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SB-909 Uniform Trust Decanting Act. (2017-2018)

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Senate Bill No. 909

CHAPTER 407

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

[Approved by Governor September 14, 2018. Filed with Secretary of State September 14, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 909, 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 Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

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

PART 9. Uniform Trust Decanting Act

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

19502. For purposes of this part:

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

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

(1)) and any applicable regulations.

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

(1) 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.

(2) A special fiduciary appointed under Section 19509.

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

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

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

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

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

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

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

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

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

(f) "Charitable organization" means either of the following:

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

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

(g) "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.

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

(i) "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.

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

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

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

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

(n) "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.

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

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

(q) "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.

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

(s) "Presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time.

(1) The term 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 one of the following, respectively:

- (A) The occurrence of the specified event.
- (B) The satisfaction of the ascertainable standard.
- (C) The passage of the specified time.

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

(t) "Qualified beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined, satisfies one of the following conditions:

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

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

(v) "Second trust" means either of the following:

- (1) A first trust after modification under this part.
- (2) A trust to which a distribution of property from a first trust is or may be made under this part.

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

(x) "Settlor," except as otherwise provided in Section 19525, 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.

(y) "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.

(z) "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.

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

19503. (a) Except as otherwise provided in subdivisions (b) and (c), this part 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 part does not apply to a trust held solely for charitable purposes.

(c) Subject to Section 19515, a trust instrument may restrict or prohibit exercise of the decanting power.

(d) This part 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 part, common law, a court order, or a nonjudicial settlement agreement.

(e) This part 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.

19504. (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 part does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this part.

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

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

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

(b) 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 any of the following:

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

(2) Construction of terms of the trust.

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

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

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

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

(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.

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

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

(e) If an authorized fiduciary knows, or has reason to know, that a person entitled to notice under subdivision (c) is substantially unable to manage that person's own financial resources or resist fraud or undue influence, the authorized fiduciary shall give notice under subdivision (c) to that person and to the individual appointed to act on that person's behalf, including, but not limited to, an attorney-in-fact under a power of attorney. If no such individual has been appointed at the time of the notice, the authorized fiduciary shall seek the appointment of such an individual. The court may appoint a guardian ad litem, for purposes of this section, in instances where the only matter before the court is that appointment.

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

(g) A notice under subdivision (c) shall include all of the following:

(1) A description of the manner in which the authorized fiduciary intends to exercise the decanting power, which shall include a statement as to the authorized fiduciary's reason for the proposed decanting and an explanation as to the differences between the first trust and the second trust or trusts.

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

(3) A copy of the first trust instrument.

(4) A copy of all second trust instruments.

(5) A warning, set out in a separate paragraph in not less than 10-point bold type, or a reasonable equivalent thereof, that states the following:

"If you do not bring a court action to contest the proposed trust decanting (the proposed changes to the trust) within 59 days of this notice, you will lose your right to contest the decanting."

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

(i) 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 19509 that asserts either of the following:

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

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

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

19508. (a) Notice to a person with authority to represent and bind another person under this code or a first trust instrument 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 this code or a first trust instrument 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 this code or a first trust instrument may file an application under Section 19509 on behalf of the person represented.

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

19509. (a) On application of an authorized fiduciary, a person entitled to notice under subdivision (c) of Section 19507, 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 do any of the following:

(1) Provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this part and is 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 part 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 of either of the following:

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

(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 19522 applies to a prior exercise of the decanting power.

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

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

(b) If an application is made under subdivision (a), the burden is on the authorized fiduciary to establish that notice was given as required by Section 19507 and that the authorized fiduciary may exercise the decanting power.

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

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

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

19510. An exercise of the decanting power shall be made in a writing signed by an authorized fiduciary. The signed writing shall, directly or by reference to the notice required by Section 19507, 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.

19511. (a) For purposes of 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 any of the following:

(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.

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

(b) Subject to subdivision (c) and Section 19514, 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 19513, in an exercise of the decanting power under this section, a second trust may not do any of the following:

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

(3) Reduce or eliminate a vested interest.

(d) Subject to paragraph (3) of subdivision (c) and Section 19514, 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 do each of the following:

(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.

(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 paragraphs (1) to (4), inclusive, of subdivision (d) 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.

19512. (a) For purposes of 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 19514, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust. For purposes of this subdivision, "substantially similar" means that there is no material change in a beneficiary's beneficial interests, except as provided in subdivision (d).

(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 it satisfies any of the following conditions:

(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 code.

(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.

19513. (a) For purposes of 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 legally 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, any of the following:

(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.

(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 19511 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 both of the following conditions are satisfied:

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

(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, all of the following rules apply:

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

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

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

(2) Paragraph (3) of subdivision (c) of Section 19511 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, shall 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.

19514. (a) For purposes of 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 that 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 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 do any of the following:

(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.

(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 subdivision (c).

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

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

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

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

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

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

(1) The decanting power.

(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 either of the following:

(1) The decanting power.

(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 subdivisions (a) and (b), an authorized fiduciary may exercise the decanting power under this part 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 subdivision (a) or an express restriction described in subdivision (b), the authorized fiduciary shall include that provision or restriction in the second trust instrument.

19516. (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 either of the following occurs:

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

(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 code unless either of the following occurs:

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

(2) The increase is approved by the court.

(c) (1) 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 subdivisions (a) and (b).

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

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

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

19517. (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 subdivision (c), a second trust instrument may reallocate fiduciary powers among fiduciaries as permitted by the law of this state other than this part.

19518. 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 any of the following occurs:

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

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

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

19519. (a) For purposes of this section:

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

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

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

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

(1) If a first trust contains property that qualified, or would have qualified but for provisions of this part 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 shall 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 part 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 shall 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 part other than this section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)), the second trust instrument shall 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 Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)). If the first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)) by application of Section 2503(c) of the Internal Revenue Code (26 U.S.C. Sec. 2503(c)), the second trust instrument shall 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 Section 2503(c) of the Internal Revenue Code (26 U.S.C. Sec. 2503(c)).

(4) If the property of the first trust includes shares of stock in an S-corporation, as defined in Section 1361 of the Internal Revenue Code (26 U.S.C. Sec. 1361) and the first trust is, or but for provisions of this part other than this section would be, a permitted shareholder under any provision of Section 1361 of the Internal Revenue Code (26 U.S.C. Sec. 1361), an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under Section 1361(c)(2) of the Internal Revenue Code (26 U.S.C. Sec. 1361(c)(2)). If the property of the first trust includes shares of stock in an S-corporation and the first trust is, or but for provisions of this part other than this section would be, a qualified subchapter-S trust within the meaning of Section 1361(d) of the Internal Revenue Code (26 U.S.C. Sec. 1361(d)), the second trust instrument shall 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 part other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under Section 2642(c) of the Internal Revenue Code (26 U.S.C. Sec. 2642(c)), the second trust instrument shall not include or omit a term that, if included in or omitted from the first trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under Section 2642(c) of the Internal Revenue Code (26 U.S.C. Sec. 2642(c)).

(6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second trust instrument may not include or omit any term that, if included in or omitted from the first trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)) and any applicable regulations, or any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)) or the regulations. If an attempted exercise of the decanting power violates the

preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and Section 19522 applies to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of Section 672(f)(2)(A) of the Internal Revenue Code (26 U.S.C. Sec. 672(f)(2)(A)), 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 Section 672(f)(2)(A) of the Internal Revenue Code (26 U.S.C. Sec. 672(f)(2)(A)).

(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 both of the following apply:

(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.

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

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

(B) Subject to paragraph (4), and 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 writing delivered to the fiduciary within the notice period and either of the following conditions is satisfied:

(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.

(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 either of the following apply:

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

(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.

19520. (a) Subject to subdivision (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 that apply to property of the first trust.

19521. 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.

19522. (a) If exercise of the decanting power would be effective under this part, except that the second trust instrument in part does not comply with this part, 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 that is not permitted under this part is void to the extent necessary to comply with this part.

(2) A provision required by this part 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 part.

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

19523. (a) For purposes of this section:

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

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

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

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

(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 part if each animal that benefits from the trust were an individual, if the protector consents in a signed writing to the exercise of the power.

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

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

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

19525. (a) For purposes of the law of this state other than this part and subject to subdivision (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.

19526. (a) Except as otherwise provided in subdivision (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 subdivision (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.

19527. 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.

19529. Nothing in this part limits a trustee's ability to petition for instructions or other approval under a trust pursuant Chapter 3 (commencing with Section 17200) of Part 5 or to petition for modification of a trust pursuant to Chapter 3 (commencing with Section 15400) of Part 2.

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