

Suggestions for the  
**Proposed Decanting Legislation**

For consideration by the  
**Statutory Revision Committee**  
**Trust and Estate Section**

October 15, 2009

The following suggestions, concerning protection of powers of appointment, the role of a trustee-beneficiary, and preservation of existing powers to distribute in further trust, relate to the draft of the proposed decanting legislation circulated for consideration by the Statutory Revision Committee at its meeting on Thursday, October 15, 2009.

**1. Protection of Powers of Appointment that are presently exercisable or held by settlor or settlor's spouse.** Revise section 15-16-502(1) to read as follows:

15-16-502. **Limitations on exercise of power.** (1)(a) In the exercise of a power to distribute property of the first trust to a second trust under section 15-16-501, the trustee shall preserve a power of appointment over such property if such power of appointment is either presently exercisable or held by a settlor of the first trust or the spouse of such settlor.

(b) As used in this subsection (1), "power of appointment" includes, but is not limited to, a power held in a nonfiduciary capacity to withdraw or purchase any property of the trust or revoke, terminate, amend or otherwise modify the trust.

For comparison section 15-16-502(1) in the proposed draft reads as follows:

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. Permitting beneficiary trustee to participate with other trustees in changes that do not alter beneficial interest.** Add a third sentence to section 15-16-502(2) which would then read as follows:

(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 15-16-501 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 15-16-501 to alter 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. **However a trustee who is a beneficiary of the first trust may participate in such exercise of the power to distribute to the extent that such exercise results in any differences between the terms of the first trust and the terms of the second trust other than differences in the beneficial interests of the beneficiaries altered by such exercise.**

**3. Belt and suspenders for existing powers to distribute in further trust.** Add several words to the second sentence of section 15-16-508 as follows:

15-16-508. **Default rule.** The provisions of this part 5 are default 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 this part 5 **is in addition to and 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.