

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-121
SENATE BILL 450

AN ACT TO ADOPT THE NORTH CAROLINA UNIFORM TRUST DECANTING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 36C of the General Statutes is amended by adding a new Article to read:

"Article 8B.

"North Carolina Uniform Trust Decanting Act.

"§ 36C-8B-1. Short title.

This Article shall be known and may be cited as the North Carolina Uniform Trust Decanting Act.

"§ 36C-8B-2. Definitions.

The following definitions apply to this Article, unless the context clearly requires otherwise:

- (1) Authorized fiduciary. – 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. The term also includes a special fiduciary appointed under G.S. 36C-8B-9 or a special-needs fiduciary under G.S. 36C-8B-13.
- (2) Current beneficiary. – A beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal.
- (3) Decanting power. – The power of an authorized fiduciary under this Article to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.
- (4) First trust. – A trust over which an authorized fiduciary may exercise the decanting power.
- (5) Second trust. – A first trust after modification pursuant to this Article or a trust to which a distribution of property from a first trust is or may be made pursuant to this Article.

"§ 36C-8B-3. Scope.

(a) Except as otherwise provided in this section, this Article 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 Article shall not apply to a trust held solely for charitable purposes as described in G.S. 36C-4-405(a).

(c) Subject to G.S. 36C-8B-15, a trust instrument may restrict or prohibit exercise of the decanting power.

(d) This Article shall not limit the power of a trustee, power holder, 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 Article, common law, a court order, or a nonjudicial settlement agreement.



(e) This Article shall 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.

"§ 36C-8B-4. Fiduciary duty.

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

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

(c) Except as otherwise provided in the terms of the first trust, for purposes of this Article, G.S. 36C-8-801, and G.S. 36C-8-802(a), the terms of the first trust shall be deemed to include the decanting power.

"§ 36C-8B-5. Application; governing law.

This Article shall apply to a trust that meets any of the following criteria:

- (1) The trust has its principal place of administration in this State, including a trust that has had its principal place of administration changed to this State.
- (2) The trust 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 any of the following purposes:
 - a. Administration, including administration of a trust that has had its governing law for purposes of administration changed to this State.
 - b. Construction of terms of the trust.
 - c. Determination of the meaning or effect of terms of the trust.

"§ 36C-8B-6. Reasonable reliance.

A trustee or other person that reasonably relies on the validity of the exercise of a decanting power under this Article, law of this State other than this Article, or the exercise of a similar power under the law of this State or another jurisdiction shall not be liable to any person for any action or failure to act as a result of the reliance.

"§ 36C-8B-7. Notice; exercise of decanting power.

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

(b) Except as otherwise provided in this section, an authorized fiduciary shall give written notice of the intended exercise of the decanting power at least 60 days prior to the effective date of the exercise of the decanting power to all of the following:

- (1) Any settlor as to whom the second trust would be a grantor trust.
- (2) Each qualified beneficiary of the first trust.
- (3) Each person that currently has the right to remove or replace the authorized fiduciary.
- (4) Each other fiduciary of the first trust.

(c) The notice required pursuant to subsection (b) of this section shall meet all of the following requirements:

- (1) Specify the manner in which the authorized fiduciary intends to exercise the decanting power.
- (2) Specify the proposed effective date for exercise of the power.
- (3) Include a copy of the first trust.
- (4) Include a copy of all second trusts.

(d) The decanting power may be exercised before expiration of the notice period under subsection (b) of this section if all persons entitled to receive notice waive the period in a signed written instrument.

(e) The receipt of notice, waiver of the notice period, or expiration of the notice period shall not affect the right of a person to file an application pursuant to G.S. 36C-8B-9 asserting any of the following:

- (1) An attempted exercise of the decanting power is ineffective because it did not comply with this Article or was an abuse of discretion or breach of fiduciary duty.
- (2) The provisions of G.S. 36C-8B-22 apply to the exercise of the decanting power.

(f) An exercise of the decanting power shall not be ineffective because of the failure to give notice to one or more persons pursuant to subsection (b) of this section if the authorized fiduciary acted with reasonable care to comply with subsection (b) of this section.

"§ 36C-8B-8. Reserved.

"§ 36C-8B-9. Court involvement.

(a) An authorized fiduciary, a beneficiary, or a person entitled to notice under G.S. 36C-8B-7(b) may commence a proceeding for any of the following purposes:

- (1) To approve or disapprove a proposed exercise of the authorized fiduciary's decanting power.
- (2) To appoint a special fiduciary to exercise the decanting power.

(b) Nothing in this section shall affect the right of a person to file an action in the superior court division of the General Court of Justice for declaratory relief under Article 26 of Chapter 1 of the General Statutes, including, but not limited to, an action to determine the extent to which G.S. 36C-8B-22 applies to a prior exercise of the decanting power.

"§ 36C-8B-10. Formalities.

An exercise of the decanting power shall be made in a written instrument signed by an authorized fiduciary. The signed written instrument shall identify, directly or by reference to the notice required by G.S. 36C-8B-7, 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.

"§ 36C-8B-11. Decanting power.

(a) The following definitions apply to this section:

- (1) Noncontingent right. – 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) Vested interest. – An interest where any of the following exist:
 - 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 (i) income, (ii) a specified dollar amount, or (iii) a percentage of value of some or all of the trust property.
 - c. A current and noncontingent right, annually or more frequently, to withdraw (i) income, (ii) a specified dollar amount, or (iii) a percentage of value of some or all of the trust property.
 - d. A power of withdrawal.
 - e. A right to receive an ascertainable part of the trust property on the trust's termination which is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(b) With the exception of a special-needs trust, as provided in G.S. 36C-8B-13, an authorized fiduciary that has 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 or income of the first trust, subject to the following limitations:

- (1) A second trust may not include as a current beneficiary a person that is not a current beneficiary of the first trust, except as provided in subsection (c) of this section.
- (2) The beneficiaries of a second trust may include only beneficiaries of the first trust, except as provided in subsection (c) of this section.
- (3) A second trust may not reduce or eliminate a vested interest.
- (4) If an authorized fiduciary has distributive discretion over principal that is subject to an ascertainable standard, then the powers to distribute income or principal to current beneficiaries in a second trust or trusts shall be subject to the same ascertainable standard as in the first trust and, in the aggregate, shall be exercisable in favor of the same current beneficiaries to whom such distributions could be made in the first trust.

(c) Subject to the limitation provided in subdivision (3) of subsection (b) of this section, a second trust may do all 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 power of withdrawal.
- (3) Create or modify a power of appointment if the power holder is a current beneficiary of the first trust who is not the authorized fiduciary and the authorized fiduciary has distributive discretion to distribute principal to the beneficiary.
- (4) Create or modify a power of appointment if the power holder is a remainder beneficiary of the first trust who is not the authorized fiduciary, but the exercise of the power may take effect only after the power holder becomes, or would have become, if then living, a current beneficiary.

(d) A power of appointment described in subsection (c) of this section 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.

(e) If an authorized fiduciary has 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 distributive discretion.

(f) For purposes of G.S. 36C-8-814, the first trust shall be deemed to include the decanting power.

"§ 36C-8B-12. Reserved.

"§ 36C-8B-13. Trust for beneficiary with disability.

(a) The following definitions apply in this section:

- (1) Beneficiary with a disability. – A beneficiary of a first trust who the special-needs fiduciary believes may qualify, now or in the future, for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits, or is an individual who has been adjudicated incompetent.
- (2) Governmental benefits. – Financial aid or services from a State, federal, or other public agency.
- (3) Special-needs fiduciary. – With respect to a trust that has a beneficiary with a disability, the term has any of the following meanings:
 - 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 as described in sub-subdivision a. of this subdivision, 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 as described in sub-subdivisions a. or b. of this subdivision, 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. – A trust that 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 provided in G.S. 36C-8B-11 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if 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 exercising the decanting power pursuant to this section, all of the following rules apply:

(1) Notwithstanding G.S. 36C-8B-11(b)(2), the interest in the second trust of a beneficiary with a disability may have either of the following characteristics:

a. Be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. § 1396p(d)(4)(C).

b. Contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. § 1396p(d)(4)(A).

(2) The restriction contained in G.S. 36C-8B-11(b)(3) shall not apply to the interests of the beneficiary with a disability.

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

(d) For the purposes of this section, the second trust shall not be deemed a termination of the first trust for the purpose of triggering a payback provision in the first trust provided the second trust contains a payback provision complying with the reimbursement requirement of Medicaid law under 42 U.S.C. § 1396p(d)(4).

"§ 36C-8B-14. Reserved.

"§ 36C-8B-15. Trust limitation on decanting.

(a) An authorized fiduciary shall not exercise the decanting power to the extent the terms of the first trust expressly prohibit exercise of the decanting power or 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 shall be subject to any restriction in the terms of the first trust that expressly applies to the exercise of the following powers:

(1) The decanting power, and any such restriction contained in the terms of the first trust, shall be included in the terms of the second trust.

(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 shall not preclude exercise of the decanting power.

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

"§ 36C-8B-16. Change in compensation.

(a) If a first trust specifies an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless either of the following conditions is satisfied:

- (1) All qualified beneficiaries of the second trust consent to the increase in a signed written instrument.
- (2) The increase is approved by the clerk of superior court pursuant to G.S. 36C-2-203(a)(3).

(b) For the purposes of this section, a change in an authorized fiduciary's compensation which is incidental to other changes made by the exercise of the decanting power shall not be deemed an increase in the fiduciary's compensation.

"§ 36C-8B-17. Relief from liability and indemnification.

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

(b) A second trust 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 shall not reduce fiduciary liability in the aggregate; provided, however, a second trust may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by the laws of this State other than this Article.

"§ 36C-8B-18. Removal or replacement of authorized fiduciary.

An authorized fiduciary may not exercise the decanting power to modify a provision in a first trust granting another person power to remove or replace the fiduciary unless one or more of the following occur:

- (1) The person holding the power consents to the modification in a signed written instrument and the modification applies only to the person holding the power.
- (2) The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed written instrument and the modification grants a substantially similar power to another person.
- (3) A court approves the modification and the modification grants a substantially similar power to another person.

"§ 36C-8B-19. Tax-related limitations.

(a) The following definitions apply in this section:

- (1) Grantor trust. – A trust as to which a settlor of a first trust is considered the owner under sections 671 through 677 or section 679 of the Internal Revenue Code.
- (2) Nongrantor trust. – A trust that is not a grantor trust.
- (3) Qualified benefits property. – Property subject to the minimum distribution requirements of section 401(a)(9), and any applicable regulations, or to any

similar requirements that refer to section 401(a)(9) of the Internal Revenue Code or the regulations.

- (b) An exercise of the decanting power shall be subject to the following limitations:
- (1) If a first trust contains property that qualified, or would have qualified but for the provisions of this Chapter other than this section, for a marital deduction or a charitable 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 must 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 marital deduction or charitable deduction, as the case may be, 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 the provisions of this Chapter other than this section, for the exclusion from gift tax described in section 2503(b) of the Internal Revenue Code, or section 2503(b) by the application of section 2503(c) of the Internal Revenue Code, the second trust may 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 under section 2503(b) or section 2503(c) of the Internal Revenue Code.
 - (3) 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, the following provisions apply:
 - a. If the first trust is, or but for the provisions of this Chapter other than this section would be, a permitted shareholder under any provision of section 1361 of the Internal Revenue Code, 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.
 - b. If the first trust is, or but for the provisions of this Chapter other than this section would be, a qualified Subchapter-S trust within the meaning of section 1361(d) of the Internal Revenue Code, the second trust must not include or omit a term that prevents the second trust from qualifying as a qualified Subchapter-S trust.
 - (4) If the first trust contains property that qualified, or would have qualified but for the provisions of this Chapter 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, the second trust must not include or omit a term that, if included in or omitted from the first trust, 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.
 - (5) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second trust may not include or omit any term that, if included in or omitted from the first trust, would have increased the minimum distribution required with respect to the qualified benefits property under section 401(a)(9) of the Internal Revenue Code and any applicable regulations thereunder, or similar requirements that refer to section 401(a)(9) of the Internal Revenue Code or the regulations thereunder. If an attempted exercise of the decanting power violates this subdivision, 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 G.S. 36C-8B-22 applies to the separate share.

(6) The following provisions apply to a grantor trust:

a. If the first trust qualifies as a grantor trust because of the application of section 672(f)(2)(A) of the Internal Revenue Code, the second trust may not include or omit a term that, if included in or omitted from the first trust, would have prevented the first trust from qualifying under section 672(f)(2)(A) of the Internal Revenue Code.

b. Subject to subdivision (3) of this subsection relating to S corporation stock, (i) except as otherwise provided in sub-subdivision a. of this subdivision, the second trust may be a nongrantor trust even if the first trust is a grantor trust, and (ii) except as otherwise provided in sub-subdivision c. of this subdivision, the second trust may be a grantor trust even if the first trust is a nongrantor trust.

c. An authorized fiduciary may not exercise the decanting power if the settlor objects in a signed written instrument delivered to the fiduciary within the notice period and (i) the first trust and the second trust are both grantor trusts, in whole or in part, and 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 another person, or (ii) the first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor, unless the settlor has the power at all times to cause the trust to cease to be a grantor trust, or the first trust 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 contains the same provision.

(7) For the purposes of this subdivision, the term "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 sub-subdivision b. of subdivision (6) of this subsection, a second trust may not include or omit a term that, if included in or omitted from the first trust, would have prevented qualification of the second trust for a tax benefit if both of the following apply:

a. The first trust expressly indicates an attempt to qualify for the benefit, or the first trust clearly is designed to enable the first trust to qualify for the tax benefit.

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

"§ 36C-8B-20. Duration of second trust.

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

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

"§ 36C-8B-21. Need to distribute not required.

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

"§ 36C-8B-22. Saving provision.

(a) If exercise of the decanting power would be effective under this Article except that the second trust in part does not comply with this Article, the exercise of the decanting 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 which is not permitted under this Article is void to the extent necessary to comply with this Article.
- (2) A provision required by this Article to be in the second trust which is not contained in the second trust is deemed to be included in the second trust to the extent necessary to comply with this Article.

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

"§ 36C-8B-23. Reserved.

"§ 36C-8B-24. Terms of second trust.

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

"§ 36C-8B-25. Settlor.

(a) For the purposes of the laws of this State other than this Article and subject to subsection (b) of this section, a settlor of a first trust shall be 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.

"§ 36C-8B-26. Later-discovered property.

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

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

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

SECTION 2.1. G.S. 36C-1-103(17) reads as rewritten:

"(17) Settlor. – ~~A~~Except as otherwise provided in G.S. 36C-8B-25, a person, including a testator, who 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 that person's contribution except to the extent another person has the power to revoke or withdraw that portion."

SECTION 2.2. G.S. 36C-2-203(a)(1) reads as rewritten:

"(1) To appoint or remove a trustee, including the appointment and removal of a trustee pursuant to ~~G.S. 36C-4-414(b)~~G.S. 36C-4-414(b) and the appointment of a special fiduciary pursuant to G.S. 36C-8B-9."

SECTION 2.3. G.S. 36C-2-203(f)(6) reads as rewritten:

"(6) Actions involving the exercise of the ~~trustee's special power to appoint to a second trust pursuant to G.S. 36C-8-816.1~~decanting power pursuant to Article 8B of this Chapter."

SECTION 2.4. G.S. 36C-8-816.1 is repealed.

SECTION 3. This act is effective when it becomes law. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all relevant portions of the Official Comments to the Uniform Trust Decanting Act (2015) and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

In the General Assembly read three times and ratified this the 27th day of June, 2017.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Roy Cooper
Governor

Approved 9:12 a.m. this 18th day of July, 2017