

# WEST VIRGINIA LEGISLATURE

## 2020 REGULAR SESSION

Introduced

### Senate Bill 668

FISCAL  
NOTE

BY SENATOR TRUMP

[Introduced January 30, 2020; referred  
to the Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
 2 designated §44D-8A-1, §44D-8A-2, §44D-8A-3, §44D-8A-4, §44D-8A-5, §44D-8A-6,  
 3 §44D-8A-7, §44D-8A-8, §44D-8A-9, §44D-8A-10, §44D-8A-11, §44D-8A-12, §44D-8A-13,  
 4 §44D-8A-14, §44D-8A-15, §44D-8A-16, §44D-8A-17, §44D-8A-18, §44D-8A-19, §44D-  
 5 8A-20, §44D-8A-21, §44D-8A-22, §44D-8A-23, §44D-8A-24, §44D-8A-25, §44D-8A-26,  
 6 §44D-8A-27, §44D-8A-28, §44D-8A-29, §44D-8A-30, and §44D-8A-31, all relating to  
 7 enactment of the Uniform Trust Decanting Act to allow a trustee to distribute assets of one  
 8 trust into another trust.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 8A. WEST VIRGINIA UNIFORM TRUST DECANTING ACT.**

**§44D-8A-1. Short Title.**

1 This article may be cited as the West Virginia Uniform Trust Decanting Act.

**§44D-8A-2. Definitions.**

1 In addition to the definitions contained in section 103 of article 1 of chapter 44D which  
 2 apply to this article, in this article:

3 (a) “Appointive property” means the property or property interest subject to a power of  
 4 appointment.

5 (b) “Authorized fiduciary” means:

6 (1) A trustee or other fiduciary, other than a grantor, that has discretion to distribute or  
 7 direct a trustee to distribute part or all of the principal of the first trust to one or more current  
 8 beneficiaries;

9 (2) A special fiduciary appointed under §44D-8A-9 of this code; or

10 (3) A special-needs fiduciary under §44D-8A-13 of this code.

11 (c) “Charitable interest” means an interest in a trust which:

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

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

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

18 (d) "Charitable organization" means:

19 (1) A person, other than an individual, organized and operated exclusively for charitable  
20 purposes; or

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

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

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

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

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

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

34 (j) "General power of appointment" means a power of appointment exercisable in favor of  
35 a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the  
36 powerholder's estate.

37 (k) "Power of appointment" means a power that enables a powerholder acting in a  
38 nonfiduciary capacity to designate a recipient of an ownership interest in or another power of  
39 appointment over the appointive property. The term does not include a power of attorney.

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

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

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

45 (A) The occurrence of the specified event;

46 (B) The satisfaction of the ascertainable standard; or

47 (C) The passage of the specified time; and

48 (2) Does not include a power exercisable only at the powerholder's death.

49 (n) "Reasonably definite standard" means a clearly measurable standard under which a  
50 holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section  
51 674(b)(5)(A) and any applicable regulations.

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

54 (p) "Second trust" means:

55 (1) A first trust after modification under this article; or

56 (2) A trust to which a distribution of property from a first trust is or may be made under this  
57 article.

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

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

60 (1) To execute or adopt a tangible symbol; or

61 (2) To attach to or logically associate with the record an electronic symbol, sound, or  
62 process.

**§44D-8A-3. Scope.**

1 (a) Except as otherwise provided in subsections (b) and (c), this article applies to an  
2 express trust that is irrevocable or revocable by the grantor only with the consent of the trustee

3 or a person holding an adverse interest.

4 (b) This article does not apply to a trust held solely for charitable purposes.

5 (c) Subject to §44D-8A-15 of this code, a trust instrument may restrict or prohibit exercise  
6 of the decanting power.

7 (d) This article does not limit the power of a trustee, powerholder, or other person to  
8 distribute or appoint property in further trust or to modify a trust under the trust instrument, law of  
9 this state other than this article, common law, a court order, or a nonjudicial settlement agreement.

10 (e) This article does not affect the ability of a grantor to provide in a trust instrument for  
11 the distribution of the trust property or appointment in further trust of the trust property or for  
12 modification of the trust instrument.

**§44D-8A-4. Fiduciary Duty.**

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

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

5 (c) Except as otherwise provided in a first-trust instrument, for purposes of this article and  
6 §44D-8-1 and §44D-8-2(a) of this code, the terms of the first trust are deemed to include the  
7 decanting power.

**§44D-8A-5. Application; Governing Law.**

1 This article applies to a trust created before, on, or after the effective date of this article  
2 which:

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

5 (2) Provides by its trust instrument that it is governed by the law of this state or is governed  
6 by the law of this state for the purpose of:

7 (A) Administration, including administration of a trust whose governing law for purposes

8 of administration has been changed to the law of this state;

9 (B) Construction of terms of the trust; or

10 (C) Determining the meaning or effect of terms of the trust.

**§44D-8A-6. Reasonable Reliance.**

1 A trustee or other person that reasonably relies on the validity of a distribution of part or  
2 all of the property of a trust to another trust, or a modification of a trust, under this article, law of  
3 this state other than this article, or the law of another jurisdiction is not liable to any person for any  
4 action or failure to act as a result of the reliance.

**§44D-8A-7. Notice; Exercise of Decanting Power.**

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

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

5 (c) Except as otherwise provided in subsection (f) of this section, an authorized fiduciary  
6 shall give notice in a record of the intended exercise of the decanting power not later than 60 days  
7 before the exercise to:

8 (1) Each grantor of the first trust, if living or then in existence;

9 (2) Each qualified beneficiary of the first trust;

10 (3) Each holder of a presently exercisable power of appointment over any part, or all of,  
11 the first trust;

12 (4) Each person that currently has the right to remove or replace the authorized fiduciary;

13 (5) Each other fiduciary of the first trust;

14 (6) Each fiduciary of the second trust; and

15 (7) The Attorney General, if §44D-8A-14(b) of this code applies.

16 (d) An authorized fiduciary is not required to give notice under subsection (c) of this section  
17 to a person that is not known to the fiduciary.

18 (e) A notice under subsection (c) of this section must:

19 (1) Specify the manner in which the authorized fiduciary intends to exercise the decanting  
20 power;

21 (2) Specify the proposed effective date for exercise of the power;

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

23 (4) Include a copy of all second-trust instruments.

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

26 (g) The receipt of notice, waiver of the notice period, or expiration of the notice period does  
27 not affect the right of a person to file an application under §44D-8A-9 of this code asserting that:

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

30 (2) Section 22 of this article applies to the exercise of the decanting power.

31 (h) An exercise of the decanting power is not ineffective because of the failure to give  
32 notice to one or more persons under subsection (c) of this section if the authorized fiduciary acted  
33 with reasonable care to comply with subsection (c).

**§44D-8a-8. Representation.**

1 (a) Notice to a person with authority to represent and bind another person under a first-  
2 trust instrument or the provisions of this chapter has the same effect as notice given directly to  
3 the person represented.

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

8 (c) A person with authority to represent and bind another person under a first-trust  
9 instrument or the provisions of this chapter may file an application under §44D-8A-9 of this code

10 on behalf of the person represented.

11 (d) A grantor may not represent or bind a beneficiary under this article.

**§44D-8A-9. Court involvement.**

1 (a) On application of an authorized fiduciary, a person entitled to notice under §44D-8A-  
2 7(c) of this code, a beneficiary, or with respect to a charitable interest any other person that has  
3 standing to enforce the charitable interest, the court may:

4 (1) Provide instructions to the authorized fiduciary regarding whether a proposed exercise  
5 of the decanting power is permitted under this article and consistent with the fiduciary duties of  
6 the authorized fiduciary;

7 (2) Appoint a special fiduciary and authorize the special fiduciary to determine whether the  
8 decanting power should be exercised under this article and to exercise the decanting power;

9 (3) Approve an exercise of the decanting power;

10 (4) Determine that a proposed or attempted exercise of the decanting power is ineffective  
11 because:

12 (A) After applying §44D-8A-22 of this code, the proposed or attempted exercise does not,  
13 or did not, comply with this article; or

14 (B) The proposed or attempted exercise would be or was an abuse of the fiduciary's  
15 discretion or a breach of fiduciary duty;

16 (5) Determine the extent to which §44D-8A-22 of this code applies to a prior exercise of  
17 the decanting power;

18 (6) Provide instructions to the trustee regarding the application of §44D-8A-22 of this code  
19 to a prior exercise of the decanting power; or

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

21 (b) On application of an authorized fiduciary, the court may approve:

22 (1) An increase in the fiduciary's compensation under §44D-8A-16 of this code; or

23 (2) A modification under §44D-8A-18 of this code of a provision granting a person the right

24 to remove or replace the fiduciary.

**§44D-8A-10. Formalities.**

1 An exercise of the decanting power must be made in a record signed by an authorized  
2 fiduciary. The signed record must, directly or by reference to the notice required by §44D-8A-7  
3 of this code, identify the first trust and the second trust or trusts and state the property of the first  
4 trust being distributed to each second trust and the property, if any, that remains in the first trust.

**§44D-8A-11. Decanting power under expanded distributive discretion.**

1 (a) In this section:

2 (1) "Noncontingent right" means a right that is not subject to the exercise of discretion or  
3 the occurrence of a specified event that is not certain to occur. The term does not include a right  
4 held by a beneficiary if any person has discretion to distribute property subject to the right to any  
5 person other than the beneficiary or the beneficiary's estate.

6 (2) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current  
7 beneficiary.

8 (3) "Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the  
9 date the beneficiary's qualification is determined. The term does not include a person that is a  
10 beneficiary only because the person holds a non-general power of appointment.

11 (4) "Vested interest" means:

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

14 (B) A current and noncontingent right, annually or more frequently, to a mandatory  
15 distribution of income, a specified dollar amount, or a percentage of value of some or all of the  
16 trust property;

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

19 (D) A presently exercisable general power of appointment; or

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

23 (b) Subject to subsection (c) of this section and §44D-8A-14 of this code, an authorized  
24 fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit  
25 of one or more current beneficiaries may exercise the decanting power over the principal of the  
26 first trust.

27 (c) Subject to §44D-8A-13 of this code, in an exercise of the decanting power under this  
28 section, a second trust may not:

29 (1) Include as a current beneficiary a person that is not a current beneficiary of the first  
30 trust, except as otherwise provided in subsection (d);

31 (2) Include as a presumptive remainder beneficiary or successor beneficiary a person that  
32 is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the  
33 first trust, except as otherwise provided in subsection (d); or

34 (3) Reduce or eliminate a vested interest.

35 (d) Subject to subsection (c)(3) of this section and §44D-8A-14 of this code, in an exercise  
36 of the decanting power under this section, a second trust may be a trust created or administered  
37 under the law of any jurisdiction and may:

38 (1) Retain a power of appointment granted in the first trust;

39 (2) Omit a power of appointment granted in the first trust, other than a presently  
40 exercisable general power of appointment;

41 (3) Create or modify a power of appointment if the powerholder is a current beneficiary of  
42 the first trust and the authorized fiduciary has expanded distributive discretion to distribute  
43 principal to the beneficiary; and

44 (4) Create or modify a power of appointment if the powerholder is a presumptive remainder  
45 beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect

46 only after the powerholder becomes, or would have become if then living, a current beneficiary.

47 (e) A power of appointment described in subsection (d)(1) through (4) may be general or  
48 non-general. The class of permissible appointees in favor of which the power may be exercised  
49 may be broader than or different from the beneficiaries of the first trust.

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

**§44D-8A-12. Decanting power under limited distributive discretion.**

1 (a) In this section, “limited distributive discretion” means a discretionary power of  
2 distribution, that is limited to, an ascertainable standard or a reasonably definite standard.

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

6 (c) Under this section and subject to §44D-8A-14 of this code, a second trust may be  
7 created or administered under the law of any jurisdiction. Under this section, the second trusts, in  
8 the aggregate, must grant each beneficiary of the first trust beneficial interests which are  
9 substantially similar to the beneficial interests of the beneficiary in the first trust.

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

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

14 (2) The beneficiary is under a legal disability or the trustee reasonably believes the  
15 beneficiary is incapacitated, and the distribution is made as permitted under this chapter; or

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

18 (e) If an authorized fiduciary has limited distributive discretion over part, but not all of, the

19 principal of a first trust, the fiduciary may exercise the decanting power under this section over  
20 that part of the principal over which the authorized fiduciary has limited distributive discretion.

**§44D-8A-13. Trust for beneficiary with disability.**

1 (a) In this section:

2 (1) "Beneficiary with a disability" means a beneficiary of a first trust who the special-needs  
3 fiduciary believes may qualify for governmental benefits based on disability, whether or not the  
4 beneficiary currently receives those benefits or is an individual who has been adjudicated a  
5 protected person.

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

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

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

12 (B) If no trustee or fiduciary has discretion under subparagraph (A), a trustee or other  
13 fiduciary, other than a grantor, that has discretion to distribute part, or all of, the income of the first  
14 trust to one or more current beneficiaries; or

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

18 (4) "Special-needs trust" means a trust the trustee believes would not be considered a  
19 resource for purposes of determining whether a beneficiary with a disability is eligible for  
20 governmental benefits.

21 (b) A special-needs fiduciary may exercise the decanting power under §44D-8A-11 of this  
22 code over the principal of a first trust as if the fiduciary had authority to distribute principal to a  
23 beneficiary with a disability subject to expanded distributive discretion if:

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

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

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

29 (1) Notwithstanding §44D-8A-11(c)(2) of this code, the interest in the second trust of a  
 30 beneficiary with a disability may:

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

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

35 (2) §44D-8A-11(c)(3) of this code does not apply to the interests of the beneficiary with a  
 36 disability.

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

**§44D-8A-14. Protection of charitable interest.**

1 (a) In this section:

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

6 (2) "Unconditional" means not subject to the occurrence of a specified event that is not  
 7 certain to occur, other than a requirement in a trust instrument that a charitable organization be  
 8 in existence or qualify under a particular provision of the United States Internal Revenue Code of

9 1986 on the date of the distribution, if the charitable organization meets the requirement on the  
10 date of determination.

11 (b) If a first trust contains a determinable charitable interest which is not held by an  
12 identified charitable organization, the Attorney General has the rights of a qualified beneficiary  
13 and may represent and bind the charitable interest.

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

15 (1) Diminish the charitable interest;

16 (2) Diminish the interest of an identified charitable organization that holds the charitable  
17 interest;

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

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

20 (d) If there are two or more second trusts, the second trusts shall be treated as one trust  
21 for purposes of determining whether the exercise of the decanting power diminishes the charitable  
22 interest or diminishes the interest of an identified charitable organization for purposes of  
23 subsection (c).

24 (e) If a first trust contains a determinable charitable interest which is not held by an  
25 identified charitable organization, the second trust or trusts that include a charitable interest  
26 pursuant to subsection (c) must be administered under the law of this state unless:

27 (1) The Attorney General after receiving notice under Section 701, fails to object in a  
28 signed record delivered to the authorized fiduciary within the notice period;

29 (2) The Attorney General consents in a signed record to the second trust or trusts being  
30 administered under the law of another jurisdiction; or

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

**§44D-8A-15. Trust limitation on decanting.**

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

3           (1) The decanting power; or  
 4           (2) A power granted by state law to the fiduciary to distribute part, or all of, the principal of  
 5 the trust to another trust or to modify the trust.

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

8           (1) The decanting power; or  
 9           (2) A power granted by state law to a fiduciary to distribute part ,or all of, the principal of  
 10 the trust to another trust or to modify the trust.

11           (c) A general prohibition of the amendment or revocation of a first trust, a spendthrift  
 12 clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary’s interest does  
 13 not preclude exercise of the decanting power.

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

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

**§44D-8A-16. Change in compensation.**

1           (a) If a first-trust instrument specifies an authorized fiduciary’s compensation, the fiduciary  
 2 may not exercise the decanting power to increase the fiduciary’s compensation above the  
 3 specified compensation unless:

4           (1) All qualified beneficiaries of the second trust consent to the increase in a signed record;  
 5 or  
 6           (2) The increase is approved by the court.

7           (b) If a first-trust instrument does not specify an authorized fiduciary’s compensation, the

8 fiduciary may not exercise the decanting power to increase the fiduciary's compensation above  
9 the compensation permitted by this chapter unless:

10 (1) All qualified beneficiaries of the second trust consent to the increase in a signed record;

11 or

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

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

**§44D-8A-17. Relief from liability and indemnification.**

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

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

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

9 (d) Subject to subsection (c) of this section, a second-trust instrument may divide and  
10 reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution  
11 advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from  
12 liability for an act or failure to act of another fiduciary as permitted by law of this state other than  
13 this article.

**§44D-8A-18. Removal or replacement of authorized fiduciary.**

1 An authorized fiduciary may not exercise the decanting power to modify a provision in a  
2 first-trust instrument granting another person power to remove or replace the fiduciary unless:

3 (1) The person holding the power consents to the modification in a signed record and the

4 modification applies only to the person;

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

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

**§44D-8A-19. Tax-related limitations.**

1 (a) In this section:

2 (1) "Grantor trust" means a trust as to which a grantor of a first trust is considered the  
3 owner under 26 U.S.C. §§671 through 677 or 26 U.S.C. §679.

4 (2) "Internal Revenue Code" means the United States Internal Revenue Code of 1986.

5 (3) "Non-grantor trust" means a trust that is not a grantor trust.

6 (4) "Qualified benefits property" means property subject to the minimum distribution  
7 requirements of 26 U.S.C. §401(a)(9), and any applicable regulations, or to any similar  
8 requirements that refer to 26 U.S.C. §401(a)(9) or the regulations.

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

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

17 (2) If the first trust contains property that qualified, or would have qualified but for  
18 provisions of this article other than this section, for a charitable deduction for purposes of the  
19 income, gift, or estate tax under the Internal Revenue Code or a state income, gift, estate, or

20 inheritance tax, the second-trust instrument must not include or omit any term that, if included in  
21 or omitted from the trust instrument for the trust to which the property was transferred, would have  
22 prevented the transfer from qualifying for the deduction, or would have reduced the amount of the  
23 deduction, under the same provisions of the Internal Revenue Code or state law under which the  
24 transfer qualified.

25 (3) If the first trust contains property that qualified, or would have qualified but for  
26 provisions of this article other than this section, for the exclusion from the gift tax described in 26  
27 U.S.C. §2503(b), the second-trust instrument must not include or omit a term that, if included in  
28 or omitted from the trust instrument for the trust to which the property was transferred, would have  
29 prevented the transfer from qualifying under 26 U.S.C. §2503(b). If the first trust contains property  
30 that qualified, or would have qualified but for provisions of this article other than this section, for  
31 the exclusion from the gift tax described in 26 U.S.C. §2503(b) by application of 26 U.S.C.  
32 §2503(c), the second-trust instrument must not include or omit a term that, if included or omitted  
33 from the trust instrument for the trust to which the property was transferred, would have prevented  
34 the transfer from qualifying under 26 U.S.C. §2503(c).

35 (4) If the property of the first trust includes shares of stock in an S corporation, as defined  
36 in 26 U.S.C. §1361 and the first trust is, or but for provisions of this article other than this section  
37 would be, a permitted shareholder under any provision of 26 U.S.C. §1361, an authorized  
38 fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any  
39 second trust receiving the stock is a permitted shareholder under 26 U.S.C. §1361(c)(2). If the  
40 property of the first trust includes shares of stock in an S corporation and the first trust is, or but  
41 for provisions of this article other than this section would be, a qualified subchapter-S trust within  
42 the meaning of 26 U.S.C. §1361(d), the second-trust instrument must not include or omit a term  
43 that prevents the second trust from qualifying as a qualified subchapter-S trust.

44 (5) If the first trust contains property that qualified, or would have qualified but for  
45 provisions of this article other than this section, for a zero inclusion ratio for purposes of the

46 generation-skipping transfer tax under 26 U.S.C. §2642(c) the second-trust instrument must not  
47 include or omit a term that, if included in or omitted from the first-trust instrument, would have  
48 prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C.  
49 §2642(c).

50 (6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the  
51 second-trust instrument may not include or omit any term that, if included in or omitted from the  
52 first-trust instrument, would have increased the minimum distributions required with respect to the  
53 qualified benefits property under 26 U.S.C. §401(a)(9) and any applicable regulations, or any  
54 similar requirements that refer to 26 U.S.C. §401(a)(9) or the regulations. If an attempted exercise  
55 of the decanting power violates the preceding sentence, the trustee is deemed to have held the  
56 qualified benefits property and any reinvested distributions of the property as a separate share  
57 from the date of the exercise of the power and §2201 applies to the separate share.

58 (7) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C.  
59 §672(f)(2)(A) the second trust may not include or omit a term that, if included in or omitted from  
60 the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C.  
61 §672(f)(2)(A).

62 (8) In this paragraph, “tax benefit” means a federal or state tax deduction, exemption,  
63 exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from  
64 being a grantor trust. Subject to paragraph (9), a second-trust instrument may not include or omit  
65 a term that, if included in or omitted from the first-trust instrument, would have prevented  
66 qualification for a tax benefit if:

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

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

71 (9) Subject to paragraph (4):

72 (A) Except as otherwise provided in paragraph (7), the second trust may be a non-grantor  
73 trust, even if the first trust is a grantor trust; and

74 (B) Except as otherwise provided in paragraph (10), the second trust may be a grantor  
75 trust, even if the first trust is a non-grantor trust.

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

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

81 (B) The first trust is a non-grantor trust and a second trust is a grantor trust, in whole or in  
82 part, with respect to the grantor, unless:

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

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

**§44D-8A-20. Duration of second trust.**

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

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

**§44D-8A-21. Need to distribute not required.**

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

**§44D-8A-22. Saving provision.**

1           (a) If exercise of the decanting power would be effective under this article except that the  
2 second-trust instrument in part does not comply with this article, the exercise of the power is  
3 effective and the following rules apply with respect to the principal of the second trust attributable  
4 to the exercise of the power:

5           (1) A provision in the second-trust instrument which is not permitted under this article is  
6 void to the extent necessary to comply with this article.

7           (2) A provision required by this article to be in the second-trust instrument which is not  
8 contained in the instrument is deemed to be included in the instrument to the extent necessary to  
9 comply with this article.

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

**§44D-8A-23. Trust for care of animal.**

1           (a) In this section:

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

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

7           (b) The decanting power may be exercised over an animal trust that has a protector to the  
8 extent the trust could be decanted under this article if each animal that benefits from the trust  
9 were an individual, if the protector consents in a signed record to the exercise of the power.

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

11           (d) Notwithstanding any other provision of this article, if a first trust is an animal trust, in  
12 an exercise of the decanting power, the second trust must provide that trust property may be

13 applied only to its intended purpose for the period the first trust benefitted the animal.

**§44D-8A-24. Terms of second trust.**

1 Any reference in this chapter to a trust instrument or terms of the trust includes a second-  
2 trust instrument and the terms of the second trust.

**§44D-8A-25. Grantor.**

1 (a) For purposes of law of this state other than this article and subject to subsection (b) of  
2 this section, a grantor of a first trust is deemed to be the grantor of the second trust with respect  
3 to the portion of the principal of the first trust subject to the exercise of the decanting power.

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

**§44D-8A-26. Later-discovered property**

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

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

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

**§44D-8A-27. Obligations.**

1 A debt, liability, or other obligation enforceable against property of a first trust is  
2 enforceable to the same extent against the property when held by the second trust after exercise

3 of the decanting power.

**§44D-8A-28. Uniformity of application and construction.**

1 In applying and construing this uniform act, consideration must be given to the need to  
2 promote uniformity of the law with respect to its subject matter among states that enact it.

**§44D-8A-29. Relation to electronic signatures in global and national commerce act.**

1 This article modifies, limits, or supersedes the Electronic Signatures in Global and National  
2 Commerce Act, 15 U.S.C. §7001 et seq., but does not modify, limit, or supersede Section 101(c)  
3 of that act, 15 U.S.C. §7001(c), or authorize electronic delivery of any of the notices described in  
4 §103(b) of that act, 15 U.S.C. §7003(b).

**§44D-8A-30. Severability.**

1 If any provision of this article or its application to any person or circumstance is held invalid,  
2 the invalidity does not affect other provisions or applications of this article which can be given  
3 effect without the invalid provision or application, and to this end the provisions of this article are  
4 severable.

**§44D-8A-31. Effective date.**

1 This article takes effect on July 1, 2020.

NOTE: The purpose of this bill is to enact the Uniform Trust Decanting Act to allow a trustee to distribute assets of one trust into another trust.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.