

§1218. Tax-related limitations

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Grantor trust" means a trust as to which a settlor of a first trust is considered the owner under 26 United States Code, Sections 671 to 677 or 26 United States Code, Section 679. [PL 2021, c. 235, §1 (NEW).]

B. "Internal Revenue Code" means the United States Internal Revenue Code of 1986. [PL 2021, c. 235, §1 (NEW).]

C. "Nongrantor trust" means a trust that is not a grantor trust. [PL 2021, c. 235, §1 (NEW).]

D. "Qualified benefits property" means property subject to the minimum distribution requirements of 26 United States Code, Section 401(a)(9), and any applicable regulations, or to any similar requirements that refer to 26 United States Code, Section 401(a)(9) or an applicable regulation. [PL 2021, c. 235, §1 (NEW).]

[PL 2021, c. 235, §1 (NEW).]

2. Limitations on decanting power. An exercise of the decanting power is subject to the following limitations:

A. If a first trust contains property that qualified, or would have qualified but for provisions of this Act 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 2nd-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. [PL 2021, c. 235, §1 (NEW).]

B. If the first trust contains property that qualified, or would have qualified but for provisions of this Act 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 2nd-trust instrument may 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. [PL 2021, c. 235, §1 (NEW).]

C. If the first trust contains property that qualified, or would have qualified but for provisions of this Act other than this section, for the exclusion from the gift tax described in 26 United States Code, Section 2503(b), the 2nd-trust instrument may 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 26 United States Code, Section 2503(b). If the first trust contains property that qualified, or would have qualified but for provisions of this Act other than this section, for the exclusion from the gift tax described in 26 United States Code, Section 2503(b) by application of 26 United States Code, Section 2503(c), the 2nd-trust instrument may 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 26 United States Code, Section 2503(c). [PL 2021, c. 235, §1 (NEW).]

D. If the property of the first trust includes shares of stock in an S corporation, as defined in 26 United States Code, Section 1361 and the first trust is, or but for provisions of this Act other than this section would be, a permitted shareholder under any provision of 26 United States Code,

Section 1361, an authorized fiduciary may exercise the power with respect to part or all of the S corporation stock only if any 2nd trust receiving the stock is a permitted shareholder under 26 United States Code, Section 1361(c)(2). 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 Act other than this section would be, a qualified subchapter S trust within the meaning of 26 United States Code, Section 1361(d), the 2nd-trust instrument may not include or omit a term that, if included or omitted, would have the effect of preventing the 2nd trust from qualifying as a qualified subchapter S trust. [PL 2021, c. 235, §1 (NEW).]

E. If the first trust contains property that qualified, or would have qualified but for provisions of this Act other than this section, for an inclusion ratio of zero for purposes of the generation-skipping transfer tax under 26 United States Code, Section 2642(c), the 2nd-trust instrument may 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 an inclusion ratio of zero under 26 United States Code, Section 2642(c). [PL 2021, c. 235, §1 (NEW).]

F. If the first trust is directly or indirectly the beneficiary of qualified benefits property, the 2nd-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 26 United States Code, Section 401(a)(9) and any applicable regulations, or any similar requirements that refer to 26 United States Code, Section 401(a)(9) or an applicable regulation. 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 1221 applies to the separate share. [PL 2021, c. 235, §1 (NEW).]

G. If the first trust qualifies as a grantor trust because of the application of 26 United States Code, Section 672(f)(2)(A), the 2nd 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 26 United States Code, Section 672(f)(2)(A). [PL 2021, c. 235, §1 (NEW).]

H. Subject to paragraph I, a 2nd-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:

- (1) The first-trust instrument expressly indicates an intent to qualify for the tax benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the tax benefit; and
- (2) The transfer of property held by the first trust, or the first trust, qualified, or but for provisions of this Act other than this section would have qualified, for the tax benefit.

For the purposes of this paragraph, "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. [PL 2021, c. 235, §1 (NEW).]

I. Subject to paragraph D:

- (1) Except as otherwise provided in paragraph H, the 2nd trust may be a nongrantor trust, even if the first trust is a grantor trust; and
- (2) Except as otherwise provided in paragraph J, the 2nd trust may be a grantor trust, even if the first trust is a nongrantor trust. [PL 2021, c. 235, §1 (NEW).]

J. An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the authorized fiduciary within the notice period under section 1207 and:

- (1) The first trust and a 2nd trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust and the 2nd trust does not grant an equivalent power to the settlor or other person; or
- (2) The first trust is a nongrantor trust and a 2nd trust is a grantor trust, in whole or in part, with respect to the settlor, unless:
 - (a) The settlor has the power at all times to cause the 2nd trust to cease to be a grantor trust; or
 - (b) The first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the 2nd-trust instrument contains the same provision. [PL 2021, c. 235, §1 (NEW).]

[PL 2021, c. 235, §1 (NEW).]

SECTION HISTORY

PL 2021, c. 235, §1 (NEW).

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