

§ 36C-8B-11. Decanting power.

(a) The following definitions apply to this section:

- (1) Noncontingent right. – 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) Vested interest. – An interest where any of the following exist:
 - 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 (i) income, (ii) a specified dollar amount, or (iii) a percentage of value of some or all of the trust property.
 - c. A current and noncontingent right, annually or more frequently, to withdraw (i) income, (ii) a specified dollar amount, or (iii) a percentage of value of some or all of the trust property.
 - d. A power of withdrawal.
 - 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) With the exception of a special-needs trust, as provided in G.S. 36C-8B-13, an authorized fiduciary that has 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 or income of the first trust, subject to the following limitations:

- (1) A second trust may not include as a current beneficiary a person that is not a current beneficiary of the first trust, except as provided in subsection (c) of this section.
- (2) The beneficiaries of a second trust may include only beneficiaries of the first trust, except as provided in subsection (c) of this section.
- (3) A second trust may not reduce or eliminate a vested interest.
- (4) If an authorized fiduciary has distributive discretion over principal that is subject to an ascertainable standard, then the powers to distribute income or principal to current beneficiaries in a second trust or trusts shall be subject to the same ascertainable standard as in the first trust and, in the aggregate, shall be exercisable in favor of the same current beneficiaries to whom such distributions could be made in the first trust.

(c) Subject to the limitation provided in subdivision (3) of subsection (b) of this section, a second trust may do all of the following:

- (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 power of withdrawal.
- (3) Create or modify a power of appointment if the power holder is a current beneficiary of the first trust who is not the authorized fiduciary and the authorized fiduciary has distributive discretion to distribute principal to the beneficiary.
- (4) Create or modify a power of appointment if the power holder is a remainder beneficiary of the first trust who is not the authorized fiduciary, but the exercise of the power may take effect only after the power holder becomes, or would have become, if then living, a current beneficiary.

(d) A power of appointment described in subsection (c) of this section 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.

(e) If an authorized fiduciary has 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 distributive discretion.

(f) For purposes of G.S. 36C-8-814, the first trust shall be deemed to include the decanting power. (2017-121, s. 1.)