

# Washington Reports



Thursday, April 13, 2017

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## Virginia Adopts Uniform Trust Decanting Act

On July 1, 2017, Virginia will join Colorado and New Mexico as the third state to enact the Uniform Trust Decanting Act and, in doing so, will be the first state to replace an existing trust decanting statute with the Act. See Virginia Law.

## 2017 SESSION

## CHAPTER 592

An Act to amend and reenact § 64.2-701 of the Code of Virginia; to amend the Code of Virginia by adding in Chapter 7 of Title 64.2 an article numbered 8.1, consisting of sections numbered 64.2-779.1 through 64.2-779.25; and to repeal § 64.2-778.1 of the Code of Virginia, relating to the Uniform Trust Decanting Act.

[S 913]

Approved March 16, 2017

Be it enacted by the General Assembly of Virginia:

1. That § 64.2-701 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Chapter 7 of Title 64.2 an article numbered 8.1, consisting of sections numbered 64.2-779.1 through 64.2-779.25, as follows:

§ 64.2-701. Definitions.

~~As~~ *As used in this chapter, unless the context requires a different meaning:*

"Action," with respect to an act of a trustee, includes a failure to act.

*"Appointive property" means the property or property interest subject to a power of appointment.*

"Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of § 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986 *and any applicable regulations.*

*"Authorized fiduciary" means (i) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the income or principal of the first trust to one or more current beneficiaries; (ii) a special fiduciary appointed under § 64.2-779.6; or (iii) a special-needs fiduciary under § 64.2-779.10.*

"Beneficiary" means a person that (i) has a present or future, *vested or contingent*, beneficial interest in a trust, ~~vested or contingent; or~~ (ii) ~~in a capacity other than that of trustee,~~ holds a power of appointment over trust property; *or (iii) is an identified charitable organization that will or may receive distributions under the terms of the trust.*

*"Charitable interest" means an interest in a trust that (i) is held by an identified charitable organization and makes the organization a qualified beneficiary; (ii) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or (iii) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.*

*"Charitable organization" means (i) a person, other than an individual, organized and operated exclusively for charitable purposes or (ii) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose.*

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

"Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in § 64.2-723.

"Conservator" means a person appointed by the court to administer the estate of an adult individual.

*"Court" means the court of the Commonwealth having jurisdiction in matters related to trusts.*

*"Current beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined is a distributee or permissible distributee of trust income or principal. "Current beneficiary" 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.*

*"Decanting power" means the power of an authorized fiduciary under the Uniform Trust Decanting Act (§ 64.2-779.1 et seq.) to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.*

"Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

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

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

*"First-trust instrument" means the trust instrument for a first trust.*

*"General power of appointment" means a power of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.*

"Guardian" means a person appointed by the court to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem.

"Guardian of the estate" means a person appointed by the court to administer the estate of a minor.

"Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

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

"Person" means an individual, ~~corporation, business trust,~~ estate, ~~trust, partnership, limited liability company, association, joint venture,~~ *business or nonprofit entity*; government,; governmental subdivision, agency, or instrumentality,; public corporation,; or ~~any~~ other legal or ~~commercial~~ entity.

*"Powerholder" means a person in which a donor creates a power of appointment.*

*"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. "Power of appointment" does not include a power of attorney.*

"Power of withdrawal" means a presently exercisable general power of appointment other than a power exercisable by a trustee that is limited by an ascertainable standard, or that is exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

*"Presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. "Presently exercisable power of appointment" includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time, only after (i) the occurrence of the specified event, (ii) the satisfaction of the ascertainable standard, or (iii) the passage of the specified time. "Presently exercisable power of appointment" does not include a power exercisable only at the powerholder's death.*

"Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

"Qualified beneficiary" means a ~~living or then-existing~~ beneficiary who, on the date the beneficiary's qualification is determined, (i) is a distributee or permissible distributee of trust income or principal; (ii) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in clause (i) terminated on that date, ~~but the termination of those interests would not cause~~ *without causing* the trust to terminate; or (iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

*"Reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of § 674(b)(5)(A) of the Internal Revenue Code of 1986 and any applicable regulations.*

*"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.*

"Revocable," as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

"Second trust" means (i) a first trust after modification, including a restatement of the first trust, under the Uniform Trust Decanting Act (§ 64.2-779.1 et seq.) or (ii) a trust to which a distribution of property from a first trust is or may be made under the Uniform Trust Decanting Act (§ 64.2-779.1 et seq.).

"Second-trust instrument" means the trust instrument for a second trust.

"Settlor," except as otherwise provided in § 64.2-779.22, means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

"Sign" means, with present intent to authenticate or adopt a record, (i) to execute or adopt a tangible symbol or (ii) to attach to or logically associate with the record an electronic symbol, sound, or process.

"Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

"State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

"Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by (i) other evidence that would be admissible in a judicial proceeding or (ii) court order or nonjudicial settlement agreement.

"Trust instrument" means ~~an instrument~~ a record executed by the settlor to create a trust or by any person to create a second trust that contains some or all of the terms of the trust, including any amendments ~~thereto~~.

"Trustee" includes an original, additional, and successor trustee, and a cotrustee.

### Article 8.1. Uniform Trust Decanting Act.

#### § 64.2-779.1. Scope.

A. Except as otherwise provided in subsections B and C, this article applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

B. This article does not apply to a trust held solely for charitable purposes.

C. Subject to § 64.2-779.12, a trust instrument may restrict or prohibit exercise of the decanting power.

D. This article does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, a law of the Commonwealth other than this article, common law, a court order, or a nonjudicial settlement agreement.

E. This article does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

#### § 64.2-779.2. Fiduciary duty.

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

B. This article does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this article.

C. Except as otherwise provided in a first-trust instrument, for purposes of this article and § 64.2-763 and subsection A of § 64.2-764, the terms of the first trust are deemed to include the decanting power.

§ 64.2-779.3. Application; governing law.

This article applies to a trust created before, on, or after July 1, 2017, that:

1. Has its principal place of administration in the Commonwealth, including a trust whose principal place of administration has been changed to the Commonwealth; or
2. Provides by its trust instrument that it is governed by the law of the Commonwealth or is governed by the law of the Commonwealth 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 the Commonwealth;
  - b. Construction of terms of the trust; or
  - c. Determining the meaning or effect of terms of the trust.

§ 64.2-779.4. Reasonable reliance.

A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this article, a law of the Commonwealth 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.

§ 64.2-779.5. Notice; exercise of decanting power.

A. In this section, a notice period begins on the day notice is given under subsection C and ends 59 days after the day notice is given.

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

C. Except as otherwise provided in subsection F, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than 60 days before the exercise to (i) each settlor of the first trust, if living or then in existence; (ii) each qualified beneficiary of the first trust; (iii) each holder of a presently exercisable power of appointment over any part or all of the first trust; (iv) each person that currently has the right to remove or replace the authorized fiduciary; (v) each other fiduciary of the first trust; (vi) each fiduciary of the second trust; (vii) each person acting as an advisor or protector of the first trust; (viii) each person holding an adverse interest who has the power to consent to the revocation of the first trust; and (ix) the Attorney General, if subsection B of § 64.2-779.11 applies.

D. An authorized fiduciary is not required to give notice under subsection C to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

E. A notice under subsection C shall (i) specify the manner in which the authorized fiduciary intends to exercise the decanting power, (ii) specify the proposed effective date for exercise of the power, (iii) include a copy of the first-trust instrument, and (iv) include a copy of all second-trust instruments.

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

G. The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under § 64.2-779.6 asserting that (i) an attempted exercise of the decanting power is ineffective because it did not comply with this article or was an abuse of discretion or breach of fiduciary duty or (ii) § 64.2-779.19 applies to the exercise of the decanting power.

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

§ 64.2-779.6. *Court involvement.*

A. On application of an authorized fiduciary, a person entitled to notice under subsection C of § 64.2-779.5, a beneficiary, or with respect to a charitable interest the Attorney General or other person that has standing to enforce the charitable interest, the court may (i) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this article and consistent with the fiduciary duties of the authorized fiduciary; (ii) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this article and to exercise the decanting power; (iii) approve an exercise of the decanting power; (iv) determine that a proposed or attempted exercise of the decanting power is ineffective because (a) after applying § 64.2-779.19, the proposed or attempted exercise does not or did not comply with this article or (b) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty; (v) determine the extent to which § 64.2-779.19 applies to a prior exercise of the decanting power; (vi) provide instructions to the trustee regarding the application of § 64.2-779.19 to a prior exercise of the decanting power; or (vii) order other relief to carry out the purposes of this article.

B. On application of an authorized fiduciary, the court may approve (i) an increase in the fiduciary's compensation under § 64.2-779.13 or (ii) a modification under § 64.2-779.15 of a provision granting a person the right to remove or replace the fiduciary.

§ 64.2-779.7. *Formalities.*

An exercise of the decanting power shall be made in a record signed by an authorized fiduciary. The signed record shall, directly or by reference to the notice required by § 64.2-779.5, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to or held subject to the terms of each second trust and the property, if any, that remains in the first trust.

§ 64.2-779.8. *Decanting power under expanded distributive discretion.*

A. As used in this section:

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

"Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

"Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. "Successor beneficiary" does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

"Vested interest" means:

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

B. Subject to subsection C and § 64.2-779.11, an authorized fiduciary that has expanded distributive discretion over the income or principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the income or principal of the first trust.

C. Subject to § 64.2-779.10, in an exercise of the decanting power under this section, a second trust may not:

1. Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection D;
  2. Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection D; or
  3. Reduce or eliminate a vested interest.
- D. Subject to subdivision C 3 and § 64.2-779.11, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:
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 if then living, a current beneficiary.
- E. A power of appointment described in subdivisions D 1 through 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.
- F. If an authorized fiduciary has expanded distributive discretion over part but not all of the income or principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the income or principal over which the authorized fiduciary has expanded distributive discretion.

**§ 64.2-779.9. Decanting power under limited distributive discretion.**

- 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 income or principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the income or principal of the first trust.
- C. Under this section and subject to § 64.2-779.11, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust. A second trust that defers or postpones a contingent right of a beneficiary to receive an outright distribution of assets upon the attainment of a certain age or upon the occurrence of a specific event (a "deferred distribution") shall be substantially similar to the first trust if the second trust provides that (i) during the lifetime of the beneficiary, no portion of the income or principal attributable to the deferred distribution may be distributed to, or for the benefit of, any person other than the beneficiary and (ii) the beneficiary shall have a testamentary general power of appointment exercisable in favor of the beneficiary's estate over the deferred distribution or the deferred distribution shall be payable to the beneficiary's estate if the second trust does not terminate during the beneficiary's lifetime.
- 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;
  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 chapter; 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 over part but not all of the income or principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the income or principal over which the authorized fiduciary has limited distributive discretion.

**§ 64.2-779.10. Trust for beneficiary with disability.**

A. As used in this section:

"Beneficiary with a disability" means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been determined to be an incapacitated person.

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

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

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 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 or more current beneficiaries.

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

B. A special-needs fiduciary may exercise the decanting power under § 64.2-779.8 over the income or principal of a first trust, including a first trust under which the fiduciary has only limited distributive discretion as defined in subsection A of § 64.2-779.9, as if the fiduciary had authority to distribute income or principal to a beneficiary with a disability subject to expanded distributive discretion if:

1. A second trust is a special-needs trust that benefits the beneficiary with a disability; and
2. The special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

C. In an exercise of the decanting power under this section, the following rules apply:

1. Notwithstanding subdivision C 2 of § 64.2-779.8, 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); or
- b. Contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. § 1396p(d)(4)(A).

2. Subdivision C 3 of § 64.2-779.8 does not apply to the interests of the beneficiary with a disability.

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

**§ 64.2-779.11. Protection of charitable interest.**

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.*

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

*B. 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.*

*C. If a first trust contains a charitable interest, the second trust or trusts may 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.*

*D. If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection C.*

*E. If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subsection C must be administered under the law of the Commonwealth unless:*

- 1. The Attorney General, after receiving notice under § 64.2-779.5, 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 or trusts being administered under the law of another jurisdiction; or*
- 3. The court approves the exercise of the decanting power.*

*F. This article does not limit the powers and duties of the Attorney General under law of the Commonwealth other than this article.*

**§ 64.2-779.12. Trust limitation on decanting.**

*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 income or principal of the trust to another trust or to modify the trust.*

*B. Exercise of the decanting power is subject to any 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 part or all of the income or principal of the trust to another trust or to modify the trust.*

*C. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.*

*D. Subject to subsections A and B, an authorized fiduciary may exercise the decanting power under this article even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the income or 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.*

**§ 64.2-779.13. Change in compensation.**

*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 chapter 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.*

**§ 64.2-779.14. Relief from liability and indemnification.**

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

*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 may 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 or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of the Commonwealth other than this article.*

**§ 64.2-779.15. Removal or replacement of authorized fiduciary.**

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

- 1. The person holding the power consents to the modification in a signed record and the modification applies only to the person;*
- 2. The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or*
- 3. The court approves the modification and the modification grants a substantially similar power to another person.*

**§ 64.2-779.16. Tax-related provisions.**

*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 §§ 671 through 677 of the Internal Revenue Code or § 679 of the Internal Revenue Code.*

*"Internal Revenue Code" means the United States Internal Revenue Code of 1986.*

*"Nongrantor trust" means a trust that is not a grantor trust.*

*"Qualified benefits property" means property subject to the minimum distribution requirements of § 401(a)(9) of the Internal Revenue Code and any applicable regulations, or to any similar requirements that refer to § 401(a)(9) of the Internal Revenue Code or the regulations.*

*B. 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 article 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 article 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 article other than this section, for the exclusion from the gift tax described in § 2503(b) of the Internal Revenue Code, 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 § 2503(b) of the Internal Revenue Code. If the first trust contains property that qualified, or would have qualified but for provisions of this article other than this section, for the exclusion from the gift tax described in § 2503(b) of the Internal Revenue Code by application of § 2503(c) of the Internal Revenue Code, the second-trust instrument must not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under § 2503(c) of the Internal Revenue Code.*

*4. If the property of the first trust includes shares of stock in an S corporation, as defined in § 1361 of the Internal Revenue Code, and the first trust is, or but for provisions of this article other than this section would be, a permitted shareholder under any provision of § 1361 of the Internal Revenue Code, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under § 1361(c)(2) of the Internal Revenue Code. 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 article other than this section would be, a qualified subchapter-S trust within the meaning of § 1361(d) of the Internal Revenue Code, 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 article other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under § 2642(c) of the Internal Revenue Code 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 inclusion ratio under § 2642(c) of the Internal Revenue Code.*

*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 § 401(a)(9) of the Internal Revenue Code and any applicable regulations, or any similar requirements that refer to § 401(a)(9) of the Internal Revenue Code or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power, and § 64.2-779.19 applies to the separate share.*

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

8. In this paragraph, "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 clearly is 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 would have qualified but for provisions of this article other than this section, would have qualified for the tax benefit.

9. Subject to subdivision 4:

a. Except as otherwise 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 instrument grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second-trust instrument 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:

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

(2) 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.

C. If an authorized fiduciary that has limited distributive discretion over the income or principal of a first trust reasonably determines that the overall income, estate, gift, and generation-skipping tax consequences of the first trust may be reduced by either (i) granting a general power of appointment to a beneficiary of the first trust or (ii) eliminating a general power of appointment granted to a beneficiary of the first trust, the fiduciary may exercise the decanting power over all or any portion of the principal of the trust to grant or eliminate such a general power of appointment and shall, in addition, have the powers found in subsection D of § 64.2-779.8 as if the fiduciary had expanded distributive discretion, subject to the following provisions:

1. In the case of the grant of a general power of appointment, the class of permissible appointees contained in the second trust shall be limited to the creditors of the powerholder or the creditors of the powerholder's estate.

2. In the case of the elimination of a general power of appointment, the class of permissible appointees in the second trust shall exclude the powerholder, the powerholder's creditors, the powerholder's estate, and the creditors of the powerholder's estate, but shall otherwise be identical to the class of appointees permitted in the first trust.

§ 64.2-779.17. Duration of second trust.

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.*

**§ 64.2-779.18.** *Need to distribute not required.*

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

**§ 64.2-779.19.** *Savings provision.*

*A. If exercise of the decanting power would be effective under this article except that the second-trust instrument in part does not comply with this article, the exercise of the power is effective and the following rules apply with respect to the income or principal of the second trust attributable to the exercise of the power:*

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

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

*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.*

**§ 64.2-779.20.** *Trust for care of animal.*

*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 or more animals.*

*"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.*

*B. The decanting power may be exercised over an animal trust that has a protector to the extent that the trust could be decanted under this article 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.*

*C. A protector for an animal has the rights under this article of a qualified beneficiary.*

*D. Notwithstanding any other provision of this article, 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 benefited the animal.*

**§ 64.2-779.21.** *Terms of second trust.*

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

**§ 64.2-779.22.** *Settlor.*

*A. For purposes of law of the Commonwealth other than this article 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 income or principal of the first trust subject to the exercise of the decanting power.*

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

**§ 64.2-779.23.** *Later-discovered property.*

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

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

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

**§ 64.2-779.24. Obligations.**

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

**§ 64.2-779.25. Accountings.**

*If accounts for the first trust are filed with the commissioner of accounts, the accounts for the second trust shall be filed with the commissioner of accounts unless the court orders otherwise.*

2. That § **64.2-778.1** of the Code of Virginia is repealed.