

IRREVOCABLE DOES NOT MEAN IT CAN'T BE
CHANGED – DECANTING, REFORMATIONS, AND
NON-JUDICIAL SETTLEMENT AGREEMENTS

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I. INTRODUCTION AND OVERVIEW.

A. Modifying Irrevocable Trusts.

1. On its face, the idea of modifying or changing a trust that, by its terms, is irrevocable seems difficult, if not, impossible and potentially contrary to the settlor's intent.
2. Irrevocable trusts are often required to achieve the settlor's tax objectives.
3. In many cases, it may be necessary to modify or change the terms of the trust to more accurately reflect the settlor's intent, to respond to beneficiary needs and circumstances, to address changes in law, to optimize tax consequences, or to correct errors in the trust instrument.
4. There are a number of mechanisms to modify an irrevocable trust including judicial reformation and modification, trust combinations and divisions, removal and substitution of trustees, non-judicial settlement agreements, the use of "trust protectors" or "trust advisors" to modify the terms of a trust, and now, with increasing popularity, decanting.

B. Administrative Related Reasons to Modify a Trust.

1. Change of situs of trust administration.
2. Change of law governing the administration of the trust.
3. Provide for the resignation, removal, and appointment of trustees without court approval.
4. Expand powers of trustee to engage in sophisticated financial transactions, such as derivatives and options, make or guarantee loans, adjust between income and principal, or participate in an initial public offering.
5. Provide for the division of trustee roles and responsibilities through the use of investment direction advisors, distribution advisors, trust protectors, or special asset direction advisors.

6. Address issues related to trustee compensation, which may be too high or too low.
7. Address trustee liability (and indemnification) for failure to diversify under the Prudent Investor rule with respect to an over-concentration of investment (typically closely held business) assets.
8. Convert a foreign trust to a domestic trust or vice versa.
9. Consolidate trusts for administrative efficiency.

C. Beneficiary-Related Change of Circumstances.

1. Limit distributions to beneficiaries with substance abuse problems or those engaging in other unproductive behaviors.
2. Transfer of assets to a special needs trust for a disabled beneficiary. See, e.g., *In the Matter of Kroll*, 41 Misc.3d 954, 971 N.Y.S.2d 863 (2013). The matter was appealed by the State of New York and the appellate court agreed with the trustees and allowed creation of a new trust with no payback provision. The second trust was not a self-settled special needs trust, since the beneficiary did not have the right to receive the property at the time the new trust was created. *Matter of Kroll v. New York State Department of Health*, 2016 N.Y. App. Div. LEXIS 6389 (2016).
3. Limit beneficiary rights to obtain information about the nature and extent of their interests in a trust by moving assets to a state, like Delaware, where the Trustee's duty to provide such information can be restricted.
4. Divide single "pot" sprinkle trusts into separate trusts for each branch of the family.
5. Eliminate a beneficiary altogether.
6. Transfer a self-settled irrevocable trust to a jurisdiction that recognizes asset protection for self-settled spendthrift trusts.

D. Changes Related to Federal or State Tax Planning.

1. Mitigate state income taxation of trust by moving assets to a new trust in a jurisdiction that does not subject the trust to income taxation based on the location of the trustee or the grantor.
2. Convert a non-grantor trust to a grantor trust or vice versa.

3. Maximize GST planning for assets being distributed to a beneficiary outright (or over which the beneficiary has a general power) by decanting to another trust to make use of the beneficiary's and the grantor's available GST exemption.
 4. Division of trusts for GST or marital deduction planning purposes.
 5. Basis related planning to give a beneficiary a general power of appointment to cause estate inclusion and an increase in basis over appreciated trust assets.
- E. Changes to Correct Errors or Address Ambiguities.
1. Correct a scrivener's error.
 2. Address ambiguities in the original trust instrument.
 3. Add a spendthrift clause to a trust that does not contain such a provision.

II. DECANTING.

A. Decanting Defined.

1. WEBSTER'S DICTIONARY defines the verb "decant" as follows: "(a) to draw off (a liquid) without disturbing the sediment or the lower liquid layers, (b) to pour from one vessel into another, and (c) to pour out, transfer, or unload as if by pouring."
2. Decanting is the act of a trustee exercising its power to distribute trust principal to or for the benefit of a beneficiary by distributing the assets to a new trust.
3. The best way to understand trust decanting is to visualize the physical act of decanting wine, which involves the pouring of wine from one vessel to another for the purpose of removing unwanted sediment and adding oxygen to the wine. In the trust context, practitioners can view decanting as a trustee pouring the assets of an old trust into a new trust, with the less useful provisions (the so-called "sediment") left behind, while the "oxygen" of modern trust provisions breathes life into the trust.
4. A decanting power is often thought of as the exercise of a special power of appointment, held by the trustee, to distribute assets for the benefit of a beneficiary.

- B. State Statutes Authorizing Decanting. The following states have adopted statutes which authorize decanting. They are, in chronological order of enactment:

1. New York. New York enacted the first decanting statute, N.Y. EST. POWERS & TRUSTS § 10-6.6(b), which became effective on July 24, 1992. On August 17, 2011, the New York legislature approved a bill substantially revising New York’s decanting statute.
2. Alaska. Alaska enacted ALASKA STAT. § 13.36.157, which became effective on September 15, 1998. Alaska amended its decanting statute in 2006 and again in 2013.
3. Delaware. Delaware enacted 12 DEL. CODE ANN. tit. 12, § 3528, which became effective on June 30, 2003 and has been amended several times since then.
4. Tennessee. Tennessee enacted TENN. CODE ANN. § 35-15-816(b)(27), which became effective on July 1, 2004 and was amended in 2013.
5. Florida. Florida enacted FLA. STAT. § 736.04117, which became effective on January 1, 2007.
6. South Dakota. South Dakota enacted S.D. CODIFIED LAWS §§ 55-2-15 to 55-2-21, which became effective on March 5, 2007. South Dakota amended its decanting statutes in 2012 and 2013.
7. New Hampshire. New Hampshire enacted N.H. REV. STAT. ANN. § 564-B:4-418, which became effective on September 9, 2008.
8. Arizona. Arizona enacted ARIZ. REV. STAT. § 14-10819, which became effective on September 30, 2009, and was amended on July 20, 2011.
9. North Carolina. North Carolina enacted N.C. GEN. STAT. § 36C-8-816.1, which became effective on October 1, 2009 and was amended in 2010. In 2017, SB 450 introduced an updated decanting statute based on the Uniform Trust Decanting Act, which was enacted on July 18, 2017.
10. Nevada. Nevada enacted NEV. REV. STAT. § 163.556, which became effective on October 1, 2009.
11. Indiana. Indiana enacted IND. CODE § 30-4-3-36, which became effective on July 1, 2010. In 2022, Indiana adopted the Uniform Trust Decanting Act in House Bill 1205.
12. Missouri. Missouri enacted MO. REV. STAT. § 456.4-419, which became effective on August 28, 2011.

13. Ohio. Ohio enacted O.R.C. § 5808.18, which became effective on March 22, 2012.
14. Rhode Island. Rhode Island enacted R.I. GEN. LAWS § 18-4-31 on July 23, 2012 and amended its statute in 2013.
15. Virginia. VA. CODE § 64.2-779.1. Virginia originally adopted its decanting statute in 2012. In 2017, it updated the statute to follow in most, but not all respects, the Uniform Trust Decanting Act. The new version of the decanting statute became effective on July 1, 2017.
16. Kentucky. Kentucky enacted KY. REV. STAT. § 386.175, which became effective on July 12, 2012.
17. Michigan. Michigan enacted MICH. COMP. LAWS § 700.7820a, which became effective on December 28, 2012. See also, MICH. COMP. LAWS § 700.7103 for definitions and MICH. COMP. LAWS § 556.115a.
18. Illinois. Illinois enacted 760 ILL. COMP. STAT. § 5/16.4, which became effective on January 1, 2013. In 2019, Illinois adopted the Uniform Trust Decanting Act in House Bill 1471.
19. Wyoming. Wyoming enacted WYO. STAT. ANN. § 4-10-816(a)(xxviii), which became effective on July 1, 2013.
20. Texas. Texas enacted TEX. PROP. CODE §§ 112.071-112.089, which became effective on September 1, 2013.
21. South Carolina. South Carolina enacted as S.C. CODE ANN. § 62-7-816A which became effective January 1, 2014.
22. Wisconsin. Wisconsin Trust Code §701.0418 was enacted in 2013 Wisconsin Act 92 and became effective July 1, 2014.
23. Minnesota. Minn. Stat. § 502.851 became effective January 1, 2016.
24. New Mexico. New Mexico was the first state to enact the Uniform Trust Decanting Act. HB 280. Signed March 8, 2016; effective January 1, 2017.
25. Colorado. Colorado was the second state to enact the Uniform Trust Decanting Act. SB 16-85. Signed March 8, 2016; effective January 1, 2017.
26. Washington. Washington State adopted the Uniform Trust Decanting Act. SB 5012.

27. Alabama. Alabama adopted the Uniform Trust Decanting Act in 2018. HB 163.
28. California. California adopted the Uniform Trust Decanting Act in 2018. SB 909.
29. Montana. Montana adopted the Uniform Trust Decanting Act in 2020 as House Bill 293.
30. Nebraska. Nebraska adopted the Uniform Trust Decanting Act in 2020 as LB 808.
31. West Virginia. West Virginia adopted the Uniform Trust Decanting Act in 2020 as Senate Bill 668.
32. Maine. Maine adopted the Uniform Trust Decanting Act in 2021 as LD 422.
33. Uniform Statute. The National Conference of Commissioners on Uniform State Laws adopted the final version of Uniform Trust Decanting Act (the “UTDA”) in July 2015. It was amended in November 2016 to make a minor technical correction. A copy of the statute is attached as Appendix A.

III. COMMON LAW OF DECANTING.

A. Nature of Decanting.

1. Exercise of Special Power of Appointment. Trust decanting generally refers to the distribution of property from one trust to another trust pursuant to a trustee’s discretionary power to distribute property to or for the benefit of the trust’s beneficiaries. The rationale behind decanting is that if a trustee has the discretionary power to distribute property to or for the benefit of one or more beneficiaries, then the trustee has, in effect, a special power of appointment that should enable the trustee to distribute property to a second trust for the benefit of one or more of such beneficiaries.

B. Restatement.

1. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS.
 - a. The RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 11.1 (Comment d) provides that the trustee’s ability to transfer trust property is similar to a special power of appointment, under

which a trustee can transfer an interest in property equal to or less than the title authorized under the trust instrument. If the trustee is able to transfer full legal title to trust property to a beneficiary, the trustee should be able to transfer less than full legal title by transferring the property further in trust. It provides that “[a] power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.”

- b. Comment b of Section 11.1 provides that a power of appointment permits persons to transfer a beneficial interest in property they do not otherwise possess, and the exercise of the power is considered the completion of a transfer originating with the creator of the power. Therefore, the power to determine the identity of persons entitled to receive beneficial interests in property that are owned by persons other than the “powerholder” characterizes a power of appointment.
- c. Comment d of Section 11.1 characterizes a trustee’s discretion to pay trust property to a beneficiary or among a class of beneficiaries as a power of appointment because the trustee is authorized to determine the recipients of beneficial interests in property that the trustee does not otherwise possess.
- d. Section 19.4 of the SECOND RESTATEMENT also authorizes a powerholder to create a new special power of appointment in any other person, which is exercisable only in favor of permissible appointees of the original power. For example, a trustee with the discretionary power to distribute trust property outright to or for the benefit of one or more trust beneficiaries should be able to distribute property to a separate discretionary trust for the lifetime benefit of one beneficiary that gives the beneficiary a special power of appointment over the appointed trust assets.

2. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS.¹

- a. Definition of a Power of Appointment.
 - i. Section 17.1 of the RESTATEMENT (THIRD) OF PROPERTY: WILLS & DONATIVE TRANSFERS defines a power of appointment as a power that enables the holder to designate recipients of beneficial ownership interests in or powers of appointment over the appointive property.

¹ Briani Bennet Mellen authored substantial portions of this Article II.B.2. and are reprinted here with her permission.

- ii. The THIRD RESTATEMENT recognizes a trust beneficiary's ability to hold both a beneficial interest in trust property and a power of appointment over that property, thereby eliminating from the definition of a power of appointment the requirement that the holder possess the power to designate beneficial ownership interests in property "other than as an incident of the beneficial ownership of property." *Id.* § 17.1 rep. n. 1.
 - iii. A power to revoke or amend a trust, withdraw trust property, or direct the trustee to distribute trust property to another are described as powers of appointment over trust property. *Id.* § 17.1 cmts. e, f.
- b. Power of Appointment Held in Non-Fiduciary Capacity.
- i. The THIRD RESTATEMENT recognizes that a fiduciary distributive power, defined to include a trustee's power to distribute trust property to or for the benefit of a designated beneficiary or among a defined group of beneficiaries, is a special power of appointment. *See id.* § 17.1 cmt. g. A fiduciary distributive power, however, is not a "discretionary power of appointment," which may be exercised arbitrarily as long as the exercise is within the scope of the power. *See id.* The distinction between a discretionary power of appointment and a fiduciary distributive power is based on the different treatment afforded discretionary powers of appointment, which may be exercised arbitrarily, and fiduciary distributive powers, which are subject to fiduciary obligations. *Id.* For example, unlike the exercise of a power of appointment, fiduciary standards are imposed on the exercise of a distributive power held in a fiduciary capacity. *Id.* A fiduciary power to distribute property, moreover, survives the death of a fiduciary and succeeds to its successor, but a power of appointment is personal to the holder and lapses upon the holder's death if not exercised. *Id.* § 17.1 cmt. g, rep. n. 1.
 - ii. Because of the fiduciary nature of fiduciary distributive powers, the THIRD RESTATEMENT defers to the RESTATEMENT (THIRD) OF TRUSTS for the law governing the exercise of fiduciary distributive powers. *See id.* § 17.1 cmt. g. Nevertheless, comments to the THIRD RESTATEMENT OF PROPERTY specifically recognize that,

subject to fiduciary standards and the terms governing the trustee's power, a trustee or other fiduciary can exercise a fiduciary distributive power to distribute trust property to create another trust. *See id.* § 19.14 cmt. f. The THIRD RESTATEMENT also recognizes that rules governing special powers of appointment may similarly apply to fiduciary distributive powers, such as limitations on the exercise of the power in favor of persons who are not permissible appointees or in violation of common law or statutory rules against perpetuities. *See id.* § 17.1 cmt. g.

iii. The THIRD RESTATEMENT, therefore, expressly recognizes a trustee's ability to exercise a discretionary power to distribute property by decanting property to another trust. *See id.* § 19.14 cmt. f. In addition, although the THIRD RESTATEMENT OF PROPERTY defers to the THIRD RESTATEMENT OF TRUSTS because of the fiduciary nature of fiduciary distributive powers, the established rules governing the exercise of special powers of appointment, including the power to appoint trust property further in trust, should provide guidance to trustees looking to exercise discretionary distributive powers over trust property by appointing such property in further trust.

c. Exercise of Special Power by Appointing Property in Trust.

i. The THIRD RESTATEMENT expressly provides that a fiduciary distributive power is a special power of appointment and that a trustee may exercise a fiduciary distributive power to create another trust. *See id.* §§ 17.1 cmt. g, 19.14 cmt. f. The THIRD RESTATEMENT also provides that the holder of a special power of appointment may exercise the power by appointing property to a trust solely for the benefit of permissible appointees of the power, unless the creator of the power indicates otherwise. *Id.* § 19.14. The rationale is that except to the extent that the creator of the special power has manifested a contrary intention, the holder of a special power of appointment has the same breadth of discretion to appoint property to permissible appointees that the holder has in disposing of the holder's own property to the permissible appointees. *Id.* § 19.14 cmt. a.

ii. In the absence of a contrary intent, the holder of a special power has the authority to exercise the power by an appointment in trust. *Id.* § 19.14 cmt. e. The creator of a

special power of appointment manifests a contrary intent to an appointment in trust if the language creating the power expressly prohibits an appointment in trust by the holder. *Id.* Therefore, a holder of a special power of appointment is free to exercise the power by appointing outright or in trust to permissible appointees in the absence of express language to the contrary. *See, e.g., id.* § 19.14 cmt. d (providing that where special power has only one permissible appointee, only an outright appointment or one in trust in which the permissible appointee is the sole beneficiary is permissible).

- iii. Language that merely authorizes, but does not require, an outright appointment is not construed to prohibit an appointment in trust. *Id.* § 19.14 cmt. e. For example, if the trustee is directed to pay income to the settlor's spouse for life, "then absolutely, outright, and forever" for such issue of the settlor and the settlor's spouse as the settlor's spouse may appoint by will, the settlor has not manifested an intention to limit the appointment of property outright, and the settlor's spouse may exercise the power by appointing outright or in trust to the settlor's issue. *Id.* § 19.14 illus. 5.
- iv. If the special power of appointment may be exercisable in favor of only one permissible appointee, the holder may only exercise the power to appoint property outright to such permissible appointee or to a trust in which the permissible appointee is the sole beneficiary. *Id.* § 19.14 cmt. d.

d. Creation of a New Power in Another.

- i. Similar to the SECOND RESTATEMENT, the THIRD RESTATEMENT continues the view that the exercise of a special power to grant a general power of appointment to a permissible appointee is, in substance, the equivalent of a permissible outright appointment. *Id.* § 19.14 cmt. g(1). Similarly, the exercise of a special power by granting a testamentary general power to a permissible appointee approaches outright appointment to the appointee, especially where the appointee possesses a life interest in the property subject to the appointment. *Id.*
- ii. In the absence of a contrary intent by the creator of the power, the holder may also exercise a special power of appointment by granting any other person, whether or not

such person is a permissible appointee, the power to appoint to persons who are solely permissible appointees of the original power. *Id.* § 19.14 cmt. g(3)-(4).

C. Common Law.

1. Phipps v. Palm Beach Trust Co., 196 So. 229 (Fla. 1940).

- a. In Phipps, the individual trustee and his successors had the power in their “sole and absolute discretion” to direct distributions of some, none, or all of the trust property to any one or more of the settlor’s descendants.
- b. The individual trustee directed to the corporate trustee to transfer the trust property to a second trust. The second trust was identical to the first trust, except that it gave one of the settlor’s children a special testamentary power of appointment to appoint trust income to that child’s wife.
- c. The corporate trustee sought court approval of the proposed decanting transaction. The trial court approved the decanting, but a beneficiary appealed to the Florida Supreme Court.
- d. The Florida Supreme Court, in approving the decanting, determined that the individual trustee’s power to distribute trust property to the limited class of persons designated as trust beneficiaries was a special power of appointment, and the trustee’s ability to appoint property further in trust for members of the class depended upon the extent of the power authorized under the terms of the trust agreement. The court stated “[t]he power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the donor clearly indicates a contrary intent.”

2. In Re: Estate of Spencer, 232 N.W.2d 491 (Iowa 1975).

- a. In Spencer, the decedent’s husband was the trustee and a beneficiary of a testamentary trust for the benefit of their four children. The trust held a 1/4th interest in a parcel of real estate. The husband owned the other 3/4th interest outright. The trust provided that the assets were to be distributed to their grandchildren (or more remote descendants, *per stirpes*) after the death of the husband and children.
- b. The terms of the trust provided the husband with a special power to dispose of the trust property by life estate to and among their

children, with the remainder to such children's surviving issue. Husband exercised his testamentary special power of appointment to appoint the assets from wife's trust, along with his own interest in the real estate, to a new, multi-generational trust.

- c. The court in Spencer held that the exercise of the power of appointment in further trust was a valid exercise, but that the trust could be not be a multi-generational trust and the assets should vest final distributions to the grandchildren at the death of their children.
- d. An expansive reading of Spencer suggests that a trustee can decant trust property to a new trust unless plainly prohibited by the terms of the original trust.

3. Wiedenmayer v. Johnson, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969).

- a. Under the trust instrument, the trustees were authorized to distribute any or all of the trust property to the beneficiary—the settlor's son—or to use the trust property on his behalf as the trustees determined “in their absolute and uncontrolled discretion” for the beneficiary's “best interests.”
- b. The trustees determined that they should condition distributions on the beneficiary setting up another trust (the beneficiary was going through a divorce and the new trust provided protection from marital claims).
- c. The guardian *ad litem* challenged the distribution to the new trust on behalf of certain minor children and alleged that the children lost the contingent remainder interest provided to them under the original trust. The court rejected the guardian *ad litem*'s challenge arguing that if the beneficiary received the distribution of the trust property outright—as permitted under the trust agreement—then the children would have lost their contingent remainder interest in the property that was distributed from the trust.
- d. Wiedenmayer can be distinguished from Phipps and Spencer, in that the court in Wiedenmayer limited its inquiry to whether the trustees' discretionary power to distribute trust property in further trust was in the beneficiary's best interest and whether the exercise of that power was an abuse of discretion.

4. Ferri v. Powell-Ferri, 2013 Conn. Super. LEXIS 1938 (2013); 2015 Conn. LEXIS 161(Ct. Supreme Court, 2015). Applying Massachusetts law, court invalidates decanting of trust to take away vested rights over trust assets

and thereby protect trust assets from claims of divorcing spouse, where trust terms did not grant trustee absolute discretion over trust distribution and beneficiary had right to withdraw trust assets upon reaching certain ages. The state supreme court refuses to impose duty on beneficiary to oppose decanting and protect marital assets.

5. Petition of Katharine A. Johnson to Nullify the Decanting of the Trust Created under an Agreement made by Michael L. Johnson, 2015 NY Slip Op 30017(U); 2015 N.Y. Misc. LEXIS 51 (2015). The relevant New York decanting statute did not authorize a trustee to decant a trust if the result was to broaden the class of successor and remainder beneficiaries.
6. Harrell v. Badger, 2015 Fla. App. LEXIS 11183 (2015). Decanting to special needs trust, with fraudulent pooled special needs trust as remainder beneficiary, and without notice to the beneficiaries, is void and a breach of fiduciary duty.
7. In Matter of Hoppenstein, 2017 NY Slip Opinion 30940 (March 31, 2017), the New York County Surrogate's Court found the distribution of a life insurance policy from one trust to another trust which eliminated certain beneficiaries of the original trust was a valid exercise of the trustee's discretionary power to distribute principal under the trust instrument. Under the terms of the original trust, the independent trustee had discretion to distribute principal to one or more beneficiaries (to the exclusion of other beneficiaries) and/or to a trust for their benefit after providing written notice to all beneficiaries. In the ruling, the court determined that a decanting may be accomplished under the terms of a trust instrument alone and need not comply with the provisions of New York's Estates Powers and Trusts Law §10-6.6, which governed the trust.
8. Other Cases. *See also*, Regents of the University System v. Trust Company of Georgia, 186 Ga. 498 (Ga. 1938); Marx v. Rice, 1 N.J. 574 (N.J. 1949); Morse v. Kraft, 466 Mass. 92 (2013); Ferri v. Powell-Ferri, Mass. SJC-12070 (2017).

IV. MODIFICATIONS UNDER THE UNIFORM TRUST CODE.

A. Generally.

1. The Uniform Trust Code (the “UTC”) provides a comprehensive model for codifying the law on trusts. It was completed by the Uniform Law Commissioners in 2000, and amended several times since then. It has been enacted in Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.
2. The UTC does not have a decanting provision. The UTC contains provisions permitting modifications of trusts, reformations to correct mistakes, and combinations and divisions of trusts.

B. Notice Under the UTC.

1. Generally – UTC Section 301.
 - a. Notice to a person who may represent and bind another person under the UTC has the same effect as if notice were given directly to the other person.
 - b. The consent of a person who may represent and bind another person under the UTC is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.
 - c. Subject to some exceptions, a person who may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor’s behalf.
 - d. A settlor may not represent and bind a beneficiary with respect to the termination or modification of a trust by consent of the parties.
2. Testamentary General Powers of Appointment – UTC Section 302. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

3. Representation by Fiduciaries and Parents – UTC Section 303. To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:
 - a. a conservator may represent and bind the estate that the conservator controls;
 - b. a guardian may represent and bind the ward if a conservator of the ward’s estate has not been appointed;
 - c. an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
 - d. a trustee may represent and bind the beneficiaries of the trust;
 - e. a personal representative of a decedent’s estate may represent and bind persons interested in the estate; and
 - f. a parent may represent and bind the parent’s minor or unborn child if a conservator or guardian for the child has not been appointed.
4. Virtual Representation – UTC Section 304. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented

C. Nonjudicial Settlement Agreements.

1. Section 111 of the UTC provides that interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. “Interested persons” is defined to mean persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.
2. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this UTC or other applicable law.

3. Matters that may be resolved by a nonjudicial settlement agreement include:
 - (a) the interpretation or construction of the terms of the trust;
 - (b) the approval of a trustee's report or accounting;
 - (c) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
 - (d) the resignation or appointment of a trustee and the determination of a trustee's compensation;
 - (e) transfer of a trust's principal place of administration; and
 - (f) liability of a trustee for an action relating to the trust.
4. Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

D. Modifications, Divisions, and Other Changes Under the Uniform Trust Code.

1. Modification by Consent.
 - a. Section 411(a) of the UTC provides that a non-charitable irrevocable trust may be modified or terminated (with or without court approval depending on the jurisdiction) upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.
 - b. Section 411(b) provides that a non-charitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.
 - c. Section 411(e) provides that if not all of the beneficiaries consent to a proposed modification or termination of the trust under 411(a) or 411(b), the modification or termination may be approved by the court if the court is satisfied that:
 - i. if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

- ii. the interests of a beneficiary who does not consent will be adequately protected.
- 2. Modification Due to Unanticipated Circumstances.
 - a. Section 412(a) of the UTC provides that the court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
 - b. Section 412(b) of the UTC provides that the court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.
- 3. Modification of Uneconomic Trust. Under UTC § 414(b) the court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.
- 4. Reformation to Correct Mistakes.
 - a. Under Section 415 of the UTC, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.
 - b. The Comment to Section 415 provides that reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy. RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.1, which this section copies, clarifies that this doctrine also applies to wills.
- 5. Modification to Achieve Settlor's Tax Objective.
 - a. Section 416 of the UTC provides that "[t]o achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect."
 - b. Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law.

Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

6. Combination and Division of Trust.

a. UTC § 417 provides that, after notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.

b. The Official Comment to UTC § 417 provides important context:

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination.

V. TAX CONSEQUENCES OF DECANTING AND OTHER MODIFICATIONS.

A. Overview.

1. The term "decant" does not appear anywhere in the Code or Regulations.

2. With such minimal guidance from the IRS, it can be hard to analogize a trustee's act of decanting to an act or event explicitly characterized by the Code or Regulations. Nevertheless, most commentators, drawing from origins at common law, have equated decanting with the exercise of a trustee's special power of appointment.
 - a. The power of appointment analogy is based on the Restatement (Second) of Property, which provides that a trustee's ability to make discretionary distributions to or for the benefit of trust beneficiaries is akin to the exercise of special power of appointment. *See generally* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 11.1.
 - b. This view has been supported by several state statutes that specifically refer to a trustee's power to invade principal as the exercise of a special power of appointment. *See, e.g.*, ALASKA STAT. § 13.36.157(c); ARIZ. REV. STAT. ANN. § 14-10819(C); DEL. CODE ANN. tit. 12, § 3528(c); FLA. STAT. ANN. § 736.04117(3).
 - c. The Restatement (Third) of Property, which was approved by the American Law Institute in 2010, distinguishes a trustee's discretionary power of distribution from a special power of appointment because a trustee's distributive power is exercisable only in a fiduciary capacity. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 17.1. The Restatement (Third) of Property does recognize, however, that the same basic rules apply to a non-fiduciary's special power of appointment and a fiduciary's ability to make trust distributions. *See id.*
3. IRS Places Decanting on "No-Ruling" List. Given the increased legislative activity by states in enacting decanting statutes and the need to provide definitive guidance, the Service, in Rev. Proc. 2011-3, placed decanting on its no-ruling list. It continues to remain on the "no-ruling" list. Rev. Proc. 2017-3, 2017-1 IRB 130. Until the Service publishes a more definitive revenue ruling, revenue procedure, regulation, or other publication, the Service will not issue determination letters or rule on the following matters:
 - a. whether decanting gives rise to a Code § 661 deduction or results in inclusion in gross income under Code § 662;
 - b. whether decanting results in a taxable gift being made under Code § 2501; and

- c. whether decanting causes the loss of GST exempt status or constitutes a taxable termination or taxable distribution under Code § 2612.
4. IRS Places Decanting on Priority Guidance Plan. After placing decanting on its no-ruling list, the Service placed decanting on its 2011-2012 Priority Guidance Plan.
 - a. Specifically, the Service intends to issue a “Notice on decanting of trusts under §§ 2501 and 2601.”
 - b. Interestingly, while the Service has targeted the gift and GST tax consequences of decanting, the Service did not include the income or estate tax consequences of decanting in its 2011-2012 Priority Guidance Plan.
5. IRS Requests Comments on Decanting.
 - a. On December 27, 2011, the Service issued Notice 2011-101, in which it requested comments regarding when decanting that results in a change in the beneficial interests are not subject to income, gift, estate, and/or GST taxes.
 - b. According to Notice 2011-101, the Service is studying the tax implications of decanting and considering approaches to addressing some or all of the relevant tax issues in published guidance.
6. Decanting Removed from Priority Guidance Plan. After placing decanting on its 2011-2012 Priority Guidance Plan, it was conspicuously absent on the 2012-2013 Priority Guidance Plan, presumably because it was unlikely that guidance would be completed by June 2013. It has not reappeared on the Priority Guidance Plan.
7. Unless and until the Service issues more definitive guidance on the tax consequences of decanting, it is best to view decanting, from a theoretical perspective, as the trustee’s exercise of a special power of appointment. It is important to remain flexible, however, to enable critical evaluation of the actual results that a proposed decanting will yield.

B. General Overview of Tax Considerations.

1. Income Tax Considerations. As discussed *infra*, in most cases, there should be no income tax consequences associated with the transfer of assets from one trust to another through the process of decanting. It is important, however, that practitioners consider the capital gain implications of Cottage Savings Ass’n v. Comm’r., 499 U.S. 554 (1991),

and the negative basis implications of Crane v. Comm’r., 331 U.S. 1 (1947). In addition, it is important to consider whether the tax attributes of the old trust are carried forward into the new trust under the distributable net income (DNI) rules.

2. Federal Wealth Transfer Tax Considerations. As discussed *infra*, it is important to consider whether a taxable gift occurs when assets are transferred from one trust to another, and whether there is estate inclusion with respect to the decanted assets. In addition, as discussed *infra*, it is important to consider the generation skipping transfer (GST) tax consequences of decanting a “grandfathered” GST exempt trust or decanting a non-grandfathered trust that is exempt by reason of the allocation of GST exemption.
3. Estate of Bosch.
 - a. A state court authorizing a modification or reformation does not automatically bind the Service. The Service is not shy about reviewing a state law decision and finding the ruling does not conform to the Service's reading of the state law.
 - b. The leading case is Estate of Bosch, 387 U.S. 456 (1967), in which the U.S. Supreme Court held that the Service is not necessarily bound by the ruling of a state court as to an underlying issue of state law when applied to a federal statute. Rather, the highest court of the state is the best authority on the underlying substantive rule of state law to be applied in the federal matter.
 - c. If there is no decision by that court, then the federal authority must apply what it finds to be state law after giving “proper regard” to the state trial court's determination and to relevant rulings of other courts of the state. In this respect, the federal agency may be said, in effect, to be sitting as a state court.

C. Income Tax.

1. General Rule. As a general matter, decanting assets from one domestic trust to another will generate minimal, if any, income tax consequences for the trust and its beneficiaries.
2. Income Tax Consequences to the Old and New Trusts.
 - a. Decanting assets from one domestic trust to another should not affect the income taxation of the trust because (i) the old trust and the new trust are treated as the same trust for income tax purposes or (ii) in the alternative, the transfer of assets merely carries out the original trust's distributable net income (“DNI”), resulting in

income to the new trust with a corresponding distribution deduction for the old trust.

b. Basic Principles of Trust Taxation.

i. If a trust is classified as a grantor trust pursuant to Code §§ 671 through 679, then all of the trust's income tax attributes (gain, loss, deductions, credits, etc.) are passed through to the grantor. *See* Code § 671.

ii. In the case of non-grantor trusts, income tax consequences are largely determined by a trust's DNI, which is computed in accordance with Code § 643(a). DNI tracks the net income earned by a trust and is designed to represent the maximum amount on which the IRS may impose an income tax. When the trustee makes a discretionary distribution to a beneficiary from an irrevocable trust, the distribution is deemed to consist entirely of DNI, unless the distribution exceeds the trust's total DNI. With respect to the allocation of income taxes between the trust and its beneficiaries:

aa. accumulated income is taxed to the trust and, if added to principal, not taxed again upon distribution to the beneficiaries;

bb. distributed income is taxed to the beneficiaries to the extent that it consists of the trust's DNI, with the trust receiving a corresponding deduction for the income distribution; and

cc. any amount distributed in excess of the trust's DNI will constitute principal and will not be taxed to the trust or to the beneficiary.

c. When a trustee decants all the assets of an existing trust to a new trust, the new and existing trusts should be treated as the same trust for income tax purposes. *See* Priv. Ltr. Rul. 200736002 (Oct. 26, 2007).

i. Based on this "same trust theory," decanting should be viewed as a trust modification, and not the creation of an entirely new trust. *See, e.g.,* Priv. Ltr. Rul. 200723014 (Feb. 5, 2007) (ruling that a trust division would not cause a distribution under Code §§ 661 or 662); Priv. Ltr. Rul. 200607015 (Nov. 5, 2005) (ruling that a transfer of assets

from existing trusts to new trusts for purposes of changing governing law and modifying administrative provisions would not cause the existing trusts, the new trusts, or the beneficiaries to realize income, gain, or loss under Code §§ 661 or 662).

- ii. The old and new trusts should be treated as the same trust regardless of whether the new trust obtains a new taxpayer identification number.
- d. Importantly, non-recognition should still apply even if the tax law treats the old and new trusts as separate entities.
 - i. Under this line of reasoning, the old trust would terminate and its DNI, including any capital gains for the year, would pour into the new trust. *See* Treas. Reg. § 1.643(a)-3(e), Example (7).
 - ii. In addition, all of the old trust's unused loss carryovers and excess deductions on termination would be transferred into the new trust. This is because under Code § 642(h)(2), the new trust should be considered the beneficiary succeeding to the property of the old trust.
 - iii. Under the separate trust theory, the new trust would receive taxable income under Code § 662(a) to the extent of the old trust's DNI, and the old trust would be entitled to a corresponding deduction under Code § 661(a). While this should not produce a taxable event when viewed in the aggregate, it is important to consider any state income (or property) tax issues that may arise when transferring assets from one trust to another.

3. Income Tax Consequences to the Beneficiaries.

- a. In any trust decanting, the beneficiaries should be primarily concerned with two income tax issues:
 - i. whether the mere act of decanting, which arguably involves the exchange of one property interest for another, causes the trust beneficiaries to realize gain or loss; and
 - ii. whether a trustee's decanting of encumbered property or other negative basis assets causes the trust beneficiaries to realize a taxable gain.

- b. The general rule is that decanting should not cause the trust beneficiaries to realize any gain or loss unless the trustee's appointment (i) converts a grantor trust to a non-grantor trust and (ii) the assets appointed include negative basis assets.
- c. The Beneficiary Gain Concern (Cottage Savings).
 - i. The mere act of decanting should constitute a non-recognition event.
 - ii. The basic rule under Code § 1001 is that a taxpayer only realizes gain or loss when the taxpayer (aa) sells or disposes of property (bb) in exchange for property that is materially different from the property the taxpayer sold or disposed. *See* Treas. Reg. § 1.1001-1(a).
 - iii. In the well-cited case of Cottage Savings Ass'n v. Comm'r., 499 U.S. 554 (1991), the Supreme Court considered whether a financial institution realized a loss when it exchanged its interests in one set of residential mortgage loans for another institution's interests in a different set of residential mortgage loans. The Court found that under Code § 1001(a) and Treas. Reg. § 1.1001-1(a), a taxpayer realized gain or loss whenever it received property that was "materially different" from the property the taxpayer exchanged. Two items of property are materially different, the Court explained, if their owners possess legal entitlements that differ in kind or extent. Although the financial regulatory agency found the two sets of mortgage interests substantially identical, the Court held the mortgages to be materially different because they were made to different borrowers and secured by different pieces of real property. As a consequence, the exchange of mortgage interests between the institutions constituted a realization event.
 - iv. Following the Court's interpretation of Code § 1001(a) in Cottage Savings, the question with respect to decanting was whether the IRS would consider a trustee's distribution in further trust to be a realization event because each beneficiary's new interest was materially different from his or her old interest. *See, e.g.*, Priv. Ltr. Rul. 199951028 (Sept. 28, 1999); *see also* Priv. Ltr. Rul. 200231011 (Aug. 2, 2002) (finding a taxable exchange when a settlement provided a beneficiary with a unitrust interest instead of an annuity interest); Priv. Ltr. Rul. 200736002 (specifying that

a beneficiary could realize a taxable gain if his interests in a new trust created under a pro rata trust division were materially different than his interests in the old trust).

- v. In Priv. Ltr. Rul. 200743022 (Oct. 26, 2007), however, the Service confirmed that decanting would not result in a beneficiary's realization of income or loss so long as the decanting was authorized by the trust instrument or governing state law. The Service reasoned that the taxpayer's proposed decanting would not involve a taxable exchange of property because there would only be a transfer of assets from one trust to another, and not a reciprocal exchange involving the legal rights and entitlements of the trust beneficiaries. *Id.*
 - aa. Stated another way, if a beneficiary's trust interest is subject to the trustee's discretion to decant—either under the terms of the trust or applicable state law—then there is no change in the quality of the beneficiary's interest (i.e., it is not materially different under Cottage Savings) when the trustee actually exercises that discretion. This is because the beneficiary's interest was always subject to the trustee's decanting authority. *Cf.* Treas. Reg. § 1.1001-1(h) (prescribing similar rules for the severance of trusts); Priv. Ltr. Rul. 200810019 (Mar. 7, 2008) (finding no adverse income tax consequences when income interest converted to unitrust interest under governing state law); Priv. Ltr. Rul. 200010037 (Dec. 13, 1999) (ruling that a taxable exchange would not occur when a trustee partitioned a trust pursuant to partition authority granted in the trust instrument).
 - bb. The Service recently confirmed its view with respect to Cottage Savings gain and decanting in Priv. Ltr. Rul. 201134017 (May 26, 2011). In that ruling, the special trustee of a trust proposed to decant the trust assets to a new trust in order to ease the administration of various family entities. Under the terms of the original trust, the special trustee was expressly authorized to appoint income and principal, either outright or in trust, to or among any of the grantor's descendants or their spouses. The Service ruled that the proposed decanting would not result in any beneficiary recognizing income under

Code §§ 61 or 1001. Because the transfer of assets would be made pursuant to an express decanting authority, the Service reasoned, there would be no “exchange” within the meaning of Cottage Savings and, therefore, it was unnecessary to analyze the “materially different” standard. With no taxable exchange, the Service also ruled that the basis and holding period of each asset in the new trust would be the same as the basis and holding period of the asset in the old trust under Code §§ 1015 and 1223, respectively.

- cc. Importantly, however, if decanting is not authorized by the terms of the trust or local law, the Service could persuasively argue that a beneficiary’s consent to a decanting constitutes a recognition event. *See, e.g.*, Rev. Rul. 69-486, 1969-2 C.B. 159 (finding that a non-pro-rata trust distribution will be treated as a taxable exchange if the trustee lacked authority to make such a distribution). Even if decanting were authorized by the trust instrument or state statute, the Service could argue that requiring beneficiary consent connotes a change in the quality of the beneficiary’s interest, thereby resulting in a recognition event. For this reason, many states have drafted their decanting statutes to require only beneficiary notice, and not consent. *See, e.g.*, FLA. STAT. § 736.04117(4); IND. CODE § 30-4-3-36(e); N.C. GEN. STAT. § 36C-8-816.1(f); S.D. CODIFIED LAWS § 55-2-18.

c. The Negative Basis Concern (Crane).

- i. The negative basis concern arises when the trustee decants:
 - aa. property with debt in excess of basis; or
 - bb. an LLC or partnership interest with a negative capital account.
- ii. In the landmark case of Crane v. Comm’r., 331 U.S. 1 (1947), the Supreme Court considered whether the amount of gain realized under Code § 1001 included any liability discharged by the taxpayer’s transfer of property subject to a non-recourse debt. The Court found that a taxpayer’s amount realized from a sale or disposition of property

under Code § 1001 includes cash and other property received in the transaction, as well as the amount of liabilities from which the taxpayer is discharged as a result of the sale or disposition. *See also* Treas. Reg. § 1.1001-2(a). In other words, when a transferee assumes the transferor's liability in connection with a sale or exchange, the transferor must include in his amount realized the liability assumed by the transferee.

- iii. Similar to the holding in Crane, Code § 752(d) provides that when a transferor sells or exchanges a partnership interest, the transferor must treat any partnership liabilities transferred in the same manner as liabilities transferred in connection with the sale or exchange of any other property. *See also* Treas. Reg. § 1.1001-2(a)(4)(v) (providing that upon the sale or exchange of a partnership interest, the transferor's share of partnership liabilities are treated as liabilities in which the transferor was discharged).
- iv. Despite the Court's holding in Crane and the plain language of Code § 752(d), there is some argument that beneficiaries should not recognize gain under Code § 643(e). Code § 643(e) provides that in the case of trust distributions of property, the beneficiary will receive a carryover basis in the property received, subject to the trustee's election to recognize any gain on the distribution. The question is whether Code § 643(e) overrides the gain recognition principles of Crane and Code §§ 752(d) and 1001.
 - aa. On the one hand, because there is no authority directly on point, a trustee could use its fiduciary discretion to comply literally with the terms of Code § 643(e) and not make an election to recognize gain on the distribution of trust property to a beneficiary.
 - bb. On the other hand, the plain language of Code § 643(e)(1) provides that the beneficiary's basis must be adjusted for any gain or loss recognized by the trust on the distribution. Because the trust could recognize a gain by discharging its liabilities, it is arguable that the gain should be recognized and the beneficiary's basis should be increased in accordance with Code § 643(e)(1).

- v. The interplay between Code § 643(e) and Code §§ 752(d) and 1001 causes the tax consequences of decanting negative basis property (i.e., whether the beneficiaries recognize any gain) to be uncertain in the following situations:
 - aa. the decanting of negative basis assets from a complex trust to a complex trust;
 - bb. the decanting of negative basis assets from a complex trust to a grantor trust; and
 - cc. the decanting of negative basis assets from a non-grantor trust to a grantor trust (*but see* Chief Counsel Advice 2009 23024 (finding no income tax consequences upon the conversion from a non-grantor trust to a grantor trust, albeit without negative basis assets)).

- vi. The law is certain, however, with respect to the following issues:
 - aa. Gain will not be recognized on the decanting of negative basis assets from a grantor trust to another grantor trust. Non-recognition is based on the bedrock principle that transactions between two grantor trusts (with the same grantor) are disregarded for income tax purposes. *See* Rev. Rul. 85-13, 1985-1 C.B. 184.
 - bb. Gain will be recognized on the decanting of negative basis assets from a grantor trust to a non-grantor trust. When grantor trust status terminates, the grantor is treated as having transferred the assets to the trust and the grantor is deemed to realize an amount equal to any liabilities held as part of the trust property. *See* Treas. Reg. § 1.1001-2(c), Example (5) (explaining the tax consequences associated with the termination of grantor trust status for a trust holding a partnership interest with a negative capital account); *see also* Madorin v. Comm’r., 84 T.C. 667 (1985). Code § 643(e) does not offer any protection in this context because it does not apply to grantor trusts (Subpart E of Subchapter J).

4. Foreign Trusts.

a. Decanting from Domestic Trust to Foreign Trust.

- i. Code § 684 generally treats the transfer of assets to a foreign trust as a recognition event.
- ii. Despite this, if the trustee of a domestic trust decants all of the trust assets to a foreign trust, the domestic trust will be entitled to a deduction equal to the amount of any income generated by the decanting. *See* Code § 661(a).
- iii. In addition, if the foreign trust receiving the decanted assets is a grantor trust with respect to the transferor, Code § 684(b) provides that the transfer will be a non-recognition event. The gain, if any, will be recognized once the grantor trust status of the foreign trust terminates. *See* Treas. Reg. § 1.684-2(e)(1).

b. Decanting from Foreign Trust to Domestic Trust.

- i. When decanting the assets of a foreign trust, the transferor may carry out the foreign trust's undistributed net income (UNI) and trigger the throwback rules of Subchapter J.
- ii. A foreign trust decanting is also likely to necessitate a reporting obligation pursuant to Code § 6048.
- iii. And although the same trust theory arguably applies when a foreign trust is domesticated via decanting, the Service may assert, if the trust changes are substantial, that the domestic trust is a new trust for income tax purposes.

D. Estate and Gift Taxes.

1. General Rules.

- a. Decanting will not cause a beneficiary to make a taxable gift to the trust unless:
 - i. the trustee exercising the discretion to decant is also a trust beneficiary;
 - ii. the trustee's ability to decant is contingent on obtaining beneficiary consent; or

- iii. the Delaware tax trap applies.
- b. Decanting will not result in estate inclusion for federal estate tax purposes unless:
 - i. the new trust gives a beneficiary a general power of appointment over trust property that would render such property includible in the beneficiary's gross estate under Code § 2041(a)(2);
 - ii. the decanting is treated as an incomplete gift pursuant to a beneficiary's testamentary limited power of appointment and such gift becomes complete at the beneficiary's death;
 - iii. a grantor's or beneficiary's involvement in the decanting process shows that the grantor or beneficiary had implied control over the trust assets within the meaning of Code §§ 2036 or 2038; or
 - iv. the Delaware tax trap applies.

2. Beneficiaries Who Also Serve as Trustees.

- a. Pursuant to Treas. Reg. § 25.2511-1(g)(2), if a trustee is also a beneficiary, the trustee's distribution of trust assets will constitute a taxable gift unless such distribution is limited by an ascertainable standard relating to health, education, maintenance, or support.
- b. While caution must be taken when decanting with a beneficiary who also serves as a trustee, as a practical matter, many state statutes limit a trustee's ability to make distributions to an ascertainable standard whenever the trustee also has a beneficial interest in the trust.

3. Beneficiary Consent.

- a. The Service could argue that when a beneficiary consents to a decanting, the beneficiary has exercised sufficient control over the trust assets to characterize such consent as a taxable gift.
 - i. In addition, the Service could extend this line of reasoning to beneficiary acquiescence. The Service could argue, for example, that if a beneficiary had the right to object to a trust decanting, but did not, then the beneficiary's failure to exercise her right to object constituted a gratuitous transfer.

- ii. Although beneficiary consent could very well constitute a gift under appropriate circumstances, beneficiary acquiescence should not. This is because taxable gifts require the transferor to make a voluntary transfer. *See Harris v. Comm’r*, 340 U.S. 106 (1958); *Estate of DiMarco v. Comm’r*, 87 T.C. 653 (1986), acq. 1990-2 C.B.1. When a trustee exercises the power to decant in the trustee’s sole discretion and without beneficiary intervention, the beneficiary’s inaction, as a factual matter, should not constitute a voluntary transfer capable of triggering the gift tax.
 - b. In any event, the Service is unlikely to assert that beneficiary consent or acquiescence causes a beneficiary to make a taxable gift unless the decanting:
 - i. shifts a beneficial interest in the trust; or
 - ii. delays the vesting of a beneficiary’s property interest in the trust.
 - c. In Priv. Ltr. Rul. 201134017 (May 26, 2011), the Service confirmed that decanting will not constitute a taxable gift when there is no change in the beneficial interests in the trust. Ruling on the gift tax consequences of a proposed decanting from one trust to a new trust, the Service found that there will be no taxable gift when “all beneficial interests in trust assets will be the same before and after the proposed transfer.”
 - d. With respect to a delay in vesting, the Service could advance this argument if the original trust provided that a beneficiary would receive trust principal at a specified age or ages. If the beneficiary consented or acquiesced to decanting the assets to a new trust that extended or eliminated the ages at which the beneficiary was entitled to principal, then the Service could treat the beneficiary’s (in)action as a release of a general power of appointment pursuant to Code § 2514(b). Again, the Service’s gift argument would be much stronger if the trustee also had a beneficial interest in the trust or if the decanting required beneficiary consent.
- 4. Power to Remove and Replace Independent Trustees. Generally, if a trust beneficiary has the power to remove and replace independent trustees, such power will not result in estate inclusion under Code §§ 2036 or 2038, and will not constitute a general power of appointment under Code §§ 2041 and 2514.

- a. Rev. Rul. 95-58, 1995-2 C.B. 191 provides that a decedent's or a grantor's reservation of the right to remove a trustee and appoint an individual or corporate trustee who is not related or subordinate within the meaning of Code § 672(c) will not cause estate inclusion under Code §§ 2036 or 2038 due to a retention of dominion or control. *See also Estate of Vak v. Comm'r*, 973 F.2d 1409 (8th Cir. 1992).
- b. In Priv. Ltr. Rul. 201134017 (May 26, 2011), the Service applied Rev. Rul. 95-58 to a proposed decanting in which, under the terms of the new trust, the beneficiary would possess the power to remove and replace a "special trustee." The new trust prohibited the special trustee from making distributions to or for the benefit of the special trustee, his creditors, the creditors of his estate, or any trust in which the special trustee has a beneficial interest. The new trust also prohibited any special trustee who was a related or subordinate party under Code § 672(c) from making distributions to or for the benefit of any beneficiary who participated in appointing the special trustee. If, at any time, no special trustee was able to make distributions due to the above limitations, an independent special trustee would be appointed. Under these facts, the Service found that the trust beneficiary's ability to remove and replace special trustees would not constitute general powers of appointment under Code §§ 2041 and 2514.

5. Delaware Tax Trap.

- a. Code § 2514(d), commonly referred to as the "Delaware tax trap," provides that the exercise of a power of appointment will be considered a transfer for transfer tax purposes if:
 - i. the powerholder, in exercising the power of appointment, grants another person the right to exercise a power of appointment; and
 - ii. under applicable local law, the new powerholder can exercise his or her power of appointment to postpone the vesting of any trust interest or suspend the absolute ownership or power of alienation of such property for a period ascertainable without regard to the date that the first power was created.
- b. Importantly, the Delaware tax trap applies whether the second powerholder exercises the power in the prohibited manner or not. In other words, if the second powerholder has the mere potential to limit the ownership rights of trust property beyond the time period

that such property was limited by the terms of the original trust instrument, then the first powerholder's appointment of the property will result in a taxable gift.

- c. If a person exercises a power of appointment as provided in Code § 2514(d) during his or her lifetime, then such exercise is treated as a taxable gift. If the person exercises his or her power at death, then such exercise will result in estate inclusion.
- d. The Delaware tax trap should not apply to a trust decanting when:
 - i. prohibited by a state's decanting statute, *see, e.g.*, N.C. GEN. STAT. § 36C-8-816.1(c)(8), (e)(2);
 - ii. an independent trustee with no beneficial interest in the trust initiates the decanting; or
 - iii. the second trust includes a provision that prohibits the exercise of a power of appointment in such a manner that extends the vesting period or suspends the ownership or alienation of any interest in the first trust.

6. Limiting Taxable Gifts. If the risks of a gift are particularly acute, trustees and their advisors may insulate themselves from gift tax liability by:

- a. ensuring that an independent trustee who has no beneficial interest in the trust is the only fiduciary who exercises the authority to decant;
- b. limiting the decanting to administrative changes only, thereby avoiding the shifting of beneficial interests in trust and the postponement of vesting periods in trust property; and/or
- c. giving the beneficiary a testamentary limited power of appointment.

7. Incomplete Gifts. If a beneficiary is given a testamentary limited power of appointment over the assets of the second trust, then any gift (assuming it constitutes a taxable gift) should be rendered incomplete for gift tax purposes. *See* Treas. Reg. § 25.2511-2(b); *see also* Priv. Ltr. Rul. 200715005 (Apr. 13, 2007). If the beneficiary later releases this power of appointment, the gift will be complete. If the beneficiary does not release the power during his or her lifetime, then the property will be included in the beneficiary's gross estate under Code §§ 2036 and 2038.

8. Value of Taxable Gifts. Interestingly, if a decanting does result in a taxable gift and trust distributions are discretionary, then the amount of the gift is a factual issue that cannot be determined by use of the tables contained in Code § 2512. *See* Priv. Ltr. Rul. 200745015 (June 6, 2007).

E. GST Tax.

1. Background.

- a. Generation-skipping transfers made from a non-exempt trust will be subject to GST tax. *See* Code § 2601.
- b. Trusts are generally exempt from GST tax if:
 - i. they became irrevocable on or before September 25, 1985, the effective date of the GST statute, or are otherwise subject to certain transition rules associated with the GST effective date regulations (referred to collectively as “grandfathered trusts”), *see generally* Treas. Reg. 26.2601-1(b); or
 - ii. for trusts that were not irrevocable on or before September 25, 1985, the transferor allocated GST exemption to the trust (referred to collectively as “non-grandfathered trusts”).
- c. Treas. Reg. § 26.2601-1(b)(1) provides that a grandfathered trust will lose its GST exempt status if an actual or constructive addition is made to the trust after the effective date.
- d. Because decanting could be construed as an addition or other modification that causes a trust to lose its GST exempt status, it is important to understand the treatment of decanting under the GST regulations.

2. Special Powers of Appointment under the GST Regulations. The GST regulations do not treat decanting as the exercise of a special power of appointment.

- a. As discussed above, practitioners can view decanting, in some circumstances, as the trustee’s exercise of a special power of appointment. Several states have adopted this view and have explicitly referred to the decanting authority as the power to exercise a special power of appointment over trust assets. *See, e.g.*, ALASKA STAT. § 13.36.157(c); DEL. CODE ANN. tit. 12, § 3528(c); FLA. STAT. § 736.04117(3).

- b. The GST regulations, however, do not characterize decanting as a special power of appointment. The GST regulations relevant to a trustee's decanting authority are organized as follows:
 - i. Treas. Reg. § 26.2601-1(b)(1)(v)(B) determines whether the post-effective date exercise of a power of appointment over the assets of a grandfathered trust causes the trust to lose its GST exempt status;
 - ii. Treas. Reg. § 26.2601-1(b)(4)(i)(A) concerns the effect of the trustee's distribution of trust principal from an exempt trust to a new or continuing trust; and
 - iii. Treas. Reg. § 26.2601-1(b)(4)(i)(D)(1) deals with the trustee's modification of the governing instrument of an exempt trust.
 - c. With respect to powers of appointment, the Regulations provide that the exercise of a power of appointment over the assets of a grandfathered trust will not cause the trust to lose its GST exempt status unless the exercise violates the permissible perpetuities period under federal law. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(B).
 - i. The federal perpetuities period will not be violated by the exercise of a special power of appointment if the vesting, absolute ownership, or power of alienation of an interest in property is not suspended or delayed beyond:
 - aa. some life in being at the date of the creation of the grandfathered trust plus 21 years; or
 - bb. ninety years from the date of the creation of the grandfathered trust. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2).
 - ii. Importantly, the mere release or lapse of a power of appointment after the effective date will not taint the GST exempt status of the grandfathered trust. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(B)(1).
3. Preserving GST Exempt Status for Grandfathered Trusts.
- a. Decanting will not cause a grandfathered trust to lose its GST exempt status if the decanting satisfies either the discretionary distribution safe harbor of Treas. Reg. § 26.2601-1(b)(4)(i)(A) or

the trust modification safe harbor of Treas. Reg. § 26.2601-1(b)(4)(i)(D).

- b. Under the discretionary distribution safe harbor of Treas. Reg. § 26.2601-1(b)(4)(i)(A), a decanting will not taint the GST exempt status of a grandfathered trust if the following conditions are satisfied:
 - i. when the grandfathered trust became irrevocable, either the terms of the trust instrument or local law (i.e., state statute or common law) authorized the trustee to make distributions to a new trust;
 - ii. neither beneficiary consent nor court approval is required for the trustee to exercise his discretionary authority; and
 - iii. the new trust will not suspend or delay the vesting, absolute ownership, or power of alienation of an interest in trust beyond the permissible perpetuities period under federal law.
- c. In the event a decanting will not satisfy the discretionary distribution safe harbor, the trust modification safe harbor of Treas. Reg. § 26.2601-1(b)(4)(i)(D) acts as a catch-all. The trust modification safe harbor provides that a decanting will not taint the GST exempt status of a grandfathered trust if the following conditions are satisfied:
 - i. the decanting will not shift a beneficial interest in the trust to a beneficiary occupying a lower generation than the person or persons holding the beneficial interest under the terms of the original trust; and
 - ii. the decanting will not extend the time for vesting of any beneficial interest in the trust beyond the period provided in the original trust.

4. Application of the Discretionary Distribution Safe Harbor and the Trust Modification Safe Harbor to Grandfathered Trusts.

- a. If a decanting involves only administrative changes, there should be no loss of GST exempt status. *See* Priv. Ltr. Rul. 200607015 (Nov. 4, 2005); *see also* Treas. Reg. § 26.2601-1(b)(4)(i)(E), Example (6) (explaining that a trust modification that is merely administrative will not taint GST exempt status even if the modification indirectly increases the benefits available to the

beneficiaries); *cf.* Priv. Ltr. Rul. 9737024 (Sept. 12, 1997) (finding that grandfathered status is preserved when a trust is modified pursuant to a state decanting statute so long as the terms of the new trust do not adversely affect the quality, value, or timing of any beneficial interest in the trust). Under the trust modification safe harbor, this is true regardless of whether state law authorizes the decanting. Decanting for the purposes of making administrative changes, therefore, should not result in any adverse income, gift, estate, or GST tax consequences.

b. State Law Considerations.

i. The first prong of the discretionary distribution safe harbor requires that decanting be authorized under the terms of the trust instrument or applicable state law. Because no state decanting statute was in existence at the time of the GST's effective date in 1985, a trustee must rely on his or her inherent ability under common law to decant the trust assets. This common law reliance should not pose a problem, especially if the trustee had the ability to move the trust situs to Florida, a state that explicitly recognized the common law decanting authority of its trustees. *See Phipps v. Palm Beach Trust Co.*, 142 Fla. 782 (1940).

ii. Unlike the discretionary distribution safe harbor, a decanting will not fail the trust modification safe harbor solely by reason of a beneficiary's consent or a court's approval of the decanting. While these measures may not affect the trust's GST status, they could result in adverse income, gift, or estate tax consequences, as discussed in Parts IV.B. and IV.C., *supra*.

c. Note that a trustee may only extend an interest's vesting period beyond the period prescribed in the original trust if the decanting satisfies the discretionary distribution safe harbor. Even then, the decanting cannot extend the vesting period beyond the federal perpetuities period.

i. A trustee may desire to extend the vesting period, for example, when a beneficiary is scheduled to receive trust principal at a certain age or upon the death of a certain person. When extending the vesting period in these scenarios, it is important to include provisions in the new trust document limiting the vesting period to comply with federal perpetuities period.

- ii. Interestingly, the federal perpetuities period contained in the decanting Regulations (Treas. Reg. § 26.2601-1(b)(4)(i)(A)) prescribes a different starting point than the period contained in the power of appointment Regulations (Treas. Reg. § 26.2601-1(b)(1)(v)(B)). The power of appointment Regulations measure the perpetuities period (the later of 21 years plus some life in being or 90 years) from the date of the creation of the trust, while the decanting Regulations measure the perpetuities period from the date the grandfathered trust became irrevocable.
- d. Like the extension of vesting periods, a trustee may only shift a beneficial interest in trust down generational lines if the decanting meets the requirements of the discretionary distribution safe harbor. Because the trust modification safe harbor only prohibits the shifting of beneficial interests to persons occupying a lower generation, a trustee may still shift beneficial interests up or across generational lines under the trust modification safe harbor.
- e. Treas. Reg. § 26.2601-1(b)(4)(i)(E), Example (2) provides a good example of the interaction between the discretionary distribution and trust modification safe harbors.
 - i. Under the facts of the Example, the grantor established an irrevocable trust for the benefit of the grantor's child "A," A's spouse, and A's issue. When the trust was established, A had two children, "B" and "C." The trust provided for discretionary distributions of income and principal to the beneficiaries. The trust terminated at A's death, with the principal distributed to A's issue, *per stirpes*.
 - ii. Pursuant to a state decanting statute enacted after the creation of the trust, the trustee may appoint the assets to a new trust with either the consent of the beneficiaries or court approval. The trustee did not have the authority to decant under state law prior to the enactment of the decanting statute.
 - iii. The trustee appointed one-half of the principal to a new trust pursuant to the state decanting statute. The terms of the new trust provide income to A for life, with the remainder passing one-half to B or B's issue and one-half to C or C's issue.

- iv. The decanting does not satisfy the discretionary distribution safe harbor because beneficiary consent or court approval is required.
- v. The decanting does satisfy the trust modification safe harbor, however, because it will not shift a beneficial interest in the trust and it will not extend the vesting period beyond the period prescribed in the original trust.
- f. Care should be taken when converting a grandfathered trust from a complex trust to a grantor trust. The Service could argue that the conversion constitutes a shift in the beneficial interest of the trust, resulting in a loss of GST exempt status. This argument is unlikely to succeed, however, as Rev. Rul. 2004-64, 2004-2 C.B. 7, confirms that when a grantor pays the income tax liability attributable to a grantor trust, he has not made a gift to the trust or its beneficiaries. If the payment of income taxes by the grantor is not deemed a transfer under Rev. Rul. 2004-64, then a conversion to grantor trust status, in and of itself, should not shift a beneficial interest in the trust.

5. Preserving GST Exempt Status for Non-Grandfathered Trusts.

- a. Neither the Code nor the Regulations directly address the consequences of decanting the assets of a non-grandfathered trust.
- b. The Service has indicated, however, that the GST Regulations for grandfathered trusts should apply to non-grandfathered trusts. *See* Priv. Ltr. Rul. 201134017 (May 26, 2011) (“At a minimum, a change that would not affect the GST status of a grandfathered trust should similarly not affect the exempt status of such a [non-grandfathered] trust.”); Priv. Ltr. Rul. 200743028 (May 29, 2007); *see also* Priv. Ltr. Rul. 200919008 (May 8, 2008) (confirming that the GST Regulations should apply to non-grantor trusts).
- c. In Priv. Ltr. Rul. 201134017 (May 26, 2011), the Service applied the discretionary distribution safe harbor to a proposed trust decanting of a non-grandfathered trust. In that ruling, the Service considered whether a proposed decanting by a special trustee would cause the trust to lose its GST exempt status. Citing Treas. Reg. § 26.2601-1(b)(4)(i)(E), Example (1), the Service concluded that following the decanting, the new trust would continue to have an inclusion ratio of zero because the decanting satisfied the discretionary distribution safe harbor. The Service specifically found that:

- i. the terms of the original trust expressly authorized the special trustee to decant;
 - ii. neither beneficiary consent nor court approval was required for the special trustee to exercise the decanting authority; and
 - iii. the terms of the new trust would not suspend or delay the vesting, absolute ownership, or power of alienation of an interest in the original trust beyond any life in being at the creation of the original trust plus 21 years.
- d. With more recent trusts, it is possible that a state decanting statute was in existence at the time a transferor allocated GST exemption to the trust. Therefore, assuming the grandfathered GST Regulations apply to such trusts, a trustee could decant the trust assets pursuant to the state's decanting statute without losing GST exempt status and, so long as no beneficiary consent or court approval was required, could shift a beneficial interest down generational lines or extend the vesting period of a trust interest.
- e. Even if the GST Regulations do not apply to non-grandfathered trusts, a non-grandfathered trust is likely to enjoy more liberal rules with respect to the preservation of its GST exempt status.
- i. For one, the policy rationales behind the GST rules for grandfathered and non-grandfathered trusts are different. The GST rules for grandfathered trusts are far more concerned with preventing abuse, while the rules for non-grandfathered trusts are more flexible.
 - ii. In addition, if the grandfathered GST Regulations did not apply, more liberal analogies may be drawn, such as to the rules concerning special powers of appointment, as discussed above. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(B).
 - iii. Some analogy may be drawn, however, to the rules governing the qualified severance of trusts for GST purposes. *See* Treas. Reg. § 26.2642-6. For a good discussion of the intersection between the qualified severance rules and trust decanting, see Diana S.C. Zeydel & Jonathan G. Blattmachr, Tax Effects of Decanting—Obtaining and Preserving the Benefits, 111 J. TAX'N 287 (Nov. 2009).

6. Consequences of Losing GST Exempt Status.

- a. The tax consequences of an IRS determination that a decanting has tainted GST exempt status remain unclear.
- b. Early rulings indicated that the loss of GST exempt status would result in the creation of a new trust with adverse gift tax consequences. *See* Priv. Ltr. Rul. 9421048 (May 27, 1994); Priv. Ltr. Rul. 9448024 (Dec. 2, 1994).
- c. The Service has since retreated from this position, however, and does not regard the loss of GST exempt status as a transaction with immediate gift tax implications. Instead, when a trust loses its GST exempt status, the grantor becomes the transferor for purposes of Chapter 13. *See* Priv. Ltr. Rul. 9522032 (June 2, 1995).
- d. Although there is no authority directly on point, it is unlikely that a loss of GST exempt status will result in all future distributions from the trust being subject to GST tax. Instead, a GST tax should only be imposed when a distribution is made to a person who would have been unable to receive the distribution under the terms of the original trust without being subject to GST tax.
 - i. Under this view, if a grandfathered trust for the benefit of the grantor's grandchild loses its GST exempt status, then future distributions to the grandchild would still be exempt from GST taxation because the grandchild would have received tax-free distributions under the original trust. With the grantor deemed the transferor for purposes of Chapter 13, however, trust distributions to the grantor's great-grandchildren would be subject to GST tax.
 - ii. Given the great uncertainty with respect to the tax implications of losing GST exempt status, practitioners should take great care to preserve a trust's grandfathered or GST exempt status.

VI. STATE DECANTING STATUTES.

A. Overview.

1. New York was the first state to enact a decanting statute in 1992.
2. While there is no substitute for careful consideration of applicable state law, most state decanting statutes follow a similar pattern, which can be best explained by answering the questions outlined in the paragraphs below.

B. Who possesses the authority to decant?

1. As a general matter, it is the trustee who has the ability to decant, and not the grantor or the beneficiaries.
2. Some states place a further limit on who may decant by prohibiting a trustee who also has a beneficial interest in the trust from exercising the decanting authority in certain situations. *See, e.g.*, MO. REV. STAT. § 456.4-419.2(2)(a); N.H. REV. STAT. ANN. § 564-B:4-418(c); S.D. CODIFIED LAWS § 55-2-15(2). These provisions are designed to limit gift tax exposure caused by trustee/beneficiary decanting.
3. The UTDA does not place a limit on who may decant, which may cause adverse tax consequences. Virginia Senate Bill 78 provides for the following definition of authorized fiduciary to address these concerns:

"Authorized fiduciary" means (i) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the income or principal of the first trust to one or more current beneficiaries and that is not (a) a current beneficiary of the first trust or a beneficiary to which the net income or principal of the first trust would be distributed if the first trust were terminated, (b) a trustee of the first trust that may be removed and replaced by a current beneficiary who has the power to remove the existing trustee of the first trust and designate as successor trustee a person that may be a related or subordinate party, as defined in 26 U.S.C. § 672(c), with respect to such current beneficiary, or (c) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the first trust; (ii) a special fiduciary appointed under § 64.2-779.6; or (iii) a special-needs fiduciary under § 64.2-779.10.

C. Under what circumstances may the trustee exercise his or her authority to decant?

1. In order to exercise the decanting authority:

- a. the trustee must have the power to decant under the terms of the trust instrument or applicable state law; and
 - b. the exercise of the decanting authority must be consistent with the discharge of the trustee’s fiduciary duties.
2. Power to decant under the terms of the trust instrument or applicable state law.
- a. As is the case with some newer trusts, the trust instrument may explicitly vest the trustee with decanting authority and outline the procedures by which the trustee may exercise such authority. In these circumstances, the trustee has the authority to decant and the trust instrument will control the method and extent to which the decanting may occur.
 - b. If the trust instrument does not explicitly grant decanting authority, the trustee must look to applicable state law. The decanting statutes of all states determine whether the trustee possesses the ability to decant based on the extent of the trustee’s power of invasion. As explained below, however, some state statutes are more accessible than others in this respect.
 - i. The most stringent state statutes require that a trustee have “absolute discretion” or “absolute power” to invade trust principal before the trustee is granted decanting authority. *See* FLA. STAT. § 736.04117(1)(a); IND. CODE § 30-4-3-36(a); R.I. GEN. LAWS § 18-4-31.
 - ii. The majority of state statutes, however, merely require that a trustee have some authority to invade trust principal. *See, e.g.,* ALASKA STAT. § 13.36.157(a); ARIZ. REV. STAT. ANN. § 14-10819(A); S.D. CODIFIED LAWS § 55-2-15.
 - iii. Texas grants all “authorized trustees” the ability to decant, but distinguishes between authorized trustees with “full discretion” and authorized trustees with “limited discretion.” *See* TEX. PROP. CODE §§ 112.073, 112.074. Authorized trustees with full discretion (*i.e.*, trustees whose ability to distribute principal is not limited by any standard) may decant to trusts with different beneficial and administrative provisions, while authorized trustees with limited discretion (*i.e.*, trustees whose ability to distribute principal is limited by an ascertainable standard) must retain the same beneficial interests and may only decant to trusts with different administrative provisions. *See id.*

- iv. Many statutes do not address the issue of whether a trustee has the power to decant when the trustee's power of invasion is limited to an ascertainable standard relating to health, education, maintenance, or support. Some statutes have addressed this concern on the backend, providing that the terms of the second trust must contain the same or a more restrictive standard of invasion than that contained in the first trust. *See, e.g.*, ALASKA STAT. § 13.36.157(a)(4). North Carolina has addressed this issue on the front end, providing that decanting authority exists in limited circumstances when the trustee's power of invasion is limited by an ascertainable standard. *See* N.C. GEN. STAT. § 36C-8-816(b), (c)(7).
- v. The UTDA uses a bifurcated approach where the trustee can decant a trust where the principal distribution right is limited by an ascertainable standard in fairly limited ways, but has broader authority to decant when the trustee has broad discretion to distribute principal, not limited by an ascertainable standard. *See*, UTDA Sections 11 and 12.

3. Fiduciary Duties.

- a. In addition to holding the power to decant trust assets under the terms of the trust or applicable state statute, the trustee must also determine that the decanting is consistent with the discharge of his or her fiduciary duties. *See, e.g.*, UTDA Section 4.
- b. While the scope of a trustee's fiduciary duties will vary from state to state and trust to trust, a core duty of loyalty transcends individual application. The duty of loyalty requires the trustee to administer the trust solely in the best interests of the beneficiaries. In this sense, the trustee must avoid self-dealing and, where appropriate, remain fair and impartial towards all beneficiaries.
- c. When a decanting involves only administrative changes, the trustee's duty of loyalty should not be seriously implicated.
- d. A decanting could, however, raise duty of loyalty issues when a trustee's discretion shifts beneficial interests in the trust or otherwise exhibits a preference for one individual or class of beneficiary over another. A beneficiary may complain, for instance, because his or her interest in the trust has been reduced. In addition, a living settlor may complain because the decanting

does not comport with his or her desires with respect to the trust administration.

- e. Although it would seem advantageous to obtain a release from all affected beneficiaries or a court order approving the decanting, these measures could have adverse tax consequences, as discussed above. Similarly, if the grantor signs an indemnification agreement, the Service may argue that the decanted trust assets should be included in the grantor's estate because the grantor retained implied control under Code §§ 2036 or 2038.
- f. Proper methods to limit a trustee's liability with respect to a decanting include the use of a receipt and refunding agreement or the inclusion of indemnifying language in the decanted trust agreement.
- g. Because a trustee's fiduciary duties are omnipresent throughout the trust administration, a trustee must always consider the impact a trust decanting would have on his or her duty of loyalty.

D. Which assets of the trust may the trustee decant?

- 1. All states permit the trustee to decant trust principal.
- 2. Many states, however, limit the trustee's decanting authority to trust principal only. *See* ALASKA STAT. § 13.36.157(a); DEL. CODE ANN. tit. 12, § 3528(a); FLA. STAT. ANN. § 736.04117(1)(a); IND. CODE § 30-4-3-36(a); TENN. CODE ANN. § 35-15-816(b)(27)(A). UTDA Section 11 and 12;
- 3. Several states expressly authorize the decanting of both trust income and principal. *See* MO. REV. STAT. § 456.4-419.2(1); NEV. REV. STAT. § 163.556(1); N.C. GEN. STAT. § 36C-8-816.1(b); S.D. CODIFIED LAWS § 55-2-15. The Virginia adoption of the UTDA permits decanting of both trust income and principal.
- 4. The Arizona and New Hampshire statutes do not distinguish between trust income and principal. *See* ARIZ. REV. STAT. ANN. § 14-10819(A); N.H. REV. STAT. ANN. § 564-B:4-418(a).
- 5. The Texas statute defines principal to include income of the trust that is not currently required to be distributed. *See* TEX. PROP. CODE § 112.071(8).

- E. Must the trustee decant the assets to a separate trust instrument?
1. Some statutes require that the decanted assets be transferred to another trust established by separate trust agreement. *See, e.g.*, S.D. CODIFIED LAWS § 55-2-15; TENN. CODE ANN. § 35-15-816(b)(27)(A).
 2. Other statutes, however, permit the trustee to establish a new trust under the original trust instrument. *See, e.g.*, FLA. STAT. ANN. § 736.04117(1)(a); N.C. GEN. STAT. § 36C-8-816.1(a)(3); IND. CODE § 30-4-3-36(a). *See also*, UTDA Section 10 on formalities of decanting. The Virginia version of the UTDA acknowledges a restatement of the existing trust.
- F. Who are the permissible appointees of the decanted trust?
1. As a general matter, all states require that the second trust name at least some of the beneficiaries named in the original trust. While this generally prohibits adding to the class of beneficiaries, it does not prevent the removal of a beneficiary.
 2. Older decanting statutes define permissible appointees to include those persons who are the “proper objects of the exercise of the power.” *See* DEL. CODE ANN. tit. 12, § 3528(a)(1); TENN. CODE ANN. § 35-15-816(27)(A)(ii). Because the term “proper objects” is not statutorily defined, there is some question as to whether the term includes future or contingent beneficiaries, in addition to current permissible beneficiaries. Most commentators agree that future and contingent beneficiaries are the proper objects of the trustee’s decanting power under older state statutes.
 3. More recent decanting statutes define the class of permissible appointees in terms of “beneficiaries,” instead of proper objects. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10819(A)(3); IND. CODE § 30-4-3-36(a)(1). Some statutes address the future beneficiary question by distinguishing between “current beneficiaries” and “other beneficiaries.” *See, e.g.*, N.C. GEN. STAT. § 36C-8-816.1(a); S.D. CODIFIED LAWS § 55-2-15(1). Texas refers to “current beneficiaries,” “presumptive remainder beneficiaries,” and “successor beneficiaries.” *See* TEX. PROP. CODE § 112.071
 4. Notably, although most statutes limit the class of permissible appointees, it may be possible to add to the class of beneficiaries by giving a beneficiary a limited or general power of appointment in the second trust. Such strategy is expressly contemplated by the Delaware and Nevada statutes. DEL. CODE ANN. tit 12, § 3528(a); NEV. REV. STAT. § 163.556(5)(a).
 5. As is the case with the tax consequences of decanting, under any state statutory regime, shifting beneficial interests through decanting—either

directly or indirectly through power of appointment—is a risky and, in some cases, a prohibited endeavor.

G. Are there any limitations on a trustee’s authority to decant?

1. Many states have placed limitations on a trustee’s decanting authority to shield the decanting from adverse tax consequences and to protect the rights of trust beneficiaries. *See*, UTDA Sections 15 and 19.
2. Acceleration of remainder interests.
 - a. With the exception of Missouri and South Dakota, all states prohibit the acceleration of a remainderman’s interest to a current right to receive distributions from the trust. Missouri’s and South Dakota’s statutes, in fact, expressly permit the acceleration of remainder interests. *See* MO. REV. STAT. § 456.4-419.2(1); S.D. CODIFIED LAWS § 55-2-15(1).
 - b. Most state statutes prohibit the acceleration of remainder interests by implication. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3528(a)(1); TENN. CODE ANN. § 35-15-816(b)(27)(A)(ii).
3. Distribution standard of second trust.
 - a. Some states require the distribution standard of the second trust to be at least as restrictive as the distribution standard in the first trust. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10819(A)(4); S.D. CODIFIED LAWS § 55-2-15(2)(b).
 - b. The general purpose of these provisions is to preserve the settlor’s intent with respect to discretionary distributions from the trust.
4. Reduction of income interests.
 - a. Almost every state decanting statute prohibits a trustee’s decanting if it would reduce a beneficiary’s fixed income interest in the trust. *See, e.g.*, ALASKA STAT. § 13.36.157(a)(1).
 - b. More modern decanting statutes also prohibit decanting if it would result in the reduction of a beneficiary’s fixed annuity or unitrust interest. *See, e.g.*, FLA. STAT. ANN. § 736.04117(1)(a)(2); N.H. REV. STAT. ANN. § 564-B:418(b)(2); TEX. PROP. CODE § 112.085(1).
 - c. The Missouri and Texas statutes provide that decanting cannot reduce the income interest of any Qualified Subchapter S Trust or

Electing Small Business Trust. *See* MO. REV. STAT. § 456.4-419.2(5)(d); TEX. PROP. CODE 112.086(c).

- d. Texas also includes a provision designed to promote compliance with the minimum distribution rules of Code § 401(a)(9). *See* TEX. PROP. CODE § 112.086(d).

5. Tax savings provisions.

- a. Another trend in recent statutes is to include tax savings provisions that are designed to prevent decanting when it would otherwise produce unintended and adverse tax consequences.
- b. Most state statutes include a perpetuities savings provision designed to avoid a violation of the state's rule against perpetuities. *See, e.g.*, FLA. STAT. ANN. § 736.04117(3); NY EST. POWERS & TRUSTS § 10-6.6(f); TENN. CODE ANN. § 35-15-816(b)(27)(C); TEX. PROP. CODE § 112.085(6).
- c. Some statutes also limit a trustee's decanting authority when the first trust qualifies for the marital or charitable deduction for federal or state income, gift, or estate tax purposes, and the decanted trust would risk or forfeit such marital or charitable deduction. *See, e.g.*, MO. REV. STAT. § 456.4-419.2(5); NEV. REV. STAT. § 163.556(2)(c); N.H. REV. STAT. ANN. § 564-B:418(b)(3).
- d. Other statutes limit a trustee's decanting authority when the trust assets are subject to a beneficiary's presently exercisable right of withdrawal, such as a *Crummey* right or a "hanging" 5 X 5 power. *See, e.g.*, NEV. REV. STAT. § 163.556(2)(d); N.H. REV. STAT. ANN. § 564-B:418(b)(4). These provisions are designed to prevent beneficiaries from making a taxable gift to the trust upon the lapse of a withdrawal right.

H. What are the procedural requirements for decanting?

- 1. Most states require an appointment or decanting document that is:
 - a. in writing;
 - b. signed and acknowledged by the trustees; and
 - c. kept with the original trust records. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3528(b); TEX. PROP. CODE § 112.075.

2. Some states also impose an additional requirement that the trustees provide notice of the decanting to the beneficiaries. *See, e.g.*, FLA. STAT. ANN. § 736.04117(4); INDIANA CODE § 30-4-3-36(e); MO. REV. STAT. § 45.4-419.3; S.D. CODIFIED LAWS § 55-2-18; TEX. PROP. CODE § 112.074.
3. Notably, the Arizona statute does not list the procedures a trustee must follow to decant a trust.
4. The UTDA contains robust provisions and protections relating to beneficiary notice and representation. *See*, UTDA Sections 7 and 8.

I. Is beneficiary consent or court approval required to decant a trust?

1. Due in large part to the tax consequences associated with requiring beneficiary consent or court approval, no state statute requires the trustee to obtain beneficiary consent or court approval prior to decanting a trust.
2. Some states, however, do require the trustees to notify the beneficiaries of the decanting. *See, e.g.*, FLA. STAT. ANN. § 736.04117(4); IND. CODE § 30-4-3-36(e); S.D. CODIFIED LAWS § 55-2-18; TEX. PROP. CODE § 112.074.
3. In addition, some states also permit a trustee or beneficiary to seek court approval for a decanting. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10819(D); NEV. REV. STAT. § 163.556(4); UTDA Section 9.
4. Notably, Nevada requires beneficiary consent if property that is designated for one beneficiary under the terms of the original trust will no longer be designated for that beneficiary under the terms of the decanted trust. *See* NEV. REV. STAT. § 163.556(2)(e).

J. What other provisions are typically contained in a state's decanting statute?

1. Many statutes provide that a trustee's exercise of a decanting authority is akin to the exercise of a special power of appointment in a fiduciary capacity. *See, e.g.*, ALASKA STAT. § 13.36.157(c); ARIZ. REV. STAT. ANN. § 14-10819(C); DEL. CODE ANN. tit. 12, § 3528(c); FLA. STAT. ANN. § 736.04117(3); IND. CODE § 30-4-3-36(d).
2. Most state statutes provide that the decanting authority vested in the trustee by statute is in addition to, and not in place of, the powers and authority granted to the trustee by common law and the terms of the trust instrument. *See, e.g.*, FLA. STAT. ANN. § 736.04117(7); IND. CODE § 30-4-3-36(h).
3. More recent statutes have clarified that a trustee's decanting authority is not jeopardized by a spendthrift provision in the original trust agreement

or a provision that prohibits the settlor from amending or revoking the trust. *See, e.g.*, IND. CODE § 30-4-3-36(f); MO. REV. STAT. § 456.4-419.2(7); N.H. REV. STAT. ANN. § 564-B:418(g), (h); TEX. PROP. CODE § 112.084(b).

4. Several statutes also clarify that the trustee's exercise of the decanting authority is voluntary and does not impose any additional duty or obligation on the trustee. *See, e.g.*, FLA. STAT. ANN. § 736.04117(6); N.H. REV. STAT. ANN. § 564-B:418(f); TEX. PROP. CODE § 112.083(a); UTDA Section 15.
5. The Virginia statute provides that a second trust that receives assets from a trust subject to the requirement for filing accountings with the commissioner of accounts will continue to be subject to this requirement.
6. The UTDA includes robust provisions related to the protection of charitable interests. *See*, UTDA Section 14.
7. The UTDA addresses later discovered property and situations where property that is payable to the first trust after it has been decanted to a second trust. *See*, UTDA Section 26.
8. The UTDA prohibits a trustee from decanting to a second trust to increase its compensation, reduce its liability, or change the mechanism for its removal and replacement without the consent of the beneficiaries. *See*, UTDA Section 16, 17, and 18.
9. The UTDA specifically addresses decanting for special needs trusts. *See*, UTDA Section 13.

K. Things Virginia Changed in the Uniform Act.

1. The power to decant can be exercised by any trustee (interested or disinterested). Because of the bifurcated nature where broader powers are afforded to a trust with broad distributive discretion, the thought is that only a disinterested trustee would possess such a power and therefore it is permissible to allow any trustee to act. Virginia curtailed this in its statute and only allows a disinterested trustee to act. *See* Virginia Code Section 64.2-701 definition of "authorized fiduciary."
2. In cases where the trustee only has limited distributive discretion, it would nevertheless be helpful, for tax planning purposes, to be able to add or remove a general power of appointment. This was added to the Virginia statute. This is less of a concern because the trustee is always a disinterested trustee. *See* Virginia Code Section 64.2-779.16.C.

3. In cases where the trustee only has limited distributive discretion, there are situations where it may be helpful to postpone an outright distribution to a beneficiary who may be receiving assets at an inopportune time. The Virginia statute permits deferment of an outright distribution provided that the assets are held in trust solely for the beneficiary, are only distributed to the beneficiary during their lifetime, and they possess a general power of appointment over the decanted assets if they die when the assets are in trust. See Virginia Code Section 64.2-779.9.C.
- L. Nuances. Again, although all of the state decanting statutes follow a similar pattern, each statute contains its own nuances and unique procedures. Consequently, a trustee, in addition to weighing other considerations, should carefully review the appropriate statutory language to ensure that the trustee's exercise of the decanting authority complies with the applicable statutory requirements. Additionally, because decanting can be accomplished through a power contained within the trust instrument, the trust instrument itself may prescribe unique decanting requirements or procedures.

VII. CONCLUSION.

A. A Change, or At Least a Clarification, Is Coming.

1. Although decanting is by no means a new phenomenon, its popularity has grown by leaps and bounds in recent years. As more and more states adopt decanting statutes, more practitioners are beginning to view irrevocable trusts as a starting, instead of the end, point.
2. Moreover, the Service's recent request for comments signals that authoritative decanting Regulations or similar guidance may be forthcoming.
3. In any event, with many trustees and beneficiaries willing to push the decanting boundaries in pursuit of more favorable trust benefits, it only seems a matter of time before more definitive guidance is warranted.

B. Advice to Practitioners and Trustees.

1. It is important to remember that decanting is just one tool in a practitioner's toolbox. Irrevocable trusts can be modified in other ways, such as through a trust modification under the Uniform Trust Code or through other judicial or non-judicial settlement procedures.
2. If appropriate, speculation that the Service may soon issue guidance is no reason to delay when a trust decanting would otherwise be in the best interests of the beneficiaries. Practitioners can take measures to manage

trustee and institutional risk, and vocal beneficiaries are unlikely to wait if their current trust arrangement is not to their liking.

3. A trustee's first step in the decanting process is to determine that he or she has the authority to decant, either under the trust instrument or applicable state statute.
 - i. Although trustees arguably have the power to decant under the common law of all states, if decanting authority is not explicitly granted by the trust agreement or state statute, the trustee should change the situs and/or governing law of the trust to a state with a decanting statute in place.
 - ii. Changing trust situs offers the trustee a chance to forum shop based on the individual needs of the beneficiaries and the accessibility of state decanting statutes.
 - iii. Any change in trust situs or governing law will be controlled by the procedures set forth in the trust agreement, if any, and applicable choice of law rules.
4. Once in a jurisdiction with a decanting statute, a trustee should take steps to protect himself or herself from fiduciary liability.
 - i. As a general matter, a trustee should communicate openly and honestly with the trust beneficiaries and the settlor, if living. The trustee should take care, however, to avoid communications that would seem to indicate a preference for one beneficiary over another or an implied agreement that the settlor reserved the use and control of irrevocable trust assets.
 - ii. The trustee should also ensure that he or she knows and understands the potential tax consequences of the decanting, especially if decanting a GST exempt trust. When the decanting involves shifting beneficial interests in trust, a trustee must proceed with extra caution.
 - iii. Unless a decanting involves purely administrative changes, practitioners should urge clients to rely on independent trustees with no beneficial interests in the trusts. This reduces the risk of both adverse tax consequences and fiduciary liability issues. The use of independent trustees is even more important if the decanting involves the shifting of beneficial interests or extension of vesting periods in trust.

- iv. It is important to draft a proper decanting instrument. A decanting instrument may be similar to an exercise of a power of appointment, a property distribution agreement, or a trust merger agreement. In any form, a decanting instrument should include appropriate recitals that provide references to:
 - a. the terms of the original trust agreement;
 - b. the identity of current trustees and beneficiaries;
 - c. any relevant background information regarding the trust administration and need for decanting;
 - d. the source of the trustee's authority to decant, either under the terms of the trust or applicable state statute; and
 - e. identifying information regarding the decanted trust agreement.
- v. The trustee must remember to comply with all requirements under state law, including those relating to beneficiary notice.
- vi. A release and indemnification of the Trustee by the beneficiaries may be prudent, although beneficiary consent may be unwise, given the possibility of adverse tax consequences.
- vii. Finally, a trustee may protect himself or herself by including certain provisions in the decanted trust agreement. These include, but are not limited to:
 - a. expressly prohibiting the extension of the perpetuities period beyond that of the first trust or as otherwise limited by applicable law;
 - b. extending the time period for any trustee indemnification back to the creation of the original trust agreement; and
 - c. giving the trustee of the new trust agreement the express authority to decant.

APPENDIX A

UNIFORM TRUST DECANTING ACT

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

SECTION 2. DEFINITIONS. In this [act]:

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

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

(3) “Authorized fiduciary” means:

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

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

(C) a special-needs fiduciary under Section 13.

(4) “Beneficiary” means a person that:

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

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

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

(5) “Charitable interest” means an interest in a trust which:

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

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

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

(6) “Charitable organization” means:

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

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

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

(8) "Court" means the court in this state having jurisdiction in matters relating to trusts.

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

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

(11) "Expanded distributive discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

(12) "First trust" means a trust over which an authorized fiduciary may exercise the decanting power.

(13) "First-trust instrument" means the trust instrument for a first trust.

(14) "General power of appointment" means a power of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

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

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

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

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

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

(A) includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

- (i) the occurrence of the specified event;
- (ii) the satisfaction of the ascertainable standard; or
- (iii) the passage of the specified time; and

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

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

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

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

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

(21) “Reasonably definite standard” means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A)[, as amended,] and any applicable regulations.

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

(23) “Second trust” means:

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

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

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

(25) “Settlor”, except as otherwise provided in Section 25, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to

a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion.

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

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

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

(27) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

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

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

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

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

In Section 2(8) the definition of "court" should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.

SECTION 3. SCOPE.

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

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

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

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

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

SECTION 4. FIDUCIARY DUTY.

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

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

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

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

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

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

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

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

(B) construction of terms of the trust; or

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

SECTION 6. REASONABLE RELIANCE. A trustee or other person that reasonably relies on

the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this [act], law of this state other than this [act], or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

SECTION 7. NOTICE; EXERCISE OF DECANTING POWER.

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

(b) Except as otherwise provided in this [act], an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

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

- (1) each settlor of the first trust, if living or then in existence;
- (2) each qualified beneficiary of the first trust;
- (3) each holder of a presently exercisable power of appointment over any part or all of the first trust;
- (4) each person that currently has the right to remove or replace the authorized fiduciary;
- (5) each other fiduciary of the first trust;
- (6) each fiduciary of the second trust; and
- (7) [the Attorney General], if Section 14(b) applies.

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

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

- (1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;
- (2) specify the proposed effective date for exercise of the power;
- (3) include a copy of the first-trust instrument; and
- (4) include a copy of all second-trust instruments.

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

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

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

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

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

Legislative Note: Subsection (a) might apply a different rule than the state's general rule governing computation of days.

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

[SECTION 8. REPRESENTATION.

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

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

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

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

Legislative Note: State law generally specifies when a beneficiary who is a minor or otherwise incapacitated may be represented by another party. State law also may specify when an incapacitated settlor may be represented by another party. These provisions with respect to trusts may be contained in the state's trust code. For example, Article 3 of the Uniform Trust Code provides rules for representation. If state law does not already provide for representation of an incapacitated beneficiary or settlor, representation provisions should be included in the act. If this act is inserted into the state's Uniform Trust Code, Section 8 may be omitted.

SECTION 9. COURT INVOLVEMENT.

(a) On application of an authorized fiduciary, a person entitled to notice under Section 7(c), a beneficiary, or with respect to a charitable interest the [Attorney General] or other person that has standing to enforce the charitable interest, the court may:

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

(2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this [act] and to exercise the decanting power;

(3) approve an exercise of the decanting power;

(4) determine that a proposed or attempted exercise of the decanting power is ineffective because:

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

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

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

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

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

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

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

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

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

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

SECTION 10. FORMALITIES. An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must, directly or by reference to the notice required by Section 7, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

SECTION 11. DECANTING POWER UNDER EXPANDED DISTRIBUTIVE DISCRETION.

(a) In this section:

(1) “Noncontingent right” means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary’s estate.

(2) “Presumptive remainder beneficiary” means a qualified beneficiary other than a current beneficiary.

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

(4) “Vested interest” means:

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

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

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

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

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

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

distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(c) Subject to Section 13, in an exercise of the decanting power under this section, a second trust may not:

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

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

(3) reduce or eliminate a vested interest.

(d) Subject to subsection (c)(3) and Section 14, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

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

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

(3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

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

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

(f) If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

SECTION 12. DECANTING POWER UNDER LIMITED DISTRIBUTIVE DISCRETION.

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

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

(c) Under this section and subject to Section 14, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust.

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

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

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

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

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

SECTION 13. TRUST FOR BENEFICIARY WITH DISABILITY.

(a) In this section:

(1) “Beneficiary with a disability” means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated [incompetent].

(2) “Governmental benefits” means financial aid or services from a state, federal, or other public agency.

(3) “Special-needs fiduciary” means, with respect to a trust that has a beneficiary with a disability:

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

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

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

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

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

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

and

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

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

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

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

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

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

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

Legislative Note: *In subsection (a)(1), substitute for "incompetent" the appropriate term for a judicial determination of disability or incompetency.*

In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (c)(1).

SECTION 14. PROTECTION OF CHARITABLE INTEREST.

(a) In this section:

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

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

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

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

(1) diminish the charitable interest;

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

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

(4) alter any condition or restriction related to the charitable interest.

(d) If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (c).

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

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

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

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

(f) This [act] does not limit the powers and duties of the [Attorney General] under law of this state other than this [act].

Legislative Note: *In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a)(2).*

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

SECTION 15. TRUST LIMITATION ON DECANTING.

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

(1) the decanting power; or

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

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

(1) the decanting power; or

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

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

(d) Subject to subsections (a) and (b), an authorized fiduciary may exercise the decanting power

under this [act] even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

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

SECTION 16. CHANGE IN COMPENSATION.

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

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

(2) the increase is approved by the court.

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

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

(2) the increase is approved by the court.

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

SECTION 17. RELIEF FROM LIABILITY AND INDEMNIFICATION.

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

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

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

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

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

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

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

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

SECTION 19. TAX-RELATED LIMITATIONS.

(a) In this section:

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

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

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

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

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

(1) If a first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for a marital deduction for purposes of the gift or estate tax under the

Internal Revenue Code or a state gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

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

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

(4) If the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. Section 1361[, as amended,] and the first trust is, or but for provisions of this [act] other than this section would be, a permitted shareholder under any provision of 26 U.S.C. Section 1361[, as amended], an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. Section

1361(c)(2)[, as amended]. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this [act] other than this section would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. Section 1361(d)[, as amended], the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(5) If the first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c)[, as amended,] the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. Section 2642(c)[, as amended].

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

(7) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A)[, as amended,] the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. Section 672(f)(2)(A)[, as amended].

(8) In this paragraph, “tax benefit” means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to paragraph (9), a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

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

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

(9) Subject to paragraph (4):

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

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

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

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

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

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

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

Legislative Note: *In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a)(1), (2) and (4) and subsection (b)(3) through (7).*

SECTION 20. DURATION OF SECOND TRUST.

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

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

SECTION 21. NEED TO DISTRIBUTE NOT REQUIRED. An authorized fiduciary may exercise the decanting power whether or not under the first trust’s discretionary distribution standard the fiduciary

would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

SECTION 22. SAVING PROVISION.

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

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

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

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

SECTION 23. TRUST FOR CARE OF ANIMAL.

(a) In this section:

(1) "Animal trust" means a trust or an interest in a trust created to provide for the care of one or more animals.

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

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

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

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

intended purpose for the period the first trust benefitted the animal.

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

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

SECTION 25. SETTLOR.

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

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

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

SECTION 26. LATER-DISCOVERED PROPERTY.

(a) Except as otherwise provided in subsection (c), if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

(b) Except as otherwise provided in subsection (c), if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

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

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

SECTION 28. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with

respect to its subject matter among states that enact it.

SECTION 29. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 30. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

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

SECTION 31. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

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