

Introduced by Senator HertzbergJanuary 18, 2018

An act to add Part 9 (commencing with Section 19501) to Division 9 of the Probate Code, relating to trusts.

LEGISLATIVE COUNSEL'S DIGEST

SB 909, as introduced, Hertzberg. Uniform Trust Decanting Act.

Existing law regulates trust administration and generally requires a trustee to administer the trust according to the trust instrument. Under existing law, a trustee may exercise specified powers without court authorization, including the power to acquire or dispose of property. Existing law authorizes the beneficiaries of an irrevocable trust to compel modification of the trust upon petition to the court, if all beneficiaries of the trust consent.

This bill would enact the Uniform Trust Decanting Act, under which a fiduciary of an irrevocable trust may distribute the property of a first trust to one or more 2nd trusts or modify the terms of the first trust without the consent of the beneficiaries or approval of the court, subject to certain exceptions. The bill would require specified persons, including qualified beneficiaries and, if the trust contains a determinable charitable interest, the Attorney General, to be provided notice of the intended exercise of the decanting power, and would authorize the court, on application by specified persons, to, among other things, approve an exercise of the decanting power. Among other provisions, the bill would require a fiduciary exercising the decanting power to act in accordance with its fiduciary duties and in accordance with the purposes of the first trust. The bill would also specify that the decanting power does not apply to a trust held solely for charitable purposes.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Part 9 (commencing with Section 19501) is added
2 to Division 9 of the Probate Code, to read:

3

4 PART 9. UNIFORM TRUST DECANTING ACT

5

6 19501. This part may be cited as the Uniform Trust Decanting
7 Act.

8 19502. For purposes of this part:

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

11 (b) "Ascertainable standard" means a standard relating to an
12 individual's health, education, support, or maintenance within the
13 meaning of Section 2041(b)(1)(A) or Section 2514(c)(1) of the
14 Internal Revenue Code (26 U.S.C. Secs. 2041(b)(1)(A), 2514(c)(1))
15 and any applicable regulations.

16 (c) "Authorized fiduciary" means any of the following:

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

21 (2) A special fiduciary appointed under Section 19509.

22 (3) A special-needs fiduciary under Section 19513.

23 (d) "Beneficiary" means a person that meets one of the following
24 conditions:

25 (1) Has a present or future, vested or contingent, beneficial
26 interest in a trust.

27 (2) Holds a power of appointment over trust property.

28 (3) Is an identified charitable organization that will or may
29 receive distributions under the terms of the trust.

30 (e) "Charitable interest" means an interest in a trust that meets
31 one of the following conditions:

32 (1) Is held by an identified charitable organization and makes
33 the organization a qualified beneficiary.

1 (2) Benefits only charitable organizations and, if the interest
2 were held by an identified charitable organization, would make
3 the organization a qualified beneficiary.

4 (3) Is held solely for charitable purposes and, if the interest were
5 held by an identified charitable organization, would make the
6 organization a qualified beneficiary.

7 (f) “Charitable organization” means either of the following:

8 (1) A person, other than an individual, organized and operated
9 exclusively for charitable purposes.

10 (2) A government or governmental subdivision, agency, or
11 instrumentality, to the extent it holds funds exclusively for a
12 charitable purpose.

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

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

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

25 (j) “Decanting power” or “the decanting power” means the
26 power of an authorized fiduciary under this part to distribute
27 property of a first trust to one or more second trusts or to modify
28 the terms of the first trust.

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

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

34 (m) “First trust instrument” means the trust instrument for a
35 first trust.

36 (n) “General power of appointment” means a power of
37 appointment exercisable in favor of a powerholder, the
38 powerholder’s estate, a creditor of the powerholder, or a creditor
39 of the powerholder’s estate.

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

3 (p) “Person” means an individual, estate, business or nonprofit
4 entity, public corporation, government or governmental
5 subdivision, agency, or instrumentality, or other legal entity.

6 (q) “Power of appointment” means a power that enables a
7 powerholder acting in a nonfiduciary capacity to designate a
8 recipient of an ownership interest in, or another power of
9 appointment over, the appointive property. The term does not
10 include a power of attorney.

11 (r) “Powerholder” means a person in which a donor creates a
12 power of appointment.

13 (s) “Presently exercisable power of appointment” means a power
14 of appointment exercisable by the powerholder at the relevant
15 time.

16 (1) The term includes a power of appointment exercisable only
17 after the occurrence of a specified event, the satisfaction of an
18 ascertainable standard, or the passage of a specified time only after
19 one of the following, respectively:

20 (A) The occurrence of the specified event.

21 (B) The satisfaction of the ascertainable standard.

22 (C) The passage of the specified time.

23 (2) The term does not include a power exercisable only at the
24 powerholder’s death.

25 (t) “Qualified beneficiary” means a beneficiary that, on the date
26 the beneficiary’s qualification is determined, satisfies one of the
27 following conditions:

28 (1) Is a distributee or permissible distributee of trust income or
29 principal.

30 (2) Would be a distributee or permissible distributee of trust
31 income or principal if the interests of the distributees described in
32 paragraph (1) terminated on that date without causing the trust to
33 terminate.

34 (3) Would be a distributee or permissible distributee of trust
35 income or principal if the trust terminated on that date.

36 (u) “Reasonably definite standard” means a clearly measurable
37 standard under which a holder of a power of distribution is legally
38 accountable within the meaning of Section 674(b)(5)(A) of the
39 Internal Revenue Code (26 U.S.C. Sec. 674(b)(5)(A)) and any
40 applicable regulations.

- 1 (v) “Second trust” means either of the following:
- 2 (1) A first trust after modification under this part.
- 3 (2) A trust to which a distribution of property from a first trust
- 4 is or may be made under this part.
- 5 (w) “Second trust instrument” means the trust instrument for a
- 6 second trust.
- 7 (x) “Settlor,” except as otherwise provided in Section 19525,
- 8 means a person, including a testator, that creates or contributes
- 9 property to a trust. If more than one person creates or contributes
- 10 property to a trust, each person is a settlor of the portion of the
- 11 trust property attributable to the person’s contribution except to
- 12 the extent another person has power to revoke or withdraw that
- 13 portion.
- 14 (y) “State” means a state of the United States, the District of
- 15 Columbia, Puerto Rico, the United States Virgin Islands, or any
- 16 territory or insular possession subject to the jurisdiction of the
- 17 United States.
- 18 (z) “Terms of the trust” means the manifestation of the settlor’s
- 19 intent regarding a trust’s provisions as expressed in the trust
- 20 instrument, as may be established by other evidence that would
- 21 be admissible in a judicial proceeding, or as may be established
- 22 by court order or nonjudicial settlement agreement.
- 23 (aa) “Trust instrument” means a trust executed by the settlor to
- 24 create a trust or by any person to create a second trust that contains
- 25 some or all of the terms of the trust, including any amendments.
- 26 19503. (a) Except as otherwise provided in subdivisions (b)
- 27 and (c), this part applies to an express trust that is irrevocable or
- 28 revocable by the settlor only with the consent of the trustee or a
- 29 person holding an adverse interest.
- 30 (b) This part does not apply to a trust held solely for charitable
- 31 purposes.
- 32 (c) Subject to Section 19515, a trust instrument may restrict or
- 33 prohibit exercise of the decanting power.
- 34 (d) This part does not limit the power of a trustee, powerholder,
- 35 or other person to distribute or appoint property in further trust or
- 36 to modify a trust under the trust instrument, law of this state other
- 37 than this part, common law, a court order, or a nonjudicial
- 38 settlement agreement.
- 39 (e) This part does not affect the ability of a settlor to provide in
- 40 a trust instrument for the distribution of the trust property or

1 appointment in further trust of the trust property or for modification
2 of the trust instrument.

3 19504. (a) In exercising the decanting power, an authorized
4 fiduciary shall act in accordance with its fiduciary duties, including
5 the duty to act in accordance with the purposes of the first trust.

6 (b) This part does not create or imply a duty to exercise the
7 decanting power or to inform beneficiaries about the applicability
8 of this part.

9 (c) Except as otherwise provided in a first trust instrument, for
10 purposes of this part, the terms of the first trust are deemed to
11 include the decanting power.

12 19505. This part applies to a trust created before, on, or after
13 January 1, 2019, that satisfies either of the following conditions:

14 (a) Has its principal place of administration in this state,
15 including a trust whose principal place of administration has been
16 changed to this state.

17 (b) Provides by its trust instrument that it is governed by the
18 law of this state or is governed by the law of this state for the
19 purpose of any of the following:

20 (1) Administration, including administration of a trust whose
21 governing law for purposes of administration has been changed
22 to the law of this state.

23 (2) Construction of terms of the trust.

24 (3) Determining the meaning or effect of terms of the trust.

25 19507. (a) In this section, a notice period begins on the day
26 notice is given under subdivision (c) and ends 59 days after the
27 day notice is given.

28 (b) An authorized fiduciary may exercise the decanting power
29 without the consent of any person and without court approval in
30 compliance with this part.

31 (c) Except as otherwise provided in subdivision (g), an
32 authorized fiduciary shall give notice of the intended exercise of
33 the decanting power not later than 60 days before the exercise to
34 all of the following:

35 (1) Each settlor of the first trust, if living or then in existence.

36 (2) Each qualified beneficiary of the first trust.

37 (3) Each holder of a presently exercisable power of appointment
38 over any part or all of the first trust.

39 (4) Each person that currently has the right to remove or replace
40 the authorized fiduciary.

1 (5) Each other fiduciary of the first trust.

2 (6) Each fiduciary of the second trust.

3 (7) The Attorney General, if subdivision (b) of Section 19514
4 applies.

5 (d) Unless the trust instrument provides otherwise, an authorized
6 fiduciary shall give notice under subdivision (c) to the guardian
7 ad litem for a qualified beneficiary who is a minor and has no
8 representative or who is an unascertained or unborn person. If a
9 guardian ad litem has not been appointed at the time of the notice,
10 the authorized fiduciary shall seek the appointment of one. The
11 court may appoint a guardian ad litem, for purposes of this section,
12 in instances where the only matter before the court is that
13 appointment.

14 (e) An authorized fiduciary is not required to give notice under
15 subdivision (c) to a person who is known to the fiduciary but cannot
16 be located by the fiduciary after reasonable diligence.

17 (f) A notice under subdivision (c) shall include all of the
18 following:

19 (1) A description of the manner in which the authorized fiduciary
20 intends to exercise the decanting power.

21 (2) The proposed effective date for exercise of the power.

22 (3) A copy of the first trust instrument.

23 (4) A copy of all second trust instruments.

24 (g) The decanting power may be exercised before expiration of
25 the notice period under subdivision (a) if all persons entitled to
26 receive notice waive the period in a signed waiver.

27 (h) The receipt of notice, waiver of the notice period, or
28 expiration of the notice period does not affect the right of a person
29 to file an application under Section 19509 that asserts either of the
30 following:

31 (1) An attempted exercise of the decanting power is ineffective
32 because it did not comply with this part or was an abuse of
33 discretion or breach of fiduciary duty.

34 (2) Section 19522 applies to the exercise of the decanting power.

35 (i) The notice required by this section shall be served by mail
36 to the last known address, pursuant to Section 1215, or by personal
37 delivery.

38 19508. (a) Notice to a person with authority to represent and
39 bind another person under this code or a first trust instrument has
40 the same effect as notice given directly to the person represented.

1 (b) Consent of or waiver by a person with authority to represent
2 and bind another person under this code or a first trust instrument
3 is binding on the person represented unless the person represented
4 objects to the representation before the consent or waiver otherwise
5 would become effective.

6 (c) A person with authority to represent and bind another person
7 under this code or a first trust instrument may file an application
8 under Section 19509 on behalf of the person represented.

9 (d) A settlor may not represent or bind a beneficiary under this
10 part.

11 19509. (a) On application of an authorized fiduciary, a person
12 entitled to notice under subdivision (c) of Section 19507, a
13 beneficiary, or, with respect to a charitable interest, the Attorney
14 General or other person that has standing to enforce the charitable
15 interest, the court may do any of the following:

16 (1) Provide instructions to the authorized fiduciary regarding
17 whether a proposed exercise of the decanting power is permitted
18 under this part and is consistent with the fiduciary duties of the
19 authorized fiduciary.

20 (2) Appoint a special fiduciary and authorize the special
21 fiduciary to determine whether the decanting power should be
22 exercised under this part and to exercise the decanting power.

23 (3) Approve an exercise of the decanting power.

24 (4) Determine that a proposed or attempted exercise of the
25 decanting power is ineffective because of either of the following:

26 (A) After applying Section 19522, the proposed or attempted
27 exercise does not or did not comply with this part.

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

30 (5) Determine the extent to which Section 19522 applies to a
31 prior exercise of the decanting power.

32 (6) Provide instructions to the trustee regarding the application
33 of Section 19522 to a prior exercise of the decanting power.

34 (7) Order other relief to carry out the purposes of this part.

35 (b) On application of an authorized fiduciary, the court may
36 approve either or both of the following:

37 (1) An increase in the fiduciary's compensation under Section
38 19516.

39 (2) A modification under Section 19518 of a provision granting
40 a person the right to remove or replace the fiduciary.

1 19510. An exercise of the decanting power shall be made in a
2 writing signed by an authorized fiduciary. The signed writing shall,
3 directly or by reference to the notice required by Section 19507,
4 identify the first trust and the second trust or trusts and state the
5 property of the first trust being distributed to each second trust and
6 the property, if any, that remains in the first trust.

7 19511. (a) For purposes of this section:

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

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

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

20 (4) “Vested interest” means any of the following:

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

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

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

30 (D) A presently exercisable general power of appointment.

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

35 (b) Subject to subdivision (c) and Section 19514, an authorized
36 fiduciary that has expanded distributive discretion over the
37 principal of a first trust for the benefit of one or more current
38 beneficiaries may exercise the decanting power over the principal
39 of the first trust.

1 (c) Subject to Section 19513, in an exercise of the decanting
2 power under this section, a second trust may not do any of the
3 following:

4 (1) Include as a current beneficiary a person that is not a current
5 beneficiary of the first trust, except as otherwise provided in
6 subdivision (d).

7 (2) Include as a presumptive remainder beneficiary or successor
8 beneficiary a person that is not a current beneficiary, presumptive
9 remainder beneficiary, or successor beneficiary of the first trust,
10 except as otherwise provided in subdivision (d).

11 (3) Reduce or eliminate a vested interest.

12 (d) Subject to paragraph (3) of subdivision (c) and Section
13 19514, in an exercise of the decanting power under this section, a
14 second trust may be a trust created or administered under the law
15 of any jurisdiction and may do each of the following:

16 (1) Retain a power of appointment granted in the first trust.

17 (2) Omit a power of appointment granted in the first trust, other
18 than a presently exercisable general power of appointment.

19 (3) Create or modify a power of appointment if the powerholder
20 is a current beneficiary of the first trust and the authorized fiduciary
21 has expanded distributive discretion to distribute principal to the
22 beneficiary.

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

28 (e) A power of appointment described in paragraphs (1) to (4),
29 inclusive, of subdivision (d) may be general or nongeneral. The
30 class of permissible appointees in favor of which the power may
31 be exercised may be broader than, or different from, the
32 beneficiaries of the first trust.

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

38 19512. (a) For purposes of this section, “limited distributive
39 discretion” means a discretionary power of distribution that is

1 limited to an ascertainable standard or a reasonably definite
2 standard.

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

7 (c) Under this section and subject to Section 19514, a second
8 trust may be created or administered under the law of any
9 jurisdiction. Under this section, the second trusts, in the aggregate,
10 shall grant each beneficiary of the first trust beneficial interests
11 which are substantially similar to the beneficial interests of the
12 beneficiary in the first trust. For purposes of this subdivision,
13 “substantially similar” means that there is no material change in
14 a beneficiary’s beneficial interests, except as provided in
15 subdivision (d).

16 (d) A power to make a distribution under a second trust for the
17 benefit of a beneficiary who is an individual is substantially similar
18 to a power under the first trust to make a distribution directly to
19 the beneficiary. A distribution is for the benefit of a beneficiary if
20 it satisfies any of the following conditions:

21 (1) The distribution is applied for the benefit of the beneficiary.

22 (2) The beneficiary is under a legal disability or the trustee
23 reasonably believes the beneficiary is incapacitated, and the
24 distribution is made as permitted under this code.

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

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

33 19513. (a) For purposes of this section:

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

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

1 (3) “Special needs fiduciary” means, with respect to a trust that
2 has a beneficiary with a disability, any of the following:

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

6 (B) If no trustee or fiduciary has discretion under subparagraph
7 (A), a trustee or other fiduciary, other than a settlor, that has
8 discretion to distribute part or all of the income of the first trust to
9 one or more current beneficiaries.

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

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

17 (b) A special needs fiduciary may exercise the decanting power
18 under Section 19511 over the principal of a first trust as if the
19 fiduciary had authority to distribute principal to a beneficiary with
20 a disability subject to expanded distributive discretion if both of
21 the following conditions are satisfied:

22 (1) A second trust is a special needs trust that benefits the
23 beneficiary with a disability.

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

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

28 (1) Notwithstanding paragraph (2) of subdivision (c) of Section
29 19511, the interest in the second trust of a beneficiary with a
30 disability may fulfill either of the following:

31 (A) Be a pooled trust as defined by Medicaid law for the benefit
32 of the beneficiary with a disability under Section 1396p(d)(4)(C)
33 of the Public Health and Welfare Code (42 U.S.C. Sec.
34 1396p(d)(4)(C)).

35 (B) Contain payback provisions complying with reimbursement
36 requirements of Medicaid law under Section 1396p(d)(4)(A) of
37 the Public Health and Welfare Code (42 U.S.C. Sec.
38 1396p(d)(4)(A)).

39 (2) Paragraph (3) of subdivision (c) of Section 19511 does not
40 apply to the interests of the beneficiary with a disability.

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

7 19514. (a) For purposes of this section:

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

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

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

23 (c) If a first trust contains a charitable interest, the second trust
24 or trusts may not do any of the following:

25 (1) Diminish the charitable interest.

26 (2) Diminish the interest of an identified charitable organization
27 that holds the charitable interest.

28 (3) Alter any charitable purpose stated in the first trust
29 instrument.

30 (4) Alter any condition or restriction related to the charitable
31 interest.

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

37 (e) If a first trust contains a determinable charitable interest, the
38 second trust or trusts that include a charitable interest pursuant to
39 subdivision (c) shall be administered under the law of this state
40 unless any of the following occur:

1 (1) The Attorney General, after receiving notice under Section
2 19507, fails to object in a signed writing delivered to the authorized
3 fiduciary within the notice period.

4 (2) The Attorney General consents in a signed writing to the
5 second trust or trusts being administered under the law of another
6 jurisdiction.

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

8 (f) This part does not limit the powers and duties of the Attorney
9 General under law of this state other than this part.

10 19515. (a) An authorized fiduciary may not exercise the
11 decanting power to the extent the first trust instrument expressly
12 prohibits exercise of either of the following:

13 (1) The decanting power.

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

17 (b) Exercise of the decanting power is subject to any restriction
18 in the first trust instrument that expressly applies to exercise of
19 either of the following:

20 (1) The decanting power.

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

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

28 (d) Subject to subdivisions (a) and (b), an authorized fiduciary
29 may exercise the decanting power under this part even if the first
30 trust instrument permits the authorized fiduciary or another person
31 to modify the first trust instrument or to distribute part or all of
32 the principal of the first trust to another trust.

33 (e) If a first trust instrument contains an express prohibition
34 described in subdivision (a) or an express restriction described in
35 subdivision (b), the authorized fiduciary shall include that provision
36 or restriction in the second trust instrument.

37 19516. (a) If a first trust instrument specifies an authorized
38 fiduciary's compensation, the fiduciary may not exercise the
39 decanting power to increase the fiduciary's compensation above
40 the specified compensation unless either of the following occurs:

1 (1) All qualified beneficiaries of the second trust consent to the
2 increase in a signed writing.

3 (2) The increase is approved by the court.

4 (b) If a first trust instrument does not specify an authorized
5 fiduciary's compensation, the fiduciary may not exercise the
6 decanting power to increase the fiduciary's compensation above
7 the compensation permitted by this code unless either of the
8 following occurs:

9 (1) All qualified beneficiaries of the second trust consent to the
10 increase in a signed writing.

11 (2) The increase is approved by the court.

12 (c) (1) A change in an authorized fiduciary's compensation
13 which is incidental to other changes made by the exercise of the
14 decanting power is not an increase in the fiduciary's compensation
15 for purposes of subdivisions (a) and (b).

16 (2) For purposes of this subdivision, an incidental change to an
17 authorized fiduciary's compensation includes, but is not limited
18 to, an increase in the compensation of the authorized fiduciary for
19 the following reasons:

20 (A) The second trust lasts longer than the first trust.

21 (B) The second trust has a greater value than the first trust.

22 (C) Changes in investments.

23 (D) Changes in the law governing the administration of the trust.

24 (E) Changes in the identity of the authorized fiduciary.

25 (F) Changes in the duties of the authorized fiduciary.

26 19517. (a) Except as otherwise provided in this section, a
27 second trust instrument may not relieve an authorized fiduciary
28 from liability for breach of trust to a greater extent than the first
29 trust instrument.

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

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

37 (d) Subject to subdivision (c), a second trust instrument may
38 reallocate fiduciary powers among fiduciaries as permitted by the
39 law of this state other than this part.

1 19518. An authorized fiduciary may not exercise the decanting
2 power to modify a provision in a first trust instrument granting
3 another person power to remove or replace the fiduciary unless
4 any of the following occurs:

5 (a) The person holding the power consents to the modification
6 in a signed writing and the modification applies only to the person.

7 (b) The person holding the power and the qualified beneficiaries
8 of the second trust consent to the modification in a signed writing
9 and the modification grants a substantially similar power to another
10 person.

11 (c) The court approves the modification and the modification
12 grants a substantially similar power to another person.

13 19519. (a) For purposes of this section:

14 (1) “Grantor trust” means a trust as to which a settlor of a first
15 trust is considered the owner under Sections 671 to 677, inclusive,
16 or Section 679 of the Internal Revenue Code (26 U.S.C. Secs. 671
17 to 677, 679).

18 (2) “Nongrantor trust” means a trust that is not a grantor trust.

19 (3) “Qualified benefits property” means property subject to the
20 minimum distribution requirements of Section 401(a)(9) of the
21 Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)), and any
22 applicable regulations, or to any similar requirements that refer to
23 Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec.
24 401(a)(9)) or the regulations.

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

27 (1) If a first trust contains property that qualified, or would have
28 qualified but for provisions of this part other than this section, for
29 a marital deduction for purposes of the gift or estate tax under the
30 Internal Revenue Code or a state gift, estate, or inheritance tax,
31 the second trust instrument shall not include or omit any term that,
32 if included in or omitted from the trust instrument for the trust to
33 which the property was transferred, would have prevented the
34 transfer from qualifying for the deduction, or would have reduced
35 the amount of the deduction, under the same provisions of the
36 Internal Revenue Code or state law under which the transfer
37 qualified.

38 (2) If the first trust contains property that qualified, or would
39 have qualified but for provisions of this part other than this section,
40 for a charitable deduction for purposes of the income, gift, or estate

1 tax under the Internal Revenue Code or a state income, gift, estate,
2 or inheritance tax, the second trust instrument shall not include or
3 omit any term that, if included in or omitted from the trust
4 instrument for the trust to which the property was transferred,
5 would have prevented the transfer from qualifying for the
6 deduction, or would have reduced the amount of the deduction,
7 under the same provisions of the Internal Revenue Code or state
8 law under which the transfer qualified.

9 (3) If the first trust contains property that qualified, or would
10 have qualified but for provisions of this part other than this section,
11 for the exclusion from the gift tax described in Section 2503(b) of
12 the Internal Revenue Code (26 U.S.C. Sec. 2503(b)), the second
13 trust instrument shall not include or omit a term that, if included
14 in or omitted from the trust instrument for the trust to which the
15 property was transferred, would have prevented the transfer from
16 qualifying under Section 2503(b) of the Internal Revenue Code
17 (26 U.S.C. Sec. 2503(b)). If the first trust contains property that
18 qualified, or would have qualified but for provisions of this part
19 other than this section, for the exclusion from the gift tax described
20 in Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec.
21 2503(b)) by application of Section 2503(c) of the Internal Revenue
22 Code (26 U.S.C. Sec. 2503(c)), the second trust instrument shall
23 not include or omit a term that, if included or omitted from the
24 trust instrument for the trust to which the property was transferred,
25 would have prevented the transfer from qualifying under Section
26 2503(c) of the Internal Revenue Code (26 U.S.C. Sec. 2503(c)).

27 (4) If the property of the first trust includes shares of stock in
28 an S-corporation, as defined in Section 1361 of the Internal
29 Revenue Code (26 U.S.C. Sec. 1361) and the first trust is, or but
30 for provisions of this part other than this section would be, a
31 permitted shareholder under any provision of Section 1361 of the
32 Internal Revenue Code (26 U.S.C. Sec. 1361), an authorized
33 fiduciary may exercise the power with respect to part or all of the
34 S-corporation stock only if any second trust receiving the stock is
35 a permitted shareholder under Section 1361(c)(2) of the Internal
36 Revenue Code (26 U.S.C. Sec. 1361(c)(2)). If the property of the
37 first trust includes shares of stock in an S-corporation and the first
38 trust is, or but for provisions of this part other than this section
39 would be, a qualified subchapter-S trust within the meaning of
40 Section 1361(d) of the Internal Revenue Code (26 U.S.C. Sec.

1 1361(d)), the second trust instrument shall not include or omit a
2 term that prevents the second trust from qualifying as a qualified
3 subchapter-S trust.

4 (5) If the first trust contains property that qualified, or would
5 have qualified but for provisions of this part other than this section,
6 for a zero inclusion ratio for purposes of the generation-skipping
7 transfer tax under Section 2642(c) of the Internal Revenue Code
8 (26 U.S.C. Sec. 2642(c)), the second trust instrument shall not
9 include or omit a term that, if included in or omitted from the first
10 trust instrument, would have prevented the transfer to the first trust
11 from qualifying for a zero inclusion ratio under Section 2642(c)
12 of the Internal Revenue Code (26 U.S.C. Sec. 2642(c)).

13 (6) If the first trust is directly or indirectly the beneficiary of
14 qualified benefits property, the second trust instrument may not
15 include or omit any term that, if included in or omitted from the
16 first trust instrument, would have increased the minimum
17 distributions required with respect to the qualified benefits property
18 under Section 401(a)(9) of the Internal Revenue Code (26 U.S.C.
19 Sec. 401(a)(9)) and any applicable regulations, or any similar
20 requirements that refer to Section 401(a)(9) of the Internal Revenue
21 Code (26 U.S.C. Sec. 401(a)(9)) or the regulations. If an attempted
22 exercise of the decanting power violates the preceding sentence,
23 the trustee is deemed to have held the qualified benefits property
24 and any reinvested distributions of the property as a separate share
25 from the date of the exercise of the power and Section 19522
26 applies to the separate share.

27 (7) If the first trust qualifies as a grantor trust because of the
28 application of Section 672(f)(2)(A) of the Internal Revenue Code
29 (26 U.S.C. Sec. 672(f)(2)(A)), the second trust may not include or
30 omit a term that, if included in or omitted from the first trust
31 instrument, would have prevented the first trust from qualifying
32 under Section 672(f)(2)(A) of the Internal Revenue Code (26
33 U.S.C. Sec. 672(f)(2)(A)).

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

1 (A) The first trust instrument expressly indicates an intent to
2 qualify for the benefit or the first trust instrument clearly is
3 designed to enable the first trust to qualify for the benefit.

4 (B) The transfer of property held by the first trust or the first
5 trust qualified, or, but for provisions of this part other than this
6 section, would have qualified for the tax benefit.

7 (9) (A) Subject to paragraph (4), and except as otherwise
8 provided in paragraph (7), the second trust may be a nongrantor
9 trust, even if the first trust is a grantor trust.

10 (B) Subject to paragraph (4), and except as otherwise provided
11 in paragraph (10), the second trust may be a grantor trust, even if
12 the first trust is a nongrantor trust.

13 (10) An authorized fiduciary may not exercise the decanting
14 power if a settlor objects in a signed writing delivered to the
15 fiduciary within the notice period and either of the following
16 conditions is satisfied:

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

22 (B) The first trust is a nongrantor trust and a second trust is a
23 grantor trust, in whole or in part, with respect to the settlor, unless
24 either of the following apply:

25 (i) The settlor has the power at all times to cause the second
26 trust to cease to be a grantor trust.

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

31 19520. (a) Subject to subdivision (b), a second trust may have
32 a duration that is the same as, or different from, the duration of
33 the first trust.

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

39 19521. An authorized fiduciary may exercise the decanting
40 power whether or not under the first trust's discretionary

1 distribution standard the fiduciary would have made or could have
2 been compelled to make a discretionary distribution of principal
3 at the time of the exercise.

4 19522. (a) If exercise of the decanting power would be
5 effective under this part, except that the second trust instrument
6 in part does not comply with this part, the exercise of the power
7 is effective and the following rules apply with respect to the
8 principal of the second trust attributable to the exercise of the
9 power:

10 (1) A provision in the second trust instrument that is not
11 permitted under this part is void to the extent necessary to comply
12 with this part.

13 (2) A provision required by this part to be in the second trust
14 instrument, which is not contained in the instrument, is deemed to
15 be included in the instrument to the extent necessary to comply
16 with this part.

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

21 19523. (a) For purposes of this section:

22 (1) "Animal trust" means a trust or an interest in a trust described
23 in Section 15212.

24 (2) "Protector" means either of the following:

25 (A) A person appointed in an animal trust to enforce the trust
26 on behalf of the animal as described in subdivision (c) of Section
27 15212 or, if no person is appointed in the trust for that purpose, a
28 person appointed by the court for that purpose.

29 (B) A nonprofit charitable corporation described in subdivision
30 (e) of Section 15212 that has requested an accounting in writing.

31 (b) The decanting power may be exercised over an animal trust
32 that has a protector to the extent the trust could be decanted under
33 this part if each animal that benefits from the trust were an
34 individual, if the protector consents in a signed writing to the
35 exercise of the power.

36 (c) A protector for an animal has the rights under this part of a
37 qualified beneficiary.

38 (d) Notwithstanding any other provision of this part, if a first
39 trust is an animal trust, in an exercise of the decanting power, the
40 second trust shall provide that trust property may be applied only

1 to its intended purpose for the period the first trust benefited the
2 animal.

3 19524. A reference in this code to a trust instrument or terms
4 of the trust includes a second trust instrument and the terms of the
5 second trust.

6 19525. (a) For purposes of the law of this state other than this
7 part and subject to subdivision (b), a settlor of a first trust is deemed
8 to be the settlor of the second trust with respect to the portion of
9 the principal of the first trust subject to the exercise of the decanting
10 power.

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

14 19526. (a) Except as otherwise provided in subdivision (c), if
15 exercise of the decanting power was intended to distribute all the
16 principal of the first trust to one or more second trusts,
17 later-discovered property belonging to the first trust and property
18 paid to or acquired by the first trust after the exercise of the power
19 is part of the trust estate of the second trust or trusts.

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

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

30 19527. A debt, liability, or other obligation enforceable against
31 property of a first trust is enforceable to the same extent against
32 the property when held by the second trust after exercise of the
33 decanting power.

34 19529. This part modifies, limits, or supersedes the federal
35 Electronic Signatures in Global and National Commerce Act (15
36 U.S.C. Sec. 7001 et seq.), but does not modify, limit, or supersede
37 Section 101(c) of that act (15 U.S.C. Sec. 7001(c)) or authorize
38 electronic delivery of any of the notices described in Section 103(b)
39 of that act (15 U.S.C. Sec. 7003(b)).

1 19530. The provisions of this part are severable. If any
2 provision of this part or its application is held invalid, that
3 invalidity shall not affect other provisions or applications that can
4 be given effect without the invalid provision or application.

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