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## OLR Bill Analysis

**sSB 272 (File 503, as amended by Senate "A")\***

### ***AN ACT CONCERNING ADOPTION OF THE CONNECTICUT UNIFORM TRUST DECANTING ACT.***

#### **SUMMARY**

This bill adopts the Connecticut Uniform Trust Decanting Act. Generally, a trust decanting occurs when a trust's authorized fiduciary (typically, the trustee), in line with authority granted under the trust, modifies the trust's terms or distributes property from it to another trust. Existing law recognizes decanting but does not set specific procedures or standards for this practice.

The bill generally allows decanting for express irrevocable trusts, or under limited circumstances, revocable trusts. It does not allow decanting of wholly charitable trusts (but sets rules for decanting of charitable interests within other trusts). For a decanting to occur, the authorized fiduciary generally must have the discretionary power under the trust's terms to make principal distributions (except for certain trusts for a beneficiary with a disability). The decanting power differs based on whether the authorized fiduciary has limited or expanded discretion under the first trust to distribute principal.

Under the bill, authorized fiduciaries who choose to decant must do so in line with their fiduciary duties. These fiduciaries generally (1) do not need court approval for decanting, except for testamentary trusts, but (2) must notify qualified beneficiaries and in some cases, certain state officials.

Among other things, the bill:

1. protects trustees or other people from liability for reasonably relying on a prior decanting;

2. specifically grants the court authority over certain decanting-related matters, upon petition of the authorized fiduciary or certain other parties;
3. sets specific standards for decanting involving special needs trusts for a beneficiary with a disability;
4. sets certain limits on the decanting power, such as limits to avoid unintended tax consequences; and
5. includes a saving provision to address a decanting that does not comply with all of its requirements.

The bill also makes certain related changes to existing laws, including (1) establishing which court has jurisdiction over decanting-related matters and (2) setting a \$300 fee for petitions to the probate court for approval of a decanting (as noted above, court approval is not generally required).

\*Senate Amendment "A" removes provisions from the underlying bill setting certain rules for the bill's applicability (but retains other provisions on this issue (e.g., see §§ 3 & 5)).

EFFECTIVE DATE: January 1, 2025

### **§§ 1-29 — CONNECTICUT UNIFORM TRUST DECANTING ACT**

The bill sets rules for trust decanting. A trust, generally speaking, is an arrangement in which one person (the trustee) holds money or other property for another person (the beneficiary). The trustee owes certain duties to the beneficiary with regard to safeguarding, managing, and disposing of the trust property and income according to the trust's terms. The person who created the trust is called the settlor.

Under the bill, a "first trust" is a trust over which an authorized fiduciary may exercise the decanting power. A "second trust" is a (1) first trust after its modification under the bill or (2) trust to which a property distribution from a first trust was or could be made under the bill. The "decanting power" is an authorized fiduciary's power to

modify the first trust's terms or distribute its property to one or more second trusts under the bill.

An "authorized fiduciary" is generally a trustee or other fiduciary, other than a settlor or a beneficiary, with discretion to distribute or direct a trustee to distribute any part of the first trust's principal to one or more current beneficiaries. The term also includes a (1) court-appointed special fiduciary (see § 9) or (2) special-needs fiduciary (see § 13).

**Scope (§ 3)**

The bill generally applies to express trusts that are (1) irrevocable (whether created under a will or otherwise) or (2) revocable by the settlor only with the consent of the trustee or someone holding an adverse interest. It does not apply to (1) wholly charitable trusts or (2) statutory trusts created under the existing Connecticut Statutory Trust Act (CGS § 34-500 et seq.).

The bill allows a trust instrument to restrict or prohibit the exercise of the decanting power (see § 15).

Under the bill, for special needs trusts created under specified federal Medicaid law, (1) the bill's applicable provisions must not be interpreted in a way that is inconsistent with or contradicts federal law and (2) courts may not issue an order or other ruling that is inconsistent with or contradicts federal law.

The bill does not limit anyone's authority to distribute or appoint property in further trust or to modify a trust under the trust instrument, other state law, the common law, a court order, or a nonjudicial settlement agreement. It also does not affect the settlor's ability to provide in a trust instrument for the distribution of the trust property, appointment in further trust of the property, or modification of the trust instrument.

**Fiduciary Duty (§ 4)**

The bill requires authorized fiduciaries, in exercising the decanting power, to act in line with their fiduciary duties, including the duty to act

in line with the first trust's purposes. It does not create or imply a duty to decant or to inform beneficiaries about the bill's applicability.

Under the bill, and for a trustee's specified fiduciary duties under the existing Connecticut Uniform Trust Code (see BACKGROUND), the first trust's terms are deemed to include the decanting power unless the trust provides otherwise. These duties include, among other things, to administer trust assets solely in the beneficiary's interests and consistent with the settlor's intent.

***Application; Governing Law (§ 5)***

The bill applies to trusts, whenever created, that have their principal place of administration in Connecticut. It also applies to trusts, whenever created, that specify that they are governed by Connecticut law generally or for their administration, construction of terms, or to determine the meaning or effect of terms.

***Reasonable Reliance (§ 6)***

The bill allows a trustee or other person to reasonably rely on the validity of a prior decanting performed under the bill, another state law, or the law of another jurisdiction. The person is not liable for any act or failure to act on that reliance.

***Notice; Exercise of Decanting Power (§ 7)***

The bill allows an authorized fiduciary to exercise the decanting power without anyone else's consent and without court approval unless the bill requires otherwise. Generally, before decanting, an authorized fiduciary must give at least 60 days' notice in a record to the following:

1. the first trust's settlors (if living or in existence) and qualified beneficiaries (see below),
2. holders of a presently exercisable power of appointment over part or all of the first trust,
3. anyone with the right to remove or replace the fiduciary,
4. the first trust's other fiduciaries and the second trust's fiduciaries,

5. the attorney general (for trusts with a determinable charitable interest), and
6. the attorney general and the Department of Social Services (for special needs trusts created under federal Medicaid law).

“Qualified beneficiaries” are those who (1) are currently eligible to receive a trust distribution or (2) would be eligible upon termination of the trust or the interests of current qualified beneficiaries.

The bill allows a fiduciary to decant before this notice period expires if all people entitled to receive notice provide a signed waiver.

The required notice must (1) specify how and when the fiduciary intends to decant and (2) include a copy of the first-trust instrument and all second-trust instruments.

Under the bill, a person’s receiving or waiving of the notice, or the notice period’s expiration, does not prevent the person from bringing a court petition asserting that the (1) decanting did not comply with the bill or was an abuse of discretion or breach of fiduciary duty or (2) bill’s saving provision applies (see § 22).

The failure to give required notice generally does not invalidate the decanting if the authorized fiduciary complied with certain notice provisions under the state’s Uniform Trust Code (which sets the permissible forms of notice, among other things; see § 31). But when the attorney general must receive notice under the bill (see above), the decanting is not valid unless the authorized fiduciary has a confirmed email delivery notification or certified mail receipt.

***Representation (§ 8)***

The bill sets rules about people authorized by the first-trust instrument or the existing trust code to represent and bind another person. Under the bill, (1) notice to a person’s representative has the same effect as if the person were directly notified, (2) the representative’s consent or waiver is binding on the represented person unless that person objects to the representation beforehand, and (3) a

representative may bring a court petition on the person's behalf.

The bill does not allow a settlor to represent or bind a beneficiary.

***Court Involvement (§ 9)***

The bill allows the authorized fiduciary, anyone entitled to notice under the bill (see § 7 above), a beneficiary, or anyone with standing to enforce a charitable interest (including the attorney general), to petition the court for certain decanting-related purposes. Specifically, they may ask the court to:

1. instruct the fiduciary as to whether a proposed decanting is permissible under the bill and consistent with the fiduciary's duties;
2. appoint a special fiduciary and authorize that person to determine whether a decanting should occur and to decant;
3. approve the exercise of the decanting power;
4. determine that a proposed or attempted decanting is ineffective because it violates the bill, even after applying the saving clause, or is an abuse of the fiduciary's discretion or breach of fiduciary duty;
5. determine the extent to which the saving clause applies to a prior decanting;
6. instruct a trustee on the saving clause's application to a prior decanting; or
7. order other relief to carry out the bill's purposes.

The bill also allows the authorized fiduciary to petition the court for approval of (1) an increase in the fiduciary's compensation (see § 16) or (2) a modification of a provision granting someone the right to remove or replace the fiduciary (see § 18).

Under the bill, for testamentary trusts, an authorized fiduciary must

obtain probate court approval before decanting.

If a first trust has a determinable charitable interest, an authorized fiduciary is barred from using the decanting power while a related court petition is pending, unless the court orders otherwise.

***Formalities (§ 10)***

Under the bill, a decanting must be in a record signed by an authorized fiduciary. The record, directly or by referencing the required notice, must (1) identify the involved trusts and (2) state the property being distributed to each second trust and any property remaining in the first trust.

***Decanting Power Under Expanded Distributive Discretion (§ 11)***

Under the bill, an authorized fiduciary with expanded distributive discretion over the first trust’s principal for the benefit of one or more current beneficiaries generally may exercise the decanting power over that principal. “Expanded distributive discretion” is a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard. (Generally, these are standards relating to, among other things, someone’s health, education, support, maintenance, or standard of living.)

Generally, in the decanting, a second trust in these cases may not (1) reduce or eliminate a vested interest; (2) include as a current beneficiary a person who is not a current beneficiary of the first trust; or (3) include as a presumptive remainder beneficiary or successor beneficiary a person who is not a current, presumptive remainder, or successor beneficiary of the first trust. Generally, a “current beneficiary” is a beneficiary who is currently receiving, or is entitled to receive, trust income and principal; a “successor beneficiary” is a beneficiary that is not a qualified beneficiary; and a “presumptive remainder beneficiary” is a qualified beneficiary other than a current beneficiary.

Under the bill and subject to certain limitations, the second trust may do the following:

1. reduce or eliminate non-vested interests of current, presumptive

- remainder, or successor beneficiaries;
2. keep a power of appointment;
  3. omit a power of appointment (other than a presently exercisable general power of appointment); and
  4. under certain conditions, create or modify a power of appointment.

A “power of appointment” is a power allowing someone acting in a nonfiduciary capacity to designate someone to receive an ownership interest in property or to another power of appointment over that property. It does not include a power of attorney. Among other things, the bill specifies that people who are not beneficiaries of the first trust may be permissible appointees of a current beneficiary’s power of appointment.

The bill also specifies that the second trust need not be created or administered under Connecticut law (except trusts with charitable interests must be administered here under certain circumstances; see § 14).

Under the bill, if an authorized fiduciary has expanded distributive discretion over only part of the first trust’s principal, the fiduciary may exercise the decanting power over that part of the principal.

***Decanting Power Under Limited Distributive Discretion (§ 12)***

The bill allows an authorized fiduciary with limited distributive discretion over the first trust’s principal for the benefit of one or more current beneficiaries to exercise the decanting power over the principal. “Limited distributive discretion” is a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

In a decanting under these circumstances, a second trust may not (1) have different current, presumptive remainder, or successor beneficiaries than the first trust; (2) change the discretion standard from



the first trust, except as provided below; (3) modify a power of appointment granted in the first trust; or (4) reduce or eliminate a vested interest.

Under the bill and subject to certain limitations, if the second trust extends the duration of the first trust, it may change the first trust's discretion standard, including to make it an expanded standard. This only applies to the period after which the first trust would have otherwise terminated.

The second trust need not be created or administered under Connecticut law (except trusts with charitable interests must be administered here under certain circumstances; see § 14).

If an authorized fiduciary has limited distributive discretion over only part of a first trust's principal, the fiduciary may exercise the decanting power over that part.

***Trust for Beneficiary With a Disability (§ 13)***

The bill sets specific rules for how a fiduciary can exercise the decanting power over "special needs trusts" for a beneficiary with a disability. These are trusts that the trustee believes would not be considered an asset for determining the beneficiary's eligibility for governmental benefits. The beneficiary does not have to currently be receiving these benefits or to have been adjudicated incapable.

Under the bill, the fiduciary with power to decant these trusts is called a "special-needs fiduciary." Unlike with other authorized fiduciaries under the bill, this term is not restricted to fiduciaries with discretionary authority to distribute the first trust's principal to current beneficiaries. If there is no such fiduciary, the special needs fiduciary can be one with discretionary authority to distribute the trust's income, or if there is no such fiduciary, one who is required to make distributions of principal or income.

The bill allows a special-needs fiduciary to decant the first trust's principal under its provisions on expanded distributive discretion (see § 11) if the (1) second trust is a special-needs trust for a beneficiary with

a disability and (2) fiduciary determines that decanting will further the first trust's purposes.

In this decanting, the bill allows the second trust to be a pooled trust as defined under federal Medicaid law or have payback provisions that comply with Medicaid reimbursement requirements (i.e., upon the beneficiary's death, the state is reimbursed for the Medicaid assistance it gave the person). (Generally, a pooled trust is a trust, established by a nonprofit organization, that holds the assets of several people with disabilities in separate accounts, but pools the accounts for investing and managing the funds.)

In either case, the decanting must not impair the state's claim, upon the beneficiary's death, for (1) medical assistance the state provided or (2) other claims the state would have against the beneficiary's estate.

The bill's general prohibition on decanting that reduces or eliminates a vested interest does not apply to the interests of beneficiaries with a disability.

The second trust (or if there are multiple second trusts, those trusts in total) generally must give each of the first trust's other beneficiaries the beneficial interest in the second trust in line with the bill's general requirements (see §§ 11 & 12). This applies except to the extent these other people's interests are affected by changes to the interests of the beneficiary with a disability.

***Protection of Charitable Interests (§ 14)***

Under the bill, 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 in line with existing law.

If a first trust contains a charitable interest, the second trust or trusts may not:

1. diminish that interest or the interest of an identified charitable organization that holds that interest or

2. change any charitable purpose in the first-trust instrument or any condition or restriction related to that interest.

If there are multiple second trusts, they must be treated as one trust when determining whether decanting diminishes the charitable interest or the interest of an organization holding that interest.

If a first trust has a determinable charitable interest, the second trust with a charitable interest must be administered under Connecticut law unless the (1) attorney general, after receiving notice, fails to timely object; (2) attorney general consents in a signed record to the second trust being administered under another jurisdiction's law; or (3) court approved the decanting.

The bill specifies that it does not limit the attorney general's powers and duties under state law.

***Trust Limitation on Decanting (§ 15)***

The bill prohibits an authorized fiduciary from exercising the decanting power to the extent the first-trust instrument expressly prohibits (1) decanting or (2) a fiduciary from using authority under state law to modify the trust or distribute any part of its principal to another trust. Decanting is subject to any of the first-trust instrument's express restrictions on these activities.

Subject to these provisions, an authorized fiduciary may decant under the bill even if the first-trust instrument permits the fiduciary or someone else to modify that instrument or to distribute part or all of the first trust's principal to another trust.

Any of the first trust's express prohibitions or restrictions as described above must be included in the second-trust instrument.

A general prohibition on amending or revoking a first trust, a spendthrift clause (generally, a limitation on the beneficiaries' or their creditors' ability to reach the trust assets), or a clause restraining the transfer of a beneficiary's interest does not prevent decanting.

### ***Change in Compensation (§ 16)***

The bill requires court approval or unanimous consent of the second trust's qualified beneficiaries for an authorized fiduciary to use decanting to increase the fiduciary's compensation above the amount specified in the first trust. If the first trust does not set the compensation, the fiduciary may not use decanting to increase his or her compensation above that allowed under the state's existing trust code.

These provisions do not apply to compensation increases that are incidental to other changes made by decanting.

### ***Relief From Liability and Indemnification (§ 17)***

The bill generally prohibits a second-trust instrument from protecting an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument. But a second-trust instrument may provide for indemnification of the first trust's authorized fiduciary (or someone else 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 had not occurred.

Under the bill, a second-trust instrument may not reduce fiduciary liability in total. But it can divide and reallocate fiduciary powers among fiduciaries (including trustees or trust directors) and relieve a fiduciary from liability for another fiduciary's act or failure to act as permitted by other state law.

### ***Removal or Replacement of Authorized Fiduciary (§ 18)***

Under the bill, an authorized fiduciary may not use decanting to change a provision in a first-trust instrument authorizing another person to remove or replace the fiduciary unless the (1) person consents in a signed record and the change applies only to that person, (2) person and the second trust's qualified beneficiaries consent in a signed record and the change gives a substantially similar power to another person, or (3) court approves the change that gives a substantially similar power to another person.

### ***Tax-Related Limitations (§ 19)***

The bill places specified tax-related limitations on the decanting power (i.e., limits certain actions that could disqualify a trust from a particular tax benefit). This applies to tax situations involving the following:

1. the marital deduction under the federal gift or estate tax, or a state gift, estate, or inheritance tax;
2. the charitable deduction under the federal income, gift, or estate tax, or a state income, gift, estate, or inheritance tax;
3. the federal gift tax annual exclusion;
4. S corporation stock;
5. the federal generation-skipping transfer tax;
6. qualified benefits and minimum distributions under certain retirement plans; and
7. grantor trusts, non-grantor trusts, or foreign grantor trusts (a grantor trust is one for which a first trust's settlor is considered the owner for federal income tax purposes).

For example, if a first trust contains property that qualified for the marital or charitable deduction, or would have qualified except for the bill's other provisions, the second-trust instrument must not include or omit any term that, if included or omitted, would prevent the transfer from qualifying for the deduction or reduce the deduction.

The bill also contains a catch-all provision on tax benefits. It generally prohibits a second-trust instrument from including or omitting any term that, if included or omitted from the first-trust instrument, would lead to disqualification for a tax benefit. This applies if the (1) first-trust instrument expressly indicated an intention, or was clearly designed, to qualify for the benefit and (2) property transfer or first trust qualified for the benefit, or would have qualified except for the bill's other provisions. This catch-all provision does not apply to benefits arising from being a grantor trust.

***Duration of Second Trust (§ 20)***

Subject to its provisions on charitable interests, the bill generally allows a second trust's duration to be the same or different than the first trust's duration. But perpetuities rules that apply to the first trust also apply to the second trust to the extent that the second trust's assets are from the first trust. This includes rules on maximum perpetuity, accumulation, or suspension of the power of alienation.

***Need to Distribute Not Required (§ 21)***

The bill allows an authorized fiduciary to exercise the decanting power regardless of whether the fiduciary would have distributed principal to a current beneficiary (or been required to do so) under the first trust's discretionary distribution standard.

***Saving Provision (§ 22)***

If a decanting would be valid except for the second-trust instrument's partial noncompliance with the bill, the decanting is still valid, subject to the following rules for the second trust's principal from the decanting. Generally, impermissible provisions in the second-trust instrument are deemed void, and missing required provisions are deemed included. The bill requires a second trust's trustee or other fiduciary to take corrective action after determining that a prior decanting is subject to these provisions.

***Trust for Care of an Animal (§ 23)***

The bill allows decanting to be used in an animal trust if it would otherwise be allowed under the bill as if the animals were people and the protector consents in a signed record. A "protector" is someone appointed in the trust, or by the court, to enforce the trust on the animal's behalf. Under the bill, a protector has the rights of a qualified beneficiary.

In a decanting, if a first trust is an animal trust, 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.

***Terms of a Second Trust (§ 24)***

Under the bill, any reference in the state's Uniform Trust Code to a trust instrument or trust terms includes a second-trust instrument and terms.

***Settlor (§ 25)***

Under the bill, for other state law, a first trust's settlor is deemed to be the second trust's settlor for the portion of the first trust's principal that is subject to decanting. The intent of either trust's settlors and the authorized fiduciary may be considered when determining settlor intent about the second trust.

***Later-Discovered Property (§ 26)***

The bill sets rules for what happens to a first trust's later-discovered property or property that the first trust received after the decanting. Generally, if the decanting was intended to distribute all of the first trust's principal, this property goes to the second trust; if not, it stays with the first trust. But the authorized fiduciary may provide otherwise in the decanting or by the second trust's terms.

***Obligations (§ 27)***

Under the bill, a debt, liability, or other obligation against the first trust's property is enforceable to the same extent against the second trust's property after the decanting.

***Uniformity of Application and Construction (§ 28)***

The bill specifies that, in applying and construing its provisions, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

***Relation to E-SIGN Act (§ 29)***

The bill provides that its provisions modify, limit, and supersede the federal Electronic Signatures in Global and National Commerce (E-SIGN) Act, except for that act's consumer disclosure requirements. But it does not authorize electronic delivery of specified notices not subject to E-SIGN, such as court orders or notices.

## **§§ 31-33 — CORRESPONDING CHANGES TO EXISTING LAWS**

### ***Methods of Notice (§ 31)***

The bill applies the state’s Uniform Trust Code standards for permissible methods of notice to notices or documents under the bill (allowing them to be sent, among other ways, by first-class mail, or if the person has consented in advance, by email).

It similarly extends to these notices and documents an existing provision which allows notices or documents to not be sent to someone whose identity or location is unknown to, and not reasonably determinable by, the trustee.

### ***Court Jurisdiction (§ 32)***

For testamentary trusts, the bill gives the probate court sole original jurisdiction to hear and decide decanting-related petitions (see § 9). For inter vivos trusts, the bill gives the probate court and Superior Court concurrent jurisdiction over these petitions.

### ***Probate Court Fee (§ 33)***

The bill sets a \$300 fee for probate court petitions to exercise the decanting power under § 9.

## **BACKGROUND**

### ***Connecticut Uniform Trust Code***

PA 19-137 enacted the Connecticut Uniform Trust Code. The code establishes numerous rules on creating, modifying, terminating, and enforcing trusts (CGS § 45a-499a et seq.).

## **COMMITTEE ACTION**

Judiciary Committee

Joint Favorable Substitute

Yea 36    Nay 0    (03/28/2024)