

**Report of the Standing Committee on Massachusetts Legislation Relating  
to Wills, Trusts, Estates and Fiduciary Administration on the proposed  
MASSACHUSETTS UNIFORM TRUST DECANTING ACT**

**Introduction**

The fiduciary exercise of broad discretionary powers of distribution to create new trusts for one or more beneficiaries of an existing trust, known as trust decanting, is a method of trust modification. Trust decanting is now authorized by statute in about half the states, and it is arguably inherent in the broad discretionary distribution authority of a trustee under common law. In 2015, the Uniform Law Commission promulgated the Uniform Trust Decanting Act (the “UTDA” or the “Uniform Act”), which took a fresh look at decanting, synthesizing many of the provisions of the existing state statutes with several innovations to create a comprehensive set of rules.

Trust decanting is relatively new to trust law. Recognized as a common law concept by the Florida Supreme Court in *Phipps v. Palm Beach Trust Co.*, 142 Fla. 782, 196 So. 299 (1940), and later by the New Jersey Supreme Court in *Wiedenmayer v. Johnson*, 106 N.J. Super. 161, 254 A.2d 534 (App. Div.), *aff’d sub nom. Wiedenmayer v. Villaneuva*, 55 N.J. 81, 259 A.2d 465 (1969), the doctrine began to take hold when New York adopted the first decanting statute in 1992. Since then, twenty-six states have adopted a decanting statute, and five of those states have adopted the UTDA. The state statutes take different approaches on such key issues as the requirement of notice to beneficiaries, whether a trust with an ascertainable standard may be decanted, whether a mandatory income interest may be eliminated, and whether a new power of appointment may be created with a broader scope of permissible appointees. An important goal of the UTDA is to create uniformity in this area of the law.

Massachusetts does not have a decanting statute, but the Supreme Judicial Court has recognized the authority of trustees to decant where the terms of the particular trust and the surrounding circumstances indicate that decanting is consistent with the settlor’s intent. *Morse v. Kraft*, 466 Mass. 92 (2013). The *Morse* decision did not recognize an inherent power to decant in any situation where a trustee has a broad discretionary power of distribution, but rather the holding is limited to the facts of the particular case. *Id.* at 97-99. The Supreme Judicial Court has also recognized the power of trustees to decant on particular facts even where doing so eliminates a beneficiary’s currently exercisable right of withdrawal and even though the beneficiary had no notice of the distribution effectuating the decanting. *Ferri v. Powell-Ferri*, 476 Mass. 651 (2017).

In early 2017, the Standing Committee on Massachusetts Legislation Relating to Wills, Trusts, Estates and Fiduciary Administration (the “Fiduciary Legislation Committee”) appointed a subcommittee (the “Subcommittee”) to review the UTDA to consider whether the Fiduciary Legislation Committee should recommend that it be

enacted in Massachusetts. The Subcommittee met seven times throughout 2017 to review and discuss the provisions of the UTDA. In particular, the Subcommittee considered the following questions:

- Whether Massachusetts should enact the UTDA;
- If so, whether any changes should be made to the UTDA;
- Whether the UTDA should be incorporated into the Massachusetts Uniform Trust Code (the “MUTC”) or included in the General Laws in a separate chapter; and
- Whether the UTDA should provide the exclusive method for decanting in Massachusetts or whether common law decanting should continue to be available.

The Subcommittee concluded that the UTDA should be enacted in Massachusetts to provide clear guidance to fiduciaries as to how they may accomplish trust decanting with certainty as to its effectiveness.

The Subcommittee reviewed each of the provisions of the UTDA. In considering whether to make changes, the Subcommittee felt it was important to promote uniformity unless there was some good reason to vary from the Uniform Act. Although the Subcommittee understands that most of the current state decanting statutes predate the UTDA, states may well consider changes to their statutory decanting schemes to bring them into line with the UTDA. The Subcommittee recommended a handful of changes, which are explained in the comments below. The Subcommittee made significant changes to only Section 14 of the UTDA, which deals with protection of the charitable interest, and the other changes were relatively minor.

The Subcommittee recommended incorporating the UTDA into the MUTC. Currently, Article 9 of the MUTC is reserved, and the Subcommittee recommended that the UTDA should be inserted into that Article. As part of the MUTC, the UTDA may utilize certain defined terms contained in the MUTC as well as the virtual representation provisions of the MUTC. As part of incorporating the UTDA into the MUTC, the Subcommittee suggested some minor revisions to Section 103 of the MUTC, which contains definitions used through the Trust Code, and a conforming revision to Section 110.

Finally, the Subcommittee recommended that the UTDA not be the sole method for trust decanting, and that common law decanting continue to be available in Massachusetts after enactment of the UTDA. Proposed Section 903(d) makes it clear that the new law does not limit the power of a fiduciary to decant in accordance with common law principles. The UTDA provides a clear path for a trustee to follow in exercising the decanting power. There are prerequisites to the exercise of such a power, including very specific notice provisions. There are also limitations to decanting pursuant to the UTDA. The key benefit of statutory decanting is certainty as to its validity. But where statutory decanting is unavailable—*e.g.*, where the trustee wishes to decant property subject to a currently exercisable power of withdrawal—common law decanting is still a possibility.

**Proposed Changes to Article 1 of the Massachusetts Uniform Trust Code**

**CHAPTER 203E**

**ARTICLE 1**

**GENERAL PROVISIONS AND DEFINITIONS**

\* \* \* \*

**Section 103. Definitions.**

In this chapter the following words shall, unless the context clearly requires otherwise, have the following meanings:-

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

“Ascertainable standard”, a standard relating to an individual’s health, education, support or maintenance.

“Beneficiary”, a person who has a present or future beneficial interest in a trust, vested or contingent.

“Charitable trust”, a trust, or portion of a trust, created for a charitable purpose described in subsection (a) of section 405.

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

“Interests of the beneficiaries”, the beneficial interests provided in the terms of the trust.

“Jurisdiction”, a geographic area, including a state or country.

“Person”, an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity.

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

“Qualified beneficiary”, a 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 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.

**“Revocable”, a trust that is revocable by the settlor without the consent of the trustee or a person holding an adverse interest.**

**“Settlor”, 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.**

**“Spendthrift provision”, a term of a trust which restrains transfer of a beneficiary’s interest.**

**“State”, 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, including an Indian tribe or band recognized by federal law or formally acknowledged by a state.**

**“Terms of a trust”:**

**(i) except as otherwise provided in clause (ii), the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or established by other evidence that would be admissible in a judicial proceeding; or**

**(ii) the trust’s provisions as established, determined, or amended by a trustee or other person in accordance with applicable law, a court order, or a non-judicial settlement agreement under section 111.**

**“Trust instrument”, an instrument that contains terms of the trust, including any amendments thereto.**

**“Trustee”, an original, additional or successor trustee or a co-trustee.**

#### COMMENT

The definition of “qualified beneficiary” was revised to return to the Uniform Trust Code definition, also included in the UTDA. The Ad Hoc Committee reviewing the Uniform Trust Code for enactment in Massachusetts determined that subsection (ii) of the definition (referring to distributees of trust income if prior interests in the trust terminated but the trust continued) should be deleted. However, the Subcommittee determined that there are instances where that subsection is necessary to ensure proper identification of qualified beneficiaries.

The definition of “terms of a trust” was updated to include the definition contained in the Uniform Directed Trust Act, which clarifies that a trust’s terms include amendments by the trust’s terms, judicial modification or non-judicial settlement agreement.

**Section 110. Others treated as qualified beneficiaries**

(a) Whenever notice to qualified beneficiaries of a trust is required under this chapter, the trustee shall also give notice to any other beneficiary who has sent the trustee a request for notice.

(b) A charitable organization expressly designated to receive distributions under the terms of a charitable trust shall have the rights of a qualified beneficiary under this chapter if, on the date the charitable organization's qualification is being determined, the charitable organization:

(1) is a distributee or permissible distributee of trust income or principal;

(2) would be a distributee or permissible distributee of trust income or principal upon the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or

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

(c) A person appointed to enforce a trust created for the care of an animal or other non-charitable purpose, as provided in sections 408 and 409, shall have the rights of a qualified beneficiary under this chapter.

COMMENT

This section has been modified to conform to the revised definition of “qualified beneficiary” in section 103 of the MUTC.

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ARTICLE 9

MASSACHUSETTS UNIFORM TRUST DECANTING ACT

Section 901. Short title

This article shall be known and may be cited as the Massachusetts Uniform Trust Decanting Act.

COMMENT

The Subcommittee believes that the Massachusetts Uniform Trust Decanting Act (the “Act”) is sufficiently consistent with the Uniform Trust Decanting Act that the word “Uniform” should be retained in the short title.

## **Section 902. Definitions**

In this article the following words shall, unless the context clearly requires otherwise, have the following meanings:-

**“Appointive property”**, the property or property interest subject to a power of appointment.

**“Authorized fiduciary”**:

(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 principal of the first trust to one or more current beneficiaries;

(ii) a special fiduciary appointed under section 909; or

(iii) a special-needs fiduciary under section 913.

**“Beneficiary”**, for purposes of this article, includes an identified charitable organization that will or may receive distributions under the terms of the trust.

**“Charitable interest”**, an interest in a trust which:

(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 described in subsection (a) of section 405 and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

**“Current beneficiary”**:

(i) a beneficiary who, on the date the beneficiary’s qualification is determined, is a distributee or permissible distributee of trust income or principal; or

(ii) a holder of a presently exercisable general power of appointment.

**“Decanting power”**, the power of an authorized fiduciary under this article to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

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

**“First trust”**, a trust over which an authorized fiduciary may exercise the decanting power.

**“First-trust instrument”, the trust instrument for a first trust.**

**“General power of appointment”, 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.**

**“Power of appointment”, a power (other than a power of attorney) 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.**

**“Powerholder”, a person in which a donor creates a power of appointment.**

**“Presently exercisable power of appointment”, a power of appointment exercisable by the powerholder at the relevant time. The term:**

**(i) 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 (a) the occurrence of the specified event, (b) the satisfaction of the ascertainable standard, or (c) the passage of the specified time; and**

**(ii) does not include a power exercisable only at the powerholder’s death.**

**“Reasonably definite standard” means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of subsection (b)(5)(A) of section 674 of the Internal Revenue Code 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.**

**“Second trust”:**

**(i) a first trust after modification under this article; or**

**(ii) a trust to which a distribution of property from a first trust is or may be made under this article.**

**“Second-trust instrument”, the trust instrument for a second trust.**

**“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.**

#### COMMENT

The Subcommittee modified and deleted certain definitions:

Consistent with the MUTC, the terms “beneficiary” and “current beneficiary” in the Act have been modified to exclude holders of powers of appointment (other than currently exercisable general powers of appointment).

The definition of “charitable organization” was deleted as unnecessary.

The definition of “charitable purpose” was deleted because this concept is already described in section 405 of the MUTC.

The definition of “court” was deleted as unnecessary.

The definitions of “jurisdiction”, “person”, “qualified beneficiary”, “settlor”, “state”, “terms of the trust” and “trust instrument” were deleted from this section because those terms are already defined in section 103 of the MUTC.

### **Section 903. 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 described in subsection (a) of section 405.**

**(c) Subject to section 915, 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, law of the commonwealth other than this article, common law, a court order, or a non-judicial 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.**

### COMMENT

This section makes clear that common law decanting will remain available in Massachusetts after enactment of the Act.



#### **Section 904. 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 sections 801 and 802(a), the terms of the first trust are deemed to include the decanting power.**

#### **COMMENT**

The Subcommittee believes that the language of this section is consistent with current Massachusetts law.

Subsection (a) confirms that an authorized fiduciary exercising the decanting power is subject to the same fiduciary duties that apply to the exercise of any other discretionary power. This includes the duty of impartiality. *See Hodges v. Johnson*, 2017 N.H. LEXIS 232.

Subsection (b) provides that this article does not impose an affirmative duty to decant on a trustee.

The Uniform Law Commission's comment to this section suggests potential circumstances under which a trustee could be under a duty to exercise a decanting power or otherwise seek authority to deviate from the terms of a trust. As section 904 makes clear, this article does not create any duty to decant, and the Uniform Law Commission's comment should not be construed to suggest in any way that there is any affirmative fiduciary duty to decant or to seek authority to deviate from the terms of a trust under Massachusetts law.

#### **Section 905. Application; governing law**

**This article applies to a trust created before, on, or after the effective date of this article which has its principal place of administration in the commonwealth.**

## COMMENT

The Subcommittee modified this section because it was concerned that the Uniform Act provided too complex an approach to the statute's applicability. Instead, the Subcommittee modified section 905 to say that this article applies to any trust which has its principal place of administration in Massachusetts. In most cases it will be clear whether a trust is administered in Massachusetts, and if it is, the article will apply. This avoids the problem of an interested party attempting to apply this article to a trust that is being administered in another state but that, by its terms, is to be construed in accordance with Massachusetts law. The Massachusetts courts likely would not have jurisdiction over such a trust, and the Subcommittee believes that this article therefore should not apply to the trust.

### **Section 906. 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, 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.**

## COMMENT

The Subcommittee recommended adopting the language of the Uniform Act provision with no substantive changes. The Subcommittee disagreed, however, with the discussion in the Uniform Law Commission's comment to this section regarding when reliance on a prior decanting is reasonable, and that comment should not be construed to reflect Massachusetts law.

### **Section 907. 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:**

- (1) each settlor of the first trust, if living or then in existence;**
- (2) each qualified beneficiary of the first trust;**
- (3) each holder of a presently exercisable power of appointment over any part or all of the first trust;**

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

**(5) each other fiduciary of the first trust;**

**(6) each fiduciary of the second trust; and**

**(7) the attorney general, if subsection (b) of section 914 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) must:**

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

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

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

**(4) 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 section 909 asserting that:**

**(1) 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**

**(2) section 922 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).**

#### COMMENT

The Uniform Act contains highly specific and detailed notice provisions. The Subcommittee considered simplifying those provisions and paring down the class of interested persons who must be notified of a proposed decanting, but ultimately decided to recommend adoption of this section without any substantive changes in order to preserve uniformity.

**Section 908. [Reserved]**

**COMMENT**

The Subcommittee deleted this section of the Uniform Act because the rules for representation are already contained in article 3 of the MUTC.

**Section 909. Court involvement**

**(a) On application of an authorized fiduciary, a person entitled to notice under subsection (c) of section 907, 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:**

**(1) 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;**

**(2) 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;**

**(3) approve an exercise of the decanting power;**

**(4) determine that a proposed or attempted exercise of the decanting power is ineffective because:**

**(A) after applying section 922, 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;**

**(5) determine the extent to which section 922 applies to a prior exercise of the decanting power;**

**(6) provide instructions to the trustee regarding the application of section 922 to a prior exercise of the decanting power; or**

**(7) order other relief to carry out the purposes of this article.**

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

**(1) an increase in the fiduciary's compensation under section 916;**

**(2) a modification of fiduciary liability under section 917; or**

**(3) a modification under section 918 of a provision granting a person the right to remove or replace the fiduciary.**

## COMMENT

This section is recommended for adoption without any substantive changes other than the addition of a conforming reference to the recommended modifications in section 917. The Subcommittee noted that while the settlor of the first trust has standing to file an application with the courts under section 909, this provision does not change present Massachusetts law with respect to the settlor's right to enforce the trust or participate in an exercise of a discretionary power by a trustee.

### **Section 910. Formalities**

**An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must, directly or by reference to the notice required by section 917, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.**

## COMMENT

The Subcommittee recommended no changes to the formal requirements for decanting.

### **Section 911. Decanting power under expanded distributive discretion**

#### **(a) In this section:**

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

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

**(3) "Successor beneficiary" means a beneficiary who is not a qualified beneficiary on the date the beneficiary's qualification is determined.**

#### **(4) "Vested interest" means:**

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

**(B) 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;**

**(C) 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;**

**(D) a presently exercisable general power of appointment; or**

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

**(b) Subject to subsection (c) and section 914, an authorized fiduciary who has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.**

**(c) Subject to section 913, in an exercise of the decanting power under this section, a second trust may not:**

**(1) include as a current beneficiary a person who is not a current beneficiary of the first trust or include as a current beneficiary with respect to trust principal a person who is a current beneficiary of the first trust only with respect to trust income, except as otherwise provided in subsection (d);**

**(2) include as a presumptive remainder beneficiary or successor beneficiary a person who 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 subsection (c)(3) and section 914, 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 subsection (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 principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.**

#### COMMENT

This provision codifies the common law authority of a trustee to decant trust property as recognized by the Supreme Judicial Court in *Morse v. Kraft*, 466 Mass. 92 (2013), and *Ferri v. Powell-Ferri*, 476 Mass. 651 (2017).

The Subcommittee adopted the language of the Uniform Act provision with two substantive changes. First, the definition of “successor beneficiary” was modified to delete the reference to holders of nongeneral powers of appointment to be consistent with the definition of “beneficiary” under the MUTC, which excludes holders of powers of appointment. Second, the Subcommittee modified subsection (c) to clarify that the decanting power may not be exercised to authorize distributions of trust principal to an income-only current beneficiary of the first trust.

The Uniform Law Commission’s comment to this section includes a helpful list of examples of permissible terms of the second trust. The Subcommittee approves this list as an illustration of potential uses of trust decanting that are authorized under this article.

#### **Section 912. Decanting power under limited distributive discretion**

**(a) 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 who has limited distributive discretion over the principal of the first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.**

**(c) Under this section and subject to section 914, 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 which are substantially similar to the beneficial interests of the beneficiary in the first trust.**

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

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

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

## COMMENT

The Subcommittee recommended for adoption the language of the Uniform Act provision with no substantive changes. The Subcommittee noted the discussion in the Uniform Law Commission's comment regarding one specific permissible use of decanting under this section, namely to permit the severance of a first trust into multiple second trusts with substantially similar beneficial interests in the aggregate. The Subcommittee found the comment helpful, but cautions that the comment must be viewed as setting out an example and not establishing a clear rule.

### **Section 913. Trust for beneficiary with disability**

**(a) In this section:**

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

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

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

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

**(B) if no trustee or fiduciary has discretion under subsection (A), a trustee or other fiduciary, other than a settlor, who has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or**

**(C) if no trustee or fiduciary has discretion under subsections (A) and (B), a trustee or other fiduciary, other than a settlor, who is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.**

**(4) "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 any governmental benefit.**



**(b) A special-needs fiduciary may exercise the decanting power under section 911 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:**

**(1) a second trust is a special-needs trust 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 subsection (c)(2) of section 911, 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. section 1396p(d)(4)(C); or**

**(B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. section 1396p(d)(4)(A).**

**(2) Subsection (c)(3) of section 911 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 which are substantially similar to the beneficiary's beneficial interests in the first trust.**

#### COMMENT

This section is a change in Massachusetts law. It authorizes the trustee of a trust with a beneficiary who the trustee believes has a disability and may qualify at any time for certain governmental benefits to decant the trust and change the dispositive provisions, even if the trustee has no discretion over distributions.

#### **Section 914. Protection of charitable interest**

**(a) In this section:**

**(1) "Determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and which is unconditional or will be held solely for charitable purposes described in subsection (a) of section 405.**

**(2) "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 Internal Revenue Code of the United States 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) This article does not limit the powers and duties of the attorney general under law of the commonwealth other than this article.**

#### COMMENT

This section provides additional safeguards on the exercise of the decanting power when the first trust contains a charitable interest.

Importantly, subsection (b) grants the Attorney General the rights of a qualified beneficiary with respect to a proposed decanting. As a result, the Attorney General is entitled to notice under section 907 and may petition the court in accordance with section 909. This is a change in existing Massachusetts law, which currently does not treat the Attorney General as a qualified beneficiary with respect to other trust matters. *See* section 110.

The Subcommittee believes that subsection (b), together with all of the other provisions of the Act and well-developed Massachusetts law regarding charitable trusts, gives the Attorney General sufficient powers to protect and enforce charitable interests in a decanting. Accordingly, the Subcommittee recommended deletion of several specific limitations on the exercise of the decanting power contained in subsections (c), (d) and (e) of the Uniform Act provision, viewing them as unnecessarily restrictive.

#### **Section 915. 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 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 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 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.**

#### COMMENT

The Subcommittee recommended adoption of this section with no substantive changes to the language of the Uniform Act.

The Subcommittee noted that many irrevocable trusts contain general restrictions on modification or amendment of the trust instrument. Under this section, such general language does not preclude exercise of the decanting power unless it expressly prohibits the application of trust modification principles under applicable state law.

#### **Section 916. 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 which 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).**

## COMMENT

This section, recommended for adoption without any substantive changes, is intended to avoid potential self-dealing.

### **Section 917. Relief from liability and indemnification**

**(a) Except as otherwise provided in this section or approved by the court, 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) Except as approved by the court, 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.**

## COMMENT

The Subcommittee recommended this section for adoption with one substantive change. The Subcommittee revised paragraphs (a) and (c) to permit decanting to modify fiduciary liability with judicial approval.

### **Section 918. 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:**

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

**(b) 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**

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

## COMMENT

The power to remove a fiduciary is an important safeguard that would be thwarted if a fiduciary could eliminate it unilaterally.

### **Section 919. Tax-related limitations**

#### **(a) In this section:**

**(1) “Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under sections 671 through 677 or section 679 of the Internal Revenue Code.**

**(2) “Internal Revenue Code” means the Internal Revenue Code of the United States as amended and as then in effect, and references to a specific provision of the Internal Revenue Code are intended to include a successor provision of the same general effect.**

**(3) “Nongrantor trust” means a trust that is not a grantor trust.**

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

**(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 section 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 such section. 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 section 2503(b) of the Internal Revenue Code by application of section 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 section 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 section 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 section 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 section 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 section 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 section 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 such section.

(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 section 401(a)(9) of the Internal Revenue Code and any applicable regulations, or any similar requirements that refer thereto. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and section 922 applies to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of section 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 such section.

(8) In this subsection, “tax benefit” means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject

**to subsection (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 but for provisions of this article other than this section, would have qualified for the tax benefit.**

**(9) Subject to subsection (4):**

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

**(B) the second trust may be a grantor trust, even if the first trust is a nongrantor trust.**

#### COMMENT

The Uniform Act contains exceptionally detailed tax saving provisions. The Subcommittee noted that existing Massachusetts law already limits the exercise of fiduciary powers to the extent necessary to protect qualification for tax benefits that were desired by the settlor, but decided to adopt most provisions of this section to further clarity as well as to preserve uniformity.

The Subcommittee recommended deletion of subsection (b)(10), which would have given the settlor the power to veto a proposed exercise of the decanting power that would restrict the settlor's ability to terminate the second trust's grantor trust status. The Subcommittee was concerned that giving the settlor such power could have unanticipated adverse consequences, and believes that the notice provisions contained in section 907 provide sufficient safeguards for the settlor.

For purposes of the Act, the definition of "Internal Revenue Code" refers to the federal tax code in effect at the relevant time, and references to specific provisions are intended to include amendments to those provisions as well as successor provisions with the same general effect.

#### **Section 920. 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 which apply to property of the first trust.**

## COMMENT

This section is consistent with the Massachusetts Rule Against Perpetuities.

### **Section 921. Need to distribute not required**

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

## COMMENT

This provision, recommended for adoption without any changes, confirms the conceptual principles underlying the decanting power conferred by sections 911 and 912.

### **Section 922. Saving 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 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.**

## COMMENT

The Subcommittee recommended adoption of the remedial rules in this section to provide clear guidance in a situation where a decanting is ineffective. The Subcommittee believes that the Uniform Law Commission's comments to this section provide helpful additional guidance.

### **Section 923. Trust for care of an animal**

**(a) In this section:**

**(1) "Animal trust" means a trust or an interest in a trust described in section 408.**



**(2) “Protector” means the person who may enforce the intended use of the principal or income of an animal trust under subsection (f) of section 408.**

**(b) The decanting power may be exercised over an animal trust that has a protector to the extent 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) 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 benefitted the animal.**

#### COMMENT

The Subcommittee recommended revision of this section to conform its provisions to section 408 of the MUTC, which governs trusts for the care of animals. Subsection (c) was eliminated because the protector of an animal trust is treated as a qualified beneficiary under section 110 of the MUTC.

#### **Section 924. 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.**

#### COMMENT

Although the Subcommittee believes this provision is unnecessary, it recommended adoption of this section to promote uniformity.

#### **Section 925. 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 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.**

#### COMMENT

This section recognizes that, although for most purposes the settlor of the first trust is treated as the settlor of the second trust, where the second trust was not reviewed by the original settlor but rather was prepared by or at the direction of the decanting trustee, then for purposes of determining “settlor’s intent” for purposes of construing the second trust instrument it may be appropriate to treat the decanting trustee as the “settlor.”

**Section 926. Later-discovered and later-acquired property**

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

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

**(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.**

**COMMENT**

After considerable discussion, the Subcommittee decided to recommend adoption of this provision without any substantive changes, only modifying the title to reflect that this section applies to both later-discovered and later-acquired property.

**Section 927. 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.**

**COMMENT**

This section clarifies that decanting does not operate to avoid obligations of the property of the first trust.

## Conclusion

For the foregoing reasons, the Fiduciary Legislation Committee recommends enactment of the Massachusetts Uniform Trust Decanting Act.

Respectfully submitted,

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April 23, 2018

**About the Standing Committee on  
Massachusetts Legislation Relating to  
Wills, Trusts, Estates, and Fiduciary Administration**

The undersigned have formed a standing committee (the “Fiduciary Legislation Committee”) to review potential new legislation relating to wills, trusts, estates, and fiduciary administration (“trust and probate matters”) and to make recommendations to the General Court. Although many of the undersigned are active in the Boston Bar Association and the Massachusetts Bar Association, and one is a Massachusetts Uniform Law Commissioner, the Fiduciary Legislation Committee will not operate under the aegis of the Bar Associations or the Uniform Law Commission. Instead it will serve as a group of individuals knowledgeable in trust and probate matters who can provide an independent perspective. Although we start with no formal charter, charge, or authorization from an existing organization, we hope that, over time, we will earn the respect of the General Court and the legal community. Any authority or influence of this Committee will come from that respect.

There is precedent for the formation of ad hoc committees to review and recommend legislation in trust and probate matters. In recent years, ad hoc committees were formed to review and recommend for approval versions of the Uniform Probate Code, the Uniform Prudent Investor Act, the Uniform Principal and Income Act, and the Uniform Trust Code. These committees included practitioners from private practice, corporate fiduciaries and private fiduciary firms, members of the academic community, and members of the judiciary. Although these committees participated in the legislative process once they finalized their recommendations, the committees themselves had no particular stature or history with the legislature, having been created ad hoc.

Regrettably, once an ad hoc committee completed its work, the committee was disbanded. Each time there was need for review of a new uniform act with regard to trust and probate matters, a new ad hoc committee was formed. Not only did this step introduce delay, but as each committee was temporary, each lacked an ongoing relationship with the legislature. Our goal is to take what was good about the ad hoc committee process and formalize it into a standing institution that, over time, can develop both stature and credibility in representing the trusts and estates bar and related constituencies. The Fiduciary Legislation Committee will seek to build relationships with the legislative leadership in the General Court in a way that the ad hoc committees could not. Moreover, as a continuing body the Fiduciary Legislation Committee will be positioned to help fine-tune legislation by proposing changes and updates on a regular basis.

The Fiduciary Legislation Committee expects to add to its membership. Generally, additional members should have knowledge and experience in trust and probate matters, and ideally would have been a member of one of the prior ad hoc committees or have had similar experience. There are, however, no set standards for membership. We would like

to add a member from the judiciary, and perhaps another member from the academic community, and we will be happy to consider anyone who has an interest.

As a matter of process, we hope to keep the core Fiduciary Legislation Committee relatively small, and to appoint subcommittees to review particular pieces of legislation. Those subcommittees will include individuals beyond the core Fiduciary Legislation Committee, and in particular may include persons with a particular expertise relative to the project in question. We expect to solicit suggestions for subcommittee membership from the Bar Associations, the Chief Justice of the Probate and Family Court, and other sources.

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