



AN ACT GENERALLY REVISING LAWS RELATED TO PROVIDING FOR THE UNIFORM TRUST DECANTING ACT; ESTABLISHING THE SCOPE OF THE ACT; REQUIRING DECANTING POWER TO BE USED IN ACCORDANCE WITH FIDUCIARY DUTIES; ESTABLISHING WHICH TRUSTS ARE GOVERNED BY THE ACT; REQUIRING NOTICE WHEN EXERCISING THE DECANTING POWER; SPECIFYING HOW NOTICE WORKS; PROVIDING FOR JUDICIAL INVOLVEMENT; REQUIRING THE DECANTING POWER BE MADE IN A SIGNED RECORD; PROVIDING REQUIREMENTS FOR THE SIGNED RECORD; PROVIDING FOR DECANTING IN CASES OF EXPANDED AND LIMITED DISTRIBUTIVE DISCRETION AND FOR TRUSTS FOR BENEFICIARIES WITH DISABILITIES AND FOR TRUSTS FOR CARE OF ANIMALS; PROTECTING CHARITABLE INTERESTS; PROVIDING LIMITATIONS ON DECANTING; LIMITING CHANGES IN AN AUTHORIZED FIDUCIARY'S COMPENSATION; LIMITING USE OF DECANTING POWER FOR RELIEF FROM LIABILITY OR INDEMNIFICATION; LIMITING LIABILITY FOR CERTAIN TRUSTEES AND OTHER PERSONS; LIMITING USE OF DECANTING POWER TO MODIFY GRANTS OF POWER TO REMOVE OR REPLACE A FIDUCIARY; PROVIDING TAX-RELATED LIMITATIONS; PROVIDING FOR DURATIONS OF SECOND TRUSTS; ALLOWING USE OF DECANTING POWER WHETHER OR NOT A FIRST TRUST'S DISCRETIONARY DISTRIBUTION STANDARD COULD COMPEL A DISTRIBUTION OF PRINCIPAL; PROVIDING FOR DETERMINATIONS OF A SETTLOR'S INTENT; AND PROVIDING FOR LATER-DISCOVERED PROPERTY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1. Short title.** [Sections 1 through 30] may be cited as the "Uniform Trust Decanting Act".

**Section 2. Definitions.** In [sections 1 through 30]:

(1) "Appointive property" has the meaning in section 72-7-102(2).

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

(3) "Authorized fiduciary" means:

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

(b) a special fiduciary appointed under [section 9]; or

(c) a special-needs fiduciary under [section 13].

(4) "Beneficiary" means a person that:

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

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

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

(5) "Charitable interest" means an interest in a trust that:

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

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

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

(6) "Charitable organization" means:

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

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

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

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

(9) "Current beneficiary" means a beneficiary that on the date the beneficiary's qualification is

determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

(10) "Decanting power" or "the decanting power" means the power of an authorized fiduciary under [sections 1 through 30] to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

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

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

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

(14) "General power of appointment" has the meaning in section 72-7-102(6).

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

(16) "Person" has the meaning in section 72-38-103(12).

(17) "Power of appointment" has the meaning in section 72-7-102(13).

(18) "Powerholder" has the meaning in section 72-7-102(14).

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

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

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

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

(20) "Qualified beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined:

- (a) is a distributee or permissible distributee of trust income or principal;
- (b) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subsection (20)(a) terminated on that date without causing the trust to terminate; or

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

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

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

(23) "Second trust" means:

- (a) a first trust after modification under [sections 1 through 30]; or
- (b) a trust to which a distribution of property from a first trust is or may be made under [sections 1 through 30].

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

(25) "Settlor", except as otherwise provided in [section 25], means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion.

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

- (a) to execute or adopt a tangible symbol; or
- (b) to attach to or logically associate with the record an electronic symbol, sound, or process.

(27) "State" has the meaning in section 72-38-103(20).

(28) "Terms of the trust" means:

(a) except as otherwise provided in subsection (28)(b), the manifestation of the settlor's intent regarding a trust's provisions as:

- (i) expressed in the trust instrument; or
- (ii) established by other evidence that would be admissible in a judicial proceeding; or
- (b) the trust's provisions as established, determined, or amended by:
  - (i) a trustee or other person in accordance with applicable law;
  - (ii) a court order; or

(iii) a nonjudicial settlement agreement under 72-38-111.

(29) "Trust instrument" means a record 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.

**Section 3. Scope.** (1) Except as provided in subsections (2) and (3), [sections 1 through 30] 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.

(2) [Sections 1 through 30] does not apply to a trust held solely for charitable purposes.

(3) Subject to [section 15], a trust instrument may restrict or prohibit exercise of the decanting power.

(4) [Sections 1 through 30] 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 [sections 1 through 30], common law, a court order, or a nonjudicial settlement agreement.

(5) [Sections 1 through 30] does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

**Section 4. Fiduciary duty.** (1) 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.

(2) [Sections 1 through 30] does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of [sections 1 through 30].

(3) Except as otherwise provided in a first-trust instrument, for purposes of [sections 1 through 30] and sections 72-38-801 and 72-38-802(1), the terms of the first trust are deemed to include the decanting power.

**Section 5. Application -- governing law.** [Sections 1 through 30] applies to a trust created before, on, or after [the effective date of sections 1 through 30] that:

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

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

- (a) administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state;
- (b) construction of terms of the trust; or
- (c) determining the meaning or effect of terms of the trust.

**Section 6. Reasonable reliance.** A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under [sections 1 through 30], law of this state other than [sections 1 through 30], or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

**Section 7. Notice -- exercise of decanting power.** (1) In this section, a notice period begins on the day notice is given under subsection (3) and ends 60 days after the day notice is given.

(2) Except as otherwise provided in [sections 1 through 30], an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

(3) Except as otherwise provided in subsection (6), an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than 60 days, exclusive of the day notice is given, before the exercise to:

- (a) each settlor of the first trust, if living or then in existence;
- (b) each qualified beneficiary of the first trust;
- (c) each holder of a presently exercisable power of appointment over any part or all of the first trust;
- (d) each person that currently has the right to remove or replace the authorized fiduciary;
- (e) each other fiduciary of the first trust;
- (f) each fiduciary of the second trust; and
- (g) the attorney general, if [section 14(2)] applies.

(4) An authorized fiduciary is not required to give notice under subsection (3) to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable

diligence.

(5) A notice under subsection (3) must:

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

(6) The decanting power may be exercised before expiration of the notice period under subsection (1)

if all persons entitled to receive notice waive the period in a signed record.

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

(a) an attempted exercise of the decanting power is ineffective because it did not comply with [sections 1 through 30] or was an abuse of discretion or breach of fiduciary duty; or

(b) [section 22] applies to the exercise of the decanting power.

(8) An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (3) if the authorized fiduciary acted with reasonable care to comply with subsection (3).

**Section 8. Representation.** (1) Notice to a person with authority to represent and bind another person under a first-trust instrument or Title 72, chapter 38, part 3, has the same effect as notice given directly to the person represented.

(2) Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or Title 72, chapter 38, part 3, is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

(3) A person with authority to represent and bind another person under a first-trust instrument or Title 72, chapter 38, part 3, may file an application under [section 9] on behalf of the person represented.

(4) A settlor may not represent or bind a beneficiary under [sections 1 through 30].

**Section 9. Court involvement.** (1) On application of an authorized fiduciary, a person entitled to

notice under [section 7(3)], 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:

- (a) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under [sections 1 through 30] and consistent with the fiduciary duties of the authorized fiduciary;
  - (b) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under [sections 1 through 30] and to exercise the decanting power;
  - (c) approve an exercise of the decanting power;
  - (d) determine that a proposed or attempted exercise of the decanting power is ineffective because:
    - (i) after applying [section 22], the proposed or attempted exercise does not or did not comply with [sections 1 through 30]; or
    - (ii) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;
  - (e) determine the extent to which [section 22] applies to a prior exercise of the decanting power;
  - (f) provide instructions to the trustee regarding the application of [section 22] to a prior exercise of the decanting power; or
  - (g) order other relief to carry out the purposes of [sections 1 through 30].
- (2) On application of an authorized fiduciary, the court may approve:
- (a) an increase in the fiduciary's compensation under [section 16]; or
  - (b) a modification under [section 18] of a provision granting a person the right to remove or replace the fiduciary.

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

**Section 11. Decanting power under expanded distributive discretion.** (1) In this section:



(a) "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.

(b) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

(c) "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.

(d) "Vested interest" means:

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

(ii) 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;

(iii) 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;

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

(v) 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.

(2) Subject to subsection (3) and [section 14], an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

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

(a) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection (4);

(b) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as

otherwise provided in subsection (4); or

(c) reduce or eliminate a vested interest.

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

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

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

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

(d) 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.

(5) A power of appointment described in subsections (4)(a) through (4)(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.

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

**Section 12. Decanting power under limited distributive discretion.** (1) In this section, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(2) 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.

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

beneficiary in the first trust.

(4) 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:

- (a) the distribution is applied for the benefit of the beneficiary;
- (b) the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under the Montana Uniform Trust Code; or
- (c) 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.

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

**Section 13. Trust for beneficiary with disability.** (1) In this section:

(a) "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 incapacitated.

(b) "Governmental benefits" means financial aid or services from a state, federal, or other public agency.

(c) "Special-needs fiduciary" means, with respect to a trust that has a beneficiary with a disability:

- (i) 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;
- (ii) if no trustee or fiduciary has discretion under subsection (1)(c)(i), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or
- (iii) if no trustee or fiduciary has discretion under subsections (1)(c)(i) and (1)(c)(ii), 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.

(d) "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.

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

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

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

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

(a) Notwithstanding [section 11(3)(b)], the interest in the second trust of a beneficiary with a disability may:

(i) 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), as amended; or

(ii) contain payback provisions complying with reimbursement requirements of medicaid law under 42 U.S.C. 1396p(d)(4)(A), as amended.

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

(c) 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 that are substantially similar to the beneficiary's beneficial interests in the first trust.

**Section 14. Protection of charitable interest.** (1) In this section:

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

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

the distribution, if the charitable organization meets the requirement on the date of determination.

(2) 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.

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

- (a) diminish the charitable interest;
- (b) diminish the interest of an identified charitable organization that holds the charitable interest;
- (c) alter any charitable purpose stated in the first-trust instrument; or
- (d) alter any condition or restriction related to the charitable interest.

(4) If there are two or more second trusts, the second trusts must be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (3).

(5) If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subsection (3) must be administered under the law of this state unless:

- (a) the attorney general, after receiving notice under [section 7], fails to object in a signed record delivered to the authorized fiduciary within the notice period;
- (b) the attorney general consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or
- (c) the court approves the exercise of the decanting power.

(6) [Sections 1 through 30] does not limit the powers and duties of the attorney general under law of this state other than [sections 1 through 30].

**Section 15. Trust limitation on decanting.** (1) An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:

- (a) the decanting power; or
- (b) 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.

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

- (a) the decanting power; or
  - (b) 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.
- (3) 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.
- (4) Subject to subsections (1) and (2), an authorized fiduciary may exercise the decanting power under [sections 1 through 30] 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.
- (5) If a first-trust instrument contains an express prohibition described in subsection (1) or an express restriction described in subsection (2), the provision must be included in the second-trust instrument.

**Section 16. Change in compensation.** (1) 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:

- (a) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
  - (b) the increase is approved by the court.
- (2) 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 the Montana Uniform Trust Code unless:
- (a) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
  - (b) the increase is approved by the court.
- (3) A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections (1) and (2).

**Section 17. Relief from liability and indemnification.** (1) 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.

(2) 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.

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

(4) Subject to subsection (3), a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this state other than [sections 1 through 30].

**Section 18. Removal or replacement of authorized fiduciary.** An authorized fiduciary may not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

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

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

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

**Section 19. Tax-related limitations.** (1) In this section:

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

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

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

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

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

(a) If a first trust contains property that qualified, or would have qualified but for provisions of [sections 1 through 30] 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 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 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.

(b) If the first trust contains property that qualified, or would have qualified but for provisions of [sections 1 through 30] 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 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 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.

(c) If the first trust contains property that qualified, or would have qualified but for provisions of [sections 1 through 30] other than this section, for the exclusion from the gift tax described in 26 U.S.C. 2503(b), as amended, the second-trust instrument may not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. 2503(b), as amended. If the first trust contains property that qualified, or would have qualified but for provisions of [sections 1 through 30] other than this section, for the exclusion from the gift tax described in 26 U.S.C. 2503(b), as amended, by application of 26 U.S.C. 2503(c), as amended, the second-trust instrument may not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. 2503(c), as amended.

(d) If the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. 1361, as amended, and the first trust is, or but for provisions of [sections 1 through 30] other than this section would be, a permitted shareholder under any provision of 26 U.S.C. 1361, as amended, an authorized fiduciary



may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. 1361(c)(2), as amended. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of [sections 1 through 30] other than this section would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. 1361(d), as amended, the second-trust instrument may not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(e) If the first trust contains property that qualified, or would have qualified but for provisions of [sections 1 through 30] other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. 2642(c), as amended, the second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. 2642(c), as amended.

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

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

(h) In this subsection (2)(h), "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 subsection (2)(h)(i) and (2)(h)(ii) below, 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:

(i) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust

instrument clearly is designed to enable the first trust to qualify for the benefit; and

(ii) the transfer of property held by the first trust or the first trust qualified, or but for provisions of [sections 1 through 30] other than this section, would have qualified for the tax benefit.

(i) Subject to subsection (2)(d):

(i) except as otherwise provided in subsection (2)(g), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(ii) except as otherwise provided in subsection (2)(j), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

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

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

(ii) 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:

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

(B) 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.

**Section 20. Duration of second trust.** (1) Subject to subsection (2), a second trust may have a duration that is the same as or different from the duration of the first trust.

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

**Section 21. Need to distribute not required.** An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or

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

**Section 22. Saving provision.** (1) If exercise of the decanting power would be effective under [sections 1 through 30] except that the second-trust instrument in part does not comply with [sections 1 through 30], 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:

(a) A provision in the second-trust instrument that is not permitted under [sections 1 through 30] is void to the extent necessary to comply with [sections 1 through 30].

(b) A provision required by [sections 1 through 30] to be in the second-trust instrument that is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with [sections 1 through 30].

(2) If a trustee or other fiduciary of a second trust determines that subsection (1) applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

**Section 23. Trust for care of animal.** (1) In this section:

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

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

(2) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under [sections 1 through 30] if each animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the power.

(3) A protector for an animal has the rights under [sections 1 through 30] of a qualified beneficiary.

(4) Notwithstanding any other provision of [sections 1 through 30], if a first trust is an animal trust, in an exercise of the decanting power, the second trust must provide that trust property may be applied only to its intended purpose for the period the first trust benefitted the animal.

**Section 24. Terms of second trust.** A reference in Title 72, chapter 38, to a trust instrument or terms

of the trust includes a second-trust instrument and the terms of the second trust.

**Section 25. Settlor.** (1) For purposes of law of this state other than [sections 1 through 30] and subject to subsection (2), 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.

(2) 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.

**Section 26. Later-discovered property.** (1) Except as otherwise provided in subsection (3), 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.

(2) Except as otherwise provided in subsection (3), 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.

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

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

**Section 28. Uniformity of application and construction.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Section 29. Relation to electronic signatures in global and national commerce act.** [Sections 1 through 30] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001, et seq., but does not modify, limit, or supersede section 101(c) of that act, 15 U.S.C. 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. 7003(b).

**Section 30. Common law of trusts -- principles of equity.** The common law of trusts and principles of equity supplement [sections 1 through 30] except to the extent modified by [sections 1 through 30] or another statute of this state.

**Section 31. Severability.** If any provision of [this act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of [this act] which can be given effect without the invalid provision or application, and to this end the provisions of [this act] are severable.

**Section 32. Codification instruction.** [Sections 1 through 30] are intended to be codified as an integral part of Title 72, and the provisions of Title 72 apply to [sections 1 through 30].

- END -

I hereby certify that the within bill,  
HB 293, originated in the House.

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Chief Clerk of the House

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Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2021.

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President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2021.

HOUSE BILL NO. 293

INTRODUCED BY B. MERCER, S. FITZPATRICK

AN ACT GENERALLY REVISING LAWS RELATED TO PROVIDING FOR THE UNIFORM TRUST DECANTING ACT; ESTABLISHING THE SCOPE OF THE ACT; REQUIRING DECANTING POWER TO BE USED IN ACCORDANCE WITH FIDUCIARY DUTIES; ESTABLISHING WHICH TRUSTS ARE GOVERNED BY THE ACT; REQUIRING NOTICE WHEN EXERCISING THE DECANTING POWER; SPECIFYING HOW NOTICE WORKS; PROVIDING FOR JUDICIAL INVOLVEMENT; REQUIRING THE DECANTING POWER BE MADE IN A SIGNED RECORD; PROVIDING REQUIREMENTS FOR THE SIGNED RECORD; PROVIDING FOR DECANTING IN CASES OF EXPANDED AND LIMITED DISTRIBUTIVE DISCRETION AND FOR TRUSTS FOR BENEFICIARIES WITH DISABILITIES AND FOR TRUSTS FOR CARE OF ANIMALS; PROTECTING CHARITABLE INTERESTS; PROVIDING LIMITATIONS ON DECANTING; LIMITING CHANGES IN AN AUTHORIZED FIDUCIARY'S COMPENSATION; LIMITING USE OF DECANTING POWER FOR RELIEF FROM LIABILITY OR INDEMNIFICATION; LIMITING LIABILITY FOR CERTAIN TRUSTEES AND OTHER PERSONS; LIMITING USE OF DECANTING POWER TO MODIFY GRANTS OF POWER TO REMOVE OR REPLACE A FIDUCIARY; PROVIDING TAX-RELATED LIMITATIONS; PROVIDING FOR DURATIONS OF SECOND TRUSTS; ALLOWING USE OF DECANTING POWER WHETHER OR NOT A FIRST TRUST'S DISCRETIONARY DISTRIBUTION STANDARD COULD COMPEL A DISTRIBUTION OF PRINCIPAL; PROVIDING FOR DETERMINATIONS OF A SETTLOR'S INTENT; AND PROVIDING FOR LATER-DISCOVERED PROPERTY.