CHAPTER 59-16.1
TRUST DECANTING

59-16.1-01. Consistency with power of attorney provisions.

The provisions of this chapter relating to power of attorney are subject to other provisions of law.

59-16.1-02. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Appointed trust" means an irrevocable trust which receives principal from an invaded trust under this chapter, including a trust created by the settlor of the invaded trust, under the terms of the invaded trust or any other trust instrument, or by the trustees, acting in that capacity, of the invaded trust. For purposes of creating another trust, a requirement that a trust instrument be signed by the settlor is deemed satisfied by the signature of the trustee of the appointed trust.
2. "Authorized trustee" means, as to an invaded trust, a trustee with authority to pay trust principal to or for one or more current beneficiaries other than a trustee who is the settlor, or a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee, other than by the exercise of a power of appointment held in a nonfiduciary capacity.
3. "Current beneficiary" or "beneficiaries" means individual, or as to a class, an individual who is or will become members of that class, to whom the trustees may distribute principal at the time of the exercise of the power, provided that the interest of a beneficiary to whom income, but not principal, may be distributed at the discretion of the trustee of the invaded trust, may be continued in the appointed trust.
4. "Invade" means the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.
5. "Invaded trust" means an existing irrevocable inter vivas or testamentary trust whose principal is appointed under this chapter.
6. "Person or persons interested in the invaded trust" means all qualified beneficiaries as defined in subsection 16 of section 59-09-06.
7. "Principal" includes the income of the trust at the time of the exercise of the power which is not currently required to be distributed, including accrued and accumulated income.
8. "Unlimited discretion" means the unlimited power to distribute principal. A power to distribute principal which includes words, such as best interests, welfare, comfort, or happiness may not be considered a limitation of the power to distribute principal.

59-16.1-03. Power of appointment.

An exercise of a power of appointment is not void if the exercise is:

1. More extensive than was authorized, but is valid to the extent authorized by the instrument creating its power; or
2. Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.

59-16.1-04. Authorized trustee with unlimited discretion.

1. An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of the principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one, or all of the current beneficiaries of the invaded trust, to the exclusion of any one or more of the current beneficiaries. The successor and remainder beneficiaries of the appointed trust may be none, one, more than one, or all of the successor and remainder beneficiaries of the invaded trust.
2. An authorized trustee exercising the power under subsection 1 of section 59-16.1-04 may grant a discretionary power of appointment in the appointed trust to one or more

of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint may receive principal outright under the terms of the invaded trust.

3. If the authorized trustee grants a power of appointment, the class of permissible appointees in favor of whom the beneficiary may exercise the power of appointment granted in the appointed trust may be broader or otherwise different from the current, successor, and remainder beneficiaries of the invaded trust.
4. If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of the class.

59-16.1-05. Authorized trustee without unlimited discretion.

1. An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust must be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries must be the same as the successor and remainder beneficiaries of the invaded trust.
2. If the authorized trustee exercises the power under this section, the appointed trust must include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.
3. If the authorized trustee exercises the power under this section to extend the term of the appointed trust beyond the term of the invaded trust, then for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, then the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subsection 2 of section 59-16.1-05, also may include language providing the trustee with unlimited discretion to invade the principal of the appointed trust during this extended term.
4. If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of the class.
5. If the authorized trustee exercises the power under this section and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant the power of appointment in the appointed trust and the class of permissible appointees must be the same as in the invaded trust.

59-16.1-06. Special power of appointment.

An exercise of the power to invade trust principal under this chapter is considered to be the exercise of a special power of appointment.

59-16.1-07. Term of appointed trust.

The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, a term measured by the lifetime of a current beneficiary.

59-16.1-08. Unlimited discretion governs.

If an authorized trustee has unlimited discretion to invade the principal of a trust, and the same trustee or another trustee has the power to invade principal under the trust instrument and the power is not subject to unlimited discretion, then the authorized trustee having unlimited discretion may exercise the power of appointment under section 59-16.1-04.

59-16.1-09. Current need to invade principal.

An authorized trustee may exercise the power to appoint in favor of an appointed trust under sections 59-6.1-04 and 59-16.1-05 whether or not there is a current need to invade principal under the terms of the invaded trust.

59-16.1-10. Fiduciary duty.

An authorized trustee exercising the power under this chapter has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances.

59-16.1-11. Subsequently discovered assets.

Unless the authorized trustee provides otherwise:

1. The appointment of all the assets comprising the principal of the invaded trust to an appointed trust must include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and
2. The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust may not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust. These assets must remain the assets of the invaded trust.

59-16.1-12. Requirements for exercise of power to appoint - Notice.

1. The exercise of the power to appoint to an appointed trust under sections 59-16.1-04 and 59-16.1-05 must be evidenced by a written instrument that is signed, dated, and acknowledged by the authorized trustee. The exercise of the power is effective sixty days after the date of delivery of notice as specified in subsection 3, unless each individual entitled to notice agrees in writing to an earlier effective date or waives in writing the right to object to the exercise of the power.
2. An authorized trustee may exercise the power authorized by under sections 59-16.1-04 and 59-16.1-05 without the consent of the settlor or the person interested in the invaded trust and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.
3. A copy of the instrument exercising the power, a copy of the appointed trust, and a copy of the invaded trust must be delivered to:
   a. A person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under sections 59-16.1-04 and 59-16.1-05; and
   b. A person interested in the invaded trust.
4. Notice of an exercise of the power must be given in the same manner as provided in section 59-09-09.
5. The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or only a part of the assets comprising the principal of the invaded trust and, if a part, the approximate percentage of the value of the principal of the invaded trust that is subject to the appointment.
6. An individual entitled to notice may object to the authorized trustee's exercise of the power under this section by serving a written notice of objection upon the authorized trustee prior to the effective date of the exercise of the power. The failure to object does not constitute consent.
7. If the authorized trustee does not receive a written objection to the proposed exercise from an individual entitled to notice within the applicable period, the authorized trustee is not liable to a person who received or was deemed to have received the required notice in that person's personal, representative, or represented capacities for the exercise of the power.
8. If the authorized trustee receives a written objection within the applicable period, either the authorized trustee or an individual entitled to notice may petition the court to have the proposed exercise of a power performed as proposed, performed with modifications, or denied. In a proceeding, an individual objecting to the proposed exercise has the burden of proof as to whether the authorized trustee's proposed exercise should not be performed.

a. A person who has not objected is not estopped from opposing the proposed exercise in the proceeding.
b. If the authorized trustee decides not to implement the proposed exercise, the trustee shall notify all persons entitled to notice of the decision not to exercise the power and the reason for the decision, and the authorized trustee's decision not to implement the proposed exercise does not give rise to liability to an individual interested in the invaded trust.
c. A person entitled to notice may petition the court to have the exercise of a power performed and has the burden of proof as to whether it should be performed.

9. A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust must be filed with records of the appointed trust and the invaded trust.

59-16.1-13. Rights of trustee.

This section does not abridge the right of a trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by a court having jurisdiction over the trust.

59-16.1-14. No duty to exercise a power to invade.

This chapter does not create a duty to exercise a power to invade principal and inference of impropriety may not be made as a result of an authorized trustee not exercising the power conferred under sections 59-16.1-04 and 59-16.1-05.

59-16.1-15. Power clarified.

A power authorized under sections 59-16.1-04 and 59-16.1-05 may be exercised subject to the provisions of section 59-16.1-10, unless expressly prohibited by the terms of the governing instrument or by the provisions of section 59-16.1-10, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constituting a spendthrift clause does not preclude the exercise of a power under sections 59-16.1-04 and 59-16.1-05.

59-16.1-16. Prohibitions.

An authorized trustee may exercise a power authorized by this chapter to appoint a trust that is a supplemental needs trust that conforms to chapter 59-08. However, an authorized trustee may not exercise a power authorized by this chapter to effect the following:

1. To reduce, limit, or modify any beneficiary's current right to:
   a. A mandatory distribution of income or principal;
   b. A mandatory annuity or unitrust interest;
   c. A current right to withdraw a percentage of the value of the trust; or
   d. A current right to withdraw a specified dollar amount;
2. Notwithstanding subsection 2 of section 59-18-08, to decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
3. To alter or eliminate a provision granting another individual the right to remove or replace the authorized trustee exercising the power under sections 59-16.1-04 or 59-16.1-05, unless notice has been provided to the persons under subsection 3 of section 59-16.1-12, or approval is granted by a court having jurisdiction over the trust;
4. To make a binding and conclusive fixation of the value of an asset for purposes of distribution, allocation, or otherwise;
5. To extend the term of the appointed trust beyond a permissible period of the rule against perpetuities of the invaded trust, and an exercise of the power that extends the term of the appointed trust beyond the permissible period of the rule against perpetuities of the invaded trust voids the entire exercise of the power; or
6. To jeopardize:
   a. The deduction or exclusion originally claimed with respect to a contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the

Internal Revenue Code; the marital deduction under section 2056(a) or 2523(a) of the Internal Revenue Code; or the charitable deduction under section 170(a), 642(c), 2055(a), or 2522(a) of the Internal Revenue Code.

b. The qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code; or

c. Any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code.

59-16.1-17. Compensation - Commissions.

For the purposes of this section, unless a court otherwise directs:

1. An authorized trustee may not exercise a power authorized under sections 59-16.1-04 and 59-16.1-05 to change the provisions regarding the determination of the compensation of a trustee. The commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and must be determined in the same manner as in the invaded trust.
2. A trustee may not receive a paying commission or other compensation for appointing of property from the invaded trust to an appointed trust under sections 59-16.1-04 and 59-16.1-05.