

(2) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(a) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(b) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty days after the contestant sent the notification.

(3) Unless a distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a beneficiary of a trust that is determined to have been invalid, or a distributee of property improperly distributed or paid, or a claimant who is improperly paid, is liable for the return of the property improperly received and its income, if any, since the distribution if he or she has the property. If he or she does not have the property, then he or she is liable for the return of the value as of the date of his or her disposition of the property improperly received, and its income and gain, if any received by him or her.

**Source: L. 2013:** Entire part added, (SB 13-077), ch. 190, p. 777, § 12, effective August 7.

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## PART 8 DIRECTED TRUSTEES

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■ **15-16-801. Definitions.** As used in this part 8, unless the context otherwise requires:

(1) "Action", with respect to an act of a fiduciary, includes a failure to act.

(2) "Excluded trustee" means any trustee that, under the terms of the governing instrument, is precluded from exercising certain powers, which powers may be exercised only by a trust advisor designated by the governing instrument.

(3) "Investment decision" means a fiduciary decision regarding the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of or rights in any property owned by a trust and, with respect to non-publicly traded investments, the determination of the value of such investments.

(4) "Governing instrument" means a will, trust agreement or declaration, or a court order appointing a trust advisor.

(5) "Non-investment decision" means a fiduciary decision regarding the distribution, administration, or management of any property owned by a trust, other than an investment decision.

(6) "Qualified beneficiary" has the same meaning set forth in section 15-1-402 (10.5).

(7) "Settlor" includes a grantor, a trustor, and a testator.

(8) (a) "Trust advisor" means a person who is:

(I) Acting in a fiduciary capacity; and

(II) Vested under a governing instrument with fiduciary powers to direct a trustee's actual or proposed investment decisions or non-investment decisions.

(b) A person who holds a nonfiduciary power over a trust, including a power of appointment as defined in section 15-2-102, is not subject to the provisions of this part 8, regardless of whether he or she is described as a "trust advisor" within a governing instrument.

(9) "Willful misconduct" means intentional wrongdoing and not mere negligence, gross negligence, or recklessness.

**Source: L. 2014:** Entire part added, (HB 14-1322), ch. 296, p. 1237, § 10, effective August 6.

■ **15-16-802. Default rules for directed trusts.** Excluding the requirement that a trust advisor act in a fiduciary capacity, the provisions of this part 8 are default rules that apply to any trust for which a trust advisor is then acting, and such rules may be expanded, restricted, eliminated, or otherwise altered by the provisions of a governing instrument.

**Source: L. 2014:** Entire part added, (HB 14-1322), ch. 296, p. 1237, § 10, effective August 6.

■ **15-16-803. Trust advisor and excluded trustee.** (1) A trust advisor with power over investment decisions is subject to the "Uniform Prudent Investor Act", article 1.1 of this title. A trust advisor who has special skills or expertise or who is named a trust advisor in reliance upon his or her representation that he or she has special skills or expertise has a duty to use those special skills or expertise.

(2) The powers and duties of a trust advisor, and the extent of such powers and duties, are established by the governing instrument, and the exercise or

nonexercise of such powers and duties is binding on all other persons.

(3) The powers and duties of a trust advisor may include, but are not limited to:

(a) The exercise of a specific power or the performance of a specific duty or function that would normally be performed by a trustee;

(b) The direction of a trustee's actions regarding all investment decisions or one or more specific investment decisions; or

(c) The direction of a trustee's actions relating to one or more specific non-investment decisions, including the exercise of discretion to make distributions to beneficiaries.

(4) If a governing instrument provides that a trustee must follow the direction of a trust advisor and the trustee acts in accordance with such direction, the trustee is an excluded trustee.

**Source: L. 2014:** Entire part added, (HB 14-1322), ch. 296, p. 1238, § 10, effective August 6.

■ **15-16-804. Appointment and removal of trust advisors.** If a governing instrument does not include express provisions for the removal of a trust advisor but does include provisions for the removal of one or more trustees, the provisions for the removal of trustees also govern the removal of any then-serving trust advisor.

**Source: L. 2014:** Entire part added, (HB 14-1322), ch. 296, p. 1238, § 10, effective August 6.

■ **15-16-805. No duty to review actions of trust advisor.** An excluded trustee has no duty to review or monitor the actions of a trust advisor.

**Source: L. 2014:** Entire part added, (HB 14-1322), ch. 296, p. 1238, § 10, effective August 6.

■ **15-16-806. Duty to communicate - no duty to warn.** (1) A trustee has a duty to keep a trust advisor reasonably informed about the administration of the trust with respect to any specific duty or function being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trust advisor to perform the duty or function. A trust advisor requesting or receiving any such information from a trustee has no duty to monitor the conduct of the trustee or to provide advice to or consult with the trustee.

(2) A trust advisor has a duty to keep the trustee and any other trust advisors reasonably informed about the administration of the trust with respect to all duties or functions being performed by the trust advisor to the extent that providing such information is reasonably necessary for the trustee and any other trust advisors to perform their duties or functions. A trustee requesting or receiving any such information from a trust advisor has no duty to monitor the conduct of the trust advisor or to provide advice to or consult with the trust advisor.

(3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303.

(4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.

**Source: L. 2014:** Entire part added, (HB 14-1322), ch. 296, p. 1238, § 10, effective August 6.

■ **15-16-807. Excluded trustee not liable for action of trust advisor.** (1) If an excluded trustee is required to follow the direction of a trust advisor and the excluded trustee acts in accordance with such direction, the excluded trustee is not liable for any cause of action resulting from the act of complying therewith, except in cases of willful misconduct on the part of the excluded trustee so directed.

(2) An excluded trustee has no liability for any action of a trust advisor.

**Source: L. 2014:** Entire part added, (HB 14-1322), ch. 296, p. 1239, § 10, effective August 6.

■ **15-16-808. Power of trust advisor to act after death or incapacity of settlor.** The power and authority of a trust advisor does not lapse at the death or incapacity of the settlor.

**Source: L. 2014:** Entire part added, (HB 14-1322), ch. 296, p. 1239, § 10, effective August 6.

■ **15-16-809. Trust advisor subject to district court jurisdiction.** By accepting appointment to serve as a trust advisor of a trust having its principal place of administration in the state of Colorado, the trust advisor is subject to the jurisdiction of the courts

of the state of Colorado even if other related agreements provide otherwise, and the trust advisor may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor.

**Source:** L. 2014: Entire part added, (HB 14-1322), ch. 296, p. 1239, § 10, effective August 6.

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## PART 9

# COLORADO UNIFORM TRUST DECANTING ACT

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### PREFATORY NOTE

The Uniform Trust Decanting Act is promulgated in the midst of a rising tide of state decanting statutes. These statutes represent one of several recent innovations in trust law that seek to make trusts more flexible so that the settlor's material purposes can best be carried out under current circumstances. A decanting statute provides flexibility by statutorily expanding discretion already granted to the trustee to permit the trustee to modify the trust either directly or by distributing its assets to another trust. While some trusts expressly grant the trustee or another person a power to modify or decant the trust, a statutory provision can better describe the power granted, impose limits on the power to protect the beneficiaries and the settlor's intent, protect against inadvertent tax consequences, provide procedural rules for exercising the power and provide for appropriate remedies. While decanting may be permitted in some situations under common law in some states, in many states it is unclear whether common law decanting is permitted, and if it is, the circumstances in which it is permitted and the parameters within which it may be exercised.

**Need for Uniformity.** Trusts may be governed by the laws of different states for purposes of validity, meaning and effect, and administration. The place of administration of a trust may move from state to state. It often may be difficult to determine the state in which a trust is administered if a trust has co-trustees domiciled in different states or has a corporate trustee that performs different trust functions in different states. As a result it may sometimes be unclear whether a particular state's decanting statute applies to a trust and sometimes more than one state's decanting statute may apply to a trust. A uniform statute can eliminate conflicts between different state statutes. It can also protect a trustee who decants under one state's statute when more than one state's statute might apply and protect a trustee who reasonably relies on a prior decanting.

Currently there is limited guidance on the income, gift, and generation-skipping transfer ("GST") tax implications of decanting. A uniform statute also may provide common ground for the promulgation of tax guidance.

**What Trusts May Be Decanted.** Generally, the Uniform Trust Decanting Act permits decanting of an irrevocable, express trust in which the terms of the trust grant the trustee or another fiduciary the discretionary power to make principal distributions. See Section 15-16-903 and Section 15-16-902(3) (defining "authorized fiduciary"). The act does not apply to revocable trusts unless they are revocable by the settlor only with the consent of the trustee or an adverse party. Section 15-16-903(1). The act does not apply to

wholly charitable trusts. Section 15-16-903(2). With one exception, if no fiduciary has discretion to distribute principal, the act does not apply unless the court appoints a special fiduciary and authorizes the special fiduciary to exercise the decanting power. See Section 15-16-909. The exception is that a fiduciary who is responsible for making trust distributions may decant a trust to create a special-needs trust even if the fiduciary does not have discretion over principal if the decanting will further the purposes of the first trust.

**Who May Decant.** As discussed below, the decanting power is a fiduciary power, and thus must be entrusted to one of the fiduciaries of the first trust. The act entrusts the "authorized 2 fiduciary" with the decanting power. The "authorized fiduciary" generally is the fiduciary who has discretion to distribute principal, although a more expansive definition is needed in the case of a special-needs trust. Generally, the authorized fiduciary will be the trustee. Where there is a divided trusteeship that gives the power to make or direct principal distributions to another fiduciary, such as a distribution director, such other fiduciary will be the authorized fiduciary.

**Discretion Over Principal.** Except in the case of special-needs trusts, the decanting power is granted only to an authorized fiduciary who by definition must have the discretion to distribute principal. The extent of the decanting authority depends upon the extent of the discretion granted to the trustee to distribute principal. When the authorized fiduciary has "limited distribution discretion" that is constrained by an ascertainable or reasonably definite standard, the interests of each beneficiary in the second trust must be substantially similar to such beneficiary's interests in the first trust. Thus when the authorized fiduciary has limited distributive discretion, an exercise of the decanting power generally can modify administrative, but not dispositive, trust provisions. When the authorized fiduciary has "expanded distributive discretion," the authorized fiduciary may exercise the decanting power to modify beneficial interests, subject to restrictions to protect interests that are current, noncontingent rights or vested remainder interests, to protect qualification for tax benefits and to protect charitable interests.

Sometimes a trust may have two or more authorized fiduciaries, some of whom have limited distributive discretion and some of whom have expanded distributive discretion. The authorized fiduciaries with limited distributive discretion may exercise the decanting power under Section 15-16-912 and the authorized fiduciaries with expanded distributive discretion may exercise the decanting power under Section 15-16-911. **Fiduciary Power.** The Uniform Trust Decanting Act does not impose any duty on the authorized fiduciary to exercise the decanting power, but if the authorized fiduciary does exercise that power, the power must be exercised in accordance with the fiduciary duties of the authorized fiduciary. See Section 15-16-904. A fiduciary must administer a trust in good faith, in accordance with its terms (subject to the decanting power) and purposes, and in the interests of the beneficiaries. An exercise of decanting power must be in accordance with the purposes of the first trust. The purpose of decanting is not to disregard the settlor's intent but to modify the trust to better effectuate the settlor's broader purposes or the settlor's probable intent if the settlor had anticipated the circumstances at the time of decanting.

As a fiduciary power, the decanting power may be exercised without consent or approval of the beneficiaries or the court, except in the case of a few specific modifications that may benefit the fiduciary personally. Nonetheless, qualified beneficiaries are entitled to notice and may petition the court if they believe the authorized fiduciary has breached its fiduciary duty. Further, the authorized fiduciary, another fiduciary, a beneficiary, the settlor or, in the case of a trust with a charitable interest, the Attorney General or