

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Enrolled

House Bill 687
Judiciary

(Delegate Cardin)

Judicial Proceedings

Estates and Trusts - Trusts - Decanting (Maryland Trust Decanting Act)

This bill establishes the Maryland Trust Decanting Act, which provides specified authority to an authorized fiduciary to distribute property of a first trust to one or more second trusts or to modify the terms of a first trust. The bill must be construed to apply retroactively and must be applied to and interpreted to affect any trust created before, on, or after October 1, 2023 (the bill's effective date), that has its principal place of administration in this State or is governed by the law of this State.

Fiscal Summary

State Effect: The bill is not anticipated to have a material, direct effect on State operations or finances.

Local Effect: The bill is not anticipated to have a material, direct effect on local government operations or finances.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: The bill applies to any express trust that:

- is irrevocable or revocable by the settlor (person that creates or contributes property to a trust) only with the consent of the trustee or a person holding an adverse interest; and
- (1) has its principal place of administration in this State, including a trust whose principal place of administration has been changed to this State or (2) is governed by the law of this State for the purpose of administration (including administration

of a trust whose governing law for purposes of administration has been changed to the law of this State), construction of the terms of the trust, or determining the meaning or effect of the terms of the trust.

The bill does not apply to a trust held solely for charitable purposes.

The bill does not limit the power of a trustee, a powerholder (holder of a power of appointment), or any other person to (1) distribute or appoint property in further trust or (2) modify a trust under the trust instrument, law of this State other than Title 14 of the Estates and Trusts Article of the Maryland Code, common law, a court order, or a nonjudicial settlement agreement. Further, the bill does not limit the ability of a settlor to provide in a trust instrument for the distribution or appointment in further trust of trust property or the modification of the trust instrument.

“Decanting power” is the power of an authorized fiduciary to distribute property of a first trust to one or more second trusts or to modify the terms of a first trust.

“Authorized fiduciary” means a trustee or other fiduciary, other than a settlor, who has discretion to distribute or direct a trustee to distribute all or part of the principal of the first trust to a beneficiary.

An authorized fiduciary, in exercising the decanting power:

- must act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust;
- may exercise the decanting power without the consent of any person and without court approval, except as otherwise provided in the Act;
- must give notice in a record, as specified, of any intended exercise of the decanting power at least 60 days before the exercise to (1) each settlor of the first trust, if living or then in existence; (2) each qualified beneficiary of the first trust and the Attorney General if the Attorney General has the rights of a qualified beneficiary; (3) each holder of a presently exercisable power of appointment over any part of the first trust; (4) each person that currently has a right to remove or replace the authorized fiduciary; and (5) any other fiduciary of the first or second trusts;
- may exercise the decanting power sooner than 60 days after providing notice if all persons entitled to receive notice waive the period in a signed record; and
- must make a record signed by an authorized fiduciary, which must identify the first trust, any second trust, any property being distributed to a second trust, and any property remaining in the first trust.

The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application asserting that an attempted exercise of the decanting power is ineffective because the exercise (1) did not comply with the Act; (2) was an abuse of discretion; or (3) was a breach of fiduciary duty.

An authorized fiduciary is prohibited from exercising the decanting power:

- to the extent that the first trust instrument expressly prohibits or restricts exercise of (1) the decanting power or (2) a power granted by State law to the fiduciary to distribute all or part of the trust to another trust or to modify the trust;
- to increase the authorized fiduciary's compensation unless all qualified beneficiaries of the second trust consent in a signed record, the court approves the increase, or the increase is incidental to other changes made by the exercise of the decanting power;
- to modify a provision in a first trust instrument granting another person the power to remove or replace the authorized fiduciary unless certain requirements are met; and
- in a manner that does not preserve specified federal or state tax benefits for the property in the second trust that existed for the property of the first trust.

Exercise of the decanting power is not prohibited 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.

An authorized fiduciary with expanded distributive discretion may exercise the decanting power:

- provided that a second trust does not include (1) as a current beneficiary a person that is not a current beneficiary of the first trust; (2) 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) provisions which reduce or eliminate a vested interest; and
- by creating or administering under the law of any jurisdiction (subject to certain conditions/exceptions) one or more second trusts, which may retain, omit, create, or modify a power of appointment, as specified.

An authorized fiduciary with limited distributive discretion may exercise the decanting power:

- by creating or administering under the law of any jurisdiction (subject to an exception) one or more second trusts, which, in the aggregate, must grant each

beneficiary of the first trust beneficial interests that are substantially similar to the beneficiary's beneficial interests under the first trust;

- to include a deferred distribution in a second trust if certain requirements are met; and
- by expanding or narrowing an existing power of appointment in the first trust to include or remove in a second trust permissible appointees, as specified.

The bill also:

- specifies that a settlor of the first trust is deemed to be the settlor of the second trust with respect to any portion of the principal of the first trust subject to the decanting power, and that in determining settlor intent with respect to a second trust, a court may consider the intent of (1) a settlor of the first trust; (2) a settlor of the second trust; and (3) an authorized fiduciary;
- authorizes a special needs fiduciary to exercise the decanting power over the principal of a first trust for a beneficiary with a disability who may qualify for government benefits, as specified, if a second trust is a special needs trust that benefits the beneficiary with a disability and the exercise of the decanting power will further the purposes of the first trust;
- (1) grants the Attorney General the rights of a qualified beneficiary if a first trust contains a determinable charitable interest, as specified; (2) prohibits a second trust from diminishing a charitable interest, altering any charitable purpose stated in the first trust instrument, or altering any condition or restriction related to the charitable interest; and (3) requiring notice by the authorized fiduciary to the Attorney General, as specified, when exercising the decanting power over a trust with a determinable charitable interest;
- specifies actions a court may take in response to a petition submitted by specified persons about the proper exercise of the decanting power;
- applies the decanting power to trusts for the care of an animal;
- addresses the disposition of later-discovered property belonging to the first trust;
- addresses trust duration, fiduciary liability and indemnification, and allocation of fiduciary powers, under first and second trusts; and
- establishes that a debt, liability, or other obligation enforceable against property of the first trust is enforceable to the same extent against the property when held by a second trust after the exercise of the decanting power.

Current Law: The Maryland Trust Act (MTA) contains various provisions relating to modification and termination of trusts, and trustee duties, powers, and discretion, as described below.

Court Modification or Termination of a Trust

Modification or Termination of a Noncharitable Irrevocable Trust

A noncharitable irrevocable trust may be modified or terminated on consent of the trustee and all beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust, and in the case of termination, that continuance of the trust is not necessary to achieve any material purpose of the trust. A spendthrift provision or similar protective language in the terms of the trust does not prevent a termination. If a trust is terminated, the trustee shall distribute the trust property as agreed by the beneficiaries. If not all beneficiaries consent to a proposed modification or termination of the trust, the modification or termination may be approved by the court if the court is satisfied that (1) if all beneficiaries had consented, the trust could have been modified or terminated and (2) the interests of a beneficiary that does not consent will be adequately protected.

Further, the court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification or termination must be made in accordance with the probable intention of the settlor. Also, the court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the administration of the trust. On termination of a trust, the trustee must distribute the trust property in a manner consistent with the purposes of the trust as ordered by the court.

Reforming the Terms of a Trust

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the intention of the settlor if it is proved by clear and convincing evidence that both the intent of the settlor and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Modification of Terms for Purposes of Taxes

To achieve the tax objectives of the settlor, the court may modify the terms of a trust in a manner that is not contrary to the probable intention of the settlor, and the modification may be retroactive.

Division or Consolidation of a Trust

On petition by specified individuals and notice as the court may direct, and for good cause shown, a court may divide a trust into two or more separate trusts or consolidate two or

more trusts into a single trust on terms and conditions the court considers appropriate and if the court is satisfied that a division of a trust or consolidation of trusts will not defeat or materially impair the accomplishment of trust purposes or the interests of the beneficiaries.

Modification of a Charitable Trust

Courts of equity have full jurisdiction to enforce trusts for charitable purposes upon suit of the State by the Attorney General or suit of any person having an interest in the enforcement of the trust. On application of any trustee, or any interested person, or the Attorney General, the Maryland Uniform Charitable Trusts Administration Act gives a court of equity the authority to order an administration of a trust, devise, or bequest as nearly as possible to fulfill the general charitable intention of the settlor or testator if the trust, devise, or bequest is illegal, impossible, or impracticable. Also, a charitable remainder trust may be modified with the consent of each beneficiary and without application to any court, to conform to specified provisions of the Internal Revenue Code.

Nonjudicial Modification or Termination of a Trust

Termination of an Uneconomical Trust

Except as provided in the trust instrument, subject to notice and procedural requirements, and federal tax considerations, if applicable, a trustee may terminate a trust without an order of court if the fair market value of the trust as of the last anniversary date of the trust is \$100,000 or less, and distribute the trust estate, as specified.

Division or Consolidation of a Trust

A trustee or personal representative may divide a trust or consolidate trusts, without an order of a court, in accordance with the applicable provisions of the governing instrument. Also, if a trust instrument does not provide for the consolidation or division of a trust, a trustee may, without an order of a court, divide a trust into two or more separate trusts or consolidate two or more trusts into a single trust, unless a beneficiary objects in writing within 30 days after the trustee provides notice, and if other statutory requirements are met.

Nonjudicial Settlement Agreements

A nonjudicial settlement agreement may resolve the following matters: (1) the interpretation or construction of the terms of the trust; (2) the approval of a report or accounting of a trustee; (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of a necessary or desirable power; (4) the resignation of appointment of a trustee and the determination of the compensation of a trustee; (5) transfer of the principal place of administration of a trust; and (6) liability of a trustee for an action

relating to the trust. A nonjudicial settlement agreement is valid only to the extent the settlement does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under MTA or other applicable law.

Trustee Duties, Powers, and Discretion

A trustee includes an original, an additional, and a successor trustee and a co-trustee. A trustee must administer the trust as a prudent person would, considering the purposes, terms, distributional requirements, and other circumstances of the trust, and to satisfy this standard, the trustee shall exercise reasonable care, skill, and caution. A trustee, without authorization by the court, and subject to its fiduciary duties, may exercise (1) powers conferred by the terms of the trust or (2) except as limited by the terms of the trust:

- all powers over the trust property that an unmarried competent owner has over individually owned property;
- other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
- other powers conferred by MTA or Title 15, Subtitle 6 of the Estates and Trusts Article.

However, a discretionary power conferred on the trustee to determine the benefits of a beneficiary is subject to judicial control to prevent misinterpretation or abuse of the discretion of the trustee. A trust has a “discretionary distribution provision” if the trustee has discretion, or words of similar import, to determine one or more of the following:

- whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust;
- the amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries;
- which, if any, among a class of beneficiaries will receive income or principal or both of the trust;
- whether the distribution of trust assets is from income or principal or both of the trust; or
- when to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary distribution provision if the distribution must be made.

“Discretionary distribution provision” includes a provision in a trust instrument that (1) provides one or more standards or other guidance for the exercise of the discretion of the trustee or (2) contains a spendthrift provision.

Additional Comments: The bill is a modified version of the [Uniform Trust Decanting Act](#) drafted by the National Conference of Commissioners on Uniform State Laws.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: SB 446 (Senator West) - Judicial Proceedings.

Information Source(s): Office of the Attorney General; Comptroller's Office; Judiciary (Administrative Office of the Courts); Register of Wills; Maryland Department of Health; Department of Legislative Services

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