

PART 5 TRUSTEE'S POWER TO DISTRIBUTE IN TRUST

15-16-501. 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 all or any part of the income or principal of the first trust 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 appoint trust property in further trust for the benefit of the trust's beneficiaries. This ability is colloquially 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 15-16-501 is predicated on such trustee having discretion to distribute any portion of the trust principal or income.

15-16-502. Limitations on exercise of power.

(1) If any beneficiary of the first trust has a presently exercisable power to withdraw all or any portion of the trust property, then while the power to withdraw remains exercisable, the trustee may not exercise the power to distribute in trust under section 15-16-501 as to the property subject to the power to withdraw.

(2) No trustee of the first trust who is also a beneficiary of the first trust may exercise or participate in the exercise of the power to distribute in trust under section 15-16-501 if that trustee's 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 15-16-501 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 15-16-502 describes two limitations on the power to distribute in trust established in 15-16-501. The first limitation restricts the trustee from exercising the power to distribute in trust as to any property currently subject to a beneficiary's 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 the 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. ~~Because a trustee who is also a beneficiary has an incentive~~ However, it still allows "interested" trustees to exercise the power described in 15-16-

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~~501 in a way that benefits the trustee to the detriment of other beneficiaries, such a trustee cannot exercise the power to decant.~~
to distribute in trust, under 15-16-501, when such exercise is designed to correct or modify administrative provisions.

15-16-503. Limitations on terms of second trust. A trustee may exercise the power to distribute in trust under section 15-16-501 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.

15-16-504. Structure and permissible terms of second trust. Subject to the requirements of sections 15-16-501, 15-16-502, and 15-16-503, 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 ~~by the trustee of the first trust~~ 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, greater 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. A future or contingent beneficiary of the first trust may be a current beneficiary of the second trust, and a current beneficiary of the first trust may be a future or contingent beneficiary of the second trust. A beneficiary's interest in the first trust may be increased, decreased, or eliminated in the second trust.

(5) The second trust may confer a power of appointment on a beneficiary of the second trust. The power of appointment may be general or limited, and may be presently exercisable, testamentary or otherwise postponed, or any variant or combination of these options. The objects of the power may include any number of persons, including persons who or that are not beneficiaries of the first trust or the second trust, and may be defined as a class.

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

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

(8) 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

This section 15-16-504 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 15-16-504(6) through 15-16-504(8), inclusive. These statutes permit the trustee to use the decanting power granted in 15-16-501 to effectively amend, through the creation of a second trust, the first trust's administrative provisions, governing laws, and principal place of administration.

15-16-505. Notice and manner of exercise.

(1) The trustee may exercise the power to distribute in trust under section 15-16-501 without court approval.

~~(2) The trustee shall~~ At any time that it otherwise may exercise its discretion to distribute all or part of the income or principal of the first trust, the trustee may exercise the power to distribute in trust under section 15-16-501 without giving notice to any interested person.

~~(3) The trustee may elect to provide notice of a proposed exercise of the power to distribute in trust under section 15-16-501. If the trustee gives such notice in accordance with section 15-16-505(4) and no qualified beneficiary (as the term is defined in section 15-1-402(10.5)) objects to the distribution by a writing delivered to the trustee within 60 days after the notice is given, the trustee is not liable for the exercise of the power proposed in such notice.~~

~~(4) If the trustee elects to give notice of a proposed exercise of the power to distribute in trust under section 15-16-501. Such~~ 501, such notice must:

(a) Be sent to the qualified beneficiaries (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 prospective effective date for the distribution, which may not be sooner than sixty days after the notice is sent; and

(c) Include a copy of the second trust.

~~(5) The~~ If the trustee may elects to give notice of a proposed exercise of the power to distribute in trust under section 15-16-501, provided that no qualified beneficiary objects to the proposed exercise of such power, upon the prospective effective date stated in such notice, or upon another date if all qualified beneficiaries agree, the trustee may exercise such power.

~~(6) 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.~~

COMMENT

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

The trustee must notify is not required to provide notice of an exercise of the power to distribute in trust under 15-16-501 because this power is an extension of the trustee's discretion to make distributions, which does not otherwise require notice. The trustee may obtain relief from

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liability for an exercise of the power by providing notice to each qualified beneficiary (as the term is defined in section 15-1-402(10.5)) of the first trust of the a proposed exercise of the power. The trustee must give such beneficiaries at least sixty days to consider the proposed exercise. If no beneficiary objects within the time period specified in the notice, the trustee may exercise the power to distribute in trust under 15-16-501 (without liability for such exercise) by signing a written instrument and filing it with the records of the first trust.

15-16-506. Power is discretionary. The decision to exercise the power to distribute in trust under section 15-16-501 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 whether to exercise the power or for not exercising the power. ~~A trustee is not liable for an exercise of the power if such trustee provides notice to the qualified beneficiaries of the first trust in accordance with section 15-16-505(2) and no beneficiary objects to the distribution by a writing delivered to the trustee within 60 days after the notice is given.~~

COMMENT

This section clarifies that a trustee may not be compelled to exercise the power to distribute in trust, and 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 60 days after notice is given, a trustee has no liability for an exercise of the power to distribute in trust.~~

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15-16-507. Power may be exercised despite certain provisions in first trust. A trustee is not prohibited from exercising its power to distribute in trust under section 15-16-501 solely because 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.

15-16-508. Default rule. ~~The trustee's power to distribute in trust under section 15-16-501 is a~~ provisions of this part 5 are default ~~rule~~ rules, which may be expanded, restricted, eliminated, or otherwise altered by the terms of a trust. The trustee's power to distribute in trust under ~~section 15-16-501~~ 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).

[Option A] 15-16-509. Effective date and application to existing trusts. This part 5 applies to distributions in trust occurring on or after July 1, 2010, from trusts existing on or created on or after such date.

COMMENT

The statute grants the power to distribute in trust to trustees of both trusts existing on July 1, 2010, and trusts created on or after that date. It does not apply to any exercise of a power to distribute in trust by a trustee prior to this date.

One proposal to deal with questions regarding the constitutionality of the proposed statute's retroactive application is to permit beneficiaries of existing trusts to "opt out" of the application of the statute to their interest in the existing trust. Option B contains opt out provisions.

[Option B] 15-16-509. Effective date and application to existing trusts.

(1) This part 5 applies to distributions in trust occurring on or after July 1, 2010, from trusts created on or after such date. This part 5 also applies to distributions in trust occurring on or after July 1, 2010, from trusts existing on such date, unless a qualified beneficiary (as the term is defined in section 15-1-402(10.5)) delivers a notice of election as provided in this section, in which case this part 5 shall not apply to such qualified beneficiary's interest in the trust.

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(2) (a) The notice of election pursuant to subsection (1) of this section 15-16-509 shall be a written statement of such qualified beneficiary's election that includes a reference to this section, the name and date of the trust, the names of the settlor and the trustee of the trust, a description of the qualified beneficiary's interest, and the name and address of the qualified beneficiary making the election. The notice of election shall be signed and acknowledged by such qualified beneficiary.

(b) The notice of election shall be delivered to a trustee of such trust on or before December 31, 2010. If there is no person serving as trustee at the time delivery is to be made, the notice of election may instead be delivered to a person authorized to appoint a successor trustee of the trust. When the successor trustee is appointed, the person to whom the notice of election was delivered shall deliver it to the successor trustee.

(c) The notice of election shall be considered delivered to the person to whom delivery is required to be made when the notice of election or a copy thereof is delivered in person or when mailed by registered or certified mail, return receipt requested, to such person.

(d) The trustee of the trust shall file the notice of election with the records maintained by the trustee of the trust. There shall be a rebuttable presumption that the notice of election was not delivered as provided in this section unless the notice of election or a copy of such notice is in the records of the trust maintained by the trustee.

(e) No fiduciary for any trust, estate, individual, or other person with an interest affected by the application of part 5 shall be required to make such election, nor shall such fiduciary be held responsible for not making such election.