

**PART 5**  
**TRUSTEE'S POWER TO DISTRIBUTE IN TRUST**

**15-16-501. Fiduciary Power.** The power to distribute in trust under this part 5 is a fiduciary power, and nothing in this part 5 alters any of the trustee's fiduciary duties imposed by other statutes, the common law, or the terms of the trust.

**COMMENT**

The power to decant is an extension of the trustee's discretionary power to distribute property to one or more beneficiaries. The power to decant is the power to distribute in further trust, rather than, and in addition to, the power to distribute outright. It is subject to the fiduciary duties generally placed upon a trustee's discretionary power to distribute.

**15-16-502. Power to distribute in trust.** If under the terms of a trust ("first trust"), the trustee has any discretion to distribute all or part of the income or principal of the first trust, the trustee may exercise that discretion to distribute to another trust ("second trust") for the benefit of one or more of the beneficiaries of the first trust, subject to the requirements of this Part 5.

**COMMENT**

This statute is designed to give trustees the power to appoint trust property in further trust for the benefit of the trust's beneficiaries. This ability colloquially is known as the power to "decant." It is contemplated that this power will be used primarily to modify a trust's administrative or distributive provisions to fit new or changing circumstances. A trustee's exercise of the power granted under 15-16-502 is predicated on such trustee having discretion to distribute any portion of the trust principal or income.

**15-16-503. Limitations on exercise of power.**

(1) A trustee may not exercise the power to distribute in trust under section 15-16-502 as to any portion of the property of the first trust that is subject to a presently exercisable general power of appointment, unless the second trust grants to the holder of such presently exercisable power a presently exercisable power that is as least as broad as the power held under the first trust.

(2) No trustee of the first trust who is also a beneficiary of the first trust may exercise the power to distribute in trust under section 15-16-502 if such exercise results in the beneficiaries of the first trust and the beneficiaries of the second trust holding different respective beneficial interests. Another trustee or a co-trustee, or other trustees or co-trustees, who are not beneficiaries of the first trust, may exercise the power to distribute in trust under section 15-16-502 in a way that alters the beneficial interests of the beneficiaries of the first trust, provided that any trustee who is a beneficiary of the first trust abstains from such exercise of this power.

## COMMENT

Section 15-16-503 describes two limitations on the power to distribute in trust established in 15-16-502. The first limitation restricts the trustee from exercising the power to distribute in trust as to any property currently subject to a beneficiary's presently exercisable power to withdraw. This limitation is designed to protect the status of a gift to the trust as a present interest qualifying for the gift tax annual exclusion.

The second limitation prevents a trustee who is also a beneficiary of the trust from exercising the power to distribute in trust. This limitation is a check on the broad power to distribute assets of the first trust into a second trust that may have different terms from the first trust or that may leave out beneficiaries of the first trust. However, it still allows "interested" trustees to exercise the power to distribute in trust, under 15-16-502, when such exercise is designed to correct or modify administrative provisions.

**15-16-504. Limitations on terms of second trust.** A trustee may exercise the power to distribute in trust under section 15-16-502 only if the second trust satisfies the requirements of this section.

(1) If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code of 1986, as amended, the second trust shall not contain any provision which, if the provision had been included in the first trust, would have prevented the contribution from qualifying for such deduction or would have reduced the amount of such deduction.

(2) The permissible period of the rule against perpetuities that applies to the second trust, and to any power of appointment exercisable pursuant to the second trust, shall not be longer than the permissible period of the rule against perpetuities that applies to the first trust.

(3) The second trust shall not have as a beneficiary any person who or that is not a beneficiary of the first trust.

## COMMENT

The statute is designed to offer significant flexibility to trustees, recognizing that such flexibility may create legal and tax issues. These issues generally are left to the trustee to recognize and address. Recognizing that preserving the marital and charitable deductions permitted by the Code and not violating the rule against perpetuities are central to many trusts, the statute requires any exercise to be to a second trust that does not prevent these deductions and also requires that the applicable rule against perpetuities not be extended.

Additionally, the statute prohibits the inclusion of new beneficiaries in the second trust as this would be detrimental to the interests of the current beneficiaries and the intent of the settlor.

**15-16-505. Structure and permissible terms of second trust.** The structure and permissible terms of the second trust may include, but are not limited to, the following:

(1) The second trust may be an existing trust, including a separate trust created under the terms of the first trust, or may be a trust that is newly created for the purpose of receiving the distribution from the first trust.

(2) The trustees of the second trust may be one or more of the trustees of the first trust or may be different trustees, and the second trust may have the same provisions as or different provisions from the first trust concerning the selection, termination, succession, and powers of the trustees.

(3) The trustees of the second trust may have the same discretion or less discretion over distributions of income and principal of the second trust as the trustee of the first trust has over distributions of income and principal of the first trust.

(4) The second trust may have one or more beneficiaries and may have all or fewer than all of the beneficiaries of the first trust.

(5) The second trust may have the same or different administrative provisions from the first trust.

(6) The governing law of the second trust may be the same or different from the law that governs the first trust.

(7) The principal place of administration of the second trust may be the same as or different from the principal place of administration of the first trust.

#### COMMENT

15-16-505 is designed to outline the terms and provisions that may govern the second trust. It is not intended to be exhaustive. The statute allows a trustee to decant by creating a second trust under the first trust's governing instrument, or by creating a new instrument to govern the second trust. It permits the trustee to alter those provisions governing the selection, termination, succession, and powers of the trustees. It permits changes in the scope of distributive powers, and allows for the removal, but not addition, of beneficiaries under the second trust. A remainder beneficiary's interest also may be accelerated into a current interest under the terms of the second trust, and beneficiaries may have new powers of appointment conferred upon them under the terms of the second trust.

It is thought that trustees will make generous use of the provisions found in 15-16-505(6) through 15-16-505(8), inclusive. These statutes permit the trustee to use the decanting power granted in 15-16-502 to effectively amend, through the creation of a second trust, the first trust's administrative provisions, governing laws, and principal place of administration.

**15-16-506. Trustee's discretion to exercise and associated liability.** The decision to exercise the power to distribute in trust under section 15-16-502 is in the discretion of the trustee. A trustee has no duty to exercise the power, and a trustee is not liable for not considering

4.15.2010

whether to exercise the power or for not exercising the power. A trustee is not liable for an exercise of the power if, prior to such exercise, such trustee provided notice to the qualified beneficiaries of the first trust in accordance with section 15-16-507(2) and no beneficiary objected to the distribution by a writing delivered to the trustee within ninety days after the notice was given.

### COMMENT

This section clarifies that a trustee may not be compelled to exercise the power to distribute in trust, that a trustee has no liability for not exercising the power to distribute in trust or for not considering whether to exercise the power to distribute in trust, and that, upon giving proper notice, if there is no objection from a beneficiary within ninety days after notice is given, a trustee has no liability for an exercise of the power to distribute in trust.

#### **15-16-507. Notice and manner of exercise.**

(1) The trustee may exercise the power to distribute in trust under section 15-16-502 without court approval.

(2) The trustee shall give notice of a proposed exercise of the power to distribute in trust under section 15-16-502. Such notice must:

(a) Be sent to each qualified beneficiary (as the term is defined in section 15-1-402(10.5)) of the first trust, determined as of the date the notice is sent and assuming nonexercise of all powers of appointment;

(b) Specify a proposed effective date for the distribution, which may not be sooner than ninety days after the notice is sent; and

(c) Include a copy of the second trust.

(3) Upon the proposed effective date stated in such notice, or upon an earlier date if all qualified beneficiaries agree, the trustee may exercise the power to distribute in trust under section 15-16-502.

(4) The exercise of the power to distribute in trust under section 15-16-501 shall be by a written instrument signed by the trustee of the first trust and filed with the records of the first trust.

(5) For purposes of this 15-16-507, a person may receive notice, consent, or object on behalf of another on whose behalf that person could act in a formal proceeding involving the first trust under the provisions of section 15-10-403(3).

### COMMENT

A purpose of this statute is to save the trustee the time and expense of obtaining court approval of a trust modification. To this end, the exercise of the power does not require court approval.

4.15.2010

The trustee must notify each qualified beneficiary (as the term is defined in section 15-1-402(10.5)) of the trust of a proposed exercise of the power. The trustee must give such beneficiaries at least ninety days to consider the proposed exercise. The trustee may exercise the power to distribute in trust under 15-16-502 by signing a written instrument and filing it with the records of the first trust.

**15-16-508. Power may be exercised despite certain provisions in first trust.** A trustee may exercise its power to distribute in trust under section 15-16-502 even if the first trust is irrevocable, the terms of the first trust provide that it may not be amended, or the terms of the first trust include a spendthrift provision.

#### COMMENT

This provision is intended to clarify that the power to distribute in trust may be exercised in spite of the irrevocable nature of a trust, a prohibition on trust amendment, or a spendthrift provision. A trust may preclude the exercise of the power to distribute in trust only by a specific provision stating that the trustee shall not have a power to distribute in trust.

**15-16-509. Default rules.** The provisions of section 15-16-501 may not be altered by the terms of the trust. All of the other provisions of this part 5 are default rules, which may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust. The trustee's power to distribute in trust under this part 5 does not restrict any power that a trustee may have to make a distribution in trust under the terms of the trust or at common law.

#### COMMENT

The statute grants trustees the power to distribute in trust. It does not preclude a trustee from exercising alternate powers to distribute in trust, whether granted under the terms of a trust or by common law. Nor does it preclude a grantor from providing different terms for a power to distribute in trust or eliminating all powers to distribute in trust (including the power granted by this statute).

**15-16-510. Effective date and application to existing trusts.** This part 5 applies to distributions in trust occurring on or after July 1, 2011, from trusts created before, on, or after such date.

#### COMMENT

The statute grants trustees of trusts created before, on, or after July 1, 2011 the power to distribute in (further) trust. However, the statute applies only to the exercise of a power on or after July 1, 2011.