effect without the invalid provision or application,
5 and to this end the provisions of this [act] are severable.]

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

8 **SECTION 604. REPEALS; CONFORMING AMENDMENTS.**

9 (a)

10 (b)

11 (c)

12 **SECTION 605. EFFECTIVE DATE.** This [act] takes effect . . .