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Decanting to Modify Irrevocable Indiana Trusts

August 17, 2023

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DECANTING TO MODIFY IRREVOCABLE INDIANA TRUSTS

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DECANTING TO MODIFY IRREVOCABLE INDIANA TRUSTS



Description

- What "Decanting" is and how it can be used by the trustee of some trusts
- Differences between trust decanting and other methods for modifying an Irrevocable Trust
- A more flexible alternative: Give the trustee a customized decanting power or grant a special amendment power to a Trust Director
- Caveats to keep in mind when advising trustees about whether decanting is possible and advisable
- Situations in which trust decanting is a potential "solution" to problems caused by the inflexible or outdated structure of an irrevocable trust
- Practical and logistical requirements for accomplishing trust decanting
- Important definitions, rules, notice requirements, and limitations on decanting under the 2022 Indiana Act
- Suggested content for the written "record of exercise" of the decanting power
- Uncertain Federal tax consequences of trust decanting

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DECANTING TO MODIFY IRREVOCABLE INDIANA TRUSTS

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Indianapolis Webcast

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DISCLAIMER

Jeff Dible has used his best efforts to include accurate and up-to-date information in this paper. Citations to and the URL link for the Indiana Uniform Trust Decanting Act (HEA 1205, P.L. 161-2022) are the latest available from Westlaw and the Indiana General Assembly's web site. Responses to questions within the hypothetical example (pages 24-30) reflect the opinions and conclusions of Jeff Dible. Others might give different responses.

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DECANTING TO MODIFY IRREVOCABLE INDIANA TRUSTS

(1) What *IS* trust decanting?

“Trust decanting” is simply a method that the trustee of a trust may be able to use to modify the terms of an irrevocable trust without the approval of a court and without the consent of the trust’s beneficiaries.

The original “conceptual model” for trust decanting arose from the existence of a discretionary power, held and exercisable by the trustee of a trust, to distribute principal *out of* the trust and to or for the benefit of at least one beneficiary of the trust. The key idea was that if the trustee’s discretionary distribution power was worded broadly enough to authorize the trustee to distribute principal “*in further trust*” for Beneficiary B, then the trustee could —

- (a) create a new irrevocable trust for Beneficiary B and for other beneficiaries of the existing trust, *and*
- (b) distribute principal assets out of the existing trust and to the new trust, which would have different terms.

Another conceptual model for trust decanting was the “power of appointment,” where the trustee of the original or existing trust would be treated as having exercised a non-general power of appointment when the trustee “decanted” assets to a new or second trust. This was the conceptual model used in the former (pre-2022) Indiana trust decanting statute, *repealed* I.C. § 30-4-3-36, which, like many state decanting statutes, never used the words “decant” or “decanting.”

The latest conceptual model for trust decanting is found in the Uniform Trust Decanting Act, which as of mid-2023, has been enacted by 15 States (including Indiana and Illinois) and which has been introduced in Massachusetts and the District of Columbia. The Uniform Act (*see* Ind. Code § 30-4-10-12) has a specific two-pronged, “either/or” definition of “decanting power”:

As used in this chapter, “decanting power” means the power of an authorized fiduciary under this chapter to:

- (1) distribute property of a first trust to one (1) or more second trusts;
or
- (2) to modify the terms of the first trust.

Thus, under the Uniform Act and in States like Indiana that have enacted it, if an existing (first) trust is worded flexibly enough to allow the trustee to decant, the trustee can exercise the decanting power to simply modify the terms of that trust, without resorting to the “fiction” or the pretense of actually transferring assets to a new or second trust. On the other hand, if the trustee has decided to modify the first trust’s terms only with respect to *some* assets or *some* beneficiaries, it may well be necessary for

the trustee to actually distribute *some* (less than all) of first trust's assets to the new or second trust.

(2) Differences between trust decanting and other trust modification methods.

The following table summarizes the pros, cons and features of other trust modification methods that are available under Indiana's statutes, compared to trust decanting under Indiana's version of the Uniform Act.

Modification Method	Indiana Statute	Key Features & Advantages	Key Disadvantages
Trust decanting	§ 30-4-10-1 <i>et seq.</i> (Trust Code ch. 10)	<ul style="list-style-type: none"> • Trustee(s) act alone • Court approval is not required • Beneficiary consent is not required 	<ul style="list-style-type: none"> • Types of changes that are permissible are limited under the statute • Requires pre-decanting notice to "qualified beneficiaries"
Court-approved modification	§ 30-4-3-24.4 <i>See also</i> § 30-4-3-30 [reformation based on mistake by settlor]	<ul style="list-style-type: none"> • May work even if a few beneficiaries object • Potentially broad or extensive modifications are possible if consistent with settlor's intent and trust's purposes 	<ul style="list-style-type: none"> • Court proceeding and hearing on notice is required • Court has discretion to deny the petition • Petitioner must show an unanticipated change in circumstances
Court-approved equitable deviation	§ 30-4-3-26	<ul style="list-style-type: none"> • May work even if a few beneficiaries object • Precise, customized changes possible 	<ul style="list-style-type: none"> • Court proceeding required • Petitioner must demonstrate how requested deviation is consistent with settlor's intent • Only narrow, specific changes are possible

Modification Method	Indiana Statute	Key Features & Advantages	Key Disadvantages
Court-approved settlement agreement	§ 30-4-7-1 <i>et seq.</i> (ch. 7 of Trust Code)	<ul style="list-style-type: none"> • Can theoretically be used to drastically rewrite and restructure a trust (so long as all parties agree and court finds that the modifications' effect on the parties' rights and interests are just and reasonable) 	<ul style="list-style-type: none"> • Settlement agreement (clearly stating the modifications) must be carefully drafted • Written consent required from all beneficiaries and other persons with interests in the trust or claims against the trust • Court proceeding and court approval is required • Beneficiary consents may create adverse federal tax consequences for beneficiaries
Non-judicial settlement agreement (NJSA)	§ 30-4-5-25	<ul style="list-style-type: none"> • Court proceeding and court approval are optional • The class of trust beneficiaries and other parties who must sign will vary according to the breadth and scope of the modifications made 	<ul style="list-style-type: none"> • An NJSA can make only those modifications that a probate court could approve under ch. 3 of the Trust Code • The modifications made cannot violate a material purpose of the trust • Beneficiary consents may create adverse federal tax consequences for beneficiaries

Another alternative to trust decanting (and the other modification methods listed above) is for the settlor of the trust to include in the irrevocable trust instrument a

specific, customized decanting power *or* a limited amendment power that is carefully defined and granted to either the trustee of a trust or to one or more “trust directors,” such as a trust protector. Such provisions in the trust instrument could allow the holder of the power to make modifications that are not possible under Indiana’s decanting statute, or in an NJSA, or in a probate court proceeding under I.C. 30-4-3.

(3) Making trust modifications in multiple stages, with decanting as ONE step.

If you are advising and assisting a trustee (possibly with the cooperation of the trust’s living settlor) about how a proposed set of modifications can be accomplished, you may find that it is impossible or extremely impractical to make *all* of the modifications in one “round” of decanting. In such a situation, one solution might be to perform a trust decanting as a *first* step (before using some other modification method), or to perform a trust decanting as a *second* or *final* step, after using another modification method or court proceeding to resolve some preliminary issues.

Example 1: Several of the “qualified beneficiaries” of the first or existing trust are non-adult individuals, or are disabled, or are members of an “open” class into which additional members are expected to be born, and there are no *adult* individual beneficiaries with “substantially identical” interests in the existing trust, so that those adults could “virtually represent” the interests of the underage, disabled, or unborn beneficiaries under I.C. § 30-4-6-10.5(c), without creating at least the impression of a conflict of interest.

One solution is to use an NJSA or a court proceeding to select and appoint an independent guardian ad litem or “designated representative” (*see* I.C. § 30-4-1-2(8)) who can represent and bind the interests of those underage, disabled, or unborn beneficiaries and can receive the required pre-decanting notice on their behalf. Then the trustee can proceed more easily with decanting.

Example 2: You, as trustee’s attorney, determine that Indiana’s version of the Uniform Trust Decanting Act will not allow the desired modifications to be made via decanting, because under the first or existing trust instrument, the trustee’s discretion to distribute principal is limited by an ascertainable standard such as HEMS and therefore is “limited distributive discretion” (*see* I.C. § 30-4-10-42(a)).

One solution could be to use an NJSA or a court-approved modification under I.C. § 30-4-3-24.4 to remove the ascertainable standard language, so that the trustee will have “expanded distributive discretion” and will be freer to use decanting to make changes to the first or existing trust’s dispositive provisions, consistent with the Indiana Act.

Example 3: The trust instrument for the first or existing trust does give the trustee “expanded distributive discretion” to distribute principal. But you, as the trustee’s attorney, have determined that the Indiana Act still will not permit the desired modifications to be made through decanting. However, you research and your communications with out-of-state counsel have helped you identify another,

older state decanting statute in a nearby and convenient jurisdiction, and that other decanting statute will allow the desired modifications.

One solution could be to use decanting under the Indiana Act to change the situs of administration and the governing law for the existing trust from Indiana to that other jurisdiction. Then the current or a new trustee could hire counsel in the other jurisdiction and proceed with a second decanting under the other more flexible statute.

(4) Some threshold principles to keep in mind when a lawyer begins to advise a trustee about the feasibility of trust decanting.

(A) Ask and check: Does any provision in the current trust instrument prohibit or restrict trust decanting OR limit the type and scope of permitted amendments?

If the answer is YES, then trust decanting under the Indiana Act may be completely unavailable, or some modifications permitted under the Act may be prohibited by the trust instrument's provisions.

(B) Is any beneficiary of the current trust likely to object to or oppose the change that the trustee wants to accomplish through decanting?

If the answer is YES, then it may be advisable for the trustee to petition for probate court instructions about whether to decant, to "smoke out" beneficiary objections before spending additional time on drafting the changes. Or it may be advisable for the trustee to abandon the idea of using decanting to make the change(s).

(C) Would the change(s) that the trustee wants to make violate a material purpose of the current trust OR be inconsistent with the best interests of the beneficiaries as a group?

Keep in mind that a trustee's exercise of the decanting power could be clearly permissible under the Indiana Act but also be an (arguable) breach of fiduciary duty by the trustee. To restate this more bluntly: Just because a trustee can decant does not mean that the trustee should decant.

(D) Be prepared to read all of the Indiana Act carefully at the beginning of each new potential decanting project.

The old, repealed decanting statute (I.C. § 30-4-3-36) was short enough to allow any moderately experienced trust and estate lawyer to remember what changes to the first or original trust's terms were and were not permitted. That is really not possible with the much longer and more detailed Indiana Act in I.C. 30-4-10.

(5) Overview of Indiana's Uniform Trust Decanting Act.

Indiana's version of the UTDA was enacted, effective July 1, 2022, by Section 3 of 2022 House Enrolled Act 1205 (P.L. 161-2022). The full text of the Indiana UTDA is stated in **Appendix 2** at the end of this paper, and is also available from the General Assembly: : <http://iga.in.gov/legislative/2022/bills/house/1205#document-286078ce>

The Indiana UTDA comprises 60 sections and 7,591 words. In contrast, the old, repealed decanting statute (see **Appendix 1**) consisted of a single section and 574 words.

Because the Indiana UTDA has been in effect for more than a year, the new Act provides the only currently available procedure for using decanting to modify an Indiana trust. Repealed section 30-3-3-36 would now be relevant only for the purpose of analyzing whether a decanting that was started or completed before July 1, 2022 was accomplished in compliance with the repealed statute.

(6) Trusts that are subject to the new Indiana trust decanting Act

Unless the trust has *only* charitable beneficiaries and is held or administered *solely* for charitable purposes (see I.C. § 30-4-10-1(c)(1)), or unless the trust's terms specifically prohibit the exercise of a statutory decanting power, the new Indiana Act will apply to every newly-created or existing *irrevocable* trust that has *either* a principal place of administration in Indiana *or* an Indiana governing law provision that applies to the administration or construction of the trust.

(7) New specifically defined terms in the new Decanting Act

New I.C. 30-4-10 includes 47 specifically defined terms. Seven (7) of those definitions are borrowed from elsewhere in the Indiana Trust Code or from other Indiana statutes, but the rest of the defined terms in the Act are new. Here are some of the more important new definitions:

- “Decanting power” (§ 30-4-10-12): The power of an “authorized fiduciary” (see *below*) to distribute property of a first trust to one or more second trusts OR “to modify the terms of the first trust.” *Comment: This definition is significant because it allows a trustee or other authorized fiduciary to modify the first trust's terms without actually transferring assets to a second trust.*
- “Authorized fiduciary” (§ 30-4-10-4): A trustee, trust director, or other fiduciary (but not a settlor) that has discretion to distribute or to direct the distribution of principal of the first trust to 1 or more current beneficiaries. *Comment: This definition recognizes that a trust director may be the person who has the discretion to direct principal distributions, and therefore will be the “authorized fiduciary” who can use the decanting procedures under the new Act.*
- “Settlor” (§§ 30-4-10-28 and 30-4-10-55): The definition incorporates the regular Indiana Trust Code definition of “settlor” (a person who creates a trust) but with these additions:

- With respect to assets that are decanted from the first trust to a second trust, the settlor of the first trust is “deemed” to be a settlor of the second trust (§ 55(a)).
- If more than 1 person creates or contributes property to a trust, each person is a “settlor” with respect to the portion of the trust that is attributable to his or her contribution except to the extent that another person has a power to revoke or withdraw that portion (§ 24(b)).
- In determining a “settlor’s” intent with respect to a second trust, evidence of the intent of the authorized fiduciary (who exercises the decanting power) or of the intent of the settlor of the first trust may also be considered (§ 55(b)).
- “Current beneficiary” (§ 30-4-10-11): “A beneficiary who, on the date that the beneficiary’s qualification is determined, is a distributee or permissible distributee of trust income or principal” (also includes the holder of a presently exercisable *general* power of appointment).
- “Successor beneficiary” (§ 30-4-10-41(c)): A beneficiary that is not a qualified beneficiary (under I.C. § 30-4-1-2(19)) on the date the beneficiary’s qualification is determined. **Comment:** *This concept is used to regulate what powers of appointment can be created within the second trust and what beneficiaries can be given stronger or more definite interests under the second trust.*
- “Presumptive remainder beneficiary” (§ 30-4-10-41(b)): A qualified beneficiary who is not a current beneficiary.
- “Beneficiary with a disability” (§ 30-4-10-6): This is a broad and detailed definition that does not appear in the national, original Uniform Act. It is similar to the definition of “incapacitated person” in the guardianship statute (I.C. § 29-3-1-7.5), but here, “disability” also includes susceptibility to financial exploitation and progressive diseases or conditions that may impair a beneficiary’s ability to provide self-care or to manage assets *currently or in the future*.
- “Noncontingent right” (§ 30-4-10-41(a)): A right that is not subject to the exercise of discretion or subject to the occurrence of a specified event that is not certain to occur.
- “Vested interest” (§ 30-4-10-41(d)): This is an important multi-part definition:
 - A “right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power”;
 - 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”;

- 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”;
- A “presently exercisable general power of appointment”;¹ or
- 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.”

Unless a beneficiary of the first trust is disabled and unless new section 43 can be used to create a special needs trust as the second trust, the exercise of the decanting power cannot “reduce or eliminate a vested interest” under the first trust (§ 30-4-10-41(f)(3)).

- “Ascertainable standard” (§ 30-4-10-3) and “reasonably definite standard” (§ 30-4-10-24): The Act borrows the federal tax law definitions of these terms from Code sections 674(b)(5)(A), 2041(b)(1)(A), and 2514(c)(1) and also refer to the “applicable regulations.”
- “Expanded distributive discretion” (§ 30-4-10-14): “A discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.”
- “Limited distributive discretion” (§ 30-4-10-42(a)): “A discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.”

As explained further in **Part (8)** below, one of the most important top-level changes in Indiana law under the Act is that the *kinds* of changes that can be made (through decanting) in the second trust will be broad if the trustee or other authorized fiduciary has “expanded distributive discretion” (no ascertainable standard or reasonably definite standard as a limitation), but the *kinds* of changes that can be made will be narrow if the trustee or other authorized fiduciary has only “limited distributive discretion.”

¹ New I.C. § 30-4-10-17, -20, -21, and -22 contain common-sense and helpful definitions of “powerholder,” “power of appointment,” general power of appointment,” and “presently exercisable power of appointment.”

(8) Decanting requirements, rules and procedures under old § 30-4-3-36 that are continued (but usually in more detail) under the new Act

Practical Issue, Rule or Requirement	Provision in Old § 30-4-3-36	Provision in New Act (IC 30-4-10)	Comment
The written terms of the “first trust” can prohibit or restrict decanting	Opening lines of § 36(a)	§ 1(d) and § 45(a)	If the first trust’s terms do not prohibit or restrict decanting, § 33(d) says the first trust’s terms are deemed to include the decanting power
Any “first trust” can include a specific decanting power that is broader than the statutory power	§ 36(g)	§ 1(c)(4)	A specific decanting provision included in the written terms of a trust controls over a contrary rule in the Act
Not a breach of fiduciary duty or actionable misconduct if a trustee declines to decant	§ 36(f)	33(c)	The trustee of a first trust also has no duty to inform the beneficiaries about the availability of decanting
A spendthrift clause or a general prohibition of amendment or revocation does not restrict or prohibit the trustee’s power to decant	§ 36(e)	§ 45(c)	The Act adds that decanting is not prevented by a general provision that prohibits assignment of a beneficiary’s interest in the first trust
Decanting does not require the probate court’s approval or the consent of any beneficiaries	Inferred from the silence of section 36 about court approval or consent	§ 33(a)	To prevent the IRS arguing that any beneficiary has made a taxable gift to any other beneficiary as a result of a change accomplished through decanting to a second trust, the beneficiaries should not consent to any change in dispositive terms

Practical Issue, Rule or Requirement	Provision in Old § 30-4-3-36	Provision in New Act (IC 30-4-10)	Comment
A trustee with the power to decant can petition the probate court for instructions about whether to decant and with what changes	Inferred from I.C. § 30-4-3-18(a)	§ 39(a)	Section 39 in the Act is more detailed about the kinds of guidance that a trustee or other authorized fiduciary can request from the probate court
Requirement for a pre-decanting notice to qualified beneficiaries at least 60 days in advance of proposed decanting	§ 36(d), first sentence	§§ 35 through 38	The Act's requirements are broader and more detailed; <i>see</i> Part (9) below
Requirement for a written "record of exercise" of the decanting power	§ 36	§ 40	The Act's § 40 is more detailed about the required content of the record of exercise; <i>see</i> Part (9) below
A beneficiary can petition the probate court for an order preventing decanting <i>OR</i> to allege that the decanting is a breach of duty or has violated beneficiary rights	§ 36(d), last sentence	§ 37(a) § 39(a)(4) and (a)(7)	Even after expiration of the 60-day notice period or after a waiver of notice, a beneficiary or other person can file a petition for a determination that a proposed or completed decanting violated the act or is a breach of fiduciary duty
For Rule Against Perpetuities (RAP) purposes, preventing the postponement of vesting or termination under the second trust	§ 36(c), last sentence	§ 50(b)	The terms of the second trust <i>can</i> extend the duration or postpone the vesting in enjoyment of various beneficial interests, but not beyond the end of the RAP period

What is the legal effect of a change that is made through decanting in the second trust but which violates a rule or restriction in the new Act? A handy provision (new I.C. § 30-4-10-52) provides the answers:

- **The “read out” rule:** If the second-trust instrument contains a changed or new provision that is prohibited under the Act, that provision is void “to the extent necessary to comply with this chapter [IC 30-4-10].”
- **The “read in” rule** If the second-trust instrument should have kept some provision from the first trust that the Act required to be preserved, that provision is “deemed to be included in the instrument to the extent necessary to comply with this chapter.”
- If a trustee or other fiduciary determines that either of the above rules applies as a result of a prior exercise of the decanting power, the trustee or other fiduciary “shall take corrective action consistent with the fiduciary’s duties.” I.C. § 30-4-10-52(c).

(9) Requirements for the “pre-decanting notice” and the “record of exercise” of the decanting power under the Indiana Act

As stated in the above table, these two requirements were also in the repealed section 30-4-3-36 and were carried over into the Act (in part because they are extremely common elements of the trust decanting statutes in most States).

Old I.C. § 30-4-3-36(d) required the trustee to provide the 60-day pre-decanting notice to all qualified beneficiaries (as defined in I.C. § 30-4-1-2(19)) of the first trust but did not specify the content of the pre-decanting notice, except for this sentence: “A copy of the proposed instrument exercising the power satisfies the trustee's notice obligation under this subsection.”²

In the new Act, the person who must give the pre-decanting notice is the “authorized fiduciary” (which may be either a trustee or a trust director) who possesses and intends to exercise the decanting power. New I.C. § 30-4-10-36 lists the minimum required content for the 60-day pre-decanting notice, which must:

- “(1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;
- (2) specify the proposed effective date for the exercise of the decanting power;

² Because the required content for the written record of exercise was not specified in detail in subsection 36(c) of the repealed statute, this writer had to design his own “notice” and “record of exercise” forms to include, at a minimum, the details of the terms of the first trust that were being changed in the second trust.

- (3) include a copy of the first-trust instrument; and
- (4) include a copy of the second-trust instrument.”

Section 35(a) in the new Act expands the class of persons who must be served with the 60-day pre-decanting notice, to include not just the qualified beneficiaries of the first trust but also —

- each settlor of the first trust who is still alive or in existence,
- each fiduciary of the first trust,
- each fiduciary of the second trust,
- each person that currently has the right to remove or replace the authorized fiduciary who is giving the notice,
- each person who holds a presently exercisable power of appointment under the first trust, and
- the attorney general of the state, if the first trust contains a charitable interest.

If an individual is listed above and is supposed to receive a pre-decanting notice, but if that individual is a minor or unborn or incapacitated or cannot be located, the authorized fiduciary can serve the notice on a virtual representative for that individual, including a “designated representative,” under I.C. § 30-4-6-10.5. See new I.C. § 30-4-10-35(a)(2), -35(c), and 38.

New § 30-4-10-35(b) says that the 60-day pre-decanting notice period begins on the day when the notice is given and expires 59 days later. Subsection 35(d) provides that the 60-day lead time may be waived only if all the persons who are entitled to receive the notice sign written waivers.

Under repealed I.C. § 30-4-3-36(c), the written record of exercise of the decanting power must be “signed and acknowledged by the trustee; and . . . filed with the records of the first trust.” The old statute says nothing about the required *content* of the “record of exercise. In this writer’s opinion, the best practice under this old Indiana statute was to include in the record of exercise, at a minimum, all of the written terms of the second trust and confirmation of what changes were made, compared to the first trust’s terms.

New I.C. § 30-4-10-40 helpfully specifies the required content of the “record of exercise” that the authorized fiduciary must sign and keep. The signed record of exercise must:

- “(1) directly or indirectly reference the notice required by section 35 of this chapter;
- (2) identify the first trust and the second trust;
- (3) identify and state the property of the first trust being distributed to each second trust; and

(4) identify the property that remains in the first trust.”

The written terms (*i.e.*, the trust instrument) of the second trust are not required to be included in the record of exercise *because they are part of the required content of the 60-day pre-decanting notice*.

(10) Differences between “second trust” modifications that are possible with “expanded distributive discretion” vs. “limited distributive discretion”

Indiana’s version of the Act, like the national version, contains *two separate* statements of the power and authority of an “authorized fiduciary to decant:

- Section 30-4-10-41(e) states, “an authorized fiduciary that has **expanded distributive discretion** over the principal of a first trust for the benefit of one (1) or more current beneficiaries may exercise the decanting power over the principal of the first trust.” *The stated exceptions to this general rule are in subsection 41(f) [explained below] and in subsection 44 for trusts with charitable interests.*
- Section 30-4-10-42(b) states, “an authorized fiduciary that has limited distributive discretion over the principal of the first trust for the benefit of one (1) or more current beneficiaries may exercise the decanting power over the principal of the first trust,” subject to important restrictions in subsections (c) and (d) [explained below].

If a trustee or other authorized fiduciary has a discretionary distribution power (decanting power) that applies to fewer than all the principal assets of the first trust (*e.g.*, only with respect to “Family Fund A”), then the authorized fiduciary can exercise the decanting power only with respect to that subset of the first trust’s principal. *See* I.C. §§ 30-4-10-41(i) and 30-4-10-42(e).

The following table summarizes the kinds of changes that can or cannot be made in the terms of the second trust, according to whether the trustee or other authorized fiduciary has “expanded distributive discretion” or only “limited distributive discretion.” These rules are found in sections 41 and 42 of the new Indiana Act.

If the authorized fiduciary has “expanded distributive discretion” –	If the authorized fiduciary has only “limited distributive discretion” –
The terms of the second trust <i>CAN</i> make these changes (compared to first trust): <ul style="list-style-type: none">• <i>CAN</i> postpone or accelerate the vesting in enjoyment of a beneficiary’s interest that is not a (currently) “vested interest”	The terms of the second trust <i>CAN</i> make these changes (compared to first trust): <ul style="list-style-type: none">• <i>CAN</i> make any changes in administrative provisions not explicitly prohibited in the rest of the Act

If the authorized fiduciary has “expanded distributive discretion” –	If the authorized fiduciary has only “limited distributive discretion” –
<ul style="list-style-type: none"> • CAN make a successor beneficiary a presumptive remainder beneficiary • CAN change the distribution standards for any beneficiary’s <i>discretionary</i> interest in the first trust • CAN delete an appointment power that is NOT a presently exercisable general power of appointment • CAN create or modify a power of appointment for a current beneficiary who is eligible to benefit from principal distributed under expanded distributive discretion • CAN create or modify an appointment power for a successor beneficiary or presumptive remainder beneficiary of the first trust, but ONLY if the power will be exercisable after the power holder becomes a current beneficiary • CAN include a new or modified appointment power exercisable in favor of appointees who are not beneficiaries of the first trust • CAN change the governing law under the second trust to a different jurisdiction • CAN make any changes in administrative provisions not explicitly prohibited in the rest of the Act 	<ul style="list-style-type: none"> • CAN change the governing law under the second trust to a different jurisdiction • If the first trust requires a distribution to be made <i>directly to</i> a beneficiary, CAN provide that the distribution can be paid or applied “for the benefit” of that beneficiary (so long as the “substantially similar beneficial interest” requirement is satisfied) <hr/> <p>The terms of the second trust <i>CANNOT</i> make these changes (except with respect to a beneficiary with a disability (Sec. 43))</p> <ul style="list-style-type: none"> • <i>CANNOT</i> reduce or eliminate a vested right such as a mandatory right to receive distributions or a currently exercisable withdrawal power • <i>CANNOT</i> add a current beneficiary who is not a current beneficiary of the first trust • <i>CANNOT</i> add as a presumptive remainder beneficiary or successor beneficiary a person who isn’t a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust

If the authorized fiduciary has “expanded distributive discretion” –	If the authorized fiduciary has only “limited distributive discretion” –
<p>The terms of the second trust <i>CANNOT</i> make these changes (except with respect to a beneficiary with a disability (Sec. 43)):</p> <ul style="list-style-type: none"> • <i>CANNOT</i> reduce or eliminate a vested right such as a mandatory right to receive distributions or a currently exercisable withdrawal power • <i>CANNOT</i> add a current beneficiary who is not a current beneficiary of the first trust • <i>CANNOT</i> add as a presumptive remainder beneficiary or successor beneficiary a person who isn’t a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust 	

(11) Changes (compared to the first trust) that are possible under the Act with respect to the interest of a “beneficiary with a disability”

One of the innovations in the Uniform Act is a detailed section (in Indiana’s version, I.C. § 30-4-10-43) which permits decanting to change the interest of a trust beneficiary who has a disability, even if that disabled beneficiary’s interest is a mandatory income, annuity or unitrust interest and or even if that disabled beneficiary has a currently-exercisable right to withdraw assets from the first trust. In contrast, Indiana’s old decanting statute (*see* I.C. § 30-4-3-36(a)(2)) prohibited decanting to reduce or eliminate a mandatory income, annuity or unitrust interest of a beneficiary, whether disabled or not.

Because the new Act defines the “decanting power” as consisting of the power to distribute assets to a second trust and the power to modify the terms of the first trust, and because sections 6 and 43 of the new Act broadly define “beneficiary with a disability” and provide more flexible decanting rules for the interests of disabled beneficiaries,³ the new Act will permit changes that will benefit the interests of a

³ Ind. Code § 30-4-10-43(f)(3) confirms that if a first trust has a beneficiary with a disability *and also* one or more beneficiaries who are not disabled, the second trust(s) must grant to the non-disabled beneficiaries substantially the same beneficial interests as they have under the first trust.

beneficiary with a disability by (for example) making it possible for the disabled beneficiary to continue to receive or to qualify for means-tested government benefits.

New section 43 contains specific definitions of “government benefits” and “special needs trust” [a trust that the trustee reasonably believes would not be considered as a resource for the purpose of determining whether a beneficiary with a disability is eligible for government benefits]. Section 43 also contains an explicit and broad definition of “special needs fiduciary” [a trustee or other fiduciary who is not a settlor and who can exercise the decanting power to benefit a beneficiary with a disability]. This specific definition of “special needs fiduciary” is required because in some situations, the trustee who administers a first trust which has a disabled beneficiary may not have any discretionary power to distribute income or principal to the disabled beneficiary or to any other current beneficiary. That trustee will nevertheless fit the definition of “special needs fiduciary” if the trustee is required to distribute part or all of the first trust’s income or principal to at least one current beneficiary, one of whom has a disability. See I.C. § 30-4-10-43(c)(3).

When a first trust has a beneficiary with a disability, the Act imposes two primary constraints on the exercise of the decanting power:

- The second trust (which could be a modification of the first trust or an actual separate trust) must be a “special needs trust” that benefits the beneficiary with a disability [I.C. § 30-4-10-43(e)(1)].
- The trustee or other “special needs fiduciary” who decants to the second trust must determine that the exercise of the decanting power “will further the purposes of the first trust” [I.C. § 30-4-10-43(e)(2)].

There is a third potential constraint under section 49 of the new Act if the decanting power were exercised to modify the disabled beneficiary’s interest in a way that would destroy a past tax benefit that was claimed for assets of the first trust. If section 43 permits extensive change to the interest of the disabled beneficiary but if that change would violate section 49 of the Act and cause a loss of a tax benefit, does section 49 trump or control over section 43, or does section 43 (and the special circumstances and needs of the disabled beneficiary) cause section 43 to control?

Neither the national Uniform Act, nor the official comments, nor Indiana’s version of the Act answers this question, and national estate planning commentators and appellate courts have (so far) not answered it either.

The opening sentence of I.C. § 30-4-10-49(e)(3) is worded almost identically to the corresponding text of the national Uniform Act and reads as follows [*italics added*]:

(3) If the first trust contains property that qualified, *or would have qualified but for provisions of this chapter other than this section*, for the exclusion from the gift tax described in 26 U.S.C. 2503(b), as amended and in effect on July 1, 2022, the second-trust instrument must not include or omit a term

that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. 2503(b), as amended and in effect on July 1, 2022.

Here is the simplest, most straightforward interpretation of the section 49 restrictions: If the beneficiary with a disability has an interest in the first trust that was funded with or traceable to an asset transfer that qualified for the estate or gift tax marital deduction or which qualified as an annual exclusion gift or “non-taxable gift” for federal gift tax or GST tax purposes, then section 49 prohibits a decanting which would change the disabled beneficiary’s interest under the second trust in a way that would have caused the original funding transfer to the first trust to fail to qualify for the tax benefit.

In the sentence from I.C. § 30-4-10-52(e)(3) quoted above, the reason for including the italicized phrase “but for provisions of this chapter other than this section” is not clear. Section 43 is a “provision of this chapter [IC 30-4-10] other than this section.” *Does this mean that section 43 controls if section 43 permits an exercise of the decanting power to make a change that section 49 (tax restrictions) would have prohibited?* The answer is not obvious.

If the straightforward interpretation of section 49 is the correct one, and if preserving or losing a marital deduction, an annual gift exclusion, or a zero inclusion ratio for a past GST gift is at stake, then it may be impossible for a trustee or other special needs fiduciary *to use the decanting power* to make the necessary changes to the disabled beneficiary’s interest, in order to permit the disabled beneficiary to become or remain qualified to receive government benefits. Another trust modification method may have to be used.

When a beneficiary of the first trust has a disability and when new section 43 gives a “special needs fiduciary” (such as a qualifying trustee) broader and more flexible powers to decant or modify with respect to the disabled beneficiary’s interest, subsection 43(f)(2) states that subsection 41(f)(3) does not apply. If the tax limitations in section 49 of the new Act do not apply, and if the disabled beneficiary has a “vested interest” in the first trust (*e.g.*, a mandatory income, annuity or unitrust interest, or a currently exercisable withdrawal power, or the right to receive direct distribution of an “outright” share of the assets of a terminating trust), the special needs fiduciary can eliminate that vested interest and replace it with an entirely discretionary spendthrift interest under the second trust.

If a special needs fiduciary uses new section 43 to create and fund a second trust which gives the disabled beneficiary an entirely discretionary spendthrift interest, that second trust cannot add remainder beneficiaries who are not either current beneficiaries or successor beneficiaries of the first trust. *See* I.C. § 30-4-10-43(f)(1), cross-referencing § 30-4-10-41(f)(2). However, unless the loss of a federal tax benefit is an issue, the

possibilities for structuring the second trust as a “special needs” trust are otherwise wide open.

I.C. § 30-4-10-43(f)(1)(A) and (B) specifically permit the disabled beneficiary’s interest in the second trust to be structured as a “(d)(4)(A) trust” under 42 U.S.C. § 1396p(d)(4)(A), or as a “(d)(4)(C) pooled trust” under 42 U.S.C. § 1396p(d)(4)(C). Both of those types of trusts are “self-settled trusts,” treated as created by the beneficiary with the disability.

- If the beneficiary with a disability is *currently* entitled to receive one or more mandatory distributions of income or principal from the first trust or if that disabled beneficiary has a currently exercisable and unconditional power to withdraw assets from the first trust, this writer believes that the second trust (special needs trust) which receives the decanting distribution arguably should be treated as a self-settled trust for government benefit eligibility purposes. This means that unless it is a (d)(4)(C) pooled trust, it should contain a payback provision.
- In contrast, if the beneficiary with a disability has some *future* right to receive mandatory distributions starting at a later date or if that disabled beneficiary will have a withdrawal power that won’t become exercisable until some date that is at least a year in the future, *and* if that disabled beneficiary either has no current right to receive distributions or has only a current discretionary interest, this writer believes that the second trust (special needs trust) can eliminate the future interest and can be structured as a third-party discretionary trust, without any payback provision.

(12) Protecting “charitable interests” under the first trust when the decanting power is exercised

Section 44 of the new Indiana Act (I.C. § 30-4-10-44) goes into more detail than our old, repealed decanting statute and contains safeguards to prevent most charitable interests in the first trust from being diminished or significantly altered. The restrictions in new section 44 operate as additional constraints on the decanting power even when the trustee of first trust has “expanded distributive discretion.”

The rules in new section 44 should be read in light of the definitions of “charitable organization,” “charitable purpose,” and “charitable interest” in sections 7, 8 and 9 of the new Indiana Act. The main restrictions in new section 44 are in subsection (d) and state that if the first trust contains a charitable interest,

. . . the second trust must not:

- (1) diminish the charitable interest [*for example, reduce a dollar amount or percentage or fractional interest*]:

- (2) diminish the interest of an identified charitable organization that holds the charitable interest [*for example, replace one charitable beneficiary with a different one*];
- (3) alter any charitable purpose stated in the first-trust instrument; or
- (4) alter any condition or restriction related to the charitable interest.

Subsection 44(a) includes an additional defined term, “determinable charitable interest,” which could include a charitable organization’s lead interest under a CLAT or CLUT, a charitable organization’s remainder interest under a CRAT or CRUT, or any other unconditional right that a charitable organization has or will later have to receive a distribution for charitable purposes, either currently or on the occurrence of a specified event.

If a charitable organization has a “determinable charitable interest” in the first trust, then two additional rules apply:

- The Attorney General of Indiana has the rights of a qualified beneficiary of the first trust and may represent and bind the charitable interest (new I.C. § 30-4-10-44(c)).⁴
- The terms of the second trust cannot change the governing law for the administration of the charitable interest to the law of some non-Indiana jurisdiction, unless the probate court approves the change, *or unless* the attorney general consents in writing to the change in governing law, *or unless* the attorney general fails to timely object within the 60-day notice period that is triggered by the pre-decanting notice (new I.C. § 30-4-10-44(f)).

(13) Tax-driven restrictions on decanting under section 49 of the new Act

The longest section in the new Act is section 49 (§ 30-4-10-49), which is designed and intended to prevent the loss of significant tax benefits for the first trust as a result of ill-conceived or mistaken exercises of the decanting power.

The Uniform Trust Decanting Act was deliberately designed to include these long and detailed tax provisions to induce the Treasury Department and IRS to issue guidance on the federal tax consequences of trust decanting when decanting makes a change to the beneficial interests in a trust. On December 27, 2011, the Treasury Department posed questions, invited comments, and announced that it was “considering approaches” to be put into published guidance. *See* Notice 2011-101 (2011-52 IRB 932). However, After 2013, Treasury dropped “tax decanting” guidance from its topic list in its Priority Guidance Plan and has not restored it in any later Priority

⁴ Based on this writer’s experience, it is unlikely that the Indiana Attorney General would take any position for or against any change that an authorized fiduciary might try to accomplish through decanting.

Guidance Plan (through the 2022-23 Plan and May 2023 update). Beginning with Rev. Proc. 2011-3, 2011-1 IRB 111 (issued in January 2011), the IRS announced that the federal tax consequences of trust decanting was an “area under study” and that the IRS would not issue private letter rulings in this area until after the Treasury Department publishes regulations or other guidance.

Among estate planning professionals, the consensus was and is that the Treasury Department and IRS would become willing to issue official guidance on the federal tax consequences of trust decanting after state law acquired some uniformity. The Uniform Trust Decanting Act and its tax benefits section attempt to create that uniformity.

Subsection (e) of new section 49 consists of ten (10) specific tax-driven rules or restrictions, which are “limitations” on “the exercise of the decanting power.” These restrictions work because under I.C. § 30-4-10-52(a)(1) and (a)(2), if an exercise of the decanting power results in a provision in the second trust that violates the Act, an offending provision is *void* to the extent necessary to comply with the new Act, and a provision that is missing is deemed to be included in the second-trust instrument. The rules and restrictions in subsection 49(e) are in subdivisions (1) through (10) and are summarized as follows:

- (1) Don’t terminate or jeopardize an estate or gift tax **marital deduction** that was claimed for assets of or a transfer to the first trust.
- (2) Don’t terminate or jeopardize an estate or gift tax **charitable deduction** that was claimed for assets of or a transfer to the first trust.
- (3) Don’t disqualify an interest in or assets of the first trust from an annual exclusion from taxable gifts under Code section 2503(b) or (c). ⁵
- (4) If the first trust holds S corporation stock, maintain provisions in the second trust which permit it to continue as a qualified subchapter S trust (QSST).
- (5) If the first trust contained assets that qualified for a zero inclusion ratio for GST tax purposes because the assets were transferred to the first trust in the form of a non-taxable gift under Code § 2642(c). ⁶

⁵ Three types of gifts to a “first trust” would have qualified as annual exclusion gifts under Code § 2503 and subsection 49(e)(3) of the Act: “Outright” gifts of a present interest in property, up to the per-donee annual maximum (\$16,000 in 2022); gifts with Crummey-type withdrawal powers; and gifts to section 2503(c) minor’s trusts.

⁶ Under § 2642(c), a gift to a trust for a skip person is a “non-taxable gift” if it satisfies Code § 2503(b) or (c) and if the trust has that skip person as its sole beneficiary during his or her lifetime and if the trust assets will be included in the skip person beneficiary’s federal gross estate if he or she dies before the trust terminates.

- (6) If the first trust holds or is entitled to receive assets of any retirement plan or account that is subject to Code § 401(a)(9) and the corresponding regulations, the provisions of the second trust cannot make a change that would increase the required minimum distributions (RMDs) or [arguably] replace a 10-year payout requirement under the SECURE Act with a 5-year payout requirement.
- (7) If the first trust has a grantor who is not a U. S. citizen or resident and if the first trust relies on Code § 672(f)(2)(A) to qualify as a grantor trust for income tax purposes, the authorized fiduciary cannot decant to a second trust that fails to also satisfy the requirements of Code § 672(f)(2)(A) to maintain grantor trust status.
- (8) Subdivision (e)(8) is a catch-all provision that applies to any federal or state tax deduction, exemption, exclusion, or other tax benefit if the first-trust instrument either is clearly designed to qualify for that tax benefit or expressly indicates an intent to qualify for the tax benefit. When either condition is satisfied, decanting cannot be used to structure the second trust in a way that would have lost the tax benefit if the change(s) had been made originally in the first-trust instrument.
- (9) [*and also* (10)] If the first trust is a grantor trust with a U. S. person as the grantor, the second trust may “switch off” grantor trust status and function as a non-grantor trust. If the first trust is a non-grantor trust, the second trust may be a grantor trust, but during the 60-day notice period, the living settlor can block the switch from non-grantor to grantor trust status by delivering a signed written objection to the trustee or other authorized fiduciary who proposed to decant. Finally, if the first trust is a grantor trust but authorizes the settlor or other person to take some action that will terminate grantor trust status, the second trust must grant an equivalent power to the settlor or another person to terminate grantor trust status.⁷

⁷ Sometimes, transforming a grantor trust to a non-grantor trust (regardless of the method used) can trigger unfavorable income tax consequences. : If the settlor and deemed owner of a grantor trust made an installment sale to the trust, if the installment sale agreement is not fully performed or paid off, and if grantor trust status is switched off or terminated for the trust, then the settlor and deemed owner will recognize taxable gain. See Rev. Rul. 77-402, 1977-2 CB 222; CCA 201730012 (July 28, 2017). In addition, if the liabilities associated with a grantor trust’s asset exceed the trust’s basis in the asset, converting the grantor trust to a non-grantor trust during the deemed owner’s lifetime will cause the deemed owner to recognize gain. See **Madorin v. Comm’r**, 84 T.C. 667, 678 (1985).

(14) A potpourri of miscellaneous rules in the Indiana UTDA

The new Indiana Act, like the national Uniform Act, contains some additional rules, procedures and safeguards.

- New I.C. § 30-4-10-39 is analogous to the “petition for instructions” provision in I.C. § 30-4-3-18(a) but is broader. Section 39 permits an authorized fiduciary, a beneficiary, a person entitled to notice under section 35, or (with respect to a charitable interest) the Indiana attorney general to file a petition with the probate court to seek any of seven (7) listed types of relief, including:
 - Providing instructions to an authorized fiduciary about whether a proposed exercise of the decanting power is permitted under the Act and is consistent with fiduciary duties.
 - Approving a proposed or completed exercise of the decanting power.
 - If an authorized fiduciary is unwilling to directly exercise the decanting power, appointing another person as “special fiduciary,” who can be authorized to decide whether to decant and to proceed with decanting.
 - Determining in advance that a proposed or attempted exercise of the decanting power is invalid or ineffective under the Act, in light of I.C. § 30-4-10-52.
 - Providing instructions to the authorized fiduciary and/or evaluating a past exercise of the decanting power about whether the “read out” or “read in” rules in section 52 apply.
- New I.C. § 30-4-10-46 prohibits an exercise of the decanting power to increase the compensation that an authorized fiduciary can collect from the second trust, unless the probate court approves the increase or all qualified beneficiaries of the second trust sign written consents to the increased compensation.
- Under new I.C. § 30-4-10-47(a), the terms of the second trust cannot absolve or relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first trust (for example, by substituting a “lower” standard of conduct or liability for that authorized fiduciary.
- If the terms of the first trust provide for or permit indemnification of an authorized fiduciary, then subsection 47(b) permits the second-trust instrument to contain a provision for payment of indemnification to an authorized fiduciary.
- Subsection (c) of new I.C. § 30-4-10-47 prohibits the second-trust instrument from “reducing fiduciary liability in the aggregate.”
- So long as the change in the administrative structure of a second trust would not “reduce fiduciary liability [of all fiduciaries] in the aggregate, subsection 47(d)

allows an exercise of the decanting power to “divide and reallocate fiduciary powers among fiduciaries, including one (1) or more trustees and [trust directors],” and to relieve a fiduciary from liability for an act or omission of another fiduciary, as permitted by other state law (including the Indiana Directed Trust Act, IC 30-4-9).

- Under new I.C. § 30-4-10-48, if the terms of the first trust give some person a power to remove or replace an authorized fiduciary, that authorized fiduciary cannot exercise the decanting power to modify that removal power in the second-trust instrument, unless —
 - The removal power is held by just one person and that person consents in writing to the modification, or
 - The modification grants a substantially similar removal power to another person and the original power holder and all qualified beneficiaries consent in writing to the modification, or
 - The modification grants a substantially similar removal power to another person and the probate court approves the modification.
- New I.C. § 30-4-10-50(a) permits a second trust to have a duration that is the same as or different from the duration of the first trust (Subsection (b), explained on the bottom of page 8 above, provides that assets transferred from the first trust remain subject to the same RAP rules.)
- Under new I.C. § 30-4-10-51, even if the discretionary distribution standard under the first trust would not have allowed a court to compel the authorized fiduciary to make a discretionary distribution of principal, that authorized fiduciary can still exercise the decanting power (unless otherwise explicitly prohibited or restricted under the first-trust instrument).
- If an exercise of the decanting power did transfer or was intended to transfer *all* principal assets from the first trust to one or more second trusts, *and* if the authorized fiduciary does not adopt a specific provision to deal differently with later-discovered trust assets, new I.C. § 30-4-10-56(a) requires all later-discovered assets of the first trust to be treated as assets of the second trust. Conversely, if the decanting power is exercised to transfer *less than all* principal assets from the first trust to a second trust(s), later-discovered trust assets are treated as assets of the first trust.
- New I.C. § 30-4-10-57 states that If a debt or other obligation is owed to a creditor and if that obligation is enforceable against assets of the first trust, that obligation is enforceable to the same extent against those assets after they are transferred by decanting to the second trust.

(15) A resource for research and analysis.

Because the text of the Indiana Act in IC 30-4-10 is almost identical to the “national” text of the Uniform Act as promulgated by the ULC, it will frequently be useful to review the Prefatory Note and the official comments to the Uniform Act. These are available in PDF format here:

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a2373e59-2d11-ec52-5e7d-2a22f10677c7&forceDialog=0>

NOTE that the numbering of sections in the Indiana Act is not the same as the numbering of the sections in the “national” Uniform Act, because the Indiana Act states many of the definitions within separately-numbered sections. However, the table of contents for the Uniform Act shows that the *order* of sections is mostly consistent. For example, Section 13 in the National Act corresponds to I.C. § 30-4-10-~~43~~, and Section 14 corresponds to I.C. § 30-4-10-~~44~~.

(16) A hypothetical example illustrates what changes are and are not possible under the new Indiana Act.

EXAMPLE. Sadie Settlor’s probated last will created and funded three trusts following Sadie’s death in 2015. All three of these trusts currently have the same trustee, T:

- *A pre-residuary trust (“Bob’s Trust”) for Sadie’s eccentric and reclusive brother Bob, funded with \$500,000 in marketable securities.* Bob has been physically fairly independent but has some significant mental and emotional quirks.
 - The terms for Bob’s Trust require the trustee to distribute or spend all net income currently to Bob or for Bob’s exclusive benefit.
 - The trustee is also authorized to spend or distribute principal from Bob’s Trust in the trustee’s sole discretion for Bob’s best interests or welfare, after taking into account the other income and resources available to Bob.
 - Following Bob’s death, the remainder beneficiaries of Bob’s trust are Sadie’s two children, Julia (older, born October 1993) and Jeremy (younger, born November 1995), and local Charitable Foundation, in equal shares.

In Sadie’s Will, she acknowledged she did not structure Bob’s Trust with an intention that Charitable Foundation’s remainder interest qualify for the estate tax charitable deduction. Sadie also provided for a significant pre-residuary lump sum bequest to Charitable Foundation.

- *A one pot descendants’ trust funded with a pecuniary amount (\$2 million) and with Sadie’s children Julia and Jeremy as the initial beneficiaries.* Under the Descendants’ Trust terms, the trustee was required to divide the Trust assets equally and to allocate them to two separate trusts (for Julia and her descendants and for

Jeremy and his descendants) promptly after Jeremy's 25th birthday, which occurred in November 2020.

- Under the identical terms for each child's separate Descendant's Trust, the trustee T has discretion to spend or distribute net income or principal or both for the benefit of the child beneficiary (Julia or Jeremy) under a HEMS standard.
- If Julia's or Jeremy's separate Descendant's Trust still contains assets following Julia's or Jeremy's death, the trustee T will divide the trust into further separate trusts, one for each living *per stirpes* descendant of the dead child, and the trustee T continues to have discretion to distribute net income and/or principal under a HEMS standard.
- With respect to their separate Trust assets, Julia and Jeremy each have a no-questions-asked power to withdraw one third of the separate Trust's principal after reaching age 30, and half of the remaining principal after reaching age 35, and all of the remaining principal after reaching age 45.
- The Descendant's Trust provisions give Julia and Jeremy and their respective descendants (as successor beneficiaries) a limited testamentary power of appointment, exercisable only by will, to appoint the power holder's remaining separate Trust asset to or among the power holder's descendants, sibling, and/or sibling's descendants, in equal or unequal amounts and either outright or in further trust.
- If a child (Julia or Jeremy) or a child's descendant dies while his or her separate Trust still contains assets and if that beneficiary does not exercise the testamentary appointment power to appoint all the remaining Trust assets, and if that deceased beneficiary does not have any surviving descendants, the trustee must distribute the remaining unappointed separate Trust assets to the Trust for Sadie's brother Bob if he is living, or to Charitable Foundation if Bob is deceased.
- A QTIP eligible marital trust for Sadie's husband Harry ("Harry's Marital Trust"), funded with Sadie's residuary estate. Under the terms of Harry's Marital Trust:
 - Trustee T is (obviously) required to distribute or spend all net income currently to Harry or for his exclusive benefit and for his lifetime.
 - Harry has an annually lapsing and non-cumulative "five and five" withdrawal power with respect to his Marital Trust principal, consistent with Code section 2514(e).
 - Trustee T also has the "sole discretion" to spend or distribute principal from Harry's Marital Trust for the best interests or welfare of Harry, but without a HEMS standard, and with a requirement that the trustee take into account

Harry's other income and liquid or marketable assets outside the Marital Trust.

- Following Harry's later death and after reimbursing his estate for any incremental extra estate tax owed by Harry's estate with respect to the remaining Marital Trust assets, the trustee T must divide the remaining net Marital Trust assets equally among children Julia and Jeremy (or their descendants *per stirpes*). The trustee T must distribute each share either (1) outright to the remainder beneficiary (Julia, Jeremy or another descendant) if he or she is at least 45 years of age, or (2) to a separate discretionary trust for the benefit of a beneficiary who is under age 45, with distributions in the trustee's discretion (HEMS standard) until age 45 and then final termination and outright distribution after the 45th birthday.

For this hypothetical example, assume that the trust provisions in Sadie's will do not negate or limit a trustee's power to use the alternative distribution methods stated in I.C. § 30-4-3-3(a)(26) for a beneficiary who is "under a legal disability" or "reasonably believe[d] to be incapacitated," but there is *no explicit power* to create and fund a new discretionary trust for such a beneficiary. The terms of these Trusts created by Sadie also do not give trustee T or any successor trustee an explicit power to modify any Trust's terms.

Assumed new facts and circumstances in mid-2023. You are the attorney for trustee T. Trustee T has learned the following new information as a result of communications from Jeremy, Julia, other members of Sadie's extended family, and the CPA and investment advisor who are involved in the administration of Bob's Trust, Julia's and Jeremy's separate Descendant's Trusts, and Harry's Marital Trust.

- (a) In 2022, Sadie's brother Bob was diagnosed with mild dementia and has exhibited symptoms of anxiety, confusion and disorientation, hallucinations, and short-term memory loss. He has also caused his personal checking account (which receives his Trust distributions) to be overdrawn and allowed a neighbor to borrow and use Bob's debit card to make unauthorized purchases. Bob's doctor has written a short report letter stating that Bob can no longer live safely alone without supervision or a standby caregiver, and that he should be evaluated for a move into an assisted living apartment. Bob's separate savings have been exhausted, and his only income separate from his Trust is his monthly social security benefit.
- (b) Harry's Marital Trust currently contains \$3 million in principal assets. Daughter Julia has reported to trustee T, and T has confirmed, that starting in mid-2020, Harry began dating a "lady friend," and that in 2020 and 2021, Harry exercised his "five and five" withdrawal power to withdraw \$75,000 in Marital Trust principal in late 2020 and \$95,000 in late 2021. Based on the current Marital Trust asset value of \$3 million, the annual limitation or cap on Harry's withdrawal

power under Code § 2514(e) would be 5 percent of \$3 million, or \$150,000. Harry is in good physical health and shows no signs of being incapacitated or of having impaired judgment. Daughter and remainder beneficiary Julia wants to know whether trustee T can “do something” about Dad’s annual withdrawal power, to prevent him from steadily depleting the Marital Trust assets.

- (c) Julia is currently 29 years old (Her 30th birthday will be in October 2023). Julia married Chuck in 2017, after her mother’s death, and Julia does not have a prenuptial agreement in place. Julia’s separate Descendant’s Trust currently contains about \$1.2 million in principal assets. Julia’s personal lawyer has told trustee T that Julia’s marriage to Chuck is on the rocks, that there is a 90-percent likelihood that Julia or Chuck will file an Indiana dissolution of marriage action sometime in 2023, and that Julia is concerned about her interest in her separate Trust being counted as a marital asset.
- (d) Jeremy is 27 years old, and his separate Descendant’s Trust contains about \$1 million in principal assets. Jeremy began abusing psychoactive drugs in late 2019 and has been diagnosed with schizophrenia. He has had several seizures, two emergency hospitalizations, four arrests for drug possession, one conviction (with required participation in a diversion treatment program), and one emergency 72-hour detention under I.C. § 12-26-5-1. Net income and principal from Jeremy’s separate Trust have been used to pay for Jeremy’s treatment, legal costs, and fines. Both his sister Julia and his father Harry are concerned about the long-term safety of Jeremy’s Trust principal, especially if his withdrawal powers at ages 30, 35 and 45 remain intact or if Jeremy requires long-term hospitalization for his schizophrenia.

Setting aside the otherwise important considerations of the material purposes of each of the Trusts created by Sadie and whether trustee T should exercise the decanting power, **can trustee T exercise the decanting power under the new Indiana Act to make the following modifications?**

- Q-1:** Can trustee T use the decanting power to modify Bob’s Trust to replace Bob’s mandatory life income interest with a purely discretionary interest, to transform Bob’s Trust into a special needs trust?

Jeff D’s Answer: YES. Bob is a “current beneficiary” (§ 30-4-10-11) and Bob’s current mandatory life income interest is a “vested interest” (§ 30-4-10-41(d)(2)), However, T has “sole discretion” to distribute principal from Bob’s Trust without being subject to an ascertainable standard such as HEMS. T therefore has “expanded distributive discretion” (§ 30-4-10-14) over Bob’s Trust. T can reasonably conclude that Bob is a “beneficiary with a disability” as defined in § 30-4-10-6.

Therefore, both conditions in § 30-4-10-43(e) can be satisfied, and section 43 supersedes § 30-4-10-41(f)(3) and allows T to decant Bob's Trust to replace Bob's vested interest in trust income with a discretionary interest.

Because Bob is currently receiving or benefiting from mandatory distributions of all net income from Bob's Trust, it is probably prudent to structure Bob's Second Trust (post-decanting) as a *self-settled* special needs trust containing a payback provision. See I.C. § 30-4-10-43(f)(1). Bob's Second Trust cannot eliminate Julia or Jeremy as remainder beneficiaries and must give them substantially the same remainder interests. See I.C. § 30-4-10-43(f)(3).

Q-2: Can trustee T use the decanting power to modify Bob's Trust to remove Charitable Foundation as a remainder beneficiary?

Jeff D's Answer: NO, for two reasons. First, § 30-4-10-43(f)(3) requires that the second trust grant substantially the same interest to each non-disabled beneficiary as it had under the pre-decanting terms of the first trust, and this rule applies to the interest of Charitable Foundation. Second, the interest of Charitable Foundation is a right to receive one-third of the remaining assets of Bob's Trust after Bob's death, which is a specified event that must occur. Under the original terms of Bob's Trust, there is no intervening act or contingency which would prevent Charitable Foundation from being entitled to receive one third of the remaining Trust assets. Therefore, Charitable Foundation's remainder interest is "unconditional" (§ 30-4-10-44(b)) and fits the definition of a determinable charitable interest (§ 30-4-10-44(a)). I.C. § 30-4-10-44(d) prohibits the second trust from "diminishing" the charitable remainder interest and from changing the identity of the charitable remainder beneficiary from Charitable Foundation to a different nonprofit organization.

Q-3: Can trustee T use the decanting power to modify the terms of Harry's Marital Trust by removing Harry's non-cumulative 5-and-5 annual withdrawal power with respect to Marital Trust principal?

Jeff D's Answer: NO. The continued existence of the 5-and-5 withdrawal power is not necessary to preserve the estate tax marital deduction that Sadie Settlor's estate claimed for the Marital Trust assets, so there is no problem under I.C. § 30-4-10-49(e)(1). And the "sole discretion" standard for discretionary principal distributions from the Marital Trust means that trustee T has "expanded distributive discretion." But Harry's 5-and-5 withdrawal power fits the definition of a "vested interest" in I.C. § 30-4-10-41(d)(3). Unless trustee T could obtain and enforce a determination that Harry has become a "beneficiary with a disability," I.C. § 30-4-10-41(f)(3) prohibits T from exercising the decanting power to eliminate Harry's 5 and 5 withdrawal power.

Q-4: In light of the significant risk that Julia will be involved in a proceeding to dissolve her marriage that is filed shortly before or after she becomes entitled to

withdraw one third of her Descendant's Trust principal upon her 30th birthday in October 2023, can trustee T use the decanting power to eliminate Julia's withdrawal power at age 30 or to postpone the exercise time that power to a later age?

Jeff D's Answer: NO. Julia's withdrawal power (which is exercisable in the future, upon her 30th birthday) is not a "vested interest" as defined in I.C. § 30-4-10-41(d). And if the trustee of Julia's Descendant's Trust had "expanded distributive discretion" as defined in § 30-4-10-14, then the trustee could decant Julia's Descendant's Trust assets to a second trust that eliminated or postponed any or all of Julia's timed withdrawal rights. *See* I.C. § 30-4-10-41(e); subsection 41(f)(3) would not apply because Julia's withdrawal right is not a vested interest.

However, trustee T's discretionary distribution power with respect to Julia's Descendant's Trust principal is subject to a HEMS standard, and this means that T has "limited distributive discretion" as defined in I.C. § 30-4-10-42(a). Therefore, if trustee T exercises the decanting power over Julia's Descendant's Trust, the second trust must grant to Julia "beneficial interests that are substantially similar to the beneficial interests" that Julia currently has under the original terms of her Descendant's Trust. (*see* I.C. § 30-4-10-42(c)). Trustee T probably could change how Julia chooses to spend the one-third of her Trust principal that she can withdraw at age 30, by providing that the withdrawn assets will flow into a separate account that Julia can control. But T could not exercise the decanting power to eliminate or substantially change that withdrawal power to prevent one third of the Descendant's Trust principal from being treated as "marital property" in Julia's dissolution of marriage action.

- Q-5:** In light of Jeremy's current substance abuse problems and diagnosed mental illness, can trustee T exercise the decanting power with respect to Jeremy's Descendant's Trust assets, to change the distribution standard to "sole discretion" (no HEMS) and to eliminate Jeremy's timed withdrawal rights that will be exercisable by Jeremy at ages 30, 35 and 45?

Jeff D's Answer: YES. Because Jeremy clearly fits the definition of a "beneficiary with a disability" under § 30-4-10-6, I.C. § 30-4-10-43(e) allows trustee T to exercise the decanting power "*as if the fiduciary had authority to distribute principal to [the] beneficiary with a disability subject to expanded distributive discretion.*" [Italics added.]

This means that trustee T can exercise the decanting power to transform Jeremy's Descendant's Trust into an entirely discretionary spendthrift trust (special needs trust), under which Jeremy has no mandatory withdrawal rights with respect to Trust principal. I.C. § 30-4-10-43(f)(2) prevents subsection 41(f)(3) from applying.

Because Jeremy will be 28 years old in November 2023, because his first withdrawal power is exercisable by him 2 years and 3 months in the future, and

because Jeremy currently does not have a right to receive mandatory distributions of Trust income or principal, there is a fairly strong argument that trustee T could exercise the decanting power to transform Jeremy's Descendant's Trust into a *third-party* or *non-self-settled* special needs trust, without a payback provision.

- Q-6:** Can trustee T exercise the decanting power to eliminate the contingent charitable remainder interest of Charitable Foundation under the current terms of the Descendant's Trusts for Julia and Jeremy?

Jeff D's Answer: YES. Under the current terms of the Descendant's Trusts, Charitable Foundation will be entitled to receive the remaining Trust assets *only* at a future time when no descendant of the original beneficiary (Jeremy or Julia) is living and when the settlor's brother Bob is not living, *and only* if the last-to-die descendant beneficiary does not fully exercise the limited testamentary power of appointment to appoint the remaining Trust assets to other person(s). This means that the contingent remainder interest of Charitable Foundation is not "unconditional" (§ 30-4-10-44(b) and is not a "determinable charitable interest" as defined in I.C. § 30-4-10-44(a). Therefore, a post-decanting second trust for Julia or Jeremy can eliminate the charitable remainder interest of Charitable Foundation. Please note that I.C. § 30-4-10-41(f)(2) would prohibit trustee T from adding or substituting a *new* beneficiary as the ultimate or end-of-the-line remainder beneficiary. Trustee T would be limited to substituting one or more persons who are "current beneficiaries," "presumptive remainder beneficiaries," or "successor beneficiaries."

- Q-7:** Can trustee T exercise the decanting power to eliminate the limited testamentary appointment powers that Jeremy and Julia or their descendants currently have or will have under the terms of their Descendant's Trusts?

Jeff D's Answer: YES. I.C. § 30-4-10-41(g)(2) allows trustee T to "omit" the testamentary appointment power of any beneficiary (Julia, Jeremy, or their descendants) because I.C. § 30-4-10-22(c) provides that an appointment power that is exercisable only at the power holder's death is not a "presently exercisable power of appointment."

Please note that because trustee T does not have expanded distributive discretion over the principal of the Descendant's Trusts (there is a HEMS standard), T cannot exercise the decanting power under § 30-4-10-41(g)(3) or (4) to expand or restrict the class of permissible appointees to whom Trust assets could be appointed upon the death of a power holder.

Appendix 1 -- Text of the REPEALED old trust decanting statute

The "Old" Decanting Statute – REPEALED effective July 1, 2022

I.C. § 30-4-3-36

Trust decanting; notice; rules of construction

Sec. 36. (a) Unless a trust expressly provides otherwise, a trustee who has discretion under the terms of a trust (referred to in this section as the "first trust") to invade the principal of the trust to make distributions to or for the benefit of one (1) or more persons may instead exercise the power by appointing all or part of the principal of the first trust in favor of a trustee of another trust (referred to in this section as the "second trust") for the benefit of one (1) or more persons under the same trust instrument or under a different trust instrument as long as:

- (1) the beneficiaries of the second trust are the same as the beneficiaries of the first trust;
- (2) the second trust does not reduce any income, annuity, or unitrust interest in the assets of the first trust; and
- (3) if any contributions to the first trust qualified for a marital or charitable deduction for purposes of the federal income, gift, or estate taxes, the second trust does not contain any provision that, if included in the first trust, would have prevented the first trust from qualifying for a deduction or reduced the amount of a deduction.

(b) The exercise of a power to invade principal under subsection (a) must be by an instrument that is:

- (1) in writing;
- (2) signed and acknowledged by the trustee; and
- (3) filed with the records of the first trust.

(c) The exercise of a power to invade principal under subsection (a) is considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate. The exercise of the power does not extend the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(d) The trustee shall notify in writing all qualified beneficiaries of the first trust at least sixty (60) days before the effective date of the trustee's exercise of the power to invade principal under subsection (a) of the manner in which the trustee intends to exercise the power. A copy of the proposed instrument exercising the power satisfies the trustee's notice obligation under this subsection. If all qualified beneficiaries waive the notice period by signed written instrument delivered to the trustee, the trustee's power to invade principal may be exercised immediately. The trustee's notice under this

Appendix 1 -- Text of the REPEALED old trust decanting statute

subsection does not limit the right of any beneficiary to object to the exercise of the trustee's power to invade principal, except as otherwise provided by this article.

(e) The exercise of the power to invade principal under subsection (a) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amending or revoking the trust.

(f) This section is not intended to create or imply a duty to exercise a power to invade principal. No inference of impropriety may be made as a result of a trustee not exercising the power to invade principal conferred under subsection (a).

(g) This section may not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust, under any other provision of this article or any other statute, or under common law.

As added by P.L.6-2010, SEC.19; amended by P.L. 51-2014, SEC. 22.

Appendix 2 -- Text of Indiana Uniform Trust Decanting Act (effective July 1, 2022)

SECTION 3. IC 30-4-10 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2022]:

<http://iga.in.gov/legislative/2022/bills/house/1205#document-286078ce>

Chapter 10. Uniform Trust Decanting Act

Sec. 1. (a) This chapter applies to a trust created before, on, or after July 1, 2022, that:

- (1) as its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state; or
- (2) provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for the purpose of:
 - (A) administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state;
 - (B) construction of terms of the trust; or
 - (C) determining the meaning or effect of terms of the trust.

(b) Except as provided in subsections (c) and (d), this chapter 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.

(c) This chapter does not:

- (1) apply to a trust held solely for charitable purposes;
- (2) limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust;
- (3) limit the power to modify a trust under the trust instrument, law of this state other than this chapter, common law, a court order, or a nonjudicial settlement agreement; or
- (4) 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. Such provisions in the trust instrument shall control over any applicable provision of this chapter.

(d) Subject to section 45 of this chapter, a trust instrument may restrict or prohibit exercise of the decanting power.

Sec. 2. As used in this chapter, "appointive property" means the property or property interest subject to a power of appointment.

Sec. 3. As used in this chapter, "ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance as defined by 26 U.S.C. 2041(b)(1)(A) or 26 U.S.C. 2514(c)(1) and applicable regulations.

Sec. 4. As used in this chapter, "authorized fiduciary" means:

Appendix 2 -- Text of Indiana Uniform Trust Decanting Act

- (1) a trustee, trust director, 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 (1) or more current beneficiaries;
- (2) a special fiduciary appointed under section 39 of this chapter; or
- (3) a special-needs fiduciary under section 43 of this chapter.

Sec. 5. As used in this chapter, "beneficiary" means a person that:

- (1) has a present or future, vested or contingent, beneficial interest in a trust;
- (2) holds a power of appointment over trust property; or
- (3) is an identified charitable organization that may receive distributions under the terms of the trust.

Sec. 6. As used in this chapter, "beneficiary with disability" means a beneficiary who is determined, in the exercise of an authorized fiduciary's discretion, to have one (1) of the following conditions:

- (1) Dementia, memory loss, Parkinson's disease, or other progressive condition that, currently or in the future, may impair the ability of the beneficiary to provide self care or manage the beneficiary's assets.
- (2) A physical or mental condition or infirmity due to age, cognitive impairment, addiction, or disease that impairs the beneficiary's ability to provide self care or manage the beneficiary's assets.
- (3) The susceptibility of the beneficiary, at any age, to financial exploitation, as defined in IC 23-19-4.1, IC 30-5-5-6.5, or FINRA Rule 2165 approved by the United States Securities and Exchange Commission.
- (4) A condition requiring essential medical treatment or prescription medication that the beneficiary cannot reasonably provide for from the beneficiary's resources outside the trust assets.
- (5) A condition related directly or indirectly to the disability of a beneficiary described in subdivisions (1) through (4) with respect to which the settlor of the trust has expressed the settlor's intent.

Sec. 7. As used in this chapter, "charitable interest" means an interest in a trust that:

- (1) is held by an identified charitable organization and makes the organization a qualified beneficiary;
- (2) benefits only a charitable organization and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or
- (3) is held solely for a charitable purpose and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

Appendix 2 -- Text of Indiana Uniform Trust Decanting Act

Sec. 8. As used in this chapter, "charitable organization" means:

- (1) a person, other than an individual, organized and operated exclusively for a charitable purpose; or
- (2) a government or governmental subdivision, agency, or instrumentality to the extent it holds funds exclusively for a charitable purpose.

Sec. 9. As used in this chapter, "charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or a purpose that is beneficial to the community.

Sec. 10. As used in this chapter, "court" has the meaning set forth in IC 30-4-1-2(6).

Sec. 11. As used in this chapter, "current beneficiary" means a beneficiary who, on the date that 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.

Sec. 12. As used in this chapter, "decanting power" means the power of an authorized fiduciary under this chapter to:

- (1) distribute property of a first trust to one (1) or more second trusts; or
- (2) to modify the terms of the first trust.

Sec. 13. As used in this chapter, "designated representative" has the meaning set forth in IC 30-4-1-2(8).

Sec. 14. As used in this chapter, "expanded distributive discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

Sec. 15. As used in this chapter, "first trust" means a trust over which an authorized fiduciary may exercise the decanting power.

Sec. 16. As used in this chapter, "first-trust instrument" means the trust instrument for a first trust.

Sec. 17. As used in this chapter, "general power of appointment" means a power of appointment exercisable in favor of:

- (1) a powerholder;
- (2) a powerholder's estate;
- (3) a creditor of the powerholder; or
- (4) a creditor of the powerholder's estate.

Sec. 18. As used in this chapter, "jurisdiction" means a geographic area, including a state or country.

Appendix 2 -- Text of Indiana Uniform Trust Decanting Act

Sec. 19. As used in this chapter, "person" means:

- (1) an individual;
- (2) a corporation;
- (3) a business trust;
- (4) an estate;
- (5) a trust;
- (6) a partnership;
- (7) a limited liability company;
- (8) an association;
- (9) a joint venture;
- (10) a government;
- (11) a governmental subdivision;
- (12) an agency or instrumentality;
- (13) a public corporation; or
- (14) any other legal or commercial entity.

Sec. 20. As used in this chapter, "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.

Sec. 21. As used in this chapter, "powerholder" means a person in which a donor creates a power of appointment.

Sec. 22. (a) As used in this chapter, "presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time.

(b) 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.

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

Sec. 23. As used in this chapter, "qualified beneficiary" has the meaning set forth in IC 30-4-1-2(19).

Sec. 24. As used in this chapter, "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) and applicable regulations.

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Sec. 25. As used in this chapter, "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.

Sec. 26. As used in this chapter, "second trust" means:

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

Sec. 27. As used in this chapter, "second-trust instrument" means the trust instrument for a second trust.

Sec. 28. (a) As used in this chapter, except as provided in section 55 of this chapter, "settlor" has the meaning set forth in IC 30-4-1-2(21).

(b) If more than one (1) 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.

Sec. 29. As used in this chapter, "sign" means with present intent to authenticate or adopt a record to:

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

Sec. 30. As used in this chapter, "state" means:

- (1) a state of the United States;
- (2) the District of Columbia;
- (3) Puerto Rico;
- (4) the United States Virgin Islands; or
- (5) a territory or insular possession subject to the jurisdiction of the United States.

Sec. 31. As used in this chapter, "terms of the trust" has the meaning set forth in IC 30-4-1-2(22).

Sec. 32. As used in this chapter, "trust instrument" has the meaning set forth in IC 30-4-1-2(25). The term includes a written document executed by the settlor to create a trust or by a person to create a second trust that contains some or all of the terms of the trust, including any amendments.

Sec. 33. (a) Except as provided in this chapter, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

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(b) 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 in exercising the decanting power.

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

(d) Except as provided in a first-trust instrument, the terms of the first trust are deemed to include the decanting power.

Sec. 34. A trustee or person that reasonably relies on:

- (1) the validity of a distribution of the property of a trust to another trust; or
- (2) a modification of a trust under this chapter, law of this state other than this article, 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.

Sec. 35. (a) Except as provided in subsection (c), an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than sixty (60) days before the exercise of the decanting power to:

- (1) each settlor of the first trust, if living or then in existence;
- (2) each qualified beneficiary of the first trust, including the designated representative, if any, or other representative under IC 30-4-6-10.5 of a qualified beneficiary who:
 - (A) is a minor or an incapacitated person;
 - (B) is unborn;
 - (C) is unknown; or
 - (D) cannot be located after a reasonably diligent search;
- (3) each holder of a presently exercisable power of appointment in the first trust;
- (4) each person that currently has the right to remove or replace the authorized fiduciary;
- (5) each fiduciary of the first trust;
- (6) each fiduciary of the second trust; and
- (7) the attorney general, if section 44(c) of this chapter applies.

(b) A notice period under subsection (a) begins on the day that the notice is given and ends fifty-nine (59) days later.

(c) An authorized fiduciary is not required to give notice under subsection (a) to a person that:

- (1) is not known to the fiduciary;

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(2) is known to the fiduciary but cannot be located by the fiduciary after a reasonably diligent search; or

(3) has no representative under IC 30-4-6-10.5.

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

Sec. 36. A notice under section 35 of this chapter must:

(1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;

(2) specify the proposed effective date for the exercise of the decanting power;

(3) include a copy of the first-trust instrument; and

(4) include a copy of the second-trust instrument.

Sec. 37. (a) 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 a petition under section 39 of this chapter asserting that:

(1) an exercise of the decanting power:

(A) is ineffective because it did not comply with this chapter;

(B) was an abuse of discretion; or

(C) was a breach of a fiduciary duty; or

(2) section 52 of this chapter applies to the exercise of the decanting power.

(b) An exercise of the decanting power is not ineffective because of the failure to give notice to one (1) or more persons under section 35 of this chapter if the authorized fiduciary acted with reasonable care to comply with section 35 of this chapter.

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

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

(c) A person with authority to represent and bind another person under a first-trust instrument or this article may file a petition under section 39 of this chapter on behalf of the person represented.

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

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Sec. 39. (a) Upon a petition by an authorized fiduciary, a beneficiary, or a person entitled to notice under section 35 of this chapter or with respect to a charitable interest by the attorney general or other person that has standing to enforce the charitable interest, the court may:

- (1) provide instructions to the authorized fiduciary about whether a proposed exercise of the decanting power is permitted under this chapter and consistent with the fiduciary duties of the authorized fiduciary;
- (2) appoint a special fiduciary and authorize the special fiduciary to determine whether the exercise of the decanting power is proper under this chapter and to exercise the decanting power;
- (3) approve an exercise of the decanting power;
- (4) determine that a proposed or attempted exercise of the decanting power is ineffective because:
 - (A) after applying section 52 of this chapter, the proposed or attempted exercise does not comply with this chapter; or
 - (B) the proposed or attempted exercise is an abuse of the fiduciary's discretion or a breach of a fiduciary duty;
- (5) determine the extent section 52 of this chapter applies to a prior exercise of the decanting power;
- (6) provide instructions to the trustee regarding the application of section 52 of this chapter to a prior exercise of the decanting power; or
- (7) order relief to carry out the purposes of this chapter.

(b) Upon a petition by an authorized fiduciary, the court may approve:

- (1) an increase in the fiduciary's compensation under section 46 of this chapter; or
- (2) a modification under section 48 of this chapter of a provision granting a person the right to remove or replace the fiduciary.

Sec. 40. An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must:

- (1) directly or indirectly reference the notice required by section 35 of this chapter;
- (2) identify the first trust and the second trust;
- (3) identify and state the property of the first trust being distributed to each second trust; and
- (4) identify the property that remains in the first trust.

Sec. 41. (a) As used in this section, "noncontingent right" means a right that is not subject to the:

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- (1) exercise of discretion; or
- (2) 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 of any person other than the beneficiary or the beneficiary's estate.

(b) As used in this section, "presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

(c) As used in this section, "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) As used in this section, "vested interest" means a:

- (1) right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;
- (2) 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;
- (3) 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;
- (4) presently exercisable general power of appointment; or
- (5) 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.

(e) Subject to subsection (f) and section 44 of this chapter, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one (1) or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(f) Subject to section 43 of this chapter, an exercise of the decanting power under this section must not:

- (1) except as provided in subsection (g), include as a current beneficiary a person that is not a current beneficiary of the first trust;
- (2) except as provided in subsection (g), 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; or
- (3) reduce or eliminate a vested interest.

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(g) Subject to subsection (f)(3) and section 44 of this chapter, in an exercise of the decanting power under this subsection, a second trust may be a trust created or administered under the law of any jurisdiction and may:

- (1) retain a power of appointment granted in the first trust;
- (2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;
- (3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and
- (4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become a current beneficiary.

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

(i) If an authorized fiduciary has expanded distributive discretion over part of the principal of a first trust, the fiduciary may exercise the decanting power under this section over the principal that the authorized fiduciary has expanded distributive discretion.

Sec. 42. (a) As used in this section, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(b) An authorized fiduciary that has limited distributive discretion over the principal of the first trust for the benefit of one (1) or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(c) Under this section and subject to section 44 of this chapter, a second trust may be created or administered under the law of any jurisdiction. A second trust 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.

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

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

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(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 article; or

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

(e) If an authorized fiduciary has limited distributive discretion of the principal of a first trust, the fiduciary may only exercise the decanting power under this section over the principal that the authorized fiduciary has limited distributive discretion.

Sec. 43. (a) This section applies to any trust that has a beneficiary with a disability, without limitation, whenever a special-needs fiduciary for the trust determines that the beneficiary with a disability may qualify for governmental benefits based on a disability, whether the beneficiary currently receives those benefits or has been adjudicated to be an incapacitated person under IC 29-3.

(b) As used in this section, "governmental benefits" means financial aid or services from a state, federal, or other public agency.

(c) As used in this section, "special-needs fiduciary" means:

(1) 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;

(2) if no trustee or fiduciary has discretion under subdivision (1), 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 (1) or more current beneficiaries; or

(3) if no trustee or fiduciary has discretion under subdivisions (1) and (2), 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 (1) or more current beneficiaries;

with respect to a trust that has a beneficiary with a disability.

(d) As used in this section, "special-needs trust" means a trust that the trustee reasonably believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(e) A special-needs fiduciary may exercise the decanting power under section 41 of this chapter over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

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

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

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

(1) Except as provided in section 41(f)(2) of this chapter, the interest in the second trust of a beneficiary with a disability may:

(A) be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. 1396p(d)(4)(C), as amended and in effect on July 1, 2022; or

(B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. 1396p(d)(4)(A), as amended and in effect on July 1, 2022.

(2) Section 41(f)(3) of this chapter does not apply to the interests of the beneficiary with a disability.

(3) Except as affected by a change to the interests of the beneficiary with a disability, the second trust, or if there are two (2) 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.

Sec. 44. (a) As used in this section, "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.

(b) As used in this section, "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 and in effect on July 1, 2022, on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

(c) 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.

(d) If a first trust contains a charitable interest, the second trust must not:

(1) diminish the charitable interest;

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

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

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

(e) If there are two (2) or more second trusts, the second trusts shall be treated as one (1) trust for purposes of determining whether the exercise of the decanting power

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diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (d).

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

- (1) the attorney general, after receiving notice under section 35 of this chapter, fails to object in a signed record delivered to the authorized fiduciary within the notice period;
- (2) the attorney general consents in a signed record to the second trust being administered under the law of another jurisdiction; or
- (3) the court approves the exercise of the decanting power.

(g) This chapter does not limit the powers and duties of the attorney general under the laws of this state other than this chapter.

Sec. 45. (a) An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:

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

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

- (1) the decanting power; or
- (2) a power granted by state law to a fiduciary to distribute the principal of the trust to another trust or to modify the trust.

(c) The decanting power of an authorized fiduciary is not precluded by:

- (1) a general prohibition of the amendment or revocation of a first trust;
- (2) a spendthrift clause; or
- (3) a clause restraining the voluntary or involuntary transfer of a beneficiary's interest.

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

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

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Sec. 46. (a) If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

- (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
- (2) the increase is approved by the court.

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

- (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
- (2) the increase is approved by the court.

(c) A change in an authorized fiduciary's compensation 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 (a) and (b).

Sec. 47. (a) Except as otherwise provided in this section, a second-trust instrument must 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 must not reduce fiduciary liability in the aggregate.

(d) Subject to subsection (c), a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one (1) 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 chapter.

Sec. 48. An authorized fiduciary must 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

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

Sec. 49. (a) As used in this section, "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 and in effect on July 1, 2022, or 26 U.S.C. 679, as amended and in effect on July 1, 2022.

(b) As used in this section, "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended and in effect on July 1, 2022.

(c) As used in this section "nongrantor trust" means a trust that is not a grantor trust.

(d) As used in this section, "qualified benefits property" means property subject to the minimum distribution requirements of 26 U.S.C. 401(a)(9), as amended and in effect on July 1, 2022, and any applicable regulations, or to any similar requirements that refer to 26 U.S.C. 401(a)(9) or the regulations.

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

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

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

(3) If the first trust contains property that qualified, or would have qualified but for provisions of this chapter other than this section, for the exclusion from the gift tax described in 26 U.S.C. 2503(b), as amended and in effect on July 1, 2022, the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. 2503(b), as amended and in effect on July 1, 2022. If the first trust contains property that qualified, or would have qualified but for provisions of this chapter other than this section, for the exclusion from the gift tax described in 26 U.S.C. 2503(b), as

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amended and in effect on July 1, 2022, by application of 26 U.S.C. 2503(c), as amended and in effect on July 1, 2022, the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. 2503(c), as amended and in effect on July 1, 2022.

(4) 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 in effect on July 1, 2022, and the first trust is, or but for provisions of this chapter other than this section would be, a permitted shareholder under any provision of 26 U.S.C. 1361, as amended and in effect on July 1, 2022, 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 and in effect on July 1, 2022. 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 chapter other than this section, would be a qualified subchapter S trust within the meaning of 26 U.S.C. 1361(d), as amended and in effect on July 1, 2022, the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter S trust.

(5) If the first trust contains property that qualified, or would have qualified but for provisions of this chapter other than this section, for a zero (0) inclusion ratio for purposes of the generation skipping transfer tax under 26 U.S.C. 2642(c), as amended and in effect on July 1, 2022, the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero (0) inclusion ratio under 26 U.S.C. 2642(c), as amended and in effect on July 1, 2022.

(6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. 401(a)(9), as amended and in effect on July 1, 2022, and any applicable regulations, or any similar requirements that refer to 26 U.S.C. 401(a)(9), as amended and in effect on July 1, 2022, or the regulations. 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 section 52 of this chapter applies to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. 672(f)(2)(A), as amended and in effect on July 1, 2022, the second trust may not include or omit a term that, if included in or omitted from the first-trust

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instrument, would have prevented the first trust from qualifying under 26 U.S.C. 672(f)(2)(A), as amended and in effect on July 1, 2022.

(8) As used in this subdivision, "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 subdivision (9), a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

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

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

(9) Subject to subdivision (4):

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

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

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

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

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

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

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

Sec. 50. (a) Subject to subsection (b), a second trust may have a duration that is the same as or different from the duration of the first trust.

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

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Sec. 51. An authorized fiduciary may exercise the decanting power whether 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.

Sec. 52. (a) If exercise of the decanting power would be effective under this chapter except that the second-trust instrument in part does not comply with this chapter, 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 chapter is void to the extent necessary to comply with this chapter.

(2) A provision required by this chapter 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 this chapter.

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

Sec. 53. (a) As used in this section, "animal trust" means a trust or an interest in a trust created to provide for the care of one (1) or more animals.

(b) As used in this section, "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.

(c) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this chapter 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.

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

(e) 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.

Sec. 54. A reference in this article to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

Sec. 55. (a) For purposes of law of this state other than this chapter and subject to subsection (b), a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

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

Appendix 2 -- Text of Indiana Uniform Trust Decanting Act

Sec. 56. (a) Except as provided in subsection (c), if exercise of the decanting power was intended to distribute all of the principal of the first trust to one (1) 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.

(b) Except as provided in subsection (c), if exercise of the decanting power was intended to distribute less than all of the principal of the first trust to one (1) 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.

Sec. 57. 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.

Sec. 58. 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.

Sec. 59. This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 as amended and in effect on July 1, 2022, but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. 7001(c) as amended and in effect on July 1, 2022, or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. 7003(b) as amended and in effect on July 1, 2022.

Sec. 60. If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

SECTION 4. IC 34-30-2-132.7 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2022]:

Sec. 132.7. IC 30-4-10-34 (Concerning a trustee who reasonably relies on a distribution or modification of a trust that transfers property to a second trust and does not act).



Decanting to Modify Irrevocable Indiana Trusts

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Disclaimer

The primary materials for this program are contained in Jeff Dible's companion paper.

Opinions expressed in this presentation are those of Jeff Dible and should not be attributed to Frost Brown Todd LLP or to the Indiana State Bar Association or ICLEF.

What's In the Companion Paper

- 30 pages of explanation and discussion of the Uniform Trust Decanting Act as enacted by Indiana in P.L. 161-2022 (House Enrolled Act 1205)
- In **Appendix 1** on p. 31, the text of the old decanting statute (I.C. §30-4-3-36), which was REPEALED effective July 1, 2022
- In **Appendix 2** starting on p. 33, the plain text of the Indiana version of the Uniform Trust Decanting Act, enacted as new chapter 30-4-10, effective July 1, 2022

Conceptual Models for Describing Trust Decanting

- “Old model # 1”: A trustee’s exercise of a decanting power is a special-case example of a power to distribute trust principal *in further trust for the benefit of a current beneficiary*, by distributing the principal *to a new trust*
- “ Old model #2”: A trustee’s exercise of a decanting power is a special-case example of an exercise of a non-general power of appointment, to appoint trust principal *to a new trust* (used in repealed § 30-4-3-36)
- “New model”: Uniform Act’s specific definition of **power to decant**:
 - Power of an authorized fiduciary to distribute assets from **first trust** to one or more **second trusts**; OR
 - Power to **modify** the terms of the first trust (*without* distributing)

Contrasting Trust Decanting with *Other* Methods for Modifying an Irrevocable Trust

See the table on pages 2 and 3 of the companion paper

- Court-approved modification, equitable deviation, or reformation (§§ 30-4-3-24.4, 30-4-3-26, or 30-4-3-30) – *requires a court proceeding and a hearing after notice to beneficiaries and interested persons; court has discretion to deny petition*
- Court-approved settlement agreement under I.C. 30-4-7 – *requires court approval and unanimous written agreement by all affected persons; extensive revision or rewriting of trust is possible*
- Non-judicial settlement agreement (NJSA) under § 30-4-5-25 – *court approval is optional; type and scope of modifications is limited by current trust's material purposes and the types of relief that a probate court could order under I.C. 30-4-3*

How is trust decanting different from those other methods for modifying an irrevocable trust?

- The trustee of the “first trust” can act alone
- Advance ***notice*** to all qualified beneficiaries of the first trust (and to certain other persons) is required, but the ***consent*** of beneficiaries is *NOT* required
- Court approval is *NOT* required, but the trustee can petition for instructions about whether or not to decant
- Under the Indiana Act, the types of modifications that can be made through decanting may be significantly limited
- An affected beneficiary could later challenge the validity of the decanting

“Workaround” techniques when decanting under the Indiana Act cannot be used to accomplish all the desired modifications

See page 4 in the companion paper

- Use a court proceeding **before** decanting to appoint GAL or designated representative to virtually represent and to receive the pre-decanting notice on behalf of underage, disabled or unborn qualified beneficiaries
- Use an NJSA or modification proceeding to remove “ascertainable standard” restrictions on trustee’s discretionary distribution power, and **then** proceed with decanting under the Indiana Act
- Do a “stage 1” decanting to change the trust’s situs and governing law to another state; then have the trustee use the other state’s decanting statute

General Tips for Advising Trustees about Decanting under the 2022 Indiana Act

- Always check the existing trust instrument (for the “first trust”) for any provision that prohibits decanting or limits what modifications can be made through decanting.
- Is any beneficiary of the first or current trust likely to object to the planned decanting?
- Would the planned modifications (through decanting) violate a material purpose of the trust or be perceived as a breach of fiduciary duty?
- Be prepared to read the *entire* Indiana Act *every time* to look for limitations on trustee action and potential traps.

Overview of the Indiana Uniform Trust Decanting Act

- Indiana's version of the Uniform Act is new chapter 10 (I.C. 30-4-10) added to the Indiana Trust Code, effective on and after July 1, 2022
- The repealed statute was 1 section and 574 words
- The new Act comprises 60 sections and 7,591 words, with 47 specific definitions
- Indiana's version of the Uniform Act makes no important changes to the national Act's text except for added references to "trust directors" (under our I.C. 30-4-9) and the addition of a detailed definition of "beneficiary with a disability" in new I.C. §30-4-10-6
- Indiana's new statute, like the national Act, includes important additional definitions ["noncontingent right," "presumptive remainder beneficiary," "vested interest," etc.] in new §30-4-10-41(a) thru (d)
- An "authorized fiduciary" (new §30-4-10-4) is any trustee or trust director with the discretionary power to make or direct principal distributions

To what trusts does the 2022 Indiana Act apply?

- The Act does *NOT* apply to revocable trusts because the settlor of a revocable trust has the power to modify the trust
- The Act applies to all irrevocable trusts (existing before July 1, 2022 or created after June 30, 2022) which have an Indiana governing law provision *or* an Indiana situs of administration, *EXCEPT* –
 - Trusts that have *ONLY* charitable beneficiaries, and
 - Trusts whose written terms explicitly prohibit decanting as a method for modification
- An irrevocable trust's written terms can also narrow the type and scope of modifications that can be made through decanting under the Act

Overview of the New Indiana Uniform Trust Decanting Act

- The first main innovation in the national UTDA (and in Indiana's version) is the expanded definition of the “decanting power”:
 - Includes the trustee's power to distribute property from the existing trust to 1 or more “second trusts”
 - *ALSO* includes the trustee's power to modify the terms of the first (existing) trust *without* distributing any assets to an actual “second trust”
[see new §30-4-10-12(2)]
- The second innovation is the distinction between “expanded distributive discretion” (if the trustee has it under the terms of the first trust) and “limited distributive discretion”

“Expanded Distributive Discretion”

- The new Act (I.C. §30-4-10-14) defines “expanded distributive discretion” as —
“a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard”
- If the trustee has “expanded distributive discretion,” then the decanting power can be exercised to make any change in the “second trust” that is not prohibited in the rest of new I.C. 30-4-10 [see new I.C. §30-4-10-33(a)]
- A trustee with expanded distributive discretion must still exercise the decanting power in a manner consistent with the first trust’s purposes [see new I.C. §30-4-10-33(b)]

“Limited Distributive Discretion”

- The new statute (I.C. §30-4-10-42(a)) defines “limited distributive discretion” as –
“a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard ”
- If the trustee has only “limited distributive discretion,” then the trustee can decant, but under subsection 42(c) –
“A second trust 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.”
- Existing irrevocable trusts that limit the trustee’s discretionary distribution power by a standard such as HEMS will be more difficult to modify through decanting, even if there was no tax or practical reason to include the HEMS standard
- A trustee with only limited distributive discretion can still use decanting to make a wide variety of administrative changes to the first (existing) trust

Changes possible with “limited distributive discretion”

- If the trustee of the existing or first trust has only limited distributive discretion, what kinds of changes can the trustee make to a beneficiary’s interest under the second trust and still comply with the “substantially similar” requirement in I.C. §30-4-10-42(c)?
 - If the first trust entitles beneficiary B to direct mandatory distribution(s), the second trust can permit *indirect* distributions *for the benefit* of B
 - Or if the trustee reasonably believes that B is incapacitated or under a disability, the trustee can make, in the terms of the second trust, any change in B’s interest that is permitted under any part of the Indiana Act (I.C. 30-4-10)

Some Features of the Repealed Decanting Statute that have ***NOT*** changed under the new Act

What rules, principles and procedures for trust decanting under repealed §30-4-3-36 have ***not changed*** under the new Act (I.C. 30-4-10)?

- The settlor of the first or existing trust can explicitly prohibit or restrict the use of decanting
- The settlor of the first or existing trust can include a special decanting power that would permit changes prohibited under the statute
- A trustee who has a decanting power cannot be forced to exercise it
- A trustee's exercise of a decanting power that complies with the statute could still be found to violate the first trust's purposes or to be a breach of a fiduciary duty owed by the trustee

Some Features of the Repealed Decanting Statute that have *NOT* changed under the new Act

What rules, principles and procedures for trust decanting under repealed §30-4-3-36 have *not changed* under the new Act (I.C. 30-4-10)?

- If a beneficiary is not disabled and has any of five defined types of “vested interest” under the terms of the first trust, the second trust cannot reduce or eliminate that vested interest [section 41(f)(3)]
- The terms of the second trust cannot *add* a current beneficiary who is not a current beneficiary of the first trust [section 41(f))(1)]
- The terms of the second trust cannot *add* a successor beneficiary who is not a current beneficiary, successor beneficiary, or presumptive remainder beneficiary of the first trust (§41(f)(2))

Some Features of the Repealed Decanting Statute that have ***NOT*** changed under the new Act

What rules, principles and procedures for trust decanting under repealed §30-4-3-36 have ***not changed*** under the new Act (I.C. 30-4-10)?

- A trustee can petition the probate court for instructions or guidance about whether or not to decant [*new §30-4-10-39 is more detailed*]
- Decanting does not require probate court approval
- With limited exceptions under I.C. §§30-4-10-46 and -48, decanting does not require the consent of any beneficiary
- The trustee must send a pre-decanting notice 60 days in advance to all qualified beneficiaries of the first trust (and to the living settlor, and to the attorney general if there is a charitable interest) [*see §§30-4-10-35 and -36*]

Some Features of the Repealed Decanting Statute that have *NOT* changed under the new Act

What rules, principles and procedures for trust decanting under repealed §30-4-3-36 have *not changed* under the new Act (I.C. 30-4-10)?

- The 60-day waiting period (after notice and before the trustee can proceed with decanting) can be waived, but only if all persons entitled to notice sign written waivers [§30-4-10-35(d)]
- After the 60-day waiting period ends or has been validly waived, the trustee actually exercises the decanting power by signing a written record (Jeff Dible calls this a “record of exercise”) with specified content [§30-4-10-40]

New rules added in the Indiana Act

- Unlike the repealed statute, I.C. § 30-4-10-36 specifies the mandatory minimum content for the 60-day pre-decanting Notice:
 - Must include a copy of the trust instrument for the first (current) trust *and* a copy of the trust instrument for each second trust that will receive assets from the first trust
 - Must “specify the manner in which the trustee or other authorized fiduciary intends to exercise the decanting power (*e.g.*, to transfer assets to a second trust, or to just modify the first trust’s terms)
 - Must state an effective date for the decanting
 - **Suggestion:** Include alternative paragraphs in your Notice template for a decanting that will involve no asset distributions (modification only) and for a decanting of less than all the assets from the first trust to a second trust

New rules added in the Indiana Act

- Unlike the repealed statute, I.C. § 30-4-10-40 specifies the required content for the written “record of exercise” of the decanting power:
 - The trustee or other authorized fiduciary who does the decanting must sign the record
 - The record of exercise must “directly or indirectly reference” the 60-day pre-decanting notice
 - The record of exercise must “identify” (by heading or title and date) the first trust and each second trust
 - The record of exercise must “identify and state” (describe) the property of the first trust that is being distributed to the second trust **AND** the property (if any) that remains in the first trust

Suggestions for how to illustrate modifications to be made in the “second trust” via decanting

- If only *some* and not *all* of the first trust’s assets will be distributed to a second trust (perhaps for only 1 or 2 of the first trust’s beneficiaries), the 60-day notice should disclose what assets (in dollar terms and percentage terms) will be distributed
- If the second trust is not an entirely new trust with an entirely new trust instrument, consider including a “tracked changes” version of the second trust instrument with the 60-day pre-decanting notice, to highlight the changes to be made through decanting, compared to the terms of the first trust
- Conversely, if the second trust will essentially replace the first trust and if the second trust is a stem-to-stern rewrite and replacement for the first trust instrument, a “tracked changes” version probably will not add value or explanatory power

New Rules in the Indiana Decanting Act

A non-exclusive list of *new* or *clarified* provisions that are in the new Indiana Act (I.C. 30-4-10) but not in the old, repealed decanting statute:

- I.C. §30-4-10-41(g) and (h) allow the terms of the second trust to create or modify appointment powers that are exercisable by current beneficiaries or presumptive remainder beneficiaries of the first trust, even if the appointment powers can be exercised in favor of persons who are *not* beneficiaries of the first trust
- I.C. §§30-4-10-41(g) 30-4-10-42(c) allow decanting to change the governing law for the second trust unless doing so would impair a charitable interest
- New §30-4-10-44 contains detailed rules which prohibit the use of decanting to diminish a charitable interest under the first trust or to alter a charitable purpose or a condition or restriction stated in the first trust

New Rules in the Indiana Decanting Act

A non-exclusive list of *new* or *clarified* provisions that are in the new Indiana Act (I.C. 30-4-10) but not in the old, repealed decanting statute (*continued*):

- If a charitable interest in the first trust is a “determinable charitable interest” (as defined), then the second trust cannot change the governing law unless (a) the attorney general consents in writing, (b) the A.G. fails to object in writing before the end of the notice period, or (c) the court approves the change
- If the first trust instrument specifies the compensation of a fiduciary who has authority to decant, new §30-4-10-46 prohibits the use of decanting to increase that fiduciary’s compensation under the second trust’s terms unless the probate court approves the increase *or* all qualified beneficiaries of the second trust consent in writing to the increase

New Rules in the Indiana Decanting Act

A non-exclusive list of ***new*** or ***clarified*** provisions that are in the new Indiana Act (I.C. 30-4-10) but not in the old, repealed decanting statute (*continued*):

- New §30-4-1-47(a) and (c) generally prohibit a reduction of fiduciary liability in the aggregate under the second trustor reducing any authorized fiduciary's standard of liability under the second trust
- Under new §30-4-1-47(b), the terms of the second trust can provide for indemnification of an authorized fiduciary of 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”
- Under new §30-4-1-47(d), the terms of the second trust can divide and allocate fiduciary powers and responsibilities among multiple trustees and/or trust directors [*This was implied under the pre-2022 repealed decanting statute but not explicitly stated*]

New Rules in the Indiana Decanting Act

A non-exclusive list of *new* or *clarified* provisions that are in the new Indiana Act (I.C. 30-4-10) but not in the old, repealed decanting statute (*continued*):

- Under new §30-4-1-48(b), if the first trust instrument gives a person the power to remove an authorized fiduciary who could decant, the terms of the second trust cannot modify that removal power unless the probate court approves or unless the power holder and/or qualified beneficiaries consent in writing
- This is why section 35(a)(4) requires the 60-day pre-decanting notice to be sent to each person who currently has a right to remove or replace the trustee or other authorized fiduciary who has the power to decant

New Rules in the Indiana Decanting Act

A non-exclusive list of *new* or *clarified* provisions that are in the new Indiana Act (I.C. 30-4-10) but not in the old, repealed decanting statute:

- I.C. §30-4-10-52 contains a “read out” rule and a “read in” rule that is automatically triggered with respect to the second trust’s principal assets that are attributable to a decanting, if a trustee or authorized fiduciary purported to exercise the decanting power in a way that violates the Act
- If the second trust instrument contains a [changed or new] provision that is not permitted under the Act, the “read out” rule treats that provision as *void*
- If the second trust instrument *fails* to contain a provision that should be there (in light of the Act’s requirements), the “read in” rule “deems” that the missing provision is included
- When section 52 is triggered, the trustee must take “corrective action” consistent with what the “read out” or “read in” rule has done

A “Cloud” Over Trust Decanting: Tax Consequences

- The income, estate, gift and GST tax consequences of trust decanting has always been uncertain whenever decanting is used to change the substantive or dispositive provisions of the first trust
- A change in the rights or interests of a beneficiary of the first trust might be classifiable as a taxable gift transfer *by someone* or might terminate a past gift tax benefit (such as an annual exclusion claimed for an earlier gift to the first trust) even if the beneficiaries do not consent to the decanting
- A change in the second trust that shifts value from an older-generation beneficiary to a younger-generation beneficiary might be a taxable generation-skipping transfer
- Using decanting to terminate “grantor trust” status for the first trust could trigger unfavorable income tax consequences for the settlor or deemed owner
- ***Other*** trust modification methods also could trigger adverse tax consequences

Some Background on Tax Consequences and the Act's Section 49

- In 2011, the IRS (Treasury) announced that it was studying the general topic of the tax consequences of trust decanting and that the IRS would stop issuing private letter rulings on this topic
- Treasury invited and received voluminous public comment, but has not issued any proposed regulations on the tax consequences of trust decanting, and the topic has been dropped from Treasury's Priority Guidance Plan
- In 2011, Treasury cited the **lack of nationwide uniformity** in state laws on trust decanting as a primary reason for studying the topic before issuing guidance
- The Uniform Trust Decanting Act was developed to promote or at least move toward that uniformity
- ***However***, Treasury has not taken the bait (or the hint) and issued guidance on the federal tax consequences of trust decanting

Safeguards in the Act's Section 49 “Tax Benefit” Rules

- New §30-4-1-49 contains long, detailed provisions intended to **prevent the inadvertent loss or impairment of tax benefits or the creation of certain tax problems** as a result of decanting
- Because the loss or impairment of tax benefits could have extremely serious adverse consequences for –
 - The settlor of the first trust, or
 - Donors who made past gifts to the first trust, or
 - Beneficiaries of the first trust,

the rules and restrictions in new §30-4-1-49 generally override and supersede other rules elsewhere in the Act which could otherwise allow a change to be made to a beneficiary's interest

Applying the Tax Benefit Rules in Section 49 of the Act

- Subsection 49(e) lists nine types of tax benefits that are protected from being lost or impaired, including –
 - Marital & charitable deductions (estate or gift tax)
 - QSST status for S corporation stock
 - Zero inclusion ratio for GST tax
- When a lawyer advises a trustee of the “first trust” about whether the Indiana Act will allow a proposed modification to be made through decanting, it may be necessary to analyze what estate and gift tax deductions or exclusions were claimed when past gifts or other transfers were made to the first trust
- The trustee’s lawyer should carefully document the analysis in a memo to the trustee (client) and may need to obtain separate expert tax advice

“Beneficiary with a disability” rules in new I.C. §30-4-10-43

- Section 43 contains rules that apply to an interest that a “beneficiary with a disability” has in a trust
- Section 43 effectively gives a trustee or other “authorized fiduciary” (with a power to decant) the ability to make modifications *to that disabled beneficiary’s interest* that the rest of the Act would not permit for the interest of a beneficiary who does *not* have a disability
- The national version of the Uniform Trust Decanting Act does not define “beneficiary with a disability,” but Indiana has enacted a detailed and broad definition in I.C. §30-4-10-6
- With respect to the interest of a “beneficiary with a disability,” section 43 gives the trustee greater flexibility to decant (as if the trustee had “expanded distributive discretion”)
- For a “beneficiary with a disability,” section 43 can override all contrary or conflicting provisions in the Indiana Act *except* the tax benefit provisions in section 49

“Beneficiary with a disability” rules in new I.C. §30-4-10-43

- If a beneficiary of the first trust fits the broad definition of “beneficiary with a disability” [in §30-4-10-6], then **even if the disabled beneficiary has a vested interest** (such as a right to receive an immediate lump-sum distribution or a mandatory life income interest), new I.C. §30-4-10-43 permits the trustee or a “special needs fiduciary” to decant to a second trust that functions as a discretionary special needs trust for that disabled beneficiary
- If there is no current trustee who has and is willing to exercise discretion, subsection 43(c) permits the appointment of a “special needs fiduciary” who **can** decant and who is willing to decant
- The trustee’s expanded ability to use decanting to modify the interest of a “beneficiary with a disability” does **not** apply to the interests of other non-disabled beneficiaries in the same “first trust” (*see* subsection 43(f)(3))

“Beneficiary with a disability” rules in new I.C. §30-4-10-43

- Subsection 43(f) specifically mentions **first-party** or self-settled (d)(4)(A) trusts and (d)(4)(C) pooled trusts under 42 U.S.C. §1396p
- **Practice suggestions** (no current detailed guidance from court decisions):
 - If the disabled beneficiary is *currently* entitled to a mandatory distribution or has a *currently* exercisable withdrawal right, decant that beneficiary’s share to a self-settled (d)(4)(A) or (d)(4)(C) trust
 - If the disabled beneficiary has a withdrawal right or a right to a mandatory distribution that is exercisable or payable *more than 1 year in the future*, consider decanting to a discretionary spendthrift trust without a payback provision
 - FSSA may challenge the validity of decanting to a non-self-settled trust, depending on the time gap preceding exercisability of a withdrawal right

“Beneficiary with a disability” rules in new I.C. §30-4-10-43

- **CAUTION:** The tax benefit rules in I.C. §30-4-10-49 can override and supersede the broad rules for disabled beneficiaries in section 43
- **Example 1:**
 - The disabled beneficiary’s interest in the first or existing trust is attributable to an annual exclusion gift that was based on a Crummey withdrawal power held by the beneficiary, who is now disabled
 - One straightforward interpretation of section 49 is that decanting under section 43 cannot be used to *eliminate* that withdrawal power, in order to help the disabled beneficiary qualify for benefits
- **Example 2:** If the disabled beneficiary is a spouse of the settlor and if the trust is a marital trust for which a QTIP election was made, decanting cannot be used to change the spouse beneficiary’s “qualifying income interest for life” to a discretionary interest

Hypothetical case scenario starting on page 24 of the paper

- Fact pattern: Sarah Settlor created 3 testamentary trusts under her probated last will
 - A pre-residuary trust (\$500,000) for eccentric and reclusive brother Bob: mandatory net income for life, “sole discretion” to distribute principal, no HEMS, remainder to charitable foundation (1/3) and to Sarah’s two adult children (1/3 each)
 - A one-pot descendant’s trust (\$2 million) for Sarah’s two children, discretionary distributions under HEMS standard, divide into separate trusts after younger child’s 25th birthday; children have limited testamentary appointment powers; contingent remainder beneficiaries are brother Bob’s Trust (1st) or charitable foundation (2nd)

Hypothetical case scenario starting on page 24 of the paper

- Fact pattern (*continued*): Sarah Settlor created 3 testamentary trusts under her probated last will
 - Residuary marital trust for Sarah's surviving spouse Harry; QTIP eligible; trustee has sole discretion to distribute principal (no HEMS standard); Harry has an annually lapsing 5-and-5 power;
 - After Harry's later death the remaining marital trust assets will be divided and administered in trust in equal shares *per stirpes* for the 2 adult children (Julia and Jeremy) or their descendants
 - Children Julia and Jeremy will receive the remaining marital assets outright only if they are at least 45 years old after Harry's later death

Hypothetical case scenario starting on page 24 of the paper

- Assumed new “messy” facts and circumstances occurring in mid-2023 and presented by “the family” to the trustee and the trustee’s lawyer:
 - Brother Bob is incapacitated (mild dementia, victim of scammers, cannot live safely alone)
 - Surviving spouse Harry has been withdrawing the full 5-percent amount from the marital trust every year (depletion of ~ \$150,000 per year)
 - Daughter Julia has an impending divorce action and will reach age 30 in October 2023, when she has the right to withdraw 1/3 of her trust’s principal
 - Son Jeremy (age 27) was diagnosed as schizophrenic and has a drug abuse problem, with rights to withdraw fractions of his trust principal at ages 30, 35 and 45

Answers to hypothetical questions starting on page 27. Can the trustee decant?

- **Q1:** Can Trustee decant Bob's trust to a second trust that replaces his life income interest with a purely discretionary interest? **YES** (Bob is a "beneficiary with a disability," and §43 applies)
- **Q2:** Can the second trust for Bob eliminate the 1/3 remainder interest of the charitable foundation? **NO** (under §§43(f)(3) and 44(d), the foundation is a non-disabled charitable beneficiary, and its interest cannot be changed or eliminated)
- **Q3:** Can Trustee decant Harry's marital trust to eliminate Harry's non-cumulative 5-and-5 withdrawal power? **NO** (The 5-and-5 power is a "vested interest" under §41(d)(3))

Answers to hypothetical questions starting on page 27. Can the trustee decant?

- **Q4:** Can Trustee decant Julia's trust to a second trust that postpones or eliminates her withdrawal power that is exercisable in July 2023 when Julia turns 30? **NO** (HEMS standard means that Trustee has "limited distributive discretion"; see §42(c))
- **Q5:** In light of Jeremy's substance abuse and mental illness, can Trustee decant Jeremy's trust assets to eliminate Jeremy's timed withdrawal rights exercisable at ages 30, 35 and 40? **YES** (Jeremy is a beneficiary with a disability; see §43(e))
- **Q6:** If Trustee decants Julia's and/or Jeremy's trusts, can their second trusts eliminate the contingent remainder interest of the charitable foundation? **YES** (*see* §44(a) and (b))

Answers to hypothetical questions starting on page 27. Can the trustee decant?

- **Q7:** Can Trustee decant Julia's trust or Jeremy's trust to a pair of second trusts that eliminate the limited testamentary appointment powers that Julia, Jeremy and their descendants currently have? **YES** (These appointment powers are not presently exercisable, and §41(g)(2) allows the second trust to “omit” the power, but not to expand or restrict the class of permissible appointees)

Thank you for your kind attention.

See the companion paper for further details.

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