

Delaware Decanting Statute (12 Del. C. § 3528)

§ 3528 Trustee's authority to invade principal in trust [For application of this section, see 80 Del. Laws, c. 153, § 5]

(a) Unless the terms of the instrument expressly provide otherwise, a trustee who has authority (whether acting at such trustee's discretion or at the direction or with the consent of an adviser), under the terms of a testamentary instrument or irrevocable inter vivos trust agreement (including a trust that, by its terms, is revocable but was created by a settlor who presently lacks the capacity to revoke the trust), to invade the principal or income or both of a trust (the "first trust") to make distributions to, or for the benefit of, 1 or more proper objects of the exercise of the power, may instead exercise such authority (whether acting at such trustee's discretion or at the direction or with the consent of an adviser, as the case may be) by appointing all or part of the such principal or income or both as is subject to the power in favor of a trustee of a trust (the "second trust") under an instrument other than that under which the power to invade is created or under the same instrument, provided, however, that, except as otherwise provided in this subsection (a):

(1) The exercise of such authority is in favor of a second trust having only beneficiaries who are proper objects of the exercise of the power except that the governing instrument of the second trust may provide that, at a time or upon an event specified in the governing instrument, the remaining trust assets shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions concerning the nature and extent of each such beneficiary's interest that are substantially identical to the first trust's terms and conditions concerning such beneficial interests;

(2) In the case of any trust, contributions to which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) (26 U.S.C. § 2503(b)) of the Internal Revenue Code of 1986 (26 U.S.C. § 1 et seq.) (hereinafter referred to in this section as the "I.R.C."), by reason of the application of I.R.C. § 2503(c) (26 U.S.C. § 2503(c)), the governing instrument for the second trust shall provide that the beneficiary's remainder interest shall vest and become distributable no later than the date upon which such interest would have vested and become distributable under the terms of the governing instrument for the first trust;

(3) The exercise of such authority does not reduce any income or unitrust interest of any beneficiary of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 (26 U.S.C. § 2056 or § 2523) or for state tax purposes under any comparable provision of applicable state law; and Title 12 - Decedents' Estates and Fiduciary Relations Page 118

(4) The exercise of such authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary who is the only trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions. Notwithstanding the foregoing provisions of this subsection (a), the governing instrument for

the second trust may grant a power of appointment (including a power to appoint trust property to the powerholder, the powerholder's creditors, the powerholder's estate, the creditors of the powerholder's estate or any other person, whether or not such person is a trust beneficiary) to 1 or more of the trust beneficiaries who are proper objects of the exercise of the power in the first trust. The exercise of a trustee's authority granted under this subsection (a) shall in all respects comply with any standard that limits the trustee's authority to make distributions from the first trust but may be exercised whether or not the trustee would have been permitted to exercise the power to make a current outright distribution of all of the trust assets in compliance with any such standard. For purposes of this subsection (a), an open class of beneficiaries identified in the governing instrument for the first trust (such as, but not limited to, a class comprised of the descendants of a person who is living or who has living descendants) is a proper object of the exercise of a power to make distributions and the exercise of such a power in favor of a second trust having only beneficiaries, including unborn future beneficiaries, who are among the members of the open class satisfies the requirement of paragraph (a)(1) of this section even if, pursuant to the terms of the governing instrument for the second trust, the class remains, or might remain, open beyond the time when the class would have closed pursuant to the terms of the governing instrument for the first trust; provided, however, that the governing instrument for the second trust shall not permit distributions to or among members of the open class sooner than when or in excess of the amounts permitted by the governing instrument for the first trust. A trustee's power, pursuant to this subsection (a), to appoint principal in favor of the trustee of a second trust shall include the power to create the second trust.

(b) The exercise of the power to invade the principal of the trust under subsection (a) of this section shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust.

(c) The exercise of the power to invade the principal of the trust under subsection (a) of this section shall be considered the exercise of a power of appointment (other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate) and shall be subject to the provisions of Chapter 5 of Title 25 covering the time at which the permissible period of the rule against perpetuities begins and the law which determines the permissible period of the rule against perpetuities. Consequently, a second trust may have a term that is longer than the term set forth in the governing instrument for the first trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

(d) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust which arises under any other section of this chapter or under another statute or under common law.

(e) When exercising the authority granted under subsection (a) of this section, the trustee and any adviser directing or consenting to the trustee's exercise of such authority shall be held to the standard of care and the standard of liability applicable to the trustee and any such adviser when making outright

distributions, free from trust, to or for the benefit of 1 or more permissible distributees. No trustee or adviser shall have a duty to exercise such authority nor, absent wilful misconduct, any liability to any person for failure to exercise such authority or failure to consider whether to exercise such authority.

(f) This section shall be available to any trust that is administered in this State.

(74 Del. Laws, c. 81, § 3; 74 Del. Laws, c. 271, § 2; 75 Del. Laws, c. 300, § 2; 76 Del. Laws, c. 90, § 3; 77 Del. Laws, c. 98, § 13; 78 Del. Laws, c. 117, §§ 6, 7; 79 Del. Laws, c. 172, § 3; 79 Del. Laws, c. 352, § 4; 80 Del. Laws, c. 153, § 4.)