

# **ZEN AND THE ART OF TRUST MODIFICATION**

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## I. How Do You Know You Need a Modification?

### A. Beneficiaries

1. Beneficiaries are fighting
2. A beneficiary has retained a lawyer
3. Beneficiaries are complaining about distributions, investments, expenses
4. Beneficiaries won't sign approvals of accounts

### B. Trustees

1. Co-trustees are fighting
2. A co-trustee has retained a separate lawyer
3. Investments are being distorted to produce more or less income
4. Trustees aren't fully abiding by the terms of the trust
5. Trustees don't know how to construe certain terms
6. Trustees are worried about fiduciary liability

## II. Common Reasons for Modifications

- A. **Disputes.** Settling a dispute or preventing a dispute.
- B. **Construction.** Construing a trust provision or correct a scrivener's error or ambiguity.
- C. **Severance.** Dividing a trust.

D. **Consolidation.** Merging trusts.

E. **Administrative Change**

1. **Investments.** Changing investment limitations, authorizing acquisition of retention of an asset or permitting lack of diversification.
2. **Trustees.** Removing or adding a trustee, or modifying trustee succession provisions.
3. **Advisors.** Providing for advisors, trust protectors or directed trustees.
4. **Information.** Defining or limiting beneficiary rights to information.

F. **Dispositive Changes**

1. **Eliminate a Beneficiary.** In rare instances it may be appropriate to eliminate a beneficiary.
2. **Limit a Beneficiary's Rights.** Defer or eliminate a beneficiary's future right to mandatory distributions or rights of withdrawal.
3. **Add a Potential Future Beneficiary.** Although generally new beneficiaries cannot be added to trusts, sometimes an existing beneficiary can be granted a power of appointment that will permit the beneficiary to provide for a spouse or other person.
4. **Change a Beneficiary's Power of Appointment.** Restrict or expand a beneficiary's power of appointment because of the beneficiary's ability to exercise it wisely, a need to provide for others who are not currently permissible appointees or for tax reasons.
5. **Create a Supplemental Needs Trust.** Create a trust for a beneficiary with a disability, particularly one that will not interfere with the beneficiary's entitlement to governmental benefits.

G. **Tax Changes**

1. **Convert Non-Grantor Trust to Grantor Trust.** It may be desirable to convert a non-grantor trust to a grantor trust to permit the grantor to pay the income taxes for the trust or to permit the trust to enter into certain estate planning strategies.
2. **Convert Grantor Trust to Non-Grantor Trust.** Typically a grantor can release any grantor trust powers to escape grantor trust status, but sometimes an additional trust modification may be necessary.

3. **Estate Tax Inclusion.** In some circumstances it may be desirable to cause inclusion of trust assets in a beneficiary's estate, especially if the beneficiary's estate tax exclusion can be used to avoid estate tax, so that GST tax may be avoided and/or to obtain a new basis for the trust assets at the beneficiary's death.
4. **Avoid Estate Tax Inclusion.** In some circumstances it may be desirable to eliminate inclusion of trust assets in a beneficiary's estate, especially if estate tax would be due and the assets will pass in a manner that will not result in GST tax.
5. **Tax Benefits.** In some cases it may be desirable to modify a trust so it qualifies for certain tax benefits, such as an extended pay out period for retirement benefits, or qualifies to hold S corporation stock.

#### H. **Other Changes**

1. **Change Governing Law.** There can be many reasons for changing the law governing the administration of a trust including simplifying administration, allowing a corporate trustee to deal with a more familiar law, accessing more sophisticated statutes for trust modification and building a better case for avoiding state income taxes on the trust.
2. **Add or Remove Spendthrift Provisions.** Adding a spendthrift provision to protect trust assets from the beneficiary's creditors, or removing a spendthrift provision where it might interfere with the beneficiary's estate planning (e.g. a sale of a remainder interest).
3. **Expand Class of Measuring Lives.** Where a trust is subject to a traditional rule against perpetuities period, but the class of measuring lives is small, it may be possible to select a larger class of measuring lives (all of whom were living when the original perpetuities period began) to enhance the longevity of the trust.

### III. **Evaluating a Proposed Modification**

- A. **Why?** What is the problem or what benefit is being sought?
- B. **What?** What is the proposed modification? Would an alternative modification work?
- C. **Who?** Who do you represent?
- D. **Advocates and Opponents.** Who wants the modification? Who is opposed or would be if they knew about it? Will the modification be done with full disclosure to the beneficiaries? Are the beneficiaries fully informed? Who in the future might challenge the modification?

E. **Trust Instrument**

1. **Trust Instrument.** Make sure you have the entire trust instrument, including any prior modifications.
2. **You Gotta Do the Reading.** Carefully read the trust instrument.
3. **Purposes.** What were the material purposes of the trust? What were the nonmaterial purposes of the trust? Have any purposes already been achieved, or could they be better achieved with a modification?
4. **Trust Modification Provisions.** Does the trust contain modification provisions that could be used? These might include provisions allowing removal and replacement of trustees and advisors, provisions allowing designation of successor trustees and advisors, provisions allowing trustees or trust protectors to expand or contract powers of appointment, provisions allowing trustees or trust protectors to add beneficiaries or make other amendments, and discretionary provisions that may allow distribution to other trusts or termination.
5. **Representation Provisions.** While you are reading the trust, be alert for any provisions that may permit certain individuals to represent beneficiaries. For example, a trust may permit a parent to represent a child regardless of any conflict of interest while state law may only permit the representation if there is no conflict of interest.
6. **Trust Prohibitions.** Does the trust prohibit modifications or decanting, or restrict modifications?

F. **Fiduciary Duties.** The exercise of a trustee's power to modify is subject to all of the fiduciary duties that otherwise govern the trustee's administration of the trust whether imposed by the trust instrument or by governing law.

1. **Duty to Consider Purposes of Trust.** A trustee has a duty to consider the purposes of the first trust. Can that purpose be better carried out through a modification? Has there been a change in circumstances that likely would have caused the grantor to change the grantor's purpose? Some purposes, such as avoiding high administrative fees, saving taxes and not needlessly making trust assets available to creditors we might fairly impute to most grantors.
2. **Duty of Impartiality.** The trustee has a duty of impartiality in modifying a trust, just like the trustee has a duty of impartiality in making discretionary distributions. The trust instrument, however, may express certain priorities among the beneficial interests.
3. **Duty of Loyalty.** The trustee cannot place the trustee's own interests over those of the beneficiaries. For example, a trustee may breach its fiduciary

duties if the trustee modifies a trust to permit self-dealing, expand the trustee's exculpation or unreasonably increase the trustee's compensation.

G. **Impact on Beneficial Interests.** How does the modification affect beneficial interests?

1. **Beneficiary by Beneficiary.** How is each beneficiary affected?
2. **Generation by Generation.** How are different generations (or other classes of beneficiaries) affected?
3. **Power of Appointment.** If a power of appointment is granted or modified, what effect may that have?
4. **Charitable Interests.** Are charitable interests affected? What rights do the Attorney General or named charities have?

H. **Governing Law**

1. **State Law.** Which state's law applies to the trust?
  - a. **Law Governing Administration.** Generally you would want to determine the law governing administration of the trust for purposes of trust modification, but if the trust has contacts with multiple states make sure you carefully read the state statutes to make certain they apply to your trust.
  - b. **Law Governing Other Matters.** The law governing construction of the trust, or the law governing principal and income issues, may differ from the law governing administration.
2. **Available Modification Tools.** What modification methods does the trust instrument or state law provide?
3. **Judicial Jurisdiction.** If you are considering a judicial modification, also consider the venue in which the judicial action should be brought.

I. **Taxes.** Are there income, estate, gift or GST tax consequences or risks?

J. **Fiduciaries**

1. **Participants.** Which fiduciaries must participate?
2. **Fiduciary Risk.** What is the fiduciary risk, even if you don't represent the fiduciary? How can you reduce the fiduciary risk?



**K. Beneficiaries**

1. **Consent.** Is beneficiary consent necessary or desirable? Which beneficiaries must participate?
2. **Representation.** Who may represent the beneficiaries, particularly minor, unborn, disabled, or unknown beneficiaries?

**L. Notice**

1. Is notice required or advisable?
2. Who must receive notice? Which beneficiaries? Who may represent minor or incapacitated beneficiaries? Do others, such as the grantor or trust advisors, receive notice?
3. If there is a charitable interest, what is the involvement of the Attorney General?

**M. Court Approval.** Is court approval required? Desirable?

**IV. Trust Modification Options**

**A. Action Permitted Under Trust Instrument**

1. **Beneficiaries.** The trust instrument may permit certain actions by beneficiaries, such as the addition or removal of trustees.
2. **Trust Protector.** The trust instrument may appoint a trust protector and empower the trust protector to make certain modifications.
3. **Trustee.** The trust instrument may permit the trustee to take certain modification actions, such as expanding a power of appointment or adding charities as beneficiaries. The trustee may even have power under the trust to make distributions to other trusts for the beneficiaries or to terminate the trust.
4. **Grantor.** The trust instrument may permit the grantor to take certain actions, such as releasing grantor trust powers.

**B. Severance and Consolidation**

**C. Unitrust Conversions**

**D. Principal and Income Adjustments**

**E. Nonjudicial Settlement Agreements (“NJSA”)**

**F. Decanting**

G. **Judicial Modifications**

V. **Severance and Consolidation**

- A. **UTC.** Under the Uniform Trust Code (“UTC”), a trustee may sever a trust or combine trusts. The UTC provides:

**SECTION 417. COMBINATION AND DIVISION OF TRUSTS.**

After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

B. **State Variations**

1. **Similar Terms.** For a consolidation, some states may require that the trusts have substantially similar terms or substantially identical terms. In the case of a severance, some states require that the aggregate interests of each beneficiary in the several trusts after severance be substantially equivalent to the beneficiary’s interests in the trust before severance.
2. **Tax Provisions.** Some states may require that the terms of the trust that affect qualification of the trust for any federal or state tax deduction, exclusion, election, exemption or other special federal or state tax status remain the same in the severed trusts.
3. **Subsequent Administration of Severed Trusts.** Some state statutes provide that in administering the severed trusts and in making tax elections, the trustee may consider the differences in federal or state tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts.
4. **Rule Against Perpetuities.** State statutes may prohibit changing the rule against perpetuities or may provide for tracking the different perpetuities dates if trusts are consolidated that speak from different dates.
5. **Notice.** State statutes may have different provisions on who must receive notice. Some states do not require notice to beneficiaries.

C. **Situations When Useful**

1. **Pot Trusts for Different Family Lines.** Severance is useful when there is a single trust for multiple family lines and:
  - a. The parties want to make discretionary distributions to one line without affecting the value for the other lines.

- b. The different family lines have different investment objectives or want different investment managers.
  - c. The different family lines want different trustees.
  - d. The purpose for having the pot trust has been accomplished (e.g. education all of the children).
2. **Partial Inclusion Ratio.** Severance can be very useful where a trust has a partial inclusion ratio for GST purposes. A severance can create one trust with an inclusion ratio of zero and one with an inclusion ratio of one.

#### D. Advantages

1. **No Beneficiary Consent.** Usually can be done without beneficiary consent.
2. **No Court Action.** Does not require court action.

#### E. Disadvantages

1. If future division or termination is not made per stirpes, it can be difficult to draft the provisions for future equalization. For example, there might be one trust for all children, but after all the children die the trust gets divided per capita for grandchildren.
2. If there is someone who must be a beneficiary of all of the severed trusts, the severance needs to provide that each trust pays its share and there could be risk that a severed trust may not be able to pay its share. For example, the pot trust might permit distributions to the grantor's spouse and descendants.

### VI. Total Return Trust Conversion

- A. **Statutes.** Many state have a "total return trust statute" that permits the trustee to convert a trust to a total return trust, also called a unitrust, with or without court approval. This permits a trust that provides for income to be paid to a beneficiary to convert to a trust that pays a percentage of the value of the trust each year to the beneficiary. A unitrust better aligns the interests of the income beneficiary and the remainder beneficiaries, because the income beneficiary is also interested in the total return of the trust rather than in the amount of trust accounting income. A unitrust also alleviates the need to carefully account for income and principal.
  1. **Conversion by Trustee.** The statute may permit the trustee to convert an income trust to an unitrust under the following circumstances:
    - a. The statute may set a unitrust percentage, such as 4%, or an acceptable range.

- b. The statute may require that the conversion enable the trustee to better carry out the purposes of the trust and the conversion is in the best interests of the beneficiaries.
  - c. The statute may require notice to certain beneficiaries and might also require that the beneficiaries not object.
- 2. **Conversion by Agreement.** The statute may permit the conversion to a total return trust by agreement between the trustee and certain beneficiaries. The statute may provide for more flexibility in setting the unitrust percentage if certain beneficiaries consent.
  - 3. **Court Conversion.** The statute may permit a court to order a conversion to a unitrust or undo a conversion. The court may have the greatest discretion in setting the unitrust percentage.

**B. Situations When Useful.** A conversion to a unitrust may be useful when:

- 1. **Insufficient Income.** Distributions to a beneficiary are limited to income and the investments are not producing sufficient income, or the investment allocation is being distorted to produce enough income.
- 2. **Too Much Income.** Income must be distributed to a beneficiary and the beneficiary does not need that much income.
- 3. **Accounting Nightmares.** The trustee or the trustee's advisor hates calculating tax accounting income.
- 4. **Certainty.** The income beneficiary wants a more certain stream of income not affected by dividend and interest rates and investment allocations.
- 5. **Harmony.** The income beneficiary and the remainder beneficiaries will get along better if a percentage distribution is used.

**C. Advantages**

- 1. **No Court.** Often can be accomplished without going to court.
- 2. **Beneficiary Consent.** In some states may not require affirmative beneficiary consent.
- 3. **Simplification.** Usually simplifies trust administration.
- 4. **No Tax Issues.** Usually does not create any tax issues.

D. **Disadvantages**

1. **Unitrust Rate.** There can be disagreement over the appropriate unitrust percentage.
2. **Too Easy.** Some clients want to reset the unitrust amount every year, or toggle back and forth between income and unitrust payments.

VII. **Principal and Income Act: Power to Adjust.** Many of the states that do not have a unitrust conversion statute have a power to adjust between income and principal. Some states have both. In many senses they are alternative approaches to dealing with the problem create when a trust's investments produce too much or too little income to be fair to both the income beneficiary and remainder beneficiaries.

A. **Uniform Principal and Income Act ("UPIA").**

1. **General Power to Adjust.** The UPIA grants a trustee the power to adjust between principal and income.

**SECTION 104. TRUSTEE'S POWER TO ADJUST.**

- (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 103(a), that the trustee is unable to comply with Section 103(b).
- (b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:
  - (1) the nature, purpose, and expected duration of the trust;
  - (2) the intent of the settlor;
  - (3) the identity and circumstances of the beneficiaries;
  - (4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;
  - (5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held

enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

- (6) the net amount allocated to income under the other sections of this [Act] and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
  - (7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
  - (8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
  - (9) the anticipated tax consequences of an adjustment.
- (c) A trustee may not make an adjustment:
- (1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
  - (2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
  - (3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
  - (4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

- (5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;
  - (6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;
  - (7) if the trustee is a beneficiary of the trust; or
  - (8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.
- (d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a co-trustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.
- (e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.
- (f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

2. **Requirements for Exercise of Power to Adjust.** There are three requirements for the exercise of the power to adjust.

- a. **Investing as a Prudent Investor.** Section 104 requires that the trustee be investing the trust assets as a prudent investor. This requirement should be met in almost all trusts in all states, except for a state in which the trustee is permitted to invest only in assets set forth on a statutory list of permitted investments.
- b. **Income Trust.** The second requirement in Section 104 is that the terms of the trust describe the amount that may or must be distributed by referring to the trust's income. This requirement will not be met in a trust that gives the trustee discretion to distribute both income and principal to the beneficiary.
- c. **Fiduciary Standard.** Section 103 of the UPIA sets forth the fiduciary standard for exercise of the power to adjust:

(b) In exercising the power to adjust under Section 104(a) . . . a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries.

3. **Is There a Fourth Requirement?** The Comments to the UPIA state that Section 104 “authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio’s total return is too small or too large because of investment decisions made by the trustee under the Prudent Investor Rule.” Arguably this would limit the trustee’s power to make adjustments to situations in which the lack of equity is due to the nature of the investments. The statute itself, however, does not contain this limitation and other factors, such as trust expenses or the manner in which expenses are allocated between income and principal could create a need for an adjustment.
4. **Considerations.** Section 104(b) sets forth a large number of factors that may be considered in deciding whether to make an adjustment. These factors include the settlor’s intent, the circumstances of the beneficiaries and the purpose of the trust.
5. **Restrictions.** Section 104(c) contains a list of circumstances under which the trustee will not have the power to adjust. Most of these are restrictions designed to avoid the loss of a tax benefit, such as the marital or charitable deduction, or to avoid an adverse tax consequence, such as including the trust assets in someone’s estate. A non-tax restriction that is significant is that a beneficiary who is a trustee cannot exercise the power to adjust.
6. **Adjustments for Taxes.** The UPIA also includes a provision that permits adjustments for tax liabilities. UPIA § 506.



- B. **Situations When Useful.** Useful when distributions are measured by income and the trust investments produce too much or too little trust accounting income.
- C. **Advantages**
  - 1. **Simplicity.** Easy way to adjust for unusual events.
- D. **Disadvantages**
  - 1. **Fiduciary Decision.** Making an adjustment between income and principal shifts economic interests. A trustee may prefer to have beneficiary approval before doing this.
  - 2. **Independent Trustee.** A trustee who is a beneficiary cannot make the adjustment.
  - 3. **Other restrictions.** There are a number of other restrictions in using the power to adjust.
  - 4. **Lack of Standard.** It is difficult to answer the question of what is the appropriate income return for a trust.
  - 5. **May Require Annual Adjustments.** Whereas a unitrust conversion can solve the problem once and for all in many cases, principal and income adjustments may be needed every year.

## VIII. Nonjudicial Settlement Agreements

- A. **UTC.** The UTC includes the following provision on nonjudicial settlement agreements:

### **§111. Nonjudicial Settlement Agreements.**

(a) For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

(1) the interpretation or construction of the terms of the trust;

(2) the approval of a trustee's report or accounting;

(3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) the resignation or appointment of a trustee and the determination of a trustee's compensation;

(5) transfer of a trust's principal place of administration; and

(6) liability of a trustee for an action relating to the trust.

(e) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

## B. State Variations

1. **Necessary Parties.** The state statutes differ in who is required to consent to an NJSA. Many states require that all "interested persons" be represented, including remote contingent beneficiaries. Other states may only require the trustee and qualified beneficiaries.
2. **Representation.** State statutes differ in who may represent beneficiaries, especially minor, unborn and disabled beneficiaries.
3. **Modifications to Trust Instrument.** Some states permit a NJSA to modify the terms of a trust instrument and other states do not. The issue may be unclear in some states such as Delaware.
4. **Matters that May be Resolved.** Some states add to the list of matters that may be resolved by a NJSA, and may include:
  - a. Validity of the terms of the trust.
  - b. The grant to a trustee of any necessary or desirable administrative power.
  - c. Questions relating to property or an interest in property held by the trust.

- d. Removal or appointment of a trustee, investment advisor, or other trust advisors or protectors.
  - e. Changing the law governing trust administration when the trust's principal place of administration is changed.
  - f. Indemnification of a trustee for an action relating to the trust.
  - g. Resolution of bona fide disputes related to the administration, investment, distribution or other matters.
  - h. Modification of terms of the trust pertaining to administration of the trust.
  - i. Any other matters that could be properly approved under applicable law by a court of competent jurisdiction.
5. **Termination.** The state statutes differ in whether they allow a NJSA to terminate a trust. For example, in Illinois termination is permitted but only with court approval.
  6. **Material Purposes.** Some statutes require that the NJSA not violate a material purpose of the trust.

### C. Situations When Useful

1. **Investments.** Useful to approve a particular investment, such as holding an interest in a concentration, a family business, a residence or in non-income producing property.
2. **Trustee Action.** Useful to approval a particular trustee action, such as an income adjustment, a discretionary distribution, a severance or consolidation.
3. **Dispute.** Useful to settle a bona fide dispute, but be wary of tax consequences especially where it cannot be shown that there is a real dispute.
4. **Ambiguity.** Useful when there is an ambiguity in the trust instrument, including scrivener's errors and issues such as who is included in the term "descendant." Where there is an ambiguity in who is included as a beneficiary by way of being someone's child or descendant, a NJSA may be the best option other than going to court. A trustee cannot decant to add beneficiaries, so such a matter cannot be resolved by decanting. Be cognizant, however, of whether or not the persons who might be included as descendants need to consent to the NJSA.

5. **Modifications of Trust.** If the statute permits modification of the terms of the trust instrument, useful in making administrative changes to the trust, including trustee succession provisions, directed trust provisions and other administrative provisions.

D. **Advantages**

1. **No Court.** Usually does not require court involvement.
2. **Trustee Protected.** Assuming the necessary parties are all represented, provides binding protection to the trustee.

E. **Disadvantages**

1. **Only Administrative Matters.** Generally limited to administrative matters unless there is a bona fide dispute.
2. **Agreement Needed.** May not be possible to obtain agreement of all necessary parties, or even to obtain representation of all necessary parties.
3. **Tax Considerations.** If beneficial interests can and are changed, may result in tax consequences to the beneficiaries because their consent was necessary.

IX. **Decanting**

A. **What Trusts Can Be Decanted?**

1. **Uniform Trust Decanting Act (“UTDA”)**
  - a. Only irrevocable trusts.
  - b. A trust cannot be decanted if its terms prohibit decanting.
  - c. Trust terms prohibiting amendment, stating that a trust is irrevocable or imposing spendthrift provisions do not prohibit decanting.
  - d. Wholly charitable trusts cannot be decanted.
2. **State Variations.** Generally, the state statutes will apply to irrevocable, but not revocable trusts. Often a wholly charitable trust cannot be decanted. Some statutes may make a distinction between inter vivos and testamentary trusts. Typically, the second trust may be either a trust already in existence or a new trust created for purposes of decanting.

## B. Which Trustees Can Exercise Decanting Power

1. **UTDA.** Under the UTDA, the fiduciary who has the discretion to make principal distributions has the authority to decant.
2. **State Variations.** Some states prohibit the grantor from decanting. Some statutes prohibit certain interested trustees from decanting. Other statutes address the potential adverse tax consequences of an interested trustee modifying a trust by limiting the types of modifications that can be made by an interested trustee. A statute that requires that a trustee have absolute discretion to decant, or a bifurcated statute that requires that a trustee have absolute discretion to make a beneficial change, may not need to include a restriction on an interested trustee decanting.

## C. Notice

1. **UTDA.** The UTDA requires prior notice of a decanting to a wide group of interested persons.
2. **State Variations.** Some states do not require prior notice of decanting. When notice is required, state statutes differ widely in who is entitled to notice.

## D. Extent of Decanting Authority

1. **UTDA.** Under the UTDA, the extent of the decanting authority depends upon the extent of the discretion granted to the trustee to distribute principal.
  - a. **Limited Distributive Discretion.** Where the trustee has limited distributive discretion (e.g., an ascertainable standard), generally the decanting can modify administrative, but not dispositive, trust provisions. The second trust must grant each beneficiary of the first trust beneficial interests in the second trust which are substantially similar to the beneficial interests of the beneficiary in the first trust. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary.
  - b. **Expanded Distributive Discretion.** Where the trustee has expanded distributive discretion (e.g., “best interests,” “welfare” or no standard), the decanting may modify dispositive provisions subject to restrictions to protect “vested rights” and to protect qualification for tax benefits. The bifurcated approach has been adopted by about half of the states.

## 2. State Variations

- a. **Discretionary Power.** Generally, the trustee must have the power to make discretionary distributions to decant. Some statutes require that the power be over principal, some require only a power over income or principal. Some statutes require that the power be an “absolute power” or that the trustee have “absolute discretion,” other statutes permit decanting even if the discretion is not absolute. Some statutes have bifurcated standards that require absolute discretion for some modifications (generally changes to beneficial interests) but permit decanting for other purposes (e.g., administrative modifications) even when the discretion is not absolute.
- b. **Beneficiaries.** Some state statutes implicitly permit a beneficiary to be eliminated by permitting the decanting power to be exercised in favor of “one or more of” the existing beneficiaries. Some states explicitly require that the new and old beneficiaries remain the same. Generally in the bifurcated states, including UTDA states, if the trustee does not have absolute discretion the beneficiaries must remain the same.
- c. **Standard for Distributions.** Presumably, absent a statutory requirement that the distribution standard or the beneficial interests remain the same, the new trust may have a different standard for distribution. States with bifurcated statutes will generally permit the standard for distributions to change if the trustee has absolute discretion, but require the standard to stay the same where the trustee does not have absolute discretion. Some states permit the distribution standard to change even if there is limited discretion, but only during any extended duration of the second trust. Some states require that the distribution standard remain the same, while other states permit the new trust to have a different distribution standard, with certain exceptions especially when the trustee is a beneficiary.
- d. **Powers of Appointment.** Commonly, decanting statutes explicitly permit the trustee to grant a power of appointment to one or more of the beneficiaries. Generally, this power of appointment may be a special or general power of appointment and may permit appointment to anyone, including persons who are not trust beneficiaries. States that take a bifurcated approach generally would not permit a trustee whose discretion is limited to an ascertainable standard to add or modify a power of appointment.

E. **Restrictions Where Trustee Has Limited Distributive Discretion**

1. **UTDA**

- a. **No Acceleration of Remainder Interests.** A second trust may not include as a current beneficiary a person who is not a current beneficiary of the first trust. UTDA § 11(c)(1).
- b. **No New Beneficiaries.** The second trust may not contain new beneficiaries.
- c. **Vested Interests.** A second trust may not reduce or eliminate a “vested interest.” UTDA § 11(c)(3).
- d. **Powers of Appointment.** Under the UTDA, a decanting may retain, omit, create or modify a power of appointment. UTDA § 11(d).

2. **State Variations.** Some statutes prohibit eliminating an existing mandatory right to income, or an income, annuity or unitrust interest or all mandatory rights. Other states do not have such a prohibition. Some states prohibit eliminating mandatory rights with respect to marital trusts, charitable trusts and GRATs. Some states prohibit eliminating or restricting an existing withdrawal right. Other states do not. Many states, including UTDA states, however, would permit a future distribution or withdrawal right to be eliminated or restricted.

F. **Special Needs Trusts**

- 1. **UTDA.** When a trust has a beneficiary with a disability, the fiduciary may decant the trust as if the fiduciary had expanded distributive discretion if (1) a second trust is a special needs trust that benefits the beneficiary with a disability, and (2) the special needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust. UTDA § 13(b). The fiduciary need not have any discretion over income or principal to decant under Section 13.
- 2. **State Variations.** Where the statute permits a change in beneficial interests, for example in a bifurcated state when the trustee has absolute discretion, the trustee can decant a trust into a supplemental needs trust that limits the beneficiary’s interest in a manner that will permit the beneficiary to qualify for governmental benefits. Generally, however, the decanting statutes will not permit decanting to a pay-back trust, because such a trust would essentially add the government as an additional beneficiary of the trust. Under statutes that require absolute discretion in order to decant in a manner that restricts a beneficiary’s interest, a trustee without absolute discretion might not have the power to decant to a supplemental needs trust even though such a decanting may be in a

beneficiary's best interest. Some states, including UTDA states, create exceptions to permit a trustee of a trust who does not have absolute discretion to decant into a supplemental needs trust under some circumstances.

#### G. Tax Restrictions

1. **UTDA.** The UTDA contains extensive provisions to prevent a decanting, or the decanting power itself, from disqualifying a trust for a tax benefit. (Note this does not mean that decanting does not have any tax risks.) The UTDA addresses tax issues seldom addressed in other statutes including grantor trust status, subchapter S qualifications and qualified retirement benefits.
2. **State Variations.** Other states may not have as complete a list of tax benefits to be protected. A majority of states, anticipating the difficulty of identifying all tax benefits that might possibly be adversely affected by a decanting power, have inserted catch-all tax-savings provisions in their statutes.

#### H. Charitable Interests

1. **UTDA**
  - a. **No Decanting of Wholly Charitable Trusts.** The UTDA does not permit decanting of wholly charitable trusts. UTDA § 3(b).
  - b. **Protection of Charitable Interests.** If the first trust contains a charitable interest, the second trust cannot diminish the charitable interest. If the first trust contains a charitable interest that names a specific charity, the second trust cannot change the charity to a different one. If the first trust sets forth a particular charitable purpose, the second trust cannot change the charitable purpose. If the first trust imposes certain conditions or restrictions on the charitable gift, the second trust cannot change the conditions or restrictions.
  - c. **Notice to Attorney General.** If a first trust contains a determinable charitable interest, the Attorney General has the rights of a qualified beneficiary, including the right to notice and to bring a court action.
  - d. **Changing Trust Jurisdiction.** If the decanting changes the jurisdiction of a trust containing a determinable charitable interest, the Attorney General may block the decanting by objecting, even without petitioning the court. UTDA § 14(e). This prevents end runs around the protections for charitable interests.



2. **State Variations.** Other state statutes may contain different or fewer protections for charitable interests and different provisions about the role of the state official empowered to protect charitable interests.

## I. **Role of the Court**

1. **UTDA.** The UTDA delineates the role of the court in greater detail than in existing state statutes. While decanting generally does not require court approval, the court plays an important supporting role. The court may:
  - a. **Instruct.** Provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under the UTDA and consistent with the fiduciary duties of the authorized fiduciary.
  - b. **Appoint Special Fiduciary.** Appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under the UTDA and to exercise the decanting power.
  - c. **Approve.** Approve an exercise of the decanting power.
  - d. **Declare Attempted Decanting Ineffective.** Determine that a proposed or attempted exercise of the decanting power is ineffective because (1) after applying UTDA § 22, the proposed or attempted exercise does not or did not comply with the UTDA or (2) the proposed or attempted exercise would be or was an abuse of the fiduciary’s discretion or a breach of fiduciary duty.
  - e. **Apply Remedial Provisions.** Determine the extent to which UTDA § 22 applies to a prior exercise of the decanting power or provide instructions to the trustee regarding the application of UTDA § 22 to a prior exercise of the decanting power.
2. **State Variations.** Generally state statutes permit the court to approve (or disapprove) decantings. Most statutes do not empower the court to appoint a special fiduciary for purposes of decanting.

## J. **Reasonable Reliance**

1. **UTDA.** Section 6 of the UTDA provides: “A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this [act], law of this state other than this [act], or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.”

2. **State Variations.** Few non-UTDA states include a reasonable reliance provision. In those states incoming trustees may need to carefully scrutinize prior decantings to determine their validity.

**K. Savings Provision.**

1. **UTDA.** The UTDA provides a remedy for an imperfect attempted decanting, to avoid the uncertainty that would exist if an attempted decanting is later discovered to have failed to fully comply with the UTDA. The UTDA essentially reads out of the second-trust instrument any impermissible provision. The UTDA also essentially reads into the second-trust instrument any required provision.
2. **State Variations.** Non-UTDA states do not contain remedial provisions, leaving a question about whether a decanting that includes one impermissible provision in the second trust or omits one required provision in the second trust is entirely invalid or may be remediated. Thus in non-UTDA states if a trustee discovers a flaw in a prior decanting the trustee may be compelled to determine the validity of the prior decanting and the appropriate remedial action by a NJSA or court action.

**L. Situations in Which Useful**

1. **Changes to Dispositive Provisions.** Decanting may often be the only non-judicial path to making a dispositive change to a trust. Common reasons for making a dispositive change include:
  - a. **Powers of Appointment.** Limiting, expanding or creating a power of appointment to cause inclusion in the beneficiary's estate or to avoid inclusion in the beneficiary's estate.
  - b. **Change Ages for Withdrawal.** Changing the ages at which trust assets are to be distributed to beneficiaries, or at which beneficiaries have rights of withdrawal.
  - c. **Change Mandatory Distribution Rights.** Eliminating mandatory distribution rights, such as income or unitrust rights, or postponing the ages at which such distributions begin.
  - d. **Special Needs Trusts.** Creating a separate special needs trust for a beneficiary with a disability.
2. **Changes to Administrative Provisions.** In a state that does not permit modification of trust terms in a NJSA or have a NJSA statute, decanting may be the only nonjudicial way to modify trust terms. Even if the modification could be made by a NJSA, decanting may be preferable if some beneficiaries are uncooperative or are incapacitated and have no representative.

## M. Advantages

1. **No Beneficiary Approval.** Decanting generally does not require the consent of the beneficiaries, and therefore may be helpful when a beneficiary would object to the proposed change. Typically even if the statute requires notice to certain beneficiaries, the beneficiary would need to file a court petition to challenge the decanting.
2. **No Judicial Approval.** Generally decanting does not require any court action or approval. Nonetheless, in certain circumstances the trustee may wish to obtain approval from the court.
3. **Permits Dispositive Changes.** Decanting is powerful in that it permits modification of dispositive provisions.
4. **Fewer Tax Risks (Sometimes).** Because decanting does not require beneficiary consent or approval, certain adverse tax consequences may be avoided when making certain modifications.

## N. Disadvantages

1. **Complexity.** The decanting statutes are fairly complex. It can be challenging to determine if a particular decanting is permitted, how the second trust should be drafted, and to implement the decanting.
2. **Fiduciary Risk.** The greater flexibility permitted by decanting also means that the fiduciary risk of decanting may be greater. In many cases the fiduciary may still wish to have the consent of certain beneficiaries or approval by the court. Independent trustees may be reluctant to decant if a beneficiary is likely to object to the decanting.
3. **Tax Risks.** Decanting a trust that is grandfathered from GST tax or that has a zero inclusion ratio may threaten the exempt status of the trust if the decanting does not fall within certain safe harbors. Some trustees may be willing to decant such trusts only if clearly within a safe harbor or if a private letter ruling is obtained from the IRS. Other tax risks may need to be analyzed carefully.

## X. Judicial Reformation

### A. Modification or Termination by Consent

1. **UTC.** The UTC provides:

**SECTION 411. MODIFICATION OR  
TERMINATION OF NONCHARITABLE  
IRREVOCABLE TRUST BY CONSENT.**

- (a) [A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.] [If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.] A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's [conservator] with the approval of the court supervising the [conservatorship] if an agent is not so authorized; or by the settlor's [guardian] with the approval of the court supervising the [guardianship] if an agent is not so authorized and a conservator has not been appointed. [This subsection does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before [the effective date of this [Code] [amendment].]]
- (b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.
- (c) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.]
- (d) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the beneficiaries.
- (e) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

- (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
- (2) the interests of a beneficiary who does not consent will be adequately protected.

**B. Modification to Achieve Tax Objectives or to Correct Mistakes**

1. **UTC.** The UTC provides:

**SECTION 416. MODIFICATION TO ACHIEVE SETTLOR'S TAX OBJECTIVES.** To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

The UTC also provides:

**SECTION 415. REFORMATION TO CORRECT MISTAKES.** The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

**C. Termination of Small Trust**

1. **UTC.** The UTC provides:

**SECTION 414. MODIFICATION OR TERMINATION OF UNECONOMIC TRUST.**

- (a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than [\$50,000] may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.
- (b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.
- (c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

- (d) This section does not apply to an easement for conservation or preservation.

**D. Modification Because of Unanticipated Circumstances**

- 1. **UTC.** The UTC provides:

**SECTION 412. MODIFICATION OR TERMINATION  
BECAUSE OF UNANTICIPATED  
CIRCUMSTANCES OR INABILITY TO  
ADMINISTER TRUST EFFECTIVELY.**

- (a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
- (b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.
- (c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

- E. **State Variations.** States vary widely in the extent to which a court is willing to modify a trust and in the efficiency and expertise of their courts.

**F. Situations in Which Helpful**

- 1. **When Other Methods Don't Work.** If judicial modification is available, it can be helpful when other methods of modification cannot achieve the desired result or when other methods cannot be used because the necessary parties cannot agree.
- 2. **When a Beneficiary Will Object.** If a beneficiary is likely to be uncooperative, it may be helpful to simply initiate a judicial modification to have an opportunity to present in full the case for making the modification. The beneficiary will then need to decide whether she or he is willing to expend the effort and resources to make the case against the modification.

3. **Concern About Fiduciary Liability.** When a trustee is concerned about fiduciary liability from a modification and a NJSA cannot be obtained to protect the fiduciary, generally a judicial action will protect the fiduciary.

#### G. **Advantages**

1. **Protective of Fiduciary.** A court order will generally protect the fiduciaries from liability.
2. **Greater Discretion.** Often a court will have greater discretion in modifying a trust than other modification methods provide.
3. **Bona Fide Dispute.** Filing a court action can be helpful in establishing that there is a bona fide dispute, which can be helpful in ensuring that any resulting settlement falls within the GST safe harbors.

#### H. **Disadvantages**

1. **Cost.** A court action may cost more than a NJSA or decanting.
2. **Timing.** A court action may take longer than a NJSA or decanting.
3. **Lack of Privacy.** Court actions are generally public and do not protect the parties' privacy.

### XI. **Virtual Representation Statutes**

- A. **UTC.** The UTC provides a number of rules that allow a person to represent and bind another person for purposes of recurring notices and giving consents.

**Section 302. Representation by Holder of General Testamentary Power of Appointment.** To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

**Section 303. Representation by Fiduciaries and Parents.** To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- (1) a [conservator] may represent and bind the estate that the [conservator] controls.

- (2) a [guardian] may represent and bind the ward if a [conservator] of the ward's estate has not been appointed;
- (3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- (4) a trustee may represent and bind the beneficiaries of the trust;
- (5) a personal representative of a decedent's estate may represent and bind person's interested in the estate; and
- (6) a parent may represent and bind the parent's minor or unborn child if a [conservator] or [guardian] for the child has not been appointed.

**Section 304. Representation by Person Having Substantially Identical Interest.** Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

## B. State Variations

1. **Fiduciaries and Parents.** Different state statutes may not include all of the ways in which fiduciaries and parents can represent beneficiaries under the UTC. State statutes may only permit representation under certain circumstances, for example, many state statutes only permit parents to represent minors and unborns. State statutes may also vary in whether they impose a conflict of interest test. For example, Illinois will permit a parent to represent a beneficiary only if neither parent has a conflict of interest with the beneficiary.
2. **Substantially Similar Interest.** States may differ in the extent to which they will permit one beneficiary to represent another beneficiary.
3. **Powers of Appointment.** Some states may not permit holders of powers of appointment to represent others. Some states may have broader provisions permitting holders of powers of appointment to represent others. For example, some states permit holders of special powers of



appointment to represent persons whose interests may be eliminated by the exercise of the power of appointment.

4. **Designated Representatives.** Some states permit the trust instrument to appoint a designated representative to represent certain beneficiaries, sometimes even if the beneficiary is an adult with capacity.
5. **Class Representation.** Some states permit a certain class of beneficiaries, such as qualified beneficiaries, to bind all other beneficiaries who have a successor, contingent, future or other interest in the trust.
6. **Priority of Representation.** Some states may have statutes that determine which representative can represent a beneficiary if more than one representative qualifies.
7. **Representation of Charity.** States differ in who can represent a charity in a trust modification. Some states may require notification to the Attorney General or other state official charged with representing charities.

## XII. Tax Issues

### A. Generally

1. **Tax Uncertainty.** The tax consequences of decanting are unclear under many circumstances.
2. **No Private Rulings.** The IRS will not rule on the income, gift or GST tax consequences of a decanting that changes beneficial interests or that change the rule against perpetuities period. Rev. Proc. 2018-3; see also Rev. Proc. 2011-3.

### B. Income Tax

1. **Conversion of Grantor Trust to Non-Grantor Trust.** If a trust owns assets that have liabilities that exceed the property's income tax basis, a conversion of a grantor trust to a non-grantor trust may cause the grantor to recognize gain to the extent the liabilities exceed the basis. Blattmachr, Jonathan G., Horn, Jerold, Zeydel, Diana, "An Analysis of the Tax Effects of Decanting," 47 *Real Property, Trust and Estate Law Journal* 141 (Spring 2012) (hereafter, "Tax Effects"); see *Madorin v. Comm'r*, 84 T.C. 667 (1985).
2. **Conversion of Non-Grantor Trust to Grantor Trust.** The conversion of a non-grantor trust to a grantor trust does not appear to have any income tax consequences. See Tax Effects at 159, citing Chief Counsel Memo. 200923024; Rev. Rul. 2004-64, 2004-2 C.B. 7.

3. **Negative Basis Assets.** When the trust property has a liability against it that exceeds the property's income tax basis (a "negative basis" asset), it is possible that decanting the negative basis assets will result in the recognition of gain. *See* Tax Effects at 156; *Crane v. Comm'r*, 331 U.S. 1 (1947).
4. **Beneficiary Recognition of Gain.** It is possible that under the doctrine of *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554 (1991), the IRS may take the position that a beneficiary recognizes gain if the decanting changes the quality of the beneficiary's interest and the beneficiary's consent (or possibly the court's approval) is required for the decanting. *See* Tax Effects at 157-159.
5. **Conversion of a Domestic Trust to a Foreign Trust.** The conversion of a domestic trust to a foreign trust may result in the recognition of gain under Code section 684. *See* Tax Effects at 159.

### C. Gift Tax

1. **Lapse of General Power of Appointment.** In a state that permits a decanting that eliminates a beneficiary's currently exercisable general power of appointment (i.e. a withdrawal right), a decanting could cause a lapse of the power of appointment, resulting in a gift from the beneficiary.
2. **Trustee-Beneficiary.** Where a beneficiary consents to a modification that reduces the beneficiary's beneficial interest, the beneficiary could be treated as having made a gift. Where a beneficiary is acting as trustee and decants in a manner that reduces the beneficiary's interest, the beneficiary could be treated as having made a gift. Most decanting statutes avoid this issue either by not permitting a trustee-beneficiary to decant, or by only permitting a beneficiary-trustee to decant in a manner that does not alter beneficial interests. Bifurcated statutes effectively reach the same result because a trustee-beneficiary will usually be limited to making distributions subject to an ascertainable standard for tax reasons, and a bifurcated statute generally does not permit a change in beneficial interests if the trustee's discretionary power is limited to an ascertainable standard.
3. **Beneficiary Objection.** In a few states a beneficiary can block a nonjudicial decanting by an objection in writing delivered to the trustee within the notice period. If a beneficiary whose interest in the trust will be reduced or eliminated by decanting fails to object, will such beneficiary be treated as making a gift to the trust or the other beneficiaries of the trust? Blattmachr, Jonathan G., Horn, Jerold, Zeydel, Diana, "An Analysis of the Tax Effects of Decanting," 47 *Real Property, Trust and Estate Law Journal* 141 (Spring 2012) (hereafter, "Tax Effects"). *Snyder v. Comm'r*, 93 T.C. 529 (1989); Rev. Rul. 81-264.

4. **Beneficiary Consent Given, But Not Required.** So long as the trustee is not breaching a fiduciary duty by decanting, the consent of a beneficiary to the decanting where the consent is not required to enable the trustee to decant, should not be treated as a gift by the beneficiary to the extent such beneficiary's interests are decreased. Where the decanting is a breach of the trustee's fiduciary duty, however, the beneficiary's failure to challenge the decanting might be treated as a gift.
5. **Incomplete Gift.** If a decanting might otherwise trigger gift tax, granting the beneficiary a special power of appointment in the decanting may cause the gift to be incomplete. *Estate of Genovese*, N.Y.L.J. p. 27, cha. 5.

D. **Estate Tax.** If decanting reduced or eliminated a beneficiary's interest in a manner that resulted in a gift, then such beneficiary's estate might include the trust assets if Code section 2035, 2036, 2037, 2038, 2039 or 2042 applied. *See Tax Effects* at 164-165. For example, if the beneficiary was the trustee of the second trust with the power to make discretionary distributions, then the decanted property subject to gift tax might be included in the beneficiary's estate under Code section 2036(a).

E. **GST Tax**

1. **Grandfathered Trusts.** Generally trusts that were irrevocable on September 30, 1985, are grandfathered from the GST tax. Such grandfathering is lost if there is an addition or constructive addition to the grandfathered trust.

- a. A grandfathered trust will not lose its grandfathered status after being decanted if at the time the trust became irrevocable state law authorized the decanting and the terms of the second trust do not extend the time for vesting of any beneficial interest in the trust in a manner that may postpone or suspend the vesting of an interest in property for a period, measured from the date the original trust became irrevocable, extending beyond any life in being at the date the original trust became irrevocable plus the period of 21 years. More specifically, Treasury Regulation section 26.2601-1(b)(4)(i)(A) provides as follows:

(A) *Discretionary powers.* – The distribution of trust principal from an exempt trust to a new trust or retention of trust principal in a continuing trust will not cause the new or continuing trust to be subject to the provisions of chapter 13, if –

(1) Either –

(i) The terms of the governing instrument of the exempt trust authorize distributions to the

new trust or the retention of trust principal in a continuing trust, without the consent or approval of any beneficiary or court; or

(ii) at the time the exempt trust became irrevocable, state law authorized distributions to the new trust or retention of principal in the continuing trust, without the consent or approval of any beneficiary or court; and

In *Morse v. Kraft*, 466 Mass. 92, 992 N.E.2d 1021 (2013), the Supreme Judicial Court of Massachusetts ruled that the trustee was authorized to decant a trust where the terms of the trust gave the trustee unlimited discretion to make outright distributions to and for the benefit of the beneficiaries. The trustee had petitioned the court for instructions to ensure that the decanting would fall under the safe harbor in Treas. Reg. § 26.2601-1(b)(4)(i)(A)(1).

b. Alternatively, the grandfathering will not be affected if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Treas. Reg. § 26.2601-1(b)(4)(i)(D).

(2) The terms of the governing instrument of the new or continuing trust do not extend the time for vesting of any beneficial interest in the trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date the original trust became irrevocable, extending beyond any life in being at the date the original trust became irrevocable plus a period of 21 years, plus if necessary, a reasonable period of gestation. For purposes of this paragraph (b)(4)(i)(A), the exercise of a trustee's distributive power that validly postpones or suspends the vesting, absolute ownership, or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date the original trust became irrevocable) will not be considered an exercise that postpones or suspends vesting, absolute ownership, or the power of alienation beyond the perpetuities period. If a distributive power is exercised by creating another power, it is deemed to be exercised to whatever extent the second power may be exercised.

2. **GST-Exempt Trusts.** If a trust is exempt from GST tax by reason of allocation of GST exemption, at a minimum any change to such trust by decanting that would not affect the GST-exempt status of a grandfathered trust should not affect the GST-exempt status of such trust. *See* PLR 200919009. Thus if such a trust was created after the date when the decanting statute became effective, and the decanting did not extend the time for vesting, the decanting should not affect the GST inclusion ratio of the trust. Alternatively, if the decanting does not shift a beneficial interest in the trust to a beneficiary in a lower generation and does not extend the time for vesting, then the decanting should not change the inclusion ratio of the trust. *See* PLR 200227020; PLR 9804046; PLR 9737024; PLR 9438023.
  
3. **Severed Trusts.** Some decantings may create separate trusts. Thus the issue may arise as to whether the second trusts are treated as separate trusts for GST purposes. Treasury Regulation section 26.2642-6 sets forth the rules for a qualified severance. If the severance is not qualified, the GST tax regulations will still treat the trusts as separate provided that state law recognizes the post-severance trusts as separate trusts. *Treas. Reg. § 26.2642-6(h).*

APPENDIX I

# Virtual Representation Statutes Chart

Revised February 24, 2020

Any comments on the chart or new developments that should be reflected on the chart may be sent to [sbart@schiffhardin.com](mailto:sbart@schiffhardin.com).

# Virtual Representation Statutes Chart

Revised February 24, 2020

	Alabama	Alaska	Arizona	Arkansas
A. Has the state adopted a "virtual representation" statute?	Yes 2006	Yes 2013	Yes 2009	Yes 2005
1. Is the statute based on the UTC?	Yes	No	Yes	Yes
2. What is the statutory citation?	ALA. CODE § 19-3B-304	ALASKA STAT. § 13.06.120	ARIZ. REV. STAT. ANN. § 14-1407	ARK. CODE ANN. § 28-73-304
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes; but a parent cannot represent the child to terminate or modify the trust if the parent is the settlor <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>3</sup>
1. ward is a minor	Yes	Yes	Yes <sup>3</sup>	Yes <sup>3</sup>
2. ward is an incapacitated adult	Yes	Yes	Yes <sup>3</sup>	Yes <sup>4</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	Estate and Person <sup>4</sup>	Estate and Person <sup>3</sup>	Estate and Person <sup>3</sup>	Estate and Person <sup>4</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>5</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>5</sup>
1. a testamentary general power of appointment	Yes <sup>5</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>5</sup>
2. a non-testamentary general power of appointment	Yes <sup>6</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	No
3. a broad special power of appointment	Yes <sup>5</sup>	Yes <sup>4</sup>	No	No
4. a limited special power of appointment	Yes <sup>5</sup>	Yes <sup>4</sup>	No	No
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	Yes	Yes	Yes
2. incapacitated adults	Yes	Yes	Yes	Yes
3. unborn	Yes	Yes	Yes	Yes
4. unidentified/unlocatable	Yes	Yes	Yes	Yes
5. other	No	No	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes	Yes <sup>5</sup>	Yes	Yes
1. Is there a conflict of interest exception?	Yes	No	Yes	Yes
2. Is there an adequacy of representation test?	No	Yes	No	No
H. Does virtual representation include vertical representation?	Expressly included <sup>7</sup>	No Provision	Implicit (UTC approach) <sup>5</sup>	Implicit (UTC approach) <sup>6</sup>

	Alabama	Alaska	Arizona	Arkansas
I. Does the statute permit a designated representative?				
J. Does the state statute allow nonjudicial settlement agreements?	Yes ALA. CODE § 19-3B-111	No	Yes ARIZ. REV. STAT. § 14-10111 <sup>6</sup>	Yes ARK. CODE ANN. § 28-73-111
K. If yes, what matters can be resolved by nonjudicial settlement agreements?	Any matter involving a trust		Any matter involving a trust	Any matter involving a trust
1. interpretation or construction	Yes		Yes	Yes
2. approval of a trustee's report or accounting	Yes		Yes	Yes
3. grant of power or direction to refrain to a trustee	Yes		Yes	Yes
4. trustee resignation/appointment	Yes		Yes	Yes
5. trustee compensation	Yes		Yes	Yes
6. transfer of a trust's place of administration	Yes		Yes	Yes
7. trustee's liability	Yes		Yes	Yes
8. other additions/exclusions	Yes <sup>8</sup>		Yes <sup>7</sup>	No
9. Is there a material purpose test?	Yes		Yes	Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?	Yes <sup>9</sup>		Not specified	Not specified
11. Must the agreement be one a court could enter?	Yes		Yes	Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No		No	No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	Interested persons <sup>10</sup>		Interested persons	Interested persons <sup>7</sup>
1. Is it the same or different than UTC section 111(a)?	Same		Different definition of "interested persons" <sup>8</sup>	Same
2. Is the trustee a necessary party?	No		Dependent on the particular proceeding <sup>8</sup>	No
M. Does the nonjudicial settlement agreement provision apply to all trusts?	No limitation specified		No limitation specified <sup>9</sup>	No limitation specified



	California	Colorado	Connecticut	Delaware
A. Has the state adopted a "virtual representation" statute?	No	Yes (formal proceedings) 2009	Yes 2001	Yes
1. Is the statute based on the UTC?		No	No	No
2. What is the statutory citation?		COLO. REV. STAT. § 15-10-403	CONN. GEN. STAT. § 45a-487a	DEL. CODE ANN. tit. 12 § 3547 Amended 2019
B. Does virtual representation allow a parent to represent a minor or unborn child?		Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?		Not specified	Yes <sup>2</sup>	Not specified
D. Does virtual representation allow a court appointed guardian to represent his or her ward?		Yes <sup>2</sup>	Yes <sup>3</sup>	Yes <sup>2</sup>
1. ward is a minor		Yes <sup>3</sup>	Yes <sup>4</sup>	Yes
2. ward is an incapacitated adult		Yes <sup>3</sup>	No <sup>4</sup>	Yes
3. Does this apply to conservators of the estate and to guardians of the person?		Estate and Person	Estate and Person <sup>5</sup>	Estate
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?		Yes <sup>4</sup>	Yes <sup>6</sup>	Not specified
1. a testamentary general power of appointment		No <sup>4</sup>	Yes	Not specified
2. a non-testamentary general power of appointment		Yes <sup>4</sup>	Yes	Not specified
3. a broad special power of appointment		No	Potential appointees	Not specified
4. a limited special power of appointment		No	Potential appointees	Not specified
F. Under virtual representation, what individuals can be represented?		Yes		
1. minors		Yes	Yes	Yes
2. incapacitated adults		Yes	Yes	Yes
3. unborn		Yes	Yes	Yes
4. unidentifiable/unlocatable		No	Yes	Yes
5. other		Yes <sup>5</sup>	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?		No	Yes <sup>7</sup>	Yes <sup>3</sup>
1. Is there a conflict of interest exception?		Yes	Yes	Yes <sup>4</sup>
2. Is there an adequacy of representation test?		No Provision	No	No
H. Does virtual representation include vertical representation?		No	No Provision	Expressly Included <sup>5</sup>
I. Does the statute permit a designated representative?				

	California	Colorado	Connecticut	Delaware
J. Does the state statute allow nonjudicial settlement agreements?		No	Yes CONN. GEN. STAT. HB07104	Yes DEL. CODE ANN. tit. 12 § 3338
K. If yes, what matters can be resolved by nonjudicial settlement agreements?				
1. interpretation or construction			Yes	Yes
2. approval of a trustee's report or accounting			Yes	Yes
3. grant of power or direction to refrain to a trustee			Yes	Yes
4. trustee resignation/appointment			Yes	Yes
5. trustee compensation			Yes	Yes
6. transfer of a trust's place of administration			Yes	Yes
7. trustee's liability			Yes	Yes
8. other additions/exclusions			Yes	
9. Is there a material purpose test?				Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?				No
11. Must the agreement be one a court could enter?				Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?				No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?				
1. Is it the same or different than UTC section 111(a)?				Different <sup>6</sup>
2. Is the trustee a necessary party?				Yes
M. Does the nonjudicial settlement agreement provision apply to all trusts?				No <sup>7</sup>

	D.C.	Florida	Georgia	Hawaii
A. Has the state adopted a "virtual representation" statute?	Yes 2004	Yes 2007	Yes 2018	Yes 1996
1. Is the statute based on the UTC?	Yes	Yes	Yes	No
2. What is the statutory citation?	D.C. CODE ANN. § 19-1303.04	FLA. STAT. ANN. § 736.0304	GA. CODE ANN. § 53-12-8	HAW. REV. STAT. § 560-1-403
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>	Not specified
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>3</sup>	No <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>2</sup>
1. ward is a minor	Yes <sup>3</sup>	n/a	Yes <sup>3</sup>	Yes <sup>3</sup>
2. ward is an incapacitated adult	Yes <sup>3</sup>	n/a	Yes <sup>3</sup>	Yes <sup>3</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	Estate and Person <sup>3</sup>	n/a	Estate and Person <sup>3</sup>	Estate and Person
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>4</sup>	Yes (exceptions exist with respect to certain matters) <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
1. a testamentary general power of appointment	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	No <sup>4</sup>
2. a non-testamentary general power of appointment	No	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
3. a broad special power of appointment	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	No <sup>4</sup>
4. a limited special power of appointment	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	No <sup>4</sup>
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	Yes	Yes	No
2. incapacitated adults	Yes	Yes	Yes	No
3. unborn	Yes	Yes	Yes	Yes
4. unidentifiable/unlocatable	Yes	Yes	Yes	Yes
5. other	No	No	Yes <sup>5</sup>	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes	Yes	Yes	Yes <sup>5</sup>
1. Is there a conflict of interest exception?	Yes	Yes	Yes	No
2. Is there an adequacy of representation test?	No	No	No	Yes
H. Does virtual representation include vertical representation?	Implicit (UTC approach) <sup>5</sup>	Implicit (UTC approach) <sup>5</sup>	Yes	No Provision

	D.C.	Florida	Georgia	Hawaii
I. Does the statute permit a designated representative?		Yes		
J. Does the state statute allow nonjudicial settlement agreements?	Yes D.C. CODE ANN. § 19-1301.11	Yes FLA. STAT. ANN. § 736.011 (West)	Yes GA. CODE ANN. § 53-12-9	No
K. If yes, what matters can be resolved by nonjudicial settlement agreements?	Any matter involving a trust	Any matter involving a trust with a few restrictions <sup>6</sup>	Any matter involving a trust <sup>6</sup>	
1. interpretation or construction	Yes	Yes	–	
2. approval of a trustee’s report or accounting	Yes	Yes	–	
3. grant of power or direction to refrain to a trustee	Yes	Yes	–	
4. trustee resignation/appointment	Yes	Yes	–	
5. trustee compensation	Yes	Yes	–	
6. transfer of a trust’s place of administration	Yes	Yes	–	
7. trustee’s liability	Yes	Yes	–	
8. other additions/exclusions	No	Yes <sup>6</sup>	–	
9. Is there a material purpose test?	Yes	Yes	Yes	
10. Is a spendthrift provision expressly presumed to not be a material purpose?	Not specified	Not specified		
11. Must the agreement be one a court could enter?	Yes	Yes	Yes	
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No	No	No	
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	Interested persons <sup>6</sup>	Interested persons <sup>7</sup>	Interested persons	
1. Is it the same or different than UTC section 111(a)?	Same	Different definition of “interested persons” <sup>7</sup>	Same	
2. Is the trustee a necessary party?	No	No	Yes	
M. Does the nonjudicial settlement agreement provision apply to all trusts?	No limitation specified	No limitation specified	No <sup>7</sup>	

	Idaho	Illinois	Indiana – Probate Code	Indiana – Trust Code	Iowa
A. Has the state adopted a "virtual representation" statute?	Yes 2005, 1971	Yes 2010, 2020	Yes 1997	Yes 2019	Yes 2005
1. Is the statute based on the UTC?	No	Yes	No	Yes	Yes
2. What is the statutory citation?	IDAHO CODE §§ 15-8-205 and 15-1- 403	760 ILL. COMP. STAT. 3/101 (effective 1/1/2020)	IND. CODE § 29-1-1-20 <sup>1</sup>	IND. CODE § 30-4-6- 10.5 <sup>1</sup> ; § 30-4- 1-2(8)	IOWA CODE § 633A.6304 <sup>1</sup>
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>1</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>3</sup>	Yes <sup>2</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Not specified	Yes <sup>3</sup>	Not specified	Yes <sup>4</sup>	Not specified
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>2</sup>	Yes <sup>4</sup>	Not specified <sup>3</sup>	Yes <sup>5</sup>	Yes (guardian of property) <sup>3</sup>
1. ward is a minor	Yes <sup>3</sup>	Yes <sup>4</sup>	Not specified	Not specified	Yes <sup>3</sup>
2. ward is an incapacitated adult	Yes <sup>3</sup>	Yes <sup>4</sup>	Not specified	Not specified	Yes <sup>3</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	Estate and Person	Estate and Person <sup>4</sup>	Not specified	Not specified	Estate <sup>3</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>4</sup>	Yes <sup>5</sup>	Yes <sup>4</sup>	Yes <sup>6</sup>	Yes <sup>4</sup>
1. a testamentary general power of appointment	No <sup>4</sup>	Yes <sup>5</sup>	No	Yes	Yes <sup>5</sup>
2. a non-testamentary general power of appointment	Yes <sup>4</sup>	Yes <sup>5</sup>	Yes	Yes	Yes <sup>6</sup>
3. a broad special power of appointment	No <sup>4</sup>	Yes <sup>5</sup>	No	No	No
4. a limited special power of appointment	No <sup>4</sup>	Yes <sup>6</sup>	No	No	No
F. Under virtual representation, what individuals can be represented?					
1. minors	No	Yes	Yes <sup>5</sup>	Yes	Yes
2. incapacitated adults	No	Yes	Yes <sup>5</sup>	Yes	Yes <sup>7</sup>
3. unborn	Yes	Yes	Yes <sup>5</sup>	Yes	Yes
4. unidentifiable/unlocatable	Yes	Yes	Yes <sup>5</sup>	Yes	Yes
5. other	No	Yes <sup>7</sup>	Yes <sup>5</sup>	No <sup>7</sup>	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes <sup>5</sup>	Yes <sup>8</sup>	Yes <sup>5</sup>	Yes <sup>8</sup>	Yes <sup>8</sup>
1. Is there a conflict of interest exception?	No	Yes	No <sup>6</sup>	Yes	No <sup>9</sup>
2. Is there an adequacy of representation test?	Yes	No	Yes	No	Yes
H. Does virtual representation include vertical representation?	No Provision	Implicit (UTC approach) <sup>9</sup>	No	Implicit (UTC approach) <sup>9</sup>	Implicit (UTC approach) <sup>10</sup>
I. Does the statute permit a designated representative?		Yes		Yes <sup>10</sup>	

	Idaho	Illinois	Indiana – Probate Code	Indiana – Trust Code	Iowa
J. Does the state statute allow nonjudicial settlement agreements?	Yes <sup>6</sup>  IDAHO CODE § 15-8-302	Yes  760 ILL. COMP. STAT. 3/111	No	IND. CODE § 30-4-5-25	Yes  IOWA CODE § 633A.6308
K. If yes, what matters can be resolved by nonjudicial settlement agreements?	Any matter, except certain trusts for minors/incapacitated	Any matter listed in statute.		Any matter listed in statute.	Any matter involving a trust except a modification or termination of a trust under Iowa Code § 633A.2203
1. interpretation or construction	Yes	Yes		Yes	Yes
2. approval of a trustee's report or accounting	Yes	Yes		Yes	Yes
3. grant of power or direction to refrain to a trustee	Yes	Yes (only grant; not direction to refrain)		Yes	Yes
4. trustee resignation/appointment	Yes	Yes		Yes	Yes
5. trustee compensation	Yes	Yes		Yes	Yes
6. transfer of a trust's place of administration	Yes	Yes		Yes	Yes
7. trustee's liability	Yes	Yes (or indemnification)		Yes	Yes
8. other additions/exclusions	Yes <sup>7</sup>	Yes <sup>10</sup>		Yes <sup>11</sup>	No
9. Is there a material purpose test?	No	No (except for termination)		Yes	Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?	Not specified	No <sup>11</sup>			Not specified
11. Must the agreement be one a court could enter?	Not specified	Yes		Yes	Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No	No		No	No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	All persons interested in the estate or trust <sup>8</sup>	Interested persons		Interested persons	Interested Persons <sup>11</sup>
1. Is it the same or different than UTC section 111(a)?	Different	Different definition of "interested persons" <sup>12</sup>		Different	Same
2. Is the trustee a necessary party?	Yes <sup>8</sup>	Yes <sup>12</sup>		Yes	No
M. Does the nonjudicial settlement agreement provision apply to all trusts?	Yes	Yes		Yes	Yes

	Kansas	Kentucky	Louisiana	Maine
A. Has the state adopted a "virtual representation" statute?	Yes 2002	Yes 2014	No	Yes 2005
1. Is the statute based on the UTC?	Yes			Yes
2. What is the statutory citation?	KAN. STAT. ANN. § 58a-304	KY. ACTS §386B.3-010 to 040		ME. REV. STAT. ANN. tit. 18B § 304
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>1</sup>	Yes <sup>1</sup>		Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Yes <sup>2</sup>	Yes <sup>2</sup>		Yes <sup>2</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>3</sup>	Yes <sup>3</sup>		Yes <sup>3</sup>
1. ward is a minor	Yes <sup>3</sup>	Yes <sup>3</sup>		Yes <sup>3</sup>
2. ward is an incapacitated adult	Yes <sup>3</sup>	Yes <sup>3</sup>		Yes <sup>3</sup>
3. Does this apply only to conservators of the estate and to guardians of the person?	Person <sup>3</sup>	Conservator and Guardian <sup>3</sup>		Estate and Person <sup>3</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>4</sup>	Yes <sup>4</sup>		Yes <sup>4</sup>
1. a testamentary general power of appointment	Yes <sup>4</sup>	Yes <sup>4</sup>		Yes <sup>4</sup>
2. a non-testamentary general power of appointment	No	No		No
3. a broad special power of appointment	No	No		No
4. a limited special power of appointment	No	No		No
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	Yes		Yes
2. incapacitated adults	Yes	Yes		Yes
3. unborn	Yes	Yes		Yes
4. unidentifiable/unlocatable	Yes	Yes		Yes
5. other	No	No		No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes	Yes <sup>5</sup>		Yes
1. Is there a conflict of interest exception?	Yes	Yes <sup>5</sup>		Yes
2. Is there an adequacy of representation test?	No	No		No
H. Does virtual representation include vertical representation?	Implicit (UTC approach) <sup>5</sup>	Implicit (UTC approach) <sup>6</sup>		Implicit (UTC approach) <sup>5</sup>

	Kansas	Kentucky	Louisiana	Maine
I. Does the statute permit a designated representative?				
J. Does the state statute allow nonjudicial settlement agreements?	Yes KAN. STAT. ANN. § 58a-111	Yes KY. ACTS §386B.1-090		Yes ME. REV. STAT. ANN. tit.18B §§ 111, 411
K. If yes, what matters can be resolved by nonjudicial settlement agreements?	Certain enumerated matters <sup>6</sup>	Any matter involving a trust <sup>7</sup>		Any matter involving a trust
1. interpretation or construction	No	Yes		Yes
2. approval of a trustee's report or accounting	Yes	Yes		Yes
3. grant of power or direction to refrain to a trustee	No	Yes		Yes
4. trustee resignation/appointment	Yes	Yes		Yes
5. trustee compensation	Yes	Yes		Yes
6. transfer of a trust's place of administration	Yes	Yes		Yes
7. trustee's liability	Yes	Yes		Yes
8. other additions/exclusions	Yes <sup>6</sup>	No		No
9. Is there a material purpose test?	Yes	Yes		Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?	Not specified	Not specified		Yes
11. Must the agreement be one a court could enter?	Yes	No		Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No	No		No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	Interested persons <sup>7</sup>	Interested persons		Interested persons <sup>6</sup>
1. Is it the same or different than UTC section 111(a)?	Same	Same		Same
2. Is the trustee a necessary party?	No			No
M. Does the nonjudicial settlement agreement provision apply to all trusts?	No limitation specified	No limitation specified		No limitation specified



	Maryland	Massachusetts	Michigan	Minnesota
A. Has the state adopted a "virtual representation" statute?	Yes	Yes 2012	Yes 2010	Yes 2016
1. Is the statute based on the UTC?	Yes	No <sup>1</sup>	Yes	Yes
2. What is the statutory citation?	MD. EST. & TRUSTS CODE § 14.S-304	MASS. GEN. LAWS ch. 190B, § 1-403	MCL § 700.7301 et seq.	MINN. STAT. 501c.0301 et seq.
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>1</sup>	Yes <sup>2</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Yes	Not specified	Yes <sup>2</sup>	Yes <sup>2</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?		Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>3</sup>
1. ward is a minor	Yes	Yes <sup>4</sup>	Yes <sup>3</sup>	Yes
2. ward is an incapacitated adult	Yes	Yes <sup>4</sup>	Yes <sup>3</sup>	Yes
3. Does this apply to conservators of the estate and to guardians of the person?	Estate and Person	Estate and Person	Estate and Person <sup>3</sup>	
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	No	Yes <sup>5</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
1. a testamentary general power of appointment		No <sup>5</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
2. a non-testamentary general power of appointment		Yes <sup>5</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
3. a broad special power of appointment		Yes <sup>5</sup>	Yes- for some things <sup>4</sup>	No <sup>4</sup>
4. a limited special power of appointment		No <sup>5</sup>	Yes- for some things <sup>4</sup>	No <sup>4</sup>
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	No	Yes	Yes
2. incapacitated adults	Yes	No	Yes	Yes
3. unborn	Yes	Yes	Yes	Yes
4. unidentifiable/unlocatable	Yes	Yes	Yes	Yes
5. other		No	No	Yes <sup>5</sup>
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes	Yes <sup>6</sup>	Yes	Yes <sup>5</sup>
1. Is there a conflict of interest exception?	Yes	No	Yes	Yes <sup>5</sup>
2. Is there an adequacy of representation test?	No	Yes	No	No
H. Does virtual representation include vertical representation?	No Provision	No Provision	Implicit (UTC approach) <sup>5</sup>	Implicit (UTC approach)
I. Does the statute permit a designated representative?				
J. Does the state statute allow nonjudicial settlement agreements?		Yes 203E-1-111	Yes MCL § 700.7111	Yes MINN. STAT. § 501C.0111

	Maryland	Massachusetts	Michigan	Minnesota
K. If yes, what matters can be resolved by nonjudicial settlement agreements?			Any matter involving a trust with a few restrictions	The approval of a trustee's accounting, trustee resignation, determination of trustee compensation, transfer of trust situs and certain terminations of noncharitable trusts. See footnote 6.
1. interpretation or construction		Yes	Yes	No
2. approval of a trustee's report or accounting		Yes	Yes	Yes
3. grant of power or direction to refrain to a trustee		Yes	Yes	No
4. trustee resignation/appointment		Yes	Yes	Yes (resignation only)
5. trustee compensation		Yes	Yes	Yes
6. transfer of a trust's place of administration		Yes	Yes	Yes
7. trustee's liability		Yes	Yes	No
8. other additions/exclusions		No	Yes <sup>6</sup>	Yes <sup>6</sup>
9. Is there a material purpose test?		Yes	Yes	Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?			Not specified	No (except termination) <sup>6</sup>
11. Must the agreement be one a court could enter?		Yes	Yes	Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?		No	No	No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?		Interested Persons	Interested Persons <sup>7</sup>	Trustee and all beneficiaries of a trust not under court supervision
1. Is it the same or different than UTC section 111(a)?		Same	Same	Different (more limited)
2. Is the trustee a necessary party?			No	Yes
M. Does the nonjudicial settlement agreement provision apply to all trusts?			No limitation specified	No limitation specified

	Mississippi	Missouri	Montana	Nebraska
A. Has the state adopted a "virtual representation" statute?	Yes 2014	Yes 2016	Yes 2019	Yes 2003
1. Is the statute based on the UTC?	Yes	Yes	No	Yes
2. What is the statutory citation?	MS CODE § 91-8-303 TO 305	MO. REV. STAT. § 456.3-304	MONT. CODE ANN. § 72-1-303	NEB. REV. STAT. § 30-3825
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Yes <sup>2</sup>	Yes <sup>2</sup>	Not specified	Yes <sup>2</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>2</sup>	Yes <sup>3</sup>
1. ward is a minor	Yes	Yes <sup>3</sup>	Yes	Yes <sup>3</sup>
2. ward is an incapacitated adult	Yes	Yes <sup>3</sup>	Yes	Yes <sup>3</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	Yes <sup>4</sup>	Estate and Person <sup>3</sup>	Estate and Person	Estate and Person <sup>3</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	No	Yes <sup>4</sup>	Yes <sup>3</sup>	Yes <sup>4</sup>
1. a testamentary general power of appointment		Yes <sup>4</sup>	Yes	Yes <sup>4</sup>
2. a non-testamentary general power of appointment		No	No	No
3. a broad special power of appointment		Yes (special testamentary) <sup>4</sup>	No	No
4. a limited special power of appointment		No	No	No
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	Yes	No	Yes
2. incapacitated adults	Yes	Yes	No	Yes
3. unborn	Yes	Yes	Yes	Yes
4. unidentifiable/unlocatable	Yes	Yes	Yes	Yes
5. other	Yes <sup>5</sup>	No	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes <sup>6</sup>	Yes <sup>5</sup>	Yes <sup>4</sup>	Yes
1. Is there a conflict of interest exception?	Yes <sup>6</sup>	Yes	No	Yes
2. Is there an adequacy of representation test?	No	No	Yes	No
H. Does virtual representation include vertical representation?	Yes <sup>7</sup>	Implicit (UTC approach) <sup>5</sup>	No Provision	Implicit (UTC approach) <sup>5</sup>
I. Does the statute permit a designated representative?				

	Mississippi	Missouri	Montana	Nebraska
J. Does the state statute allow nonjudicial settlement agreements?		Yes MO. REV. STAT. § 456.1-111	Yes § 72-38-111	Yes NEB. REV. STAT. § 30-3811
K. If yes, what matters can be resolved by nonjudicial settlement agreements?		Any matter involving a trust with a few restrictions		Any matter involving a trust with a few restrictions
1. interpretation or construction		Yes	Yes	Yes
2. approval of a trustee's report or accounting		Yes	Yes	Yes
3. grant of power or direction to refrain to a trustee		Yes	Yes	Yes
4. trustee resignation/appointment		Yes	Yes	Yes
5. trustee compensation		Yes	Yes	Yes
6. transfer of a trust's place of administration		Yes	Yes	Yes
7. trustee's liability		Yes	Yes	Yes
8. other additions/exclusions		Yes <sup>6</sup>	No	Yes <sup>6</sup>
9. Is there a material purpose test?		Yes	Yes	Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?		Not specified	Not specified	Expressly a material purpose <sup>6</sup>
11. Must the agreement be one a court could enter?		Yes	Yes	Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?		No	No	No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?		Interested persons <sup>7</sup>	Interested persons	Interested persons <sup>7</sup>
1. Is it the same or different than UTC section 111(a)?		Same	Same	Same
2. Is the trustee a necessary party?		No		No
M. Does the nonjudicial settlement agreement provision apply to all trusts?		No limitation specified	No limitation specified	No limitation specified

	Nevada	New Hampshire	New Jersey	New Mexico
A. Has the state adopted a "virtual representation" statute?	Yes 2009, 2019	Yes 2005	Yes 2016	Yes 2013
1. Is the statute based on the UTC?	No	Yes	Yes	Yes
2. What is the statutory citation?	NEV. REV. STAT. ANN. §164.038	N.H. REV. STAT. ANN. § 564-B:3-301 through 305	N.J. Stat. § 3B:31-13 through 17	N.M. STAT. ANN. § 46A-3-304
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>2</sup>	Yes- and can also represent an incapacitated child <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Not specified	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>3</sup>
1. ward is a minor	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes	Yes <sup>3</sup>
2. ward is an incapacitated adult	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes	Yes <sup>3</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	Estate <sup>3</sup>	Estate and Person <sup>3</sup>	Yes	Estate and Person <sup>3</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
1. a testamentary general power of appointment	Not specified	Yes <sup>4</sup>	Yes	Yes <sup>4</sup>
2. a non-testamentary general power of appointment	Not specified	No	No	No
3. a broad special power of appointment	Not specified	No	No	No
4. a limited special power of appointment	Not specified	No	No	No
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	Yes	Yes	Yes
2. incapacitated adults	Yes	Yes	Yes	Yes
3. unborn	Yes	Yes	Yes	Yes
4. unidentifiable/unlocatable	Yes	Yes	Yes	Yes
5. other	No	No	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes <sup>5</sup>	Yes	Yes <sup>5</sup>	Yes
1. Is there a conflict of interest exception?	Yes <sup>5</sup>	Yes	Yes	Yes
2. Is there an adequacy of representation test?	No	No	No	No
H. Does virtual representation include vertical representation?	Expressly Included <sup>6</sup>	Implicit (UTC approach) <sup>5</sup>	Yes <sup>6</sup>	Implicit (UTC approach) <sup>5</sup>
I. Does the statute permit a designated representative?				

	Nevada	New Hampshire	New Jersey	New Mexico
J. Does the state statute allow nonjudicial settlement agreements?	Yes SB 464, Sec. 61-62	Yes N.H. REV. STAT. ANN. § 564-B:1-111	Yes N.J. Stat. 3B:31-11	Yes N.M. STAT. ANN. § 46A-1-111
K. If yes, what matters can be resolved by nonjudicial settlement agreements?		Any matter involving a trust <sup>6</sup>	Any matter involving a trust <sup>7</sup>	Any matter involving a trust
1. interpretation or construction	Yes	Yes	Yes	Yes
2. approval of a trustee's report or accounting	Yes	Yes	Yes	Yes
3. grant of power or direction to refrain to a trustee	Yes	Yes	Yes	Yes
4. trustee resignation/appointment	Yes	Yes	Yes	Yes
5. trustee compensation	Yes	Yes	Yes	Yes
6. transfer of a trust's place of administration	Yes	Yes	Yes	Yes
7. trustee's liability	Yes	Yes	Yes	Yes
8. other additions/exclusions	Yes <sup>7</sup>	Yes <sup>7</sup>	Yes <sup>8</sup>	No
9. Is there a material purpose test?	Yes	Yes	Yes <sup>9</sup>	Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?	Not specified	Not specified <sup>8</sup>	No <sup>10</sup>	Not specified
11. Must the agreement be one a court could enter?	Yes	Yes	Maybe <sup>8</sup>	Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No	No	No	No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	Indispensible parties <sup>8</sup>	Interested persons	Interested persons <sup>11</sup>	Interested persons <sup>6</sup>
1. Is it the same or different than UTC section 111(a)?	Different	Different definition of "interested persons" <sup>9</sup>	Same	Same
2. Is the trustee a necessary party?	Yes			No
M. Does the nonjudicial settlement agreement provision apply to all trusts?	No limitation specified	No limitation specified	No limitation specified	No limitation specified

	New York	North Carolina	North Dakota	Ohio
A. Has the state adopted a "virtual representation" provision?	Yes 1981	Yes 2007	Yes 2007	Yes 2007
1. Is the statute based on the UTC?	No	Yes	Yes	Yes
2. What is the statutory citation?	N.Y. SURR. CT. PROC. ACT § 315	N.C. GEN. STAT. § 36C-3-304	N.D. CENT. CODE § 59-11-04	OHIO REV. CODE ANN. § 5803.01 through 5803.05
B. Does virtual representation allow a parent to represent a minor or unborn child?	No	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	No	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	No	No <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>3</sup>
1. ward is a minor	n/a	n/a	Yes <sup>3</sup>	Yes <sup>3</sup>
2. ward is an incapacitated adult	n/a	n/a	Yes <sup>3</sup>	Yes <sup>3</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	n/a	n/a	Estate and Person <sup>3</sup>	Yes <sup>3</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>1</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
1. a testamentary general power of appointment	Yes <sup>1</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
2. a non-testamentary general power of appointment	Yes <sup>1</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>	No
3. a broad special power of appointment	Yes <sup>1</sup>	No	No	No
4. a limited special power of appointment	Yes <sup>1</sup>	No	No	No
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes <sup>2</sup>	Yes	Yes	Yes
2. incapacitated adults	Yes <sup>2</sup>	Yes (incompetent)	Yes	Yes
3. unborn	Yes <sup>3</sup>	Yes	Yes	Yes
4. unidentifiable/unlocatable	Yes (unascertained) <sup>2,3</sup>	Yes	Yes	Yes
5. other	Persons under disability if the trust instrument provides <sup>2</sup>	No	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	No ("the same") <sup>4</sup>	Yes	Yes	Yes
1. Is there a conflict of interest exception?	No	Yes	Yes	Yes
2. Is there an adequacy of representation test?	No	No	No	No

	New York	North Carolina	North Dakota	Ohio
H. Does virtual representation include vertical representation?	Expressly included <sup>5</sup>	Implicit (UTC approach) <sup>5</sup>	Implicit (UTC approach) <sup>5</sup>	Implicit (UTC approach) <sup>5</sup>
I. Does the statute permit a designated representative?				
J. Does the state statute allow nonjudicial settlement agreements?	Yes  N.Y. SURR. CT. PROC. ACT § 315(8)	Yes  N.C. GEN. STAT. § 36C-1-111	Yes  N.D. CENT. CODE § 59-09-11	Yes  OHIO REV. CODE ANN. § 5801.10
K. If yes, what matters can be resolved by nonjudicial settlement agreements?	Settling the accounts of fiduciaries	Certain enumerated matters involving a trust	Any matter involving a trust	Any matter involving a trust with a few restrictions <sup>6</sup>
1. interpretation or construction	No	No	Yes	Yes
2. approval of a trustee's report or accounting	Yes	Yes	Yes	Yes
3. grant of power or direction to refrain to a trustee	No	Yes	Yes	Yes
4. trustee resignation/appointment	No	Yes	Yes	Yes
5. trustee compensation	No	Yes	Yes	Yes
6. transfer of a trust's place of administration	No	Yes	Yes	Yes
7. trustee's liability	No	Yes (only applies to actions taken under above categories)	Yes	Yes
8. other additions/exclusions	No	Yes <sup>6</sup>	Yes <sup>6</sup>	Yes <sup>6</sup>
9. Is there a material purpose test?	No	Yes	Yes	Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?	Not specified	Not specified	Expressly a material purpose <sup>7</sup>	No
11. Must the agreement be one a court could enter?	No	Yes	Yes	Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No	No	No	Yes
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	All persons whom service of process would be required in a judicial proceeding <sup>6</sup>	Interested persons <sup>7</sup>	Interested persons	The settlor; all beneficiaries; all currently serving trustees; creditors if their interests are affected <sup>7</sup>
1. Is it the same or different than UTC section 111(a)?	Different language <sup>6</sup>	Same	Different definition of "interested persons" <sup>8</sup>	Different- specifies the particular parties <sup>7</sup>
2. Is the trustee a necessary party?	No	No	Yes <sup>8</sup>	Yes <sup>7</sup>



	<b>New York</b>	<b>North Carolina</b>	<b>North Dakota</b>	<b>Ohio</b>
M. Does the nonjudicial settlement agreement provision apply to all trusts?	Yes <sup>7</sup>	No limitation specified	No limitation specified	No <sup>8</sup>

	Oklahoma	Oregon	Pennsylvania	Rhode Island
A. Has the state adopted a "virtual representation" statute?	No	Yes 2005	Yes 2017	Yes 2004
1. Is the statute based on the UTC?		Yes	No	No
2. What is the statutory citation?		OR. REV. STAT. § 130.115	20 PA. CONS. STAT. §§ 7721-7726	R.I. GEN. LAWS § 33-22-17
B. Does virtual representation allow a parent to represent a minor or unborn child?		Yes <sup>1</sup>	Yes <sup>1</sup>	Not specified
C. Does an agent under the power of attorney have the authority to represent the principal?		Yes <sup>2</sup>	Yes <sup>2</sup>	Not specified
D. Does virtual representation allow a court appointed guardian to represent his or her ward?		No <sup>3</sup>	Yes <sup>3</sup>	Not specified
1. ward is a minor		Yes <sup>4</sup>	Unspecified <sup>3</sup>	Not specified
2. ward is an incapacitated adult		Yes <sup>4</sup>	Unspecified <sup>3</sup>	Not specified
3. Does this apply to conservators of the estate and to guardians of the person?		Conservators only <sup>4</sup>	Estate <sup>3</sup>	Not specified
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?		Yes <sup>5</sup>	Yes <sup>4</sup>	Not specified
1. a testamentary general power of appointment		Yes <sup>5</sup>	Yes <sup>4</sup>	Not specified
2. a non-testamentary general power of appointment		No	Yes <sup>4</sup>	Not specified
3. a broad special power of appointment		No	Yes <sup>4</sup>	Not specified
4. a limited special power of appointment		No	Yes <sup>4</sup>	Not specified
F. Under virtual representation, what individuals can be represented?				
1. minors		Yes	Yes	Yes
2. incapacitated adults		Yes	No	Yes
3. unborn		Yes	Yes	Yes
4. unidentifiable/unlocatable		Yes	Yes	Yes
5. other		No <sup>6</sup>	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?		Yes	Yes <sup>5</sup>	Yes <sup>1</sup>
1. Is there a conflict of interest exception?		Yes <sup>7</sup>	Yes <sup>6</sup>	Yes <sup>1</sup>
2. Is there an adequacy of representation test?		No	Yes <sup>7</sup>	Yes <sup>1</sup>
H. Does virtual representation include vertical representation?		Implicit (UTC approach) <sup>7</sup>	Expressly included <sup>8</sup>	No Provision
I. Does the statute permit a designated representative?				

	Oklahoma	Oregon	Pennsylvania	Rhode Island
J. Does the state statute allow nonjudicial settlement agreements?		Yes OR. REV. STAT. § 130.045	Yes 20 PA. CONS. STAT. § 7710.1	No
K. If yes, what matters can be resolved by nonjudicial settlement agreements?		Any matter involving a trust	Any matter involving a trust	
1. interpretation or construction		Yes	Yes	
2. approval of a trustee's report or accounting		Yes	Yes	
3. grant of power or direction to refrain to a trustee		Yes	Yes	
4. trustee resignation/appointment		Yes	Yes	
5. trustee compensation		Yes	Yes	
6. transfer of a trust's place of administration		Yes	Yes	
7. trustee's liability		Yes	Yes	
8. other additions/exclusions		Yes <sup>8</sup>	Yes <sup>9</sup>	
9. Is there a material purpose test?		Yes	Yes	
10. Is a spendthrift provision expressly presumed to not be a material purpose?		Presumed material	Not specified <sup>10</sup>	
11. Must the agreement be one a court could enter?		Yes	Yes	
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?		No	No	
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?		Interested persons	All beneficiaries and trustees of the trust <sup>11</sup>	
1. Is it the same or different than UTC section 111(a)?		Different definition of "interested persons" <sup>9</sup>	Different	
2. Is the trustee a necessary party?		Yes <sup>9</sup>	Yes <sup>11</sup>	
M. Does the nonjudicial settlement agreement provision apply to all trusts?		No limitation specified	No limitation specified	

	South Carolina	South Dakota	Tennessee	Texas
A. Has the state adopted a "virtual representation" statute?	Yes 2014	Yes 2019	Yes 2010	Yes (in formal proceedings) 2009
1. Is the statute based on the UTC?	Yes	No	Yes	No
2. What is the statutory citation?	S.C. CODE ANN. § 62-7-304	S.D. CODIFIED LAWS § 55-3-24 through 38	TENN. CODE ANN. § 35-15-304	TEX. PROP. CODE ANN. § 115.013
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes- but has the lowest priority <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>3</sup>	Yes	Yes <sup>3</sup>	Yes <sup>3</sup>
1. ward is a minor	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>4</sup>
2. ward is an incapacitated adult	Yes <sup>3</sup>	Yes <sup>4</sup>	Unclear <sup>3</sup>	Yes <sup>4</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	Estate and Person <sup>3</sup>	Estate and Person <sup>5</sup>	Estate (for disabled) and Person (for minors) <sup>3</sup>	Estate <sup>3</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>4</sup>	Yes <sup>6</sup>	Yes <sup>4</sup>	Yes <sup>5</sup>
1. a testamentary general power of appointment	Yes <sup>4</sup>	Yes <sup>6</sup>	Yes <sup>4</sup>	No
2. a non-testamentary general power of appointment	Yes <sup>4</sup>	Yes <sup>6</sup>	No	Yes <sup>5</sup>
3. a broad special power of appointment	No	Yes <sup>6</sup>	No	No
4. a limited special power of appointment	No	Yes <sup>6</sup>	No	No
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	Not specified	Yes	Yes
2. incapacitated adults	Yes	Not specified	Yes	Yes
3. unborn	Yes	Yes	Yes	Yes
4. unidentified/unlocatable	Yes	Yes	Yes	Yes
5. other	No	No	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes	No <sup>7</sup>	Yes	Yes <sup>6</sup>
1. Is there a conflict of interest exception?	Yes	n/a	Yes	No
2. Is there an adequacy of representation test?	Yes <sup>5</sup>	n/a	No	Yes

	South Carolina	South Dakota	Tennessee	Texas
H. Does virtual representation include vertical representation?	Implicit (UTC approach) <sup>6</sup>	n/a	Implicit (UTC approach) <sup>5</sup>	Not specified
I. Does the statute permit a designated representative?				
J. Does the state statute allow nonjudicial settlement agreements?	Yes S.C. CODE ANN. § 62-7-111	Yes S.D. CODIFIED LAWS § 55-3-24	Yes TENN. CODE ANN. § 35-15-111	Yes TX. PROP. CODE. § 114.032 (b)-(e)
K. If yes, what matters can be solved by nonjudicial settlement agreements?	Certain enumerated matters	Modification or termination	Any matter involving a trust	
1. interpretation or construction	No	Not specified	Yes	
2. approval of a trustee's report or accounting	Yes	Yes <sup>8</sup>	Yes	
3. grant of power or direction to refrain to a trustee	Yes	Not specified	Yes	
4. trustee resignation/appointment	Yes	Not specified	Yes	
5. trustee compensation	Yes	Not specified	Yes	
6. transfer of a trust's place of administration	Yes	Not specified	Yes	
7. trustee's liability	Yes	Not specified	Yes	
8. other additions/exclusions	Yes <sup>7</sup>	Not specified	Yes <sup>6</sup>	
9. Is there a material purpose test?	No	Yes <sup>9</sup>	Yes	
10. Is a spendthrift provision expressly presumed to not be a material purpose?	N/a (because no material purpose test)	N/a	Not specified	
11. Must the agreement be one a court could enter?	No	Not specified	Yes	
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No	Not specified	No	
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	Interested persons <sup>8</sup>	Not specified	Trustee and qualified beneficiaries <sup>7</sup>	
1. Is it the same or different than UTC section 111(a)?	Same	Different	Different	
2. Is the trustee a necessary party?	No	Presumably	Yes <sup>7</sup>	
M. Does the nonjudicial settlement agreement provision apply to all trusts?	No limitation specified	Yes (those not under court supervision)	No limitation specified	

	Utah	Vermont	Virginia	Washington
A. Has the state adopted a "virtual representation" provision?	Yes 2004	Yes 2011	Yes 2012	Yes 2013
1. Is the statute based on the UTC?	Yes	Yes	Yes	No
2. What is the statutory citation?	UTAH CODE ANN. § 75-7-304	VT. STAT. ANN. tit. 14 V.S.A. § 202	VA. CODE ANN. § 64.2-717	WASH. REV. CODE ANN. § 11.96A.120 <sup>1</sup>
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>1</sup>	Yes <sup>2</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>2</sup>	Yes <sup>3</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>3</sup>	Yes <sup>4</sup>
1. ward is a minor	Yes <sup>3</sup>	Yes <sup>4</sup>	Yes <sup>3</sup>	Not specified
2. ward is an incapacitated adult	Yes <sup>3</sup>	Yes <sup>4</sup>	Yes <sup>3</sup>	Yes <sup>4</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	Estate and Person <sup>3</sup>	Estate and Person	Estate and Person <sup>3</sup>	Estate and Person <sup>4</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>4</sup>	Yes <sup>5</sup>	Yes <sup>4</sup>	Yes <sup>5</sup>
1. a testamentary general power of appointment	Yes <sup>4</sup>	Yes	Yes <sup>4</sup>	Yes
2. a non-testamentary general power of appointment	No	No	No	Yes
3. a broad special power of appointment	No	No	No	Yes
4. a limited special power of appointment	No	No	No	Yes <sup>5</sup>
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	Yes	Yes	Yes
2. incapacitated adults	Yes	Yes	Yes	Yes
3. unborn	Yes	Yes	Yes	Yes
4. unidentifiable/unlocatable	Yes	Yes	Yes	Yes
5. other	No	No	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes	Yes <sup>6</sup>	Yes	Yes <sup>6</sup>
1. Is there a conflict of interest exception?	Yes	Yes	Yes	Yes
2. Is there an adequacy of representation test?	No	No	No	No
H. Does virtual representation include vertical representation?	Implicit (UTC approach) <sup>5</sup>	Implicit (UTC Approach) <sup>7</sup>	Implicit (UTC approach) <sup>5</sup>	Yes <sup>7</sup>
I. Does the statute permit a designated representative?				

	Utah	Vermont	Virginia	Washington
J. Does the state statute allow nonjudicial settlement agreements?	Yes UTAH CODE ANN. § 75-7-110	Yes VT. STAT. ANN. tit. 14A, § 111	Yes VA. CODE ANN. § 64.2-709	Yes <sup>8</sup> WASH. REV. CODE ANN. § 11.96A.220
K. If yes, what matters can be resolved by nonjudicial settlement agreements?	Any matter involving a trust	Any matter involving a trust	Any matter involving a trust	Any matter, except certain trusts for minors/incapacitated
1. interpretation or construction	Yes	Yes	Yes	Yes
2. approval of a trustee's report or accounting	Yes	Yes	Yes	Yes
3. grant of power or direction to refrain to a trustee	Yes	Yes	Yes	Yes
4. trustee resignation/appointment	Yes	Yes	Yes	Yes
5. trustee compensation	Yes	Yes	Yes	Yes
6. transfer of a trust's place of administration	Yes	Yes	Yes	Yes
7. trustee's liability	Yes	Yes	Yes	No
8. other additions/exclusions	No	No	No	Yes <sup>9</sup>
9. Is there a material purpose test?	Yes	Yes	Yes	No
10. Is a spendthrift provision expressly presumed to not be a material purpose?	Not specified	Not specified	Not specified	Not specified
11. Must the agreement be one a court could enter?	Yes	Yes	Yes	Not specified
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No	No	No	No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	Interested persons <sup>6</sup>	Interested persons <sup>8</sup>	Interested persons <sup>6</sup>	All persons interested in the estate or trust <sup>10</sup>
1. Is it the same or different than UTC section 111(a)?	Same	Same	Same	Different
2. Is the trustee a necessary party?	No	No	No	Yes
M. Does the nonjudicial settlement agreement provision apply to all trusts?	No limitation specified	No limitation specified	No limitation specified	Yes

	West Virginia	Wisconsin	Wyoming	UTC
A. Has the state adopted a "virtual representation" provision?	Yes 2011	Yes 2014	Yes 2003	Yes
1. Is the statute based on the UTC?	Yes	No	Yes	n/a
2. What is the statutory citation?	W. VA. CODE ANN. § 44D-3-304	WIS. STAT. § 701.0304 (circuit court) § 879.23(5) (probate court)	WYO. STAT. ANN. § 4-10-304	UNIF. TRUST CODE § 304
B. Does virtual representation allow a parent to represent a minor or unborn child?	Yes <sup>1</sup>	Not specified	Yes <sup>1</sup>	Yes <sup>1</sup>
C. Does an agent under the power of attorney have the authority to represent the principal?	Yes <sup>2</sup>	Not specified	Yes <sup>2</sup>	Yes <sup>2</sup>
D. Does virtual representation allow a court appointed guardian to represent his or her ward?	Yes <sup>3</sup>	Not specified	Yes <sup>3</sup>	Yes <sup>3</sup>
1. ward is a minor	Yes	Not specified	Yes <sup>3</sup>	Yes <sup>3</sup>
2. ward is a incapacitated adult	Yes	Not specified	Yes <sup>3</sup>	Yes <sup>3</sup>
3. Does this apply to conservators of the estate and to guardians of the person?	Estate and Person <sup>3</sup>	Not specified	Estate and Person <sup>3</sup>	Estate and Person <sup>3</sup>
E. Does virtual representation allow the holder of the power of appointment to represent all potential appointees?	Yes <sup>4</sup>	Yes (circuit court) <sub>1</sub>	Yes <sup>4</sup>	Yes <sup>4</sup>
1. a testamentary general power of appointment	Yes <sup>4</sup>	Yes <sup>1</sup>	Yes <sup>4</sup>	Yes <sup>4</sup>
2. a non-testamentary general power of appointment	No	Yes <sup>1</sup>	No	No
3. a broad special power of appointment	No	No	No	No
4. a limited special power of appointment	No	No	No	No
F. Under virtual representation, what individuals can be represented?				
1. minors	Yes	Yes (probate) <sup>2</sup>	Yes	Yes
2. incapacitated adults	Yes	Yes	Yes	Yes
3. unborn	Yes	Yes	Yes	Yes
4. unidentifiable/unlocatable	Yes	Yes	Yes	Yes
5. other	No	No	No	No
G. Does virtual representation include representation by someone with a "substantially identical interest"?	Yes	Yes <sup>3</sup>	Yes	Yes
1. Is there a conflict of interest exception?	Yes	No <sup>4</sup>	Yes	Yes
2. Is there an adequacy of representation test?	No	No	No	No
H. Does virtual representation include vertical representation?	Implicit(UTC Approach) <sup>5</sup>	Not specified	Implicit (UTC approach) <sup>5</sup>	Implicit <sup>5</sup>



	West Virginia	Wisconsin	Wyoming	UTC
I. Does the statute permit a designated representative?				
J. Does the state statute allow nonjudicial settlement agreements?	Yes W. VA. CODE ANN. §44D-1-111	Yes § 701.0111	Yes  WYO. STAT. ANN. § 4-10-111	Yes  UNIF. TRUST CODE § 111
K. If yes, what matters can be resolved by nonjudicial settlement agreements?	Any matter involving a trust		Any matter involving a trust	Any matter involving a trust
1. interpretation or construction	Yes	Yes	Yes	Yes
2. approval of a trustee's report or accounting	Yes	Yes	Yes	Yes
3. grant of power or direction to refrain to a trustee	Yes	Yes	Yes	Yes
4. trustee resignation/appointment	Yes	Yes	Yes	Yes
5. trustee compensation	Yes	Yes	Yes	Yes
6. transfer of a trust's place of administration	Yes	Yes	Yes	Yes
7. trustee's liability	Yes	Yes	Yes	Yes
8. other additions/exclusions	Yes <sup>6</sup>	Yes <sup>5</sup>	Yes <sup>6</sup>	No
9. Is there a material purpose test?	Yes	No	Yes	Yes
10. Is a spendthrift provision expressly presumed to not be a material purpose?	Not specified		Expressly not a material purpose <sup>6</sup>	Not specified
11. Must the agreement be one a court could enter?	Yes	Yes	Yes	Yes
12. Does the statute expressly address whether the trustee may be removed by agreement of the beneficiaries?	No <sup>7</sup>	No	No	No
L. In a nonjudicial settlement agreement, who are the necessary parties who must sign the agreement?	Interested persons <sup>8</sup>	Interested persons <sup>6</sup>	Interested persons <sup>7</sup>	Interested persons <sup>6</sup>
1. Is it the same or different than UTC section 111(a)?	Same	Same	Different definition of "interested persons" <sup>7</sup>	n/a
2. Is the trustee a necessary party?	No		Yes <sup>7</sup>	No
M. Does the nonjudicial settlement agreement provision apply to all trusts?	No limitation specified	No limitation specified	No limitation specified	No limitation specified

## DEFINITIONS

1. General Power of Appointment: a power exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate
2. Broad Special Power of Appointment: a power exercisable in favor of anyone other than the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate
3. Limited Special Power of Appointment: a power exercisable in favor of a limited class of persons, such as the descendants of a named person
4. Vertical Representation: the representative has a superior beneficial interest that binds other beneficiaries that have a future, contingent, or other lesser interest

## ALABAMA

<sup>1</sup> Along with allowing a parent to represent a child, a grandparent or other direct ancestor may represent a grandchild in those instances where a conflict of interest exists between the parent and the child. ALA. CODE § 19-3B-303(6).

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 19-3B-303(3).

<sup>3</sup> A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed. *Id.* § 19-3B-303(2).

<sup>4</sup> A "guardian" is defined as a person who has qualified as a guardian of a minor or incapacitated person, and a "conservator" is defined in the same provision as a person who has been appointed by the court to administer the estate of a minor or adult. *Id.* § 19-3B-103.

<sup>5</sup> *Id.* § 19-3B-302(b) is substantially the same provision as § 302 of the UTC except that it allows the holder of any power of appointment other than a lifetime power to appoint to oneself to represent and bind persons whose interests, as permissible appointees, takers in default or otherwise, are subject to the power as long as there is no conflict of interest. *Id.* § 19-3B-302 Comment.

<sup>6</sup> *Id.* § 19-3B-302(a). The code adds a provision which creates "a class of holders of a power of appointment who can bind any person by virtue of the fact that this particular class of holders has immediate access to the property that is subject to the power of appointment. This class of holders has a broader power of representation in that the condition that there be no conflict is not applicable." *Id.* § 19-3B-302 cmt. While the power described in § 19-3B-302(a) is a non-testamentary general power of appointment, §19-3B-302(a) does not apply to all types of non-testamentary general powers of appointment, such as a power to appoint to one's creditors, etc.

<sup>7</sup> *Id.* § 19-3B-304. This section is based on the UTC. While UTC § 304 makes it clear in its comments to this provision that "substantially identical interests" include vertical representation, Alabama expressly codifies the vertical representation principle in § 19-3B-304(b) which states that "a presumptive remainder beneficiary may represent contingent successor remainder beneficiaries" as long as there is no conflict of interest.

<sup>8</sup> The Alabama Code adds § 19-3B-111(7) to its non-exclusive list of matters that may be resolved by a nonjudicial settlement agreement to make it expressly clear that partial and final settlements may be done with a nonjudicial settlement agreement even though many infer this from the UTC. *Id.* § 19-3B-111 cmt.

<sup>9</sup> For trusts created on or after January 1, 2007, a spendthrift provision is not presumed to constitute a material purpose of the trust. *Id.* § 19-3B-411(c).

<sup>10</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 19-3B-111(a)-(b).

## ALASKA

<sup>1</sup> ALASKA STAT. § 13.06.120(2)(B). To the extent there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the minor child.

<sup>2</sup> *Id.* § 13.06.120(2)(B). To the extent there is no conflict of interest, orders binding an agent having authority to act with respect to the particular questions or dispute bind the principal.

<sup>3</sup> *Id.* § 13.06.120(2)(B). Orders binding a guardian bind the ward if no conservator of the estate has been appointed. *Id.* A guardian is a person who has qualified as a guardian of a minor or incapacitated person in accordance with testamentary or court appointment, but excludes a person who is merely a guardian ad litem. *Id.* at § 13.06.050(20).

<sup>4</sup> *Id.* § 13.06.120(2)(A). Orders binding the holder of a general or non-general power of appointment bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

<sup>5</sup> *Id.* § 13.06.120(2)(C). An unborn, a minor, an incapacitated, or a person whose identity or location is unknown or not reasonably ascertainable who is not otherwise represented is bound by an order to the extent the interest is adequately represented by another party having a substantially identical interest in the proceeding.

## ARIZONA

<sup>1</sup> The parent may represent and bind a minor or unborn child if a guardian or conservator has not been appointed; however, in a departure from the UTC, if a parent is the settlor of the trust, the parent cannot represent the child to consent to a modification or termination of that trust. ARIZ. REV. STAT. § 14-1406(6).

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 1406(3).

<sup>3</sup> A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed. *Id.* § 14-1406(2). In § 14-10103, a "guardian" is defined as a court appointed person to make decisions regarding the support, care, education, health and welfare of a minor or an adult, and "conservator" is the court appointed person charged with managing the estate of a protected person.

<sup>4</sup> The holder of a general power of appointment, including a general testamentary power of appointment, may represent and bind persons subject to the power. These persons include: permissible appointees, takers in default, and otherwise. *Id.* § 14-1405. Unlike the UTC, representation is not limited to instances where there is no conflict of interest.

<sup>5</sup> *Id.* § 14-1407. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that "substantially identical interests" include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> The statute was amended in 2013 to update Section E, which states, "Unless the interested person...asks the court to rule without regard to this subsection, the court may either approve the agreement or decline to approve the agreement, but may not disapprove or deny the effectiveness of the agreement. If the court does not approve the agreement pursuant to this subsection, the failure to approve is not any prejudice against the effectiveness of the agreement and is not a final judgment or judicial precedent with respect to the agreement or subsequent agreements pursuant to the section." *Id.* § 14-10111(E).

<sup>7</sup> Modification or termination of a trust as otherwise permitted pursuant to the trust instrument may not be resolved by a nonjudicial settlement agreement. *Id.* § 14-10111.

<sup>8</sup> The Arizona Trust Code uses a general definition for "interested person" as it relates to § 14-10111. The definition "includes any trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment and other person who has a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. 'Interested person' also includes a person who has priority for appointment as personal representative and other fiduciaries representing interested persons. 'Interested person,' as the term relates to particular persons, may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding." *Id.* § 14-1201.

<sup>9</sup> The statute was amended in 2013 to remove the language that previously restricted it to trusts that became irrevocable after January 1, 2009. In addition, the statute applies to all of Title 14 of the Arizona Code, including decedent's estates.

## ARKANSAS

<sup>1</sup> Under ARK. CODE ANN. § 28-73-303(6). A parent may bind and represent his or her unborn or minor child if a guardian has not been appointed.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 28-73-303(3).

<sup>3</sup> *Id.* § 28-73-303 (2).

<sup>4</sup> A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed. "Guardian" is defined in *Id.* § 28-73-103 as a person appointed by the court to have care and custody of the estate of an incapacitated person, and "conservator" is defined in the same provision as the person appointed to administer the estate of an individual who by reason of age or physical disability is unable to manage his or her property.

<sup>5</sup> The holder of a general testamentary power of appointment can represent all potential appointees, takers in default or others subject to the power to the extent that there is no conflict of interest. *Id.* § 28-73-302.

<sup>6</sup> *Id.* § 28-73-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>7</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 28-73-111.

## **COLORADO**

<sup>1</sup> COLO. REV. STAT. § 15-10-403(3)(c). If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent their minor child.

<sup>2</sup> The Colorado representation statute does not address representation by an agent under a power of attorney. *Id.* § 15-10-403. However, the Colorado power of attorney statute expressly allows the principal to give the agent authority as to “claims and litigation.” *Id.* §15-14-735.

<sup>3</sup> *Id.* § 15-10-403(3)(b). If there is no conflict of interest, orders binding a conservator bind the person whose estate he controls. Additionally, orders binding a guardian bind the ward if no conservator of his estate has been appointed.

<sup>4</sup> *Id.* § 15-10-403(3)(b). A guardian is defined as a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem. *Id.* § 15-10-201(23).

<sup>5</sup> *Id.* § 15-10-403(3)(a). Orders binding the holder of a presently exercisable general power of appointment bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

<sup>6</sup> *Id.* § 15-10-403(3)(d). An unborn, unascertained, minor, or incapacitated person who is not otherwise represented is bound by an order to the extent his or her interest is adequately represented by another party having a substantially identical interest in the proceeding. The term “unascertained” appears to include persons who are “unidentifiable,” but perhaps not those whose identity is known but who cannot be located.

<sup>7</sup> An unborn, unascertained, minor or incapacitated person who is not otherwise represented is bound by an order to the extent his or her interest is adequately represented by another party having a substantially identical interest in the proceeding.

## **CONNECTICUT**

<sup>1</sup> CONN. GEN. STAT. § 19. Absent a conflict of interest, and if a conservator or guardian has not been appointed, a parent may represent or bind the parent’s minor or unborn children.

<sup>2</sup> *Id.* § 19. Absent a conflict of interest, an agent having authority to do so may represent and bind the principal.

<sup>3</sup> *Id.* § 19. A court-appointed conservator or guardian may represent or bind the ward or conserved person if a conservator or guardian of the ward’s estate or conserved person’s estate has not been appointed.

<sup>4</sup> *Id.* § 19.

<sup>5</sup> *Id.* § 45a-487c(1)-(2). This statute expressly allows virtual representation by the conservator or guardian of the estate. It also expressly allows virtual representation by conservator or guardian of the person, with court approval, provided that a guardian or conservator of the ward’s estate has not been appointed.

<sup>6</sup> *Id.* § 18. Provided there is no conflict of interest between the holder and the persons represented, this section gives the holder of any power of appointment, whether or not presently exercisable, the ability to represent all potential appointees. Additionally, the holder of the power of revocation or a general power of appointment “shall represent the takers in default of the exercise thereof.” *Id.*

<sup>7</sup> *Id.* § 19(b). In connection with trust matters, unless otherwise represented, a minor, incapacitated, or unborn individual, or person whose identity of location is unknown and not reasonably ascertainable, may be represented by and bound by another person having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person being represented.

## DELAWARE

<sup>1</sup> DEL. CODE ANN. tit. 12, § 3547(c). A minor or incapacitated beneficiary, who cannot otherwise be represented, may be represented and bound by their custodial parent or parents, provided there is no material conflict of interest.

<sup>2</sup> *Id.* tit. 12, § 3547(c). A minor or incapacitated beneficiary, who cannot otherwise be represented, may be bound and represented by a guardian of the property.

<sup>3</sup> *Id.* tit. 12, § 3547(a). Unless otherwise represented, a minor, incapacitated, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, may for all purposes be represented by and bound by another who has a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no material conflict of interest.

<sup>4</sup> Delaware presumes a conflict of interest if the representative would as a result of the matter be appointed to an office or role related to the trust, or if already serving in such role, would be granted greater authority, broader discretion or increased protection. *Id.* tit. 12 § 3547.

<sup>5</sup> *Id.* tit. 12, § 3547(b). A presumptive remainder beneficiary may represent and bind contingent successor remainder beneficiaries in certain circumstances.

<sup>6</sup> Section 3338(a) defines “interested person” as any person whose consent would be required for a binding settlement approved by the Court of Chancery. Rule 101 of the Court of Chancery requires consent from (1) trustees and other fiduciaries; (2) trust beneficiaries with a present interest and those whose interest would vest, without regard to the exercise of powers of appointment, if the present interest terminated; (3) the settlor, if living; (4) all other persons having an interest under the express terms of the trust, including holders of powers and persons having other rights in a nonfiduciary capacity.

<sup>7</sup> The nonjudicial settlement statute does not apply to trusts described in Title 12, Section 3541, which includes trusts for a particular charitable purpose or noncharitable purpose. A noncharitable purpose is a purpose described in Section 3555 (animal trusts) or 3556 (trusts without identifiable beneficiaries).

## D.C.

<sup>1</sup> Along with allowing parent representation, an individual may represent a grandchild or a more remote descendant if the parent does not represent that child, and a “qualified beneficiary may represent and bind any beneficiary who may succeed to the qualified beneficiary’s interest under the terms of the trust or pursuant to the exercise of a power of appointment.” D.C. CODE ANN. § 19-1303.03(7)-(8).

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 19-1303.03(3).

<sup>3</sup> A guardian may represent and bind the ward if a conservator of the ward’s estate has not been appointed. *Id.* § 19-1303.03(2). Under § 19-1301.03, a “guardian” is a person appointed by the court, a parent, or a spouse to make decisions concerning the support, care, education, health and welfare of a minor or adult individual, and “conservator” is a person appointed by the court to administer the estate of a minor or adult individual.

<sup>4</sup> This provision is different from the UTC. The relevant code provision, entitled “Representation by Holder of General Testamentary Power of Appointment” states that the holder of a power of appointment can represent and bind those persons whose interests as permissible appointees or takers in default are subject to the power. No other class of persons is included in this list. A qualified power under this provision is a power exercisable in favor of 1) the power holder, the power holder’s estate, the power holder’s creditors and the creditors of the power holder’s estate; or 2) all persons other than the power holder, the power holder’s estate, the power holder’s creditors, and the creditors of the power holder’s estate. *Id.* § 19-1303.02.

<sup>5</sup> *Id.* § 19-1303.04. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to the provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute. Also, while this clause is substantively the same as the UTC, it adds the language “with respect to the particular question or dispute” to final sentence of the paragraph.

<sup>6</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 19-1301.11.

## FLORIDA

<sup>1</sup> A parent may represent and bind his or her unborn or minor child if a guardian of the property for the minor child has not been appointed. FLA. STAT. ANN. § 736.0303(5) (West).

<sup>2</sup> An agent with the authority to act may represent and bind the principal. *Id.* § 736.0303(2).

<sup>3</sup> A guardian of the property may represent and bind the estate, but the section allowing a guardian to represent and bind the ward is omitted from the Florida statute. *Id.* § 736.0303.

<sup>4</sup> The holder of a power of appointment can represent and bind those who interests as permissible appointees, takers in default and others who are subject to the power. *Id.* § 736.0302. The statute contains exceptions, determining that the holder does not have the power of representation with respect to 1) a matter involving fraud or bad faith by the trustee; 2) the power of the trustee to distribute the trust property; or 3) a power of appointment held by a person while that person is the only trustee.

<sup>5</sup> *Id.* § 736.0304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> A nonjudicial settlement may not be used to produce a result not authorized by other provisions of this code, including, but not limited to, terminating or modifying a trust in an impermissible manner. *Id.* § 736.0111(3).

<sup>7</sup> “Interested persons” is defined as persons whose interests would be affected by a settlement agreement. *Id.* § 736.0111(1).

## GEORGIA

<sup>1</sup> 53-12-8(f)(6) allows an ancestor to represent the ancestor’s minor or unborn descendant if no conservator or guardian has been appointed.

<sup>2</sup> An agent may represent the principal if the agent has authority to act with respect to the particular question or dispute. 53-12-8(f)(3).

<sup>3</sup> A conservator may represent and bind the estate that the conservator controls and a guardian may represent and bind his or her ward if a conservator of such ward’s estate has not been appointed. 53-12-8(f)(1),(2).

<sup>4</sup> The holder of a power of appointment may represent permissible appointees, takers in default or other persons whose interests are subject to the power. 53-12-8(e).

<sup>5</sup> A person who would be eligible to receive distributions of income or principal upon the termination of the interests of all persons currently eligible to receive distributions may represent all contingent successor and remainder beneficiaries. 53-12-8(h).

<sup>6</sup> 53-12-9(b). The statute does not include a list of matters that can be addressed.

<sup>7</sup> A nonjudicial settlement agreement is not valid with respect to a modification or termination of a noncharitable irrevocable trust when the settlor’s consent would be required in order to achieve a binding settlement if the settlement were approved by a court.

## HAWAII

<sup>1</sup> HAW. REV. STAT. § 560-1-403(2)(B). If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the parent’s minor child.

<sup>2</sup> *Id.* § 560-1-403(2)(B). To the extent there is no conflict of interest, orders binding a guardian bind the ward if no conservator of the ward’s estate has been appointed.

<sup>3</sup> *Id.* § 560-1-403(2)(B). A guardian is defined as a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent, spouse, reciprocal beneficiary, or by the court but excludes a guardian ad litem. *Id.* at § 560-5-102.

<sup>4</sup> *Id.* § 560-1-403(2)(A). Orders binding the holder of a presently exercisable general power of appointment bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

<sup>5</sup> *Id.* § 560-1-403(2)(C). The statute allows an unborn or unascertained person, who is not otherwise represented, to be bound by another with a substantially identical interest, to the extent that they are adequately represented.

## IDAHO

<sup>1</sup> IDAHO CODE § 15-1-403(b)(2). If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent and bind his minor child.

<sup>2</sup> *Id.* § 15-1-403(b)(2). To the extent there is no conflict of interest, orders binding a guardian bind the ward if no conservator of his estate has been appointed.

<sup>3</sup> *Id.* § 15-1-403(b)(2). A guardian is defined as a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, excluding a person who is merely a guardian ad litem. *Id.* § 15-1-201(21).

<sup>4</sup> *Id.* § 15-1-403(b)(1). Orders binding the holder of a present exercisable general power of appointment bind other persons to the extent their future interests (as objects, takers in default, or otherwise) are subject to the power.

<sup>5</sup> *Id.* § 15-1-403(b)(3). An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

<sup>6</sup> This statute provides that §§ 15-8-301 through 305 shall be applicable to the resolution of any matter, with certain exceptions regarding trusts for minors and incapacitated adults. *Id.* §§ 15-8-301 through 305. If all parties agree to a resolution of any of applicable matter, they must put it into a signed written agreement, which will then be binding and conclusive on all persons interested in the estate or trust. “Matter” is defined in the statute. *Id.* § 15-8-103.

<sup>7</sup> *Id.* § 15-8-103. Nonjudicial settlement also pertains to questions, issues, or disputes regarding the determination of any class of persons interested in the estate and the resolution of matters that could affect a nonprobate asset.

<sup>8</sup> *Id.* § 15-8-103(4). Under the Probate Code, “persons interested in the estate or trust” includes the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust.

## ILLINOIS

<sup>1</sup> Senate Bill 188 (“SB 188”), effective on January 1, 2010, amended the Trusts and Trustees Act (760 ILL. COMP. STAT. 5/16.1), adding provisions from the UTC with some modifications. Effective January 1, 2020, Illinois adopted the Illinois Trust Code, also based on the UTC, which made further changes to the representation provisions.

<sup>2</sup> If a person is incapacitated (including because of minority) a parent may represent the person if there is no material conflict of interest. If the parents disagree, the parent who is a lineal descendant of the settlor controls. 760 ILCS 3/303(d)

<sup>3</sup> 760 ILCS 3/303(d). An agent is deemed to have the requisite authority if the power of attorney grants the agent the power to settle claims and to exercise powers with respect to trusts and estates, even if the powers do not include the ability to revoke or amend a trust.

<sup>4</sup> 760 ILCS 3/303(b).

<sup>5</sup> May represent permissible appointees and takers in default without regard to any conflict of interest. 760 ILCS 3/302(a).

<sup>6</sup> May represent permissible appointees and takers in default if there is no conflict of interest. 760 ILCS 3/302(b).

<sup>7</sup> A designated representative may represent a current beneficiary who is under age 30 or a presumptive remainder beneficiary of any age. 760 ILCS 3/307.

<sup>8</sup> 760 ILCS 3/304(a).

<sup>9</sup> *Id.* This section is based on the UTC. While UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, Illinois expressly codifies vertical representation in 3/304(a), allowing primary beneficiaries to bind all secondary beneficiaries and presumptive remainder beneficiaries to bind other beneficiaries who have a successor, contingent, or other future interest in the trust.

<sup>10</sup> Illinois adds to the nonexclusive list of matters that may be resolved by a nonjudicial settlement agreement. The additions are: “(1) exercise or nonexercise of any power by a trustee; (2) questions relating to property or an interest in property held by the trust; (3) resolution of disputes or issues related to administration, investment, distribution or other matters; (4) modification of the terms of the trust pertaining to administration of the trust; (5) termination of the trust, provided that court approval of such termination must be obtained, and the court must conclude continuance of the trust is not necessary to achieve any material purpose of the trust; upon such termination the court may order the trust properly distributed as agreed by the parties to the agreement or otherwise as the court determines equitable consistent with the purposes of the trust.” 760 ILCS 3/111(b)(13). Interested persons may include trust advisors or protectors.

<sup>11</sup> The court shall consider a spendthrift provision, but it is not necessarily a material purpose. 760 ILCS 3/111(b)(13).

<sup>12</sup> “Interested persons” is defined as the trustee plus all persons who consent or joinder would be required to achieve a binding settlement were the settlement to be approved by a court. Interested persons may include trust advisors or protectors.

#### **INDIANA PROBATE CODE**

<sup>1</sup> IND. CODE § 29-1-1-20 falls under the Indiana Probate Code and governs proceedings involving estates of decedents or trusts and judicially supervised settlements. IND. CODE § 29-1-1-20(a).

<sup>2</sup> Effective July 1, 2019, Indiana permits a designated representative to represent a beneficiary, Ind.

<sup>3</sup> *Id.* § 29-1-1-20(a)(3). If there is no conflict of interest and no guardian of the estate or person has been appointed, a parent may represent the parent’s minor child.

<sup>4</sup> Not specified, but presumably yes because IND. CODE § 29-1-1-20(c) provides for compensation of a guardian.

<sup>5</sup> *Id.* § 29-1-1-20(a)(1). Orders binding the holder of a presently exercisable general power of appointment bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

<sup>6</sup> In a proceeding involving estates of decedents or trusts, or in judicially supervised settlements, an interested person (A) who is incapacitated; (B) whose present name, existence, or residence upon diligent inquiry is unknown and cannot be ascertained; or (C) who is not otherwise represented is bound by an order to the extent the person’s interest is adequately represented by another party having a substantially identical interest in the proceeding. *Id.* § 29-1-1-20(a)(4). An adjudication is binding upon all interested persons, whether born or unborn, whether notified or not notified, and whether represented or not, if the interested persons are of the same class or have interests similar to the predominant interests of any person notified or represented. *Id.* § 29-1-1-20(d).

<sup>7</sup> *Id.* § 29-1-1-20(a)(4). An interested person who is incapacitated, whose present name, existence or residence upon diligent inquiry is unknown and cannot be ascertained, or who is not otherwise represented, is bound by an order to the extent the person’s interest is adequately represented by another party having a substantially identical interest in the proceeding.

#### **INDIANA TRUST CODE**

<sup>1</sup> IND. CODE § 30-4-6-10.5 falls under the Indiana Trust Code, which applies to trusts as defined under IND. CODE § 30-4-1-1.

<sup>2</sup> Effective July 1, 2019, Indiana permits a designated representative to represent a beneficiary.

<sup>3</sup> IND. CODE § 30-4-6-10.5(a)(6) states, “a parent may represent and bind the parent’s minor, unborn, or not yet adopted child if a guardian for the child has not been appointed . . . .”

<sup>4</sup> IND. CODE § 30-4-6-10.5(a)(2). This provision states, “an attorney in fact who has authority to act with respect to the particular question or dispute may represent and bind the principal . . . .”

<sup>5</sup> “[A] guardian may represent and bind the protected person who is subject to the guardianship . . . .” *Id.* § 30-4-6-10.5(a)(1). “Guardian” is defined in the § 29-3-1-6 of Indiana Trust Code.

<sup>6</sup> “The holder of a general power of appointment, including a general testamentary power of appointment, may represent and bind persons whose interests are subject to the power of appointment, including: (1) permissible appointees; and (2) takers in default.” *Id.* § 30-4-6-10.5(b).

<sup>7</sup> Indiana provides that a designated representative may represent a beneficiary. IND. CODE § 30-4-6-10.5(a)(5).

<sup>8</sup> Under IND. CODE § 30-4-6-10.5(c), unless otherwise represented, a minor, an incapacitated person, an unborn or a not yet adopted child, or a person whose identity or location is unknown and not reasonably ascertainable may be represented by and bound by another person who has a substantially identical interest with respect to the particular question or dispute, but only to the extent there is not a conflict of interest between the representative and the person represented.

<sup>9</sup> *Id.* § 30-4-6-10.5(c). This section is based on the UTC. UTC § 304 makes clear in its comments to the provision that “substantially identical interests” include vertical representation. Therefore, it can be assumed that the same applies to the Indiana statute as well, even though it is not explicitly stated.

<sup>10</sup> The designated representative must deliver a written acceptance to the trustee. The designated representative is a fiduciary and must act in good faith. IND. CODE § 30-4-1-2(8). During any period of time that the trust instrument restricts or eliminates the right of a beneficiary to be informed of the beneficiary’s interest in a trust the designated representative represents and binds the beneficiary for purposes of any “judicial proceeding or



nonjudicial matter.” IND. CODE § 30-4-3-6(d). “Nonjudicial matter” does not appear to include a nonjudicial settlement agreement. IND. CODE 30-4-1-2 (15). The designated representative may not act if there is a conflict of interest with the beneficiary that is asserted to the court by the beneficiary. IND. CODE § 30-4-3-6(d). But if the beneficiary is a competent adult and discovers information about the beneficiary’s interest in the trust, the beneficiary may demand information about the trust. *Id.*

<sup>11</sup> The other matters include (1) waiver of the preparation of a trustee’s report or accounting, (2) the criteria for distribution to a beneficiary when the trustee has discretion, (3) the resolution of a dispute, (4) an investment action, (5) the appointment of and powers granted to a directing party or trust protector, and (6) direction to a directing party or trust protector to perform or refrain from performing a particular act or the grant of a power to the directing party or trust protector. Ind. Code § 30-4-5-14.5(d).

## IOWA

<sup>1</sup> The 2010 Iowa Legislature effective April 14, 2010 enacted legislation to delete subsection 4 of IOWA CODE § 633A.6301, which previously allowed a represented person to object to the representation prior to its taking effect.

<sup>2</sup> *Id.* § 633A.6303. Provided there is no conflict of interest and no conservator has been appointed, a parent may represent and bind a minor child.

<sup>3</sup> *Id.* § 633A.6303. This section does not use the term guardian. However, it does allow a conservator to represent and bind the person whose estate the conservator controls. A conservator is defined as a person appointed by a court to manage the estate of a minor or adult individual.

<sup>4</sup> *Id.* § 633A.6302. The holder of a presently exercisable general power of appointment may represent and bind the persons whose interests, as objects, takers in default, or otherwise, are subject to the power. Additionally, to the extent there is no conflict of interest, persons whose interests are subject to a general testamentary power of appointment may be represented and bound by the holder of the powers.

<sup>5</sup> *Id.* § 633A.6302(2). To the extent there is no conflict of interest, persons whose interests are subject to a general testamentary power of appointment may be represented and bound by the holder or holders of the power.

<sup>6</sup> *Id.* § 633A.6302(1). The holder of presently exercisable general power of appointment may represent and bind the persons whose interests, as objects, takers in default, or otherwise, are subject to the power.

<sup>7</sup> *Id.* § 633A.6304. The provision uses the term “incompetent” as opposed to “incapacitated.”

<sup>8</sup> *Id.* § 633A.6304. Unless otherwise represented, a minor or an incompetent, unborn, or unascertained person may be represented by and bound by another person having a substantially identical interest with respect to the fiduciary matter, but only to the extent that the person’s interest is adequately represented.

<sup>9</sup> Although no explicit conflict of interest exception appears in § 633A.6304, a potential representative who has a conflict of interest with a person whom the representative could otherwise virtually represent could not adequately represent such person. *Id.* § 633A.6304.

<sup>10</sup> *Id.* § 633A.6304. This section is based on the UTC. UTC § 304 makes clear in its comments to the provision that “substantially identical interests” include vertical representation. Therefore, it can be assumed that the same applies to the Iowa statute as well, even though it is not explicitly stated.

<sup>11</sup> *Id.* § 633A.6308. Interested persons means the persons whose consent would be required in order to achieve a binding settlement to be approved by the court.

## KANSAS

<sup>1</sup> KAN. STAT. ANN. § 58a-303(6). A parent may bind and represent his or her unborn or minor child if a conservator or guardian has not been appointed to the extent there is no conflict of interest.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 58a-303(3).

<sup>3</sup> The guardian may represent and bind the ward within the scope of the guardian’s powers and duties. *Id.* § 58a-303(2). A “guardian” is a person appointed by the court pursuant to § 59-3001 to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. Unlike in the UTC, the guardian’s representation is not contingent on the failure to appoint the conservator of the ward’s estate. Therefore, while under § 58a-303(1), the conservator may represent and bind the estate of the ward, he or she cannot represent the ward under the statute. *Id.* § 58a-303(1).

<sup>4</sup> The holder of a general testamentary power of appointment can represent all the potential appointees the extent there is no conflict of interest. The persons subject to the power of representation under this provision are “permissible appointees, takers in default, or otherwise.” *Id.* § 58a-302.

<sup>5</sup> *Id.* § 58a-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> Interested persons may enter into binding nonjudicial settlement agreements only with respect to the enumerated matters listed in *id.* § 58a-111(d).

<sup>7</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 58a-111(a).

## **KENTUCKY**

<sup>1</sup> Under KY. ACTS §386B.3-030(6), a parent may represent and bind the parent’s minor and unborn child if a conservator or guardian for the child has not been appointed.

<sup>2</sup> Under KY. ACTS §386B.3-030(3), an agent having authority to act with respect to the particular question or dispute may represent and bind the principal.

<sup>3</sup> Under KY. ACTS §386B.3-030(1) and (2) a conservator may represent and bind the estate that the conservator controls and a guardian may represent and bind the ward if a conservator of a ward’s estate has not been appointed.

<sup>4</sup> Under KY. ACTS §386B.3-020, a holder of a general power of appointment may represent potential appointees and takes in default absent any conflict of interest.

<sup>5</sup> KY. ACTS. §386B.3-040.

<sup>6</sup> *Id.* This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>7</sup> KY. ACTS. §386B.1-090 permits a nonjudicial settlement agreement with respect to any matter involving a trust, but lists specific matters included within this scope.

## **MAINE**

<sup>1</sup> ME. REV. STAT. ANN. tit. 18B § 303(6). A parent may bind and represent his or her unborn or minor child if a conservator or guardian has not been appointed to the extent there is no conflict of interest.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* tit. 18B § 303(3).

<sup>3</sup> The guardian may represent and bind the ward if the conservator of the ward’s estate has not been appointed. *Id.* tit. 18B § 303. “Guardian” is defined in § 103 as a person who has authority granted by a court to make decisions regarding the support, care, education, health and welfare of a minor or adult individual. The same provision defines “conservator” as a person appointed by the court to administer an estate of a minor or adult individual.

<sup>4</sup> The holder of a general testamentary power of appointment can represent all those subject to this power to the extent there is no conflict of interest. The persons subject to the power of representation under this provision include “permissible appointees, takers in default, or otherwise.” *Id.* tit. 18B § 302.

<sup>5</sup> *Id.* tit. 18B § 304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* tit. 18B § 111.

## **MARYLAND**

<sup>1</sup> A grandparent or more remote ancestor may represent a minor, incapacitated, unborn or unknown individual or an individual whose location is not reasonably ascertainable. MD. EST. & TRUSTS CODE §14.5-303(7).

## **MASSACHUSETTS**

<sup>1</sup> Legislation enacting the UTC is pending and is expected to be signed into law by the end of 2012.

<sup>2</sup> MASS. GEN. LAWS ch. 190B, § 1-403(2)(ii). To the extent there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent a minor child.

<sup>3</sup> *Id.* ch. 190B, § 1-403(2)(ii). To the extent there is no conflict of interest, orders binding a guardian bind the protected person or ward if no conservator has been appointed.

<sup>4</sup> *Id.* ch. 190B, § 1-403(2)(ii). A guardian is a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is a guardian ad litem. *Id.* at 1-201.

<sup>5</sup> *Id.* ch. 190B, § 1-403(2)(i). Orders binding the holder of a presently exercisable general power of appointment, or a presently exercisable power to appoint among a class of appointees which is broader than the class of those persons who would take in default of the exercise of such power, bind other persons to the extent their interests, as objects, takers in default, or otherwise, are subject to the power.

<sup>6</sup> *Id.* ch. 190B, § 1-403(2)(iii). A unborn or unascertained person who is not otherwise represented is bound by an order binding another to the extent the person's interest is adequately represented by another party having a substantially identical interest in the proceeding.

## **MICHIGAN**

<sup>1</sup> 2009 Mich. Pub. Acts 46 § 7303(f). A parent may bind and represent his or her unborn or minor child if a conservator, plenary guardian, or partial guardian has not been appointed.

<sup>2</sup> An agent under a durable power of attorney may represent and bind the principal if a conservator, plenary guardian, or partial guardian has not been appointed. *Id.* 46 § 7303(b).

<sup>3</sup> A guardian may represent and bind the ward if a conservator or guardian of the ward's estate has not been appointed and no agent has the authority to act. *Id.* 46 § 7303(c). "Guardian" is defined in § 1104 as the person qualified by the court as a guardian of a minor or legally incapacitated individual, and "conservator" is defined in the same provision as a person appointed by the court to manage a protected individual's estate.

<sup>4</sup> *Id.* 46 § 7302. The holder of a presently exercisable or testamentary general power of appointment may bind and represent those whose interests are subject to his or her power for purposes including granting consent or approval to modification or termination of a trust, or deviation from its terms, including consent or approval to a nonjudicial settlement agreement. Those subject to this power include: permissible appointees, takers in default or otherwise. Unlike the UTC, representation is not limited by conflict of interest. The holder of a power of revocation or amendment or special power of appointment may also bind and represent permissible appointees, takers in default or others subject to the power with respect to matters excluding those listed above.

<sup>5</sup> *Id.* 46 § 7304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that "substantially identical interests" include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> Adding to the list of matters that can be solved by a nonjudicial agreement, Michigan adds "direction to withhold from a trustee any power." Michigan also excludes termination or modification of a trust from matters that can be resolved by nonjudicial settlement agreements. *Id.* 46 § 7111.

<sup>7</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 7111(5).

## **MINNESOTA**

<sup>1</sup> MINN. STAT. § 501C.0303(a)(5). The statute contains detailed provisions if the parents disagree.

<sup>2</sup> *Id.* § 501C.0303(a)(2).

<sup>3</sup> *Id.* § 501C.0303(a)(1).

<sup>4</sup> *Id.* § 501C.0302.

<sup>5</sup> *Id.* § 501C.0304. An unborn or unascertained person, an incapacitated person, a person whose identity or location is unknown and not reasonably ascertainable, or a minor, who is not otherwise represented may be represented by another party having a substantially identical interest, but only to the extent there is no conflict of interest.

<sup>6</sup> *Id.* § 501B.154(c)(5). The termination of a non-charitable trust and distribution of trust property, if the fair market value of the trust is less than \$50,000 and continuance will defeat or substantially impair the accomplishment of its purposes, can be accomplished by nonjudicial settlement agreement. The presence of a spendthrift provision does not conclusively make clause 5 inapplicable.

## MISSISSIPPI

<sup>1</sup> MS CODE § 91-8-303(6).

<sup>2</sup> *Id.* § 91-8-303(3).

<sup>3</sup> *Id.* § 91-8-303(1).

<sup>4</sup> *Id.* § 91-8-303(2).

<sup>5</sup> A grandparent may represent a grandchild not represented by a parent. *Id.* § 91-8-303(7). A designated representative may represent a beneficiary. *Id.* § 91-8-303(8).

<sup>6</sup> *Id.* § 91-8-304. Material conflict of interest exception.

<sup>7</sup> *Id.* § 91-8-304(b).

## MISSOURI

<sup>1</sup> A parent may represent and bind his or her minor or unborn child, provided there is no conflict of interest and no conservator, conservator ad litem or guardian for the child has been appointed. MO. REV. STAT. § 456.3-303(6).

<sup>2</sup> *Id.* § 456.3-303(5). An agent with the authority to act with respect to a particular question may represent and bind the principal, provided there is no conflict of interest.

<sup>3</sup> *Id.* § 456.3-303(3). A guardian may represent and bind the ward with respect to a certain question or dispute, provided there is no conflict of interest and a conservator or a conservator ad litem is not authorized to do so. A “guardian” is someone appointed by the court to have care and custody of a minor or incapacitated person, a “conservator” is someone appointed by the court to have care and custody of the estate of a minor or disabled person, and a “conservator ad litem” is a person appointed by the court under § 475.097, who for a limited time is entitled to the care and custody of the property of the protectee who is a minor, disabled or incapacitated person. *Id.* § 456.3-303(3).

<sup>4</sup> In § 456.3-302, entitled “Representation by Holder of General Testamentary Power of Appointment,” a holder of a testamentary power of appointment can represent all those subject to this power including: permissible appointees, takers in default, or otherwise. *Id.* § 456.3-302. In this section, “testamentary power of appointment” is defined as testamentary power of appointment exercisable without the consent of the creator of the power or person holding an adverse interest in favor of either: 1) a class of appointees that includes the holder, the holder’s estate, the holder’s creditors, or the creditors of the holder’s estate; or 2) all persons other than the holder, the holder’s estate, the holder’s creditors, or the creditors of the holder’s estate.

<sup>5</sup> *Id.* § 456.3-304.1. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well. Also, § 456.3-304.2 adds that a beneficiary who is not qualified may be represented and bound by a qualified beneficiary having a substantially identical interest to the extent there is no conflict of interest.

<sup>6</sup> There are limitations on use of a nonjudicial settlement agreement to terminate or modify a trust. For example, as to noncharitable trusts that became irrevocable after January 1, 2005, a nonjudicial settlement agreement may not be used to terminate or modify a trust “for the reasons that a court could terminate or modify a trust as set forth in § 456.4B-411” that authorizes the court, if all adult beneficiaries with capacity consent and the court finds that the interests of all nonconsenting beneficiaries will be adequately protected, to modify trust terms “to reduce or eliminate the interests of some beneficiaries and increase those of others, change the times or amounts of payments and distributions to beneficiaries, or provide for termination of the trust at a time earlier or later than that specified by its terms”; whereas for trusts that became irrevocable prior to January 1, 2005 the court may vary the trust terms “to reduce or eliminate the interests of some beneficiaries and increase those of others, to change the times or amounts of payments and distributions to beneficiaries, or to provide for termination of the trust at a time earlier or later than that specified” if all of the adult beneficiaries who are not disabled consent and the court finds “that such variation will benefit the disabled, minor, unborn and unascertained beneficiaries, vary the terms of a private trust so as to reduce or eliminate the interests of some beneficiaries and increase those of others, to change the times or amounts of payments and distributions to beneficiaries, or to provide for termination of the trust at a time earlier or later than that specified by the terms.” Therefore it appears this latter basis for trust modification and termination applies also to nonjudicial settlement agreements, because such agreements are valid to the extent they do not violate a material purpose of the trust and include terms and conditions that could properly be approved by the court. *Id.* § 456.1-111.3. Further, except for certain trusts established by court order, a noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries,

without court approval, even if the modification or termination is inconsistent with a material purpose of the trust. *Id.* § 456.4A -411.1.

<sup>7</sup> “Interested Persons” means the persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 456.1-111.1.

## **MONTANA**

<sup>1</sup> MONT. CODE ANN. § 72-1-303(2)(b)(ii). If there is no conflict of interest and no conservator of guardian has been appointed, a parent may represent his minor child.

<sup>2</sup> *Id.* § 72-1-303(2)(b)(i).

<sup>3</sup> *Id.* § 72-1-303(2)(b)(i)(E). Orders binding the holder of a presently exercisable general power of appointment bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

<sup>4</sup> *Id.* § 72-1-303(2)(c). An unborn or unascertained person who is not otherwise represented in bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

## **NEBRASKA**

<sup>1</sup> NEB. REV. STAT. § 30-3824(6). A parent may bind and represent his or her unborn or minor child if a conservator or guardian has not been appointed to the extent there is no conflict of interest.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 30-3824(3).

<sup>3</sup> *Id.* § 30-3824(2). To the extent there is no conflict of interest, a guardian may represent and bind the ward if a conservator has not been appointed. “Guardian” is defined in § 30-3803 as a person who has qualified as the guardian of a minor or incapacitated person and a “conservator” is defined in the same provision as a person appointed by the court to administer the estate of a minor or adult individual.

<sup>4</sup> The holder of a general testamentary power of appointment can represent permissible appointees, takers in default, or otherwise to the extent there is no conflict of interest. *Id.* § 30-3823.

<sup>5</sup> *Id.* § 30-3825. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> Unlike the UTC, a spendthrift provision is deemed to constitute a material purpose of the trust and therefore cannot be resolved in Nebraska by a nonjudicial settlement agreement. *Id.* § 30-3811(c).

<sup>7</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 30-3811(a).

## **NEVADA**

<sup>1</sup> This statute, §164.038, relates to virtual representation in trust matters . As to virtual representation in probate matters, see NEV. REV. STAT. § 155.140.

<sup>2</sup> *Id.* §164.038(5). If a trust has a minor or incapacitated beneficiary who may not be represented by another person pursuant to this section, the custodial parent. . .may represent the minor. . .in any judicial proceeding or nonjudicial matter pertaining to the trust. There must be no conflict of interest.

<sup>3</sup> *Id.* §164.038(5). If a trust has a minor or incapacitated beneficiary who may not be represented by another person pursuant to this section, the. . .guardian of the estate of the minor or incapacitated beneficiary may represent the minor or incapacitated beneficiary in any judicial proceeding or nonjudicial matter pertaining to the trust. There must be no conflict of interest.

<sup>4</sup> Pursuant to an amendment in 2019, a powerholder may represent a person who is a permissible appointee or taker in default. § 164.038(4).

<sup>5</sup> *Id.* §164.038(1)-(2). Unless otherwise represented by counsel, a minor, incapacitated person, unborn or person whose identity or location is unknown and not reasonably ascertainable may be represented by another person who has a substantially similar interest with respect to the question or dispute. *Id.* There must be no material conflict of interest. *Id.* Additionally, The representation of a minor or incapacitated beneficiary pursuant to subsection 4 is binding on an unborn person or a person who cannot be ascertained if (1) the unborn or unascertainable person has an interest substantially similar to the minor or incapacitated person, and (2) there is

no material conflict of interest between the unborn or unascertainable person and the minor or incapacitated person. *Id.* §164.038(5).

<sup>6</sup> *Id.* §164.038(3). A presumptive remainder beneficiary may represent and bind a beneficiary with a contingent remainder for the same purpose, in the same circumstance, and to the same extent as an ascertainable beneficiary may bind a minor, incapacitated person, unborn person, or person who cannot be ascertained.

<sup>7</sup> Other matters that may be addressed by a nonjudicial settlement agreement include: (1) the investment or use of trust assets; (2) the lending or borrowing of money; (3) the addition, deletion or modification of a term or condition of the trust; (4) the choice of law governing the construction of the trust instrument or administration of the trust, or both; (5) the granting of approval or authority for a trustee to make charitable gifts from a noncharitable trust; (6) the termination of the trust.

<sup>8</sup> “Indispensible parties” refers to all interested parties as defined in NRS 132.185. Whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. Section 132.185 was amended by SB484 (2015). “Interested person” now includes a settlor, if living, the trustee and a trustee remover. Note, however, that the necessary parties do not need to affirmatively consent to the settlement agreement. The trustee may give a notice of proposed action to the beneficiaries under Section 164.725, in which case the beneficiary will be deemed to have consented if the beneficiary fails to object.

#### **NEW HAMPSHIRE**

<sup>1</sup> N.H. REV. STAT. ANN. § 564-B:3-303(7). A parent may represent and bind his or her minor, unborn or incapacitated child if no guardian of the estate or guardian of the person has been appointed, and a person may represent a grandchild or more remote direct descendant if no guardian of the estate or guardian of the person has been appointed for the descendant.

<sup>2</sup> *Id.* § 564-B:3-303(4). An agent with the authority to act with respect to a particular question may represent and bind the principal.

<sup>3</sup> Section 564-B:3-303(1) allows a conservator to bind the estate the conservator controls and Section 564-B:3-303(2) allows a guardian of the estate to bind the estate the guardian controls. A “guardian of the estate,” defined in § 564-B:1-103(6)(a), is a person appointed by the court to administer the estate of a minor or incapacitated person. A conservator is a person appointed to manage a competent individual’s financial affairs (because that individual requests the appointment based upon the belief that he or she is unable to manage his or her own affairs). *See* § 564-B:1-103(4). A guardian of the person may represent and bind the ward if a guardian of the estate has not been appointed. *Id.* § 564-B:3-303(3). A “guardian of the person,” defined in § 564-B:1-103(6)(b), is a person appointed by the court to make decisions regarding the support, care, and education of a minor or incapacitated person.

<sup>4</sup> The holder of a general testamentary power of appointment can represent all those subject to this power to the extent there is no conflict of interest. The persons subject to the power of representation under this provision include “permissible appointees, takers in default, or otherwise.” *Id.* § 564-B:3-302.

<sup>5</sup> *Id.* § 564-B:3-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> *Id.* § 564-B:1-111. The matters listed in this section may be resolved “without limitation.”

<sup>7</sup> The New Hampshire statutes adds matters involving termination or modification of a trust to the nonexclusive list of matters that may be resolved by a nonjudicial settlement agreement. *Id.* § 564-B:1-111(d)(7).

<sup>8</sup> As originally enacted in 2004, the New Hampshire UTC included UTC § 411(c), under which a spendthrift provision presumptively was not a material purpose of the trust. In 2005, the statutory presumption was repealed. Laws of 2005, ch. 270, § 10.

<sup>9</sup> The New Hampshire definition of “interested persons” differs from the UTC definition in that it encompasses persons, other than the settlor, whose consent would be required to achieve a binding settlement in court. *Id.* § 564-B:1-111(a).

#### **NEW JERSEY**

<sup>1</sup> N.J. Stat. § 3B:31-15(f).

<sup>2</sup> *Id.* § 3B:31-15(c). An agent with authority to act with respect to the particular question or dispute may represent and bind the principal.

<sup>3</sup> *Id.* § 3B:31-15(a), (b). A guardian of the property may represent and bind the estate that the guardian controls and a guardian of the person may represent and bind the ward if no guardian of the property has been appointed.

<sup>4</sup> *Id.* § 3B:31-14. To the extent there is no conflict of interest with respect to the particular question or dispute, a holder of a general testamentary power of appointment may represent permissible appointees and takers in default. A holder of a general power of appointment in favor of the holder or the holder's estate shall be deemed to not have a conflict.

<sup>5</sup> *Id.* § 3B:31-16.

<sup>6</sup> *Id.* This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that "substantially identical interests" include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>7</sup> *Id.* § 3B:31-11(b).

<sup>8</sup> A nonjudicial settlement agreement may not be used to produce a result contrary to Title 3B, including terminating or modifying a trust in an impermissible manner.

<sup>9</sup> *Id.* § 3B:31-11(c).

<sup>10</sup> *Id.* § 3B:31-27(c).

<sup>11</sup> "Interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 3B:31-11(a).

## **NEW MEXICO**

<sup>1</sup> N.M. STAT. ANN. § 46A-3-303(F). A parent may bind and represent his or her unborn or minor child if a conservator or guardian has not been appointed to the extent there is no conflict of interest.

<sup>2</sup> An agent with the authority to act with respect to a particular question or dispute may represent and bind the principal. *Id.* § 46A-3-303(C).

<sup>3</sup> A guardian may represent and bind the protected person if a conservator has not been appointed. *Id.* § 46A-3-303(B). "Guardian" is defined as a person appointed by the court to make decisions about the support, care, education, health and welfare of a minor or incapacitated person; a "conservator" is defined as a person appointed to administer the estate of a minor or adult individual. *Id.* § 46A-1-103.

<sup>4</sup> The holder of a general testamentary power of appointment can represent all those subject to this power to the extent there is no conflict of interest. The persons subject to the power of representation under this provision include "permissible appointees, takers in default, or otherwise." *Id.* § 46A-3-302.

<sup>5</sup> *Id.* § 46A-3-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that "substantially identical interests" include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 46A-1-111(A).

## **NEW YORK**

<sup>1</sup> N.Y. Surr. Ct. Proc. Act § 315. The holder of any power of appointment may represent all potential appointees and the holder of a general power of appointment may represent all potential appointees and takers in default.

<sup>2</sup> If the instrument provides, a party to the proceeding with the same interest as a person under disability can represent that person. SCPA § 315(5). "Person under disability" is defined as: "Any person who is (a) an infant, (b) an incompetent, (c) an incapacitated person, (d) unknown or whose whereabouts are unknown or (e) confined as a prisoner who fails to appear under circumstances which the court finds are due to confinement in a penal institution." SCPA § 103(40). "Infant" includes any person under the age of eighteen years, and in limited circumstances, under the age of 21 years. SCPA § 103(27). "Incompetent" means any person judicially declared incompetent to manage his affairs. SCPA § 103(26). "Incapacitated person" means any "person who for any cause is incapable adequately to protect his or her rights, including a person for whom a guardian has been appointed pursuant to article 81 of the mental hygiene law." SCPA § 103(25).

<sup>3</sup> SCPA § 315(a)(iii). Unborn or unascertained persons do not need to be made parties if there is someone with their same interests.

<sup>4</sup> It is not necessary to serve an unborn or unascertained individual, as long as there is someone to represent them who has the "same" interest. If there is no one with the same interest as the unborn or unascertained individuals, the statute provides for the appointment of a guardian ad litem. SCPA § 315(2)(a)(iii).

<sup>5</sup> Living members of a class may represent future members of the class when class membership is based on a future contingency. SCPA § 315(2)(a)(i). Also, under SCPA § 315(3), successive contingent interests may be represented by the first contingent interest holder.

<sup>6</sup> While the New York legislation does not refer to “interested persons” like the UTC, the persons identified as needing to participate in order to validate a nonjudicial settlement agreement are substantively similar. SCPA § 315(8).

<sup>7</sup> Section 315 (8) of the SCPA discusses the settlement of accounts of fiduciaries. Section 7703 of the Civil Practice Law and Rules provides:

The provisions as to joinder and representation of persons interested in estates as provided in the surrogate’s court procedure act shall govern joinder and representation of persons interested in express trusts. For these purposes, the term “will” used in the surrogate’s court procedure act shall be construed to mean the instrument creating the trust.

#### **NORTH CAROLINA**

<sup>1</sup> N.C. GEN. STAT. § 36C-3-303(7). A person may represent his or her unborn issue. Under § 36C-3-303(6), a parent may represent and bind the parent’s minor child if a general guardian or guardian of the child’s estate has not been appointed. If a disagreement arises between parents seeking to represent the same minor child, then the statute provides a method to determine who will represent the child. First, the parent who is the beneficiary of the trust that is the subject of the representation is entitled to represent the minor child. If no parent is a beneficiary then the parent who is a lineal descendant of the settlor is entitled to represent the child. If no parent is a lineal descendant then a guardian ad litem will be appointed to represent the child.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 36C-3-303(3).

<sup>3</sup> A guardian of the estate may represent and bind the estate, but the section allowing a guardian to represent and bind the ward was repealed. 2007 N.C. Sess. Laws 106, s. 11.

<sup>4</sup> The holder(s) of either the power of revocation or a presently exercisable general power of appointment represent other persons to the extent that their interests as either permissible appointees, takers in default or otherwise are subject to the power. Also, to the extent that there is no conflict of interest, the holder of a general testamentary power of appointment may represent and bind those persons whose interests as either permissible appointees, takers in default or otherwise are subject to the power. N.C. GEN. STAT. § 36C-3-302.

<sup>5</sup> *Id.* § 36C-3-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> Any matter not expressly listed in the statute is excluded from those matters that may be settled by a nonjudicial settlement agreement.

<sup>7</sup> The persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. N.C. GEN. STAT. 36C-1-111(a).

#### **NORTH DAKOTA**

<sup>1</sup> N.D. CENT. CODE § 59-11-03(6). A parent may represent and bind the parent’s minor child if a conservator or guardian for the child has not been appointed. If a disagreement arises between parents seeking to represent the same minor child, then the statute provides a method to determine who will represent the child. First, the parent who is the beneficiary of the trust that is the subject of the representation is entitled to represent the minor child. If both parents are beneficiaries or neither parent is a beneficiary, then the parent who is a lineal descendant of the settlor is entitled to represent the child. If no parent is a lineal descendant, then a guardian ad litem will be appointed to represent the child. A parent may bind and represent his or her unborn child. *Id.* § 59-11-03(7).

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 59-11-03(3).

<sup>3</sup> *Id.* § 59-11-03(2). A guardian may represent and bind the ward if a conservator has not been appointed, to the extent of the power conferred on the guardian by a court order. “Guardian” is defined as a person appointed by the court to be the guardian of a minor or incapacitated person pursuant to testamentary or court appointment, and a “conservator” is a person appointed by the court to administer the estate of a protected person. *Id.* § 30.1-01-06.



<sup>4</sup> The holder of a presently exercisable general power of appointment, which includes a testamentary general power of appointment having no conditions precedent to its exercise beyond the death of the holder, the validity of the holder's last will and testament, and the inclusion of a provision in the will granting the power, may represent and bind persons whose interests are subject to the power as permissible appointees, takers in default, or otherwise. *Id.* § 59-11-02.

<sup>5</sup> *Id.* § 59-11-04 is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that "substantially identical interests" include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> Two matters are added to the list of those that may be solved by a nonjudicial settlement agreement: 1) the extent or waiver of bond of a trustee; and 2) the criteria for distribution to a beneficiary where the trustee is given discretion.

<sup>7</sup> A spendthrift provision is presumed to constitute a material purpose of the trust and therefore a dispute involving this provision cannot be resolved by a nonjudicial settlement agreement. N.D. CENT. CODE § 59-09-11(3)-(4).

<sup>8</sup> "Interested persons" refers both to the trustee and the persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 59-09-11(1).

## **OHIO**

<sup>1</sup> OHIO REV. CODE ANN. § 5803.03(F). A parent may bind and represent his or her unborn or minor child if a guardian of the estate or guardian of the person has not been appointed to the extent there is no conflict of interest. If a minor or unborn child is not represented by a parent, then he or she may be represented pursuant to § 5803.04.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 5803.03(C).

<sup>3</sup> *Id.* § 5803.03(A)-(B). A guardian of the estate may represent his ward, and if there is no guardian of the estate, a guardian of the person may represent the ward.

<sup>4</sup> The holder of a general testamentary power of appointment can represent all those subject to this power to the extent there is no conflict of interest. The persons subject to the power of representation include "permissible appointees, takers in default, or otherwise." *Id.* § 5803.02. The provision also distinguishes between those with a general testamentary power and a presently exercisable general power of appointment, noting that the holders of a presently exercisable general power are governed by a separate provision.

<sup>5</sup> *Id.* § 5803.04. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that "substantially identical interests" include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> *Id.* § 5801.10. This section is somewhat similar to the UTC section concerning nonjudicial settlement agreements but uses different language and is much more complex. Parties may enter into written agreements with respect to any matter concerning the construction, administration or distribution of the trust, the investment of income or principal held by the trustee, or other matters. Therefore, while many of the categories in this section are not explicitly named as they are in the UTC, they may still be covered by this provision. However, the agreement cannot effect a termination of a trust before the date specified in the trust, or change the interests of the beneficiaries in the trust except as specified in subsection (C).

Under § 5801.10 (C), listed matters that may be settled under this provision include but are not limited to: 1) determining classes of creditors, beneficiaries, heirs, next of kin, or other persons; 2) resolving disputes arising out of the administration or distribution under the terms of the trust, including disputes over the construction of the language of the trust instrument or other writings that affect the terms; 3) granting to the trustee necessary or desirable powers not granted in the terms of the trust or otherwise provided by law, to the extent that those powers either are not inconsistent with the provisions or purposes of the trust, or if inconsistent, then are necessary for the administration of the trust; 4) modifying the terms of the trust as long as it is not inconsistent with a dominant purpose of the trust; 5) modifying the terms of the trust to qualify it as a gift for the charitable estate or gift tax deduction, including the addition of IRS mandate governing instrument requirements for a charitable remainder trust; 6) modifying the terms of the trust required to qualify the gift for the estate tax marital deduction to noncitizen spouses, including the addition of IRS mandated governing instrument requirements for a qualified domestic trust where all interested parties have submitted written agreements to the proposed changes or written a disclaimer of interest; and 7) resolving any other matter that arises under Chapters 5801 – 5811.

<sup>7</sup> In a departure from the UTC, the Ohio Code delineates exactly which parties need to participate in a private settlement agreement. The following parties or their representatives must be present: 1) the settlor if living and if no adverse income or transfer tax results would arise from his or her participation; 2) all beneficiaries; 3) all currently serving trustees; and 4) creditors if their interests are affected by the agreement. The exception to the rule that all parties listed above must be present is that only the settlor and any trustee are required to be parties to an amendment of a revocable trust. *Id.* § 5801.10(B).

<sup>8</sup> The nonjudicial settlement provision does not apply to certain charitable trusts specified in *Id.* § 5801.10(M).

## OREGON

<sup>1</sup> A parent may represent and bind his or her minor or unborn child if a conservator for the child has not been appointed. OR. REV. STAT. § 130.110(5).

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 130.110(2).

<sup>3</sup> A conservator may represent and bind the estate, but the section allowing a guardian to represent and bind the ward is omitted from the Oregon statute. *Id.* § 130.110(1).

<sup>4</sup> The holder of a testamentary power of appointment can represent all potential appointees to the extent there is no conflict of interest. The persons subject to the power of representation under this provision are permissible appointees, takers in default, or persons subject for any other reason. While Oregon deletes the word “general” in the section, no other language is changed and the phrase presumably has the same meaning as the UTC’s “general testamentary power of appointment.” *Id.* § 130.105.

<sup>5</sup> *Id.* § 130.115. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> Two matters are added to the nonexclusive list of matters that may be solved by a nonjudicial settlement agreement in Oregon: 1) determining classes of creditors, beneficiaries, heirs, next of kin or other persons, and 2) resolving disputes arising out of the administration or distribution of the trust.

<sup>7</sup> “Interested persons” is defined differently from the UTC as any settlor of a trust who is living, beneficiaries of the trust who have an interest in the subject of the agreement, any acting trustee, and the Attorney General if the trust is a charitable trust subject to the powers of the state or the Attorney General under §§ 128.610 - 128.750.

## PENNSYLVANIA

<sup>1</sup> An individual represents his or her minor and unborn descendants unless a guardian has been appointed to represent them. 20 PA. CONS. STAT. § 7723(9).

<sup>2</sup> An agent under general power of attorney represents the agent’s principal and an agent under a limited power of attorney represents the principal within the scope of the agent’s authority. *Id.* § 7723(2).

<sup>3</sup> A plenary guardian may represent persons whose estate the guardian supervises and a limited guardian may represent persons whose estate he or she supervises within the scope of his or her court granted authority. *Id.* § 7723(1). “Guardian” is defined in § 7703 as a person other than a guardian ad litem appointed by a court to make decisions regarding the property of an individual. Although not specified, that individual can be a minor or an incapacitated adult.

<sup>4</sup> Without regard to conflict of interest concerns, holder(s) of a presently exercisable or testamentary power of appointment may represent all potential appointees and all takers in default of exercise of the power of appointment if they can appoint to: 1) the holder’s estate, the holder’s creditors, or the creditors of the holder’s estate; or 2) anyone other than the holder’s estate, the holder’s creditors and the creditors of the holder’s estate. *Id.* § 7723(7). A sole holder or co-holder of a presently exercisable or testamentary power of appointment that does not fit into one of the categories above may, absent a conflict with respect to the matter at issue, represent all potential appointees and all takers in default of exercise of the power who are also potential appointees. *Id.* § 7723(8).

<sup>5</sup> *Id.* § 7723(6).

<sup>6</sup> *Id.* § 7723.

<sup>7</sup> *Id.* § 7724. This section provides “if . . . the court determines that the representation . . . is or might be inadequate, the court may appoint a guardian ad litem or trustee ad litem. . . .”

<sup>8</sup> *Id.* § 7723(4)-(5). This section codifies the vertical representation concept implicit in UTC § 304.

<sup>9</sup> Pennsylvania adds to the nonexclusive list of matters that may be resolved by a nonjudicial agreement as long as it does not violate a material purpose of the trust. The additions are: 1) the grant to a trustee of any necessary or desirable power; 2) the exercise or nonexercise of any power by a trustee; 3) questions relating to the property or an interest in property held as part of a trust; 4) an action or proposed action by or against a trust or trustee; 5) the modification or termination of a trust; 6) an investment decision, policy, plan or program of a trustee; and 7) any other matter concerning the administration of a trust. *Id.* § 7710.1(d).

<sup>10</sup> Note that the virtual representation statute does not address this issue, but § 7740.1 (Modification or termination of non-charitable irrevocable trust by consent) provides that a spendthrift provision is in fact presumed to be a material purpose of the trust. Section 7740.1 deals with both nonjudicial and judicial modifications and terminations.

<sup>11</sup> Rather than stating that “interested persons” may enter into a binding nonjudicial settlement agreement, the Pennsylvania Code states that all beneficiaries and trustees of a trust may do so. *Id.* § 7710.1(b).

## **RHODE ISLAND**

<sup>1</sup> R.I. GEN. LAWS § 33-22-17. In any action involving wills, estates, trusts, or fiduciaries in the probate court, a minor, an incapacitated person or an unborn or unascertained person whose identity and location is unknown and not reasonably ascertainable, unless otherwise represented, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that: (1) the person's interest is adequately represented, and (2) there is no conflict of interest between the representative and the person represented. R.I. GEN. LAWS § 18-4-30 Representation by person having substantially identical interest. In any action involving wills, estates, trusts or fiduciaries in the Probate Court or the Superior Court, a minor, an incapacitated person or an unborn or unascertained person whose identity and location is unknown and not reasonably ascertainable, unless otherwise represented, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that: (1) The person's interest is adequately represented; and (2) there is no conflict of interest between the representative and the person represented. See also R.I. GEN. LAWS § 33-22-17 Representation of unborn, unascertained, and incompetent persons.

## **SOUTH CAROLINA**

<sup>1</sup> S.C. CODE ANN. § 62-7-303(a)(6). A parent may represent and bind his or her minor or unborn child if a conservator or guardian has not been appointed. The provision which grants this power orders the beneficiary representatives in order of the priority each representative has relative to the others. The order is as follows: 1) conservator 2) guardian 3) agent 4) trustee 5) personal representative of a decedent's estate and 6) parent. § 62-7-303(b).

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 62-7-303(a)(2).

<sup>3</sup> *Id.* § 62-7-303(2). A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed. A “guardian” is defined in § 62-7-103 as a person appointed to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual; a “conservator” is defined in the same provision as a court appointee to administer the estate of the protected person.

<sup>4</sup> The holder of a presently exercisable general power of appointment, which includes a testamentary general power of appointment may represent and bind persons whose interests are subject to the power. Those persons are: permissible appointees, takers in default and those otherwise subject to the power. *Id.* § 62-7-302.

<sup>5</sup> Providing that the person represented is adequately represented by the beneficiary representative, a representative may represent a minor, incapacitated, unborn individual or individual whose identity or location is unknown and not reasonably ascertainable. *Id.* § 62-7-304.

<sup>6</sup> *Id.* § 62-7-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>7</sup> All matters not listed are excluded from being settled by nonjudicial settlement agreements. *Id.* § 62-7-111.

<sup>8</sup> “Interested persons” is defined as anyone whose consent would be required to achieve a binding settlement were the settlement to be approved by the court. *Id.* § 62-7-111(a).

## **SOUTH DAKOTA**

<sup>1</sup> S.D. CODIFIED LAWS § 55-3-35. This section relates to service of persons under disabilities. If the person under a disability is a minor, and no conservator or guardian has been appointed, then service can be upon the natural parents. If there are no natural parents alive, then service may be upon the adoptive parents.

<sup>2</sup> *Id.* § 55-3-35. This section relates to service of persons under disabilities. It states that if the person under a disability is an adult and no conservator has been appointed, notice can be served on an agent under durable power of attorney.

<sup>3</sup> *Id.* § 55-3-35. This section relates to service of persons under disabilities. If the person under a disability is a minor and no conservator has been appointed, notice shall be served on a guardian of the minor.

<sup>4</sup> *Id.* § 55-3-35. This section relates to service of persons under disabilities. If a person under a disability is an adult and no conservator has been appointed, notice can be served on a guardian of the adult person.

<sup>5</sup> *Id.* § 55-3-35. This section relates to service of persons under disabilities. For both minors and adults under disabilities, it allows for service on a conservator, and if no conservator has been appointed, then on a guardian of the individual.

<sup>6</sup> *Id.* § 55-3-32. If a party to the proceeding has a power of appointment, it is not necessary to serve the potential appointees and, if it is a general power of appointment, it is not necessary to serve the takers in default of the exercise thereof.

<sup>7</sup> *Id.* § 55-3-32(3). It is not necessary to serve an unborn or unascertained individual, as long as there is someone to represent them who has the “same interests.” If there is no one with the same interests as the unborn or unascertained individual, the statutes provides for the appointment of a guardian ad litem.

<sup>8</sup> *Id.* § 55-3-45 allows for an accounting to be finalized despite the absence of approval by a beneficiary in certain circumstances. The trust must not be subject to court supervision and there must be no objection to the accounting within 180 days after a copy of the trustee’s accounting was mailed, postage prepaid, to the last known address of the beneficiary.

<sup>9</sup> Trust may be modified or terminated upon the consent of all beneficiaries if continuance on existing terms is not necessary to carry out a material purpose. A trust may be modified or terminated without regard to material purpose if the settlor consents. *Id.* § 55-3-24.

## **TENNESSEE**

<sup>1</sup> TENN. CODE. ANN. § 35-15-303(6). A person may bind and represent his or her unborn or minor descendant if a guardian for the descendant has not been appointed.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 35-15-303(3).

<sup>3</sup> A guardian may represent and bind the ward if a conservator for the ward’s estate has not been appointed. *Id.* § 35-15-303(2). “Guardian” is defined in § 34-1-101 as a person appointed by the court to provide partial or full supervision, protection and assistance to the person or property of a minor; “conservator” is defined in the same provision as a person appointed by the court to provide supervision, protection and assistance to the person or property of a disabled person. Because “conservator” only applies to disabled persons and “guardian” only applies to minors, this provision is unclear as to whether in this subchapter, “guardian” also applies to an incapacitated adult.

<sup>4</sup> *Id.* § 35-15-302. The holder of a general testamentary power of appointment may bind and represent those whose interests are subject to his or her power which include permissible appointees, takers in default or otherwise.

<sup>5</sup> *Id.* § 35-15-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> The Tennessee Code adds the following to the nonexclusive list of matters that may be resolved by a nonjudicial settlement agreement: 1) the extent or waiver of bond of a trustee; 2) the governing law of the trust; and 3) the criteria for distribution to a beneficiary where the trustee is given discretion.

<sup>7</sup> In a departure from the UTC, Tennessee specifies that qualified beneficiaries and trustees of a trust may enter into a binding nonjudicial settlement agreement. TENN. CODE. ANN. § 35-15-111(a).

## TEXAS

<sup>1</sup> TEX. PROP. CODE ANN. § 115.013(c)(3). If there is no conflict of interest and no guardian of the estate or guardian ad litem has been appointed, a parent may represent his minor child as guardian ad litem or as next friend. TEX. PROP. CODE ANN. § 114.032(c) parent can represent minor child if no conflict of interest.

<sup>2</sup> An agent under a power of attorney has the authority to represent the principal in litigation and in settlement agreements if they have signed the statutory form or another power of attorney that includes the necessary language. *Id.* § 500.

<sup>3</sup> *Id.* § 115.013(c)(2)(A). To the extent there is no conflict of interest, an order binding a guardian of the estate or a guardian ad litem binds the ward.

<sup>4</sup> *Id.* § 115.013(c)(2)(A). While the statute does not expressly state who a guardian can represent, it does use the terms guardian ad litem and guardian of the estate. There are no definitions of guardian included in the Property Code. Under the Probate Code, however, a guardian includes guardians of incapacitated persons. Tex. Prob. Code Ann. § 601(11). Minors are included in the definition of incapacitated persons. *Id.* at § 601(14). Therefore, it is probable that a guardian can represent both minors and an incapacitated adults.

<sup>5</sup> *Id.* § 115.013(c)(1). An order binding the holder of a presently exercisable general power of appointment binds other persons to the extent their interests, as objects, takers in default, or otherwise are subject to the power.

<sup>6</sup> *Id.* § 115.013(c)(4). An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding. See also *Id.* § 114.032(b).

## UTAH

<sup>1</sup> UTAH CODE ANN. § 75-7-303(6) a parent may bind and represent his or her unborn or minor child if a guardian for the child has not been appointed.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 75-7-303(3).

<sup>3</sup> A guardian may represent and bind the ward if a conservator for the ward's estate has not been appointed. *Id.* § 75-7-303(2). "Guardian" is defined in § 75-1-201 as a person qualified by either testamentary, court appointment or written instrument to be the guardian of a minor or incapacitated person, and "conservator" is defined in the same provision as a person appointed by the court to manage the estate of a protected person.

<sup>4</sup> *Id.* § 75-7-302. The holder of a general testamentary power of appointment may bind and represent those whose interests are subject to his or her power which include permissible appointees, takers in default or otherwise. This representation is limited to matters in which there are no conflicts of interest.

<sup>5</sup> *Id.* § 75-7-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that "substantially identical interests" include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> "Interested persons" is defined in the same way as under the UTC, as the persons whose consent would be required to achieve a binding settlement if the settlement were to be approved by a court. *Id.* § 75-7-110(2).

## VERMONT

<sup>1</sup> VT. STAT. ANN. tit. 14A, § 303(6). To the extent there is no conflict of interest with respect to a particular question or dispute, a parent may represent and bind the parent's minor or unborn child, if a guardian for the child has not been appointed.

<sup>2</sup> *Id.* tit. 14A, § 303(3). To the extent there is no conflict of interest with respect to a particular question or dispute, an agent having authority to act with respect to the particular question or dispute may represent and bind the principal.

<sup>3</sup> *Id.* tit. 14A, § 303(2). To the extent there is no conflict of interest with respect to a particular question or dispute, a guardian of the person may represent and bind the ward if a guardian of the ward's estate has not been appointed.

<sup>4</sup> *Id.* tit. 14A, § 303(1),(2). A guardian of the person means a person appointed by the probate court to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. *Id.* at § 103.

<sup>5</sup> *Id.* tit. 14A, § 302. To the extent there is no conflict of interest, the holder of a general testamentary power of appointment may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

<sup>6</sup> *Id.* tit. 14A, § 304. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest with respect to the particular question.

<sup>7</sup> *Id.* tit. 14A, § 111. This section is based on the UTC. UTC § 304 makes clear in its comments to the provision that “substantially identical interests” include vertical representation. Therefore, it can be assumed that the same applies to the Vermont statute as well, even though it is not explicitly stated.

<sup>8</sup> *Id.* tit. 14A, § 111(a). Interested persons means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the probate court.

## **VIRGINIA**

<sup>1</sup> VA. CODE ANN. § 64.2-716(6). A parent may bind and represent his or her unborn or minor child if a guardian for the child or guardian for the child’s estate has not been appointed. Also, under Va. Code § 64.2-716(7), if a minor or unborn child has no representative under subparts (1)-(6) of § 64.2-716, then a grandparent or other remote ancestor may represent and bind that minor or unborn child. *Id.* § 64.2-716(7).

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 64.2-716(3).

<sup>3</sup> A guardian may represent and bind the ward if a conservator or guardian of the ward’s estate has not been appointed. *Id.* § 64.2-716(2). “Guardian” is defined in § 64.2-701 as the person appointed by the court to make decisions regarding the support, care, education, health and welfare of a minor or adult individual, and “conservator” is defined in the same provision as a person appointed to manage the estate of an adult individual, and “guardian of the estate” is defined as a court appointed person to administer the estate of a minor. *Id.* § 64.2-701.

<sup>4</sup> *Id.* § 64.2-715. The holder of a general testamentary power of appointment may bind and represent those whose interests are subject to his or her power to the extent there is no conflict of interest. *Id.* Those subject include: permissible appointees, takers in default or otherwise. *Id.*

<sup>5</sup> *Id.* § 64.2-717. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> “Interested persons” is defined in the same way as under the UTC, as the persons whose consent would be required to achieve a binding settlement if the settlement was approved by a court. *Id.* §64.2-709.

## **WASHINGTON**

<sup>1</sup> As amended by S.B. No. 5344, July 28, 2013.

<sup>2</sup> A parent may represent and bind the parent’s minor or unborn child or children if a guardian for the child or children has not been appointed. WASH. REV. CODE § 11.96A.120(4)(f).

<sup>3</sup> An agent having authority to act with respect to the particular question or dispute may represent and bind the principal. WASH. REV. CODE § 11.96A.120(4)(c).

<sup>4</sup> A guardian may represent and bind the estate that the guardian controls. *Id.* § 11.96A.120(4)(a). A guardian of the person may represent and bind the incapacitated person if a guardian of the incapacitated person’s estate has not been appointed. *Id.* § 11.96A.120(4)(b). A guardian is appointed for “the persons and/or estates of incapacitated persons.” *Id.* § 11.88.010(1).

<sup>5</sup> “To the extent there is no conflict of interest between the holder of the power of appointment and the person represented with respect to the particular question or dispute, the holder of a lifetime or testamentary power of appointment may virtually represent and bind persons who are permissible appointees or takers in default (but only to the extent that they are permissible appointees in the case of a limited power of appointment) under the power....” *Id.* § 11.96A.120(9).

<sup>6</sup> “Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented with regard to the particular question or dispute.” *Id.* § 11.96A.120(5).

<sup>7</sup> *Id.* § 11.96A.120(5). Subsection (5) is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well.

<sup>8</sup> *Id.* § 11.96A.220. This statute provides that § 11.96A.210-250 shall be applicable to the resolution of any matter, with certain exceptions. If all parties agree to a resolution of any of applicable matter, they must reduce it to a signed written agreement, which will then be binding and conclusive on all persons interested in the estate or trust. “Matter” is defined in § 11.96A.030 (as amended in 2009), which provides the matters that may be resolved by nonjudicial settlement.

<sup>9</sup> *Id.* § 11.96A.030 (amended 2009). The other matters that may be decided by nonjudicial agreement are (1) the determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death, (2) certain issues relating to nonprobate trusts, and (3) the amendment, reformation, or conformation of a will or a trust instrument to comply with statutes and regulations of the United States internal revenue service.

<sup>10</sup> *Id.* § 11.96A.030 (amended 2009). “Persons interested in the estate or trust” means the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust.

## **WEST VIRGINIA**

<sup>1</sup> Under W. VA. CODE ANN. §44D-3-303(5), a parent may represent and bind the parent’s minor or unborn child if a conservator or guardian for the child has not been appointed. Additionally, West Virginia goes beyond the UTC and adds §44D-3-303(6), which allows a “grandparent or more remote ancestor” to represent and bind a minor or unborn person if the person is not already represented under the Section.

<sup>2</sup> An agent having authority to act with respect to the particular question or dispute may represent and bind the principal. *Id.* §44D-3-303(2).

<sup>3</sup> A conservator or guardian of the protected person may represent and bind the estate that the fiduciary controls. *Id.* §44D-3-303(1). “Conservator” means a person appointed by the court to administer the estate and financial affairs of a protected person. *Id.* §44D-1-103(e). “Guardian” means a person appointed by the court who is responsible for the personal affairs of a protected person or a parent to make decisions regarding the support, care, education, health and welfare of a minor. *Id.* §44D-1-103(j).

<sup>4</sup> The holder of a general testamentary power of appointment may represent and bind permissible appointees, takers in default, or those otherwise subject to the power to the extent that there is no conflict of interest between the holder of the power and the persons represented. *Id.* §44D-3-302.

<sup>5</sup> *Id.* §44D-3-304. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well, even though it is not explicit in the statute.

<sup>6</sup> The West Virginia Statute expressly includes seven additional matters that may be resolved by a non judicial settlement agreement. These are: An investment decision, policy, plan or program of the trustee; The grant to a trustee of any necessary or desirable power; The exercise or nonexercise of any power by a trustee; An action or proposed action by or against a trust or trustee; The modification or termination of a trust; and Any other matter concerning the administration of a trust. W. VA. CODE ANN. § 44D-1-111(b)(7)-(13).

<sup>7</sup> Although the Statute does not expressly address whether the trustee may be removed by agreement of the beneficiaries, § 44D-1-111(b)(11) states that an action “against a trustee” may be resolved by a nonjudicial settlement agreement. *Id.* §44D-1-111(b)(11) This likely contemplates an action for removal of a trustee.

<sup>8</sup> As in the UTC, this Statute defines “interested persons” as persons whose consent would be required to achieve a binding settlement were the settlement to be approved by the court. *Id.* §44D-1-111(a).

## **WISCONSIN**

<sup>1</sup> WIS. STAT. § 701.15(1). The statute governing probate court contains no language regarding power of appointment. The statute governing trust proceedings in circuit court, however, states that the holder of a general power of appointment may represent any or all persons whose interests are subject to such power.

<sup>2</sup> *Id.* §§ 701.15(2) & 879.23(5). While both the probate court and circuit court statutes include all of the other categories of individuals (incapacitated, unascertainable, and unborn) on this list, only the probate court expressly mentions minors as being able to be virtually represented by a person with a substantially identical interest.

<sup>3</sup> *Id.* §§ 701.15(2) & 879.23(5). The circuit court provision states that “the court may dispense with or terminate the appointment of a guardian ad litem for [any person who is legally incapacitated, unascertained, or unborn] if there is a legally competent person who is a party to the proceeding and has a substantially identical interest in it.” Likewise, the probate court provision states that “the court may dispense with or terminate the appointment of a guardian ad litem for an interested person who is a minor, an individual adjudicated incompetent, not in being, or presently unascertainable, if there is a living person, of full legal rights and capacity, who is a party to the proceeding and has a substantially identical interest in it.

<sup>4</sup> *Id.* §§ 701.15(2) & 879.23(5). Neither statute appears to have a conflict of interest provision relating to virtual representation.

<sup>5</sup> Section 701.0111 also includes the following matters:

(h) The criteria for distribution to a beneficiary where the trustee is given discretion.

(i) The resolution of disputes arising out of the administration or distribution of the trust.

(j) An investment action.

(k) The appointment of and powers granted to a directing party or a trust protector.

(l) Direction to a directing party or to a trust protector to perform or refrain from performing a particular act or the grant of a power to a directing party or trust protector.

<sup>6</sup> “Interested Person” means a person whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

## WYOMING

<sup>1</sup> WYO. STAT. ANN. § 4-10-303(a)(vi). A parent with primary legal custody may represent and bind his or her incapacitated or minor child if a legal representative has not been appointed to the extent there is no conflict of interest. This provision also provides that a parent may represent and bind his or her unborn children and the unborn descendants of each child.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 4-10-303(a)(iii).

<sup>3</sup> If a conservator of the ward’s estate has been appointed, the conservator may represent and bind the ward’s estate. *Id.* § 4-10-3-03(a)(i). A guardian may represent and bind the ward if a conservator of the ward’s estate has not been appointed. *Id.* § 4-10-303(a)(ii). “Guardian” is defined in § 3-1-101 as the person qualified by the court to exercise powers on behalf of a minor or incompetent person, and “conservator” is defined in the same provision as a person appointed by the court to have custody and control of the property of the ward.

<sup>4</sup> *Id.* § 4-10-302. The holder of a general testamentary power of appointment may bind and represent those whose interests are subject to his or her power. Those subject include: permissible appointees, takers in default or otherwise. Unlike the UTC, representation is not limited by instances where no conflict of interest exists.

<sup>5</sup> *Id.* § 4-10-304. This section is based on the UTC. Because UTC § 304 makes it clear in its comments to this provision that “substantially identical interests” include vertical representation, it can be assumed that the same applies here as well even though it is not explicit in the statute.

<sup>6</sup> Adding to the list of matters that can be solved by a nonjudicial agreement, Wyoming includes 1) an election to treat the trust as a qualified spendthrift under Article 5, and 2) modification of the trust in order to comply with § 4-10-510. *Id.* § 4-10-111.

<sup>7</sup> Unlike in the UTC, “interested persons” is defined as a qualified beneficiary, the settlor, if living, the trustee and the trust protector, if any. *Id.* § 4-10-111(a).

## UTC

<sup>1</sup> According to UNIF. TRUST CODE § 303(6), a parent may bind and represent his or her unborn or minor child if a guardian for the descendant has not been appointed.

<sup>2</sup> An agent with the authority to act with respect to a particular question may represent and bind the principal. *Id.* § 303(3).

<sup>3</sup> A guardian may represent and bind the ward if a conservator for the ward’s estate has not been appointed. *Id.* § 303(2). “Guardian” is defined in § 103 as a person appointed by the court to make decisions regarding the



support, care, education, health and welfare of a minor or adult, and “conservator” is defined in the same provision as a person appointed by the court to administer the estate of a minor or adult individual.

<sup>4</sup> *Id.* § 302. The holder of a general testamentary power of appointment may bind and represent those whose interests are subject to his or her power which include permissible appointees, takers in default or otherwise.

<sup>5</sup> *Id.* § 304. The comments to this section make clear that “substantially identical interests” include vertical representation.

<sup>6</sup> In the UTC, the term “interested persons” is defined as persons whose consent would be required to achieve a binding settlement were the settlement to be approved by the court.

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**APPENDIX II**

**TABLE OF STATE DECANTING STATUTES**

**February 1, 2020**

*Summaries of each state's decanting statute are available at [schiffhardin.com](http://schiffhardin.com) and [actec.org](http://actec.org).*

<b><u>State</u></b>	<b><u>Statutory Cite</u></b>	<b><u>Effective Date/Status</u></b>
Alabama	Ala. Code § 19-30-1 through 30	1/1/19
Alaska	Alaska Stat. §§ 13.36.157-13.36.159	9/15/98; amended 2006, 9/9/13
Arizona	Ariz. Rev. Stat. § 14-10819	9/30/09; amended 7/20/11, 8/3/18
California	Cal. Prob. Code § 19500 through 19530	1/1/19
Colorado	CRS 15-16-901, et seq.	8/10/2016
Delaware	12 Del. Code § 3528	6/30/03; amended 6/24/04, 6/27/06, 7/5/07, 7/6/09, 7/13/11, 8/6/13, 8/1/14, 8/1/15
Florida	Fla. Stat. § 736.04117	1/1/07; amended 3/19/18
Georgia	Ga. Code Ann. § 53-12-62 et. seq.	7/1/18
Illinois	760 Ill. Comp. Stat. 3/1201, et seq.	1/1/13; amended 7/27/15, 1/1/20
Indiana	Ind. Code 30-4-3-36	7/1/10; amended 7/1/14
Kentucky	Ky. Rev. Stat. § 386.175	7/11/13; amended 7/15/14
Michigan	Mich. Comp. Laws § 700.7820a Mich. Comp. Laws § 556.115a Mich. Comp. Laws § 700.7103 (definitions)	12/28/12

<u>State</u>	<u>Statutory Cite</u>	<u>Effective Date/Status</u>
Minnesota	Minnesota Statutes §502.851; part of SF 578	1/1/16
Missouri	Mo. Rev. Stat. § 456.4-419	8/28/11
Nevada	Nev. Rev. Stat. 163.556	10/1/09; amended 10/1/11, 10/1/17
New Hampshire	N.H. Rev. Stat. § 564-B:4-418	9/9/08; amended 7/1/14, 10/1/15; 7/18/17
New Mexico	N.M.S. 1978 § 46-12-101, et. seq.	1/1/2017
New York	N.Y. Est. Powers & Trusts § 10-6.6(b)-(s)	7/24/92; amended 8/17/11, 11/13/13, 7/22/14, 11/21/15
North Carolina	N.C. Gen. Stat. 36C-8-816.1	10/1/09, amended 7/20/10, 6/12/13, 10/1/15
North Dakota	ND Century Code § 59-16.1-1 through 17	8/1/17
Ohio	Ohio Rev. Code § 5808.18	3/22/12; amended 3/27/13
Rhode Island	R.I. Gen. Laws § 18-4-31.	6/23/12; amended 7/15/13
South Carolina	S.C. Code §62-7-816A	1/1/14
South Dakota	S.D. Codified Laws §§ 55-2-15 through 55-2-21	3/5/07; amended 2008, 2008, 2009, 2011, 3/2/12, 3/25/13, 2/15/17
Tennessee	Tenn. Code § 35-15-816(b)(27)	7/1/04; amended 7/1/13
Texas	Texas Prop Code §§112.071-112.087	9/1/13
Virginia	Va. Code § 64.2-779	7/1/12; amended 10/1/12, 3/27/14, 7/1/17
Wisconsin	Wisconsin Trust Code §701.0418	7/1/14

<u>State</u>	<u>Statutory Cite</u>	<u>Effective Date/Status</u>
Wyoming	W.S. 4-10-816(a)(xxviii)	7/1/13; amended 7/1/15, 7/1/17

APPENDIX III

**SAMPLE SUMMARIES OF DECANTING STATUTE**

(for other states see schiffhardin.com or actec.org)

**ILLINOIS**

**State Decanting Summary<sup>1</sup>**

<b>STATUTORY HISTORY</b>	
Statutory citation	3/1201 et seq.
Effective Date	1/1/13
Amendment Date(s)	7/27/15; 1/1/20
<b>ABILITY TO DECANT</b>	
1. Discretionary distribution authority required to decant?	<i>Expanded distributive discretion:</i> Yes, expanded discretion to distribute principal <sup>2</sup> <i>Limited distributive discretion:</i> Yes, power to distribute principal without expanded discretion <sup>3</sup>
2. Limitation on trustee who may decant?	No
<b>CHANGES PERMITTED</b>	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust <sup>4</sup>
4. May new trust eliminate beneficiary's withdrawal rights?	No <sup>4</sup>
5. Must new and old trust beneficiaries be identical?	<i>Expanded distributive discretion:</i> No <sup>5</sup> <i>Limited distributive discretion:</i> Yes <sup>6</sup>
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Expanded distributive discretion:</i> No <sup>7</sup> <i>Limited distributive discretion:</i> No <sup>8</sup>
7. May remainder beneficiaries' interests be accelerated?	No <sup>9</sup>
8. New and old trust require same distribution standard?	<i>Expanded distributive discretion:</i> No <sup>10</sup> <i>Limited distributive discretion:</i> Yes <sup>11</sup>
9. May trustee grant a power of appointment in new trust?	<i>Expanded distributive discretion:</i> Yes <sup>12</sup> <i>Limited distributive discretion:</i> Yes <sup>13</sup>
10. Must new trust grant identical power of appointment as old trust?	<i>Expanded distributive discretion:</i> No <sup>14</sup> <i>Limited distributive discretion:</i> Yes <sup>15</sup>
11. Supplemental needs trust exception?	Yes <sup>16</sup>
<b>TAX RESTRICTIONS</b>	
12. Marital deduction savings provision?	Yes <sup>17</sup>
13. Charitable deduction savings provision?	Yes <sup>18</sup>
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) <sup>19</sup> ; 2642(c) <sup>20</sup> ; Sub S <sup>21</sup> ; 401(a)(9) <sup>22</sup> ; Catch-all <sup>23</sup>

<b>16. Non-grantor trust to grantor trust conversion permitted?</b>	Yes <sup>24</sup>
<b>OTHER RESTRICTIONS</b>	
<b>17. Rule against perpetuities savings provision?</b>	Yes <sup>25</sup>
<b>18. May trustee increase trustee commission?</b>	Sometimes <sup>26</sup>
<b>19. Other restrictions?</b>	Decreasing trustee liability or eliminating trustee remover <sup>27</sup>
<b>NOTICE, CONSENT &amp; APPROVAL</b>	
<b>20. Notice to interested parties required prior to decanting?</b>	Yes <sup>28</sup>
<b>21. Is decanting prohibited if a beneficiary objects?</b>	No
<b>22. Court approval required to decant?</b>	No
<b>FIDUCIARY DUTIES</b>	
<b>23. Provision re: purposes for exercise or explicit fiduciary duty?</b>	Yes <sup>29</sup>
<b>24. Provision that trustee has no duty to consider decanting?</b>	Yes <sup>30</sup>
<b>25. Standard of review?</b>	No
<b>TRUSTS SUBJECT TO STATUTE</b>	
<b>26. Provision on trusts subject to statute?</b>	Yes <sup>31</sup>
<b>MISCELLANEOUS</b>	
<b>27. Other unique considerations?</b>	Reasonable reliance <sup>32</sup> ; Remedies provision <sup>33</sup> ; court involvement <sup>34</sup> ; charitable protections <sup>35</sup> ; subsequently discovered assets <sup>36</sup>

**ILLINOIS STATUTE  
760 ILCS 3/1201 et seq.**

**Section 1201**

*Article title.* This Article may be referred to as the Trust Decanting Law.

**Section 1202**

*Definitions.* In this Article:

- (1) “Appointive property” means the property or property interest subject to a power of appointment.
- (2) “Authorized fiduciary” means:
  - (A) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;
  - (B) a special fiduciary appointed under Section 1209; or

- (C) a special-needs fiduciary under Section 1213.
- (3) “Court” means the court in this State having jurisdiction in matters relating to trusts.
- (4) “Decanting power” or “the decanting power” means the power of an authorized fiduciary under this Article to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.
- (5) “Expanded distributive discretion” means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.
- (6) “First trust” means a trust over which an authorized fiduciary may exercise the decanting power.
- (7) “First-trust instrument” means the trust instrument for a first trust.
- (8) “Reasonably definite standard” means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of Section 674(b)(5)(A) of the Internal Revenue Code, as amended, and any applicable regulations.
- (9) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (10) “Second trust” means:
  - (A) a first trust after modification under this Article; or
  - (B) a trust to which a distribution of property from a first trust is or may be made under this Article.
- (11) “Second-trust instrument” means the trust instrument for a second trust.

### **Section 1203**

#### *Scope.*

- (a) Except as otherwise provided in subsections (b) and (c), this Article applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.
- (b) This Article does not apply to a trust held solely for charitable purposes.
- (c) Subject to Section 1215, a trust instrument may restrict or prohibit exercise of the decanting power.
- (d) This Article does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this State other than this Article, common law, a court order, or a nonjudicial settlement agreement.
- (e) This Article does not affect the ability of a settlor to provide in a trust instrument for the distribution or appointment in further trust of the trust property or for modification of the trust instrument.

### **Section 1204**

*Fiduciary duty.*

- (a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.
- (b) This Article does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this Article.
- (c) Except as otherwise provided in a first-trust instrument, for purposes of this Article and Section 801, the terms of the first trust are deemed to include the decanting power.

**Section 1205**

*Application; governing law.* This Article applies to a trust created before, on, or after the effective date of this Code that:

- (1) has its principal place of administration in this State, including a trust whose principal place of administration has been changed to this State; or
- (2) provides by its trust instrument that it is governed by the law of this State or is governed by the law of this State for the purpose of:
  - (A) administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this State;
  - (B) construction of terms of the trust; or
  - (C) determining the meaning or effect of terms of the trust.

**Section 1206**

*Reasonable reliance.* A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this Article, law of this State other than this Article or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

**Section 1207**

*Notice.*

- (a) In this Section, a notice period begins on the day notice is given under subsection (c) and ends 59 days after the day notice is given.
- (b) Except as otherwise provided in this Article, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.
- (c) Except as otherwise provided in subsection (f), an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than 60 days before the exercise to:
  - (1) each settlor of the first trust, if living or then in existence;
  - (2) each qualified beneficiary of the first trust;



- (3) each holder of a presently exercisable power of appointment over any part or all of the first trust;
  - (4) each person that currently has the right to remove or replace the authorized fiduciary;
  - (5) each other fiduciary of the first trust;
  - (6) each fiduciary of the second trust; and
  - (7) the Attorney General's Charitable Trust Bureau, if the first trust contains a charitable interest.
- (d) An authorized fiduciary is not required to give notice under subsection (c) to a qualified beneficiary who is a minor and has no representative. The authorized fiduciary is not required to give notice under subsection (c) to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.
- (e) A notice under subsection (c) must:
- (1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;
  - (2) specify the proposed effective date for exercise of the power;
  - (3) include a copy of the first-trust instrument; and
  - (4) include a copy of all second-trust instruments.
- (f) The decanting power may be exercised before expiration of the notice period under subsection (a) if all persons entitled to receive notice waive the period in a signed record.
- (g) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under Section 1209 with the court asserting that:
- (1) an attempted exercise of the decanting power is ineffective because it did not comply with this Article or was an abuse of discretion or breach of fiduciary duty; or
  - (2) Section 1222 applies to the exercise of the decanting power.
- (h) An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (c) if the authorized fiduciary acted with reasonable care to comply with subsection (c).
- (i) If the first trust contains a charitable interest and the Attorney General objects to the proposed exercise of the decanting power in writing delivered to the authorized fiduciary before the end of the notice period, the authorized fiduciary may proceed with the proposed exercise of the decanting power only with either court approval or the later written consent of the Attorney General.

## **Section 1208**

*(Reserved).*

## Section 1209

### *Court involvement.*

- (a) On application of an authorized fiduciary, a person entitled to notice under Section 1207(c), a beneficiary, or, with respect to a charitable interest, the Attorney General or any other person that has standing to enforce the charitable interest, the court may:
  - (1) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this Article and consistent with the fiduciary duties of the authorized fiduciary;
  - (2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this Article and to exercise the decanting power;
  - (3) approve an exercise of the decanting power;
  - (4) determine that a proposed or attempted exercise of the decanting power is ineffective because:
    - (A) after applying Section 1222, the proposed or attempted exercise does not or did not comply with this Article; or
    - (B) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;
  - (5) determine the extent to which Section 1222 applies to a prior exercise of the decanting power;
  - (6) provide instructions to the trustee regarding the application of Section 1222 to a prior exercise of the decanting power; or
  - (7) order other appropriate relief to carry out the purposes of this Article.
- (b) On application of an authorized fiduciary, the court may approve:
  - (1) an increase in the fiduciary's compensation under Section 1216; or
  - (2) a modification under Section 1218 of a provision granting a person the right to remove or replace the fiduciary.

## Section 1210

*Formalities.* An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must, directly or by reference to the notice required by Section 1207, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

## Section 1211

### *Decanting power under expanded distributive discretion.*

- (a) In this Section:

- (1) “Noncontingent” right means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right of any person other than the beneficiary or the beneficiary’s estate.
- (2) “Successor beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined is not a qualified beneficiary. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.
- (3) “Vested interest” means:
  - (A) a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;
  - (B) a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property;
  - (C) a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property;
  - (D) a presently exercisable general power of appointment; or
  - (E) a right to receive an ascertainable part of the trust property on the trust’s termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.
- (b) Subject to subsection (c) and Section 1214, an authorized fiduciary that has expanded distributive discretion to distribute the principal of a first trust to one or more current beneficiaries may exercise the decanting power over the principal of the first trust.
- (c) Subject to Section 1213, in an exercise of the decanting power under this Section, a second trust may not:
  - (1) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection (d);
  - (2) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection (d); or
  - (3) reduce or eliminate a vested interest.
- (d) Subject to subsection (c)(3) and Section 1214, in an exercise of the decanting power under this Section, a second trust may be a trust created or administered under the law of any jurisdiction and may:
  - (1) retain a power of appointment granted in the first trust;
  - (2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

- (3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and
- (4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.
- (e) A power of appointment described in subsection (d)(1) through (4) of subsection (d) may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.
- (f) If an authorized fiduciary has expanded distributive discretion to distribute part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this Section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

## Section 1212

### *Decanting power under limited distributive discretion.*

- (a) In this Section, “limited distributive discretion” means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.
- (b) An authorized fiduciary that has limited distributive discretion over the principal of the first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.
- (c) Under this Section and subject to Section 1214, a second trust may be created or administered under the law of any jurisdiction. Under this Section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust.
- (d) A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:
  - (1) the distribution is applied for the benefit of the beneficiary;
  - (2) the beneficiary is incapacitated or in the opinion of the trustee is unable to manage property or business affairs, and the distribution is made as permitted under this Code; or
  - (3) the distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.
- (e) If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this Section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

### Section 1213

#### *Trust for beneficiary with disability.*

- (a) In this Section:
  - (1) “Beneficiary with a disability” means a beneficiary of the first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incompetent.
  - (2) “Best interests” of a beneficiary with a disability include, without limitation, consideration of the financial impact to the family of the beneficiary who has a disability.
  - (3) “Governmental benefits” means financial aid or services from a state, federal, or other public agency.
  - (4) “Special-needs fiduciary” means, with respect to a trust that has a beneficiary with a disability:
    - (A) a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;
    - (B) if no trustee or fiduciary has discretion under subparagraph (A), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or
    - (C) if no trustee or fiduciary has discretion under subparagraphs (A) and (B), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.
  - (5) “Special-needs trust” means a trust the trustee believes would not be considered a resource for purposes of determining whether the beneficiary with a disability is eligible for governmental benefits.
- (b) A special-needs fiduciary may exercise the decanting power under Section 1211 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:
  - (1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and
  - (2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust or the best interests of the beneficiary with a disability.
- (c) In an exercise of the decanting power under this Section, the following rules apply:
  - (1) If the first trust was created by the beneficiary with a disability, or to the extent the first trust was funded by the beneficiary with a disability, then notwithstanding paragraph (2) of subsection (c) of Section 1211, the interest in the second trust of a beneficiary with a disability may:

- (A) be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. 1396p(d)(4)(C), as amended; or
  - (B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. 1396p(d)(4)(A), as amended.
- (2) Paragraph (3) of subsection (c) of Section 1211 does not apply to the interests of the beneficiary with a disability.
  - (3) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's beneficial interests in the first trust.

## Section 1214

### *Protection of charitable interests.*

- (a) In this Section:
  - (1) "Determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and that is unconditional or that will in all events be held for charitable purposes.
  - (2) "Unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the Internal Revenue Code on the date of the distribution if the charitable organization meets the requirement on the date of determination.
- (b) If a first trust contains a determinable charitable interest, the Attorney General has the rights of a qualified beneficiary and may represent and bind the charitable interest.
- (c) If a first trust contains a charitable interest, the second trusts in the aggregate may not:
  - (1) diminish the charitable interest;
  - (2) diminish the interest of an identified charitable organization that holds the charitable interest;
  - (3) alter any charitable purpose stated in the first-trust instrument; or
  - (4) alter any condition or restriction related to the charitable interest.
- (d) If there are 2 or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection (c).
- (e) If a first trust contains a determinable charitable interest, the second trusts that include charitable interests pursuant to subsection (c) must be administered under the law of this State unless:

- (1) the Attorney General, after receiving notice under Section 1207, fails to object in a signed record delivered to the authorized fiduciary within the notice period;
  - (2) the Attorney General consents in a signed record to the second trusts being administered under the law of another jurisdiction; or
  - (3) the court approves the exercise of the decanting power.
- (f) This Article does not limit the powers and duties of the Attorney General under Illinois law.

### **Section 1215**

#### *Trust limitation on decanting.*

- (a) An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:
  - (1) the decanting power; or
  - (2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.
- (b) Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:
  - (1) the decanting power; or
  - (2) a power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.
- (c) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.
- (d) Subject to subsections (a) and (b), an authorized fiduciary may exercise the decanting power under this Article even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.
- (e) If a first-trust instrument contains an express prohibition described in subsection (a) or an express restriction described in subsection (b), that provision must be included in the second-trust instrument.

### **Section 1216**

#### *Change in compensation.*

- (a) If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation beyond the specified compensation unless:
  - (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

- (2) the increase is approved by the court.
- (b) If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by Section 708 unless:
  - (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
  - (2) the increase is approved by the court.
- (c) A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections (a) and (b).

### **Section 1217**

#### *Relief from liability and indemnification.*

- (a) Except as otherwise provided in this Section, a second-trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.
- (b) A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.
- (c) A second-trust instrument may not reduce fiduciary liability in the aggregate.
- (d) Subject to subsection (c), a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this State other than this Article.

### **Section 1218**

#### *Removal or replacement of authorized fiduciary.* An authorized fiduciary may not exercise the decanting power to modify a provision in the first-trust instrument granting another person power to remove or replace the fiduciary unless:

- (1) the person holding the power consents to the modification in a signed record and the modification applies only to the person;
- (2) the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or
- (3) the court approves the modification and the modification grants a substantially similar power to another person.



**Section 1219**

*Tax-related limitations.*

- (a) In this Section:
  - (1) “Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under Sections 671 through 677 of the Internal Revenue Code or Section 679 of the Internal Revenue Code.
  - (2) “Nongrantor trust” means a trust that is not a grantor trust.
  - (3) “Qualified benefits property” means property subject to the minimum distribution requirements of Section 401(a)(9) of the Internal Revenue Code, and any applicable regulations, or to any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code or the regulations.
- (b) An exercise of the decanting power is subject to the following limitations:
  - (1) If a first trust contains property that qualified, or would have qualified but for provisions of this Article 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 second-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.
  - (2) If the first trust contains property that qualified, or would have qualified but for provisions of this Article 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 second-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.
  - (3) If the first trust contains property that qualified, or would have qualified but for provisions of this Article other than this Section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code, the second-trust instrument must 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 the same provision of Section 2503 of the Internal Revenue Code. If the first trust contains property that qualified, or would have qualified but for provisions of this Article other than this Section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code, by application of Section 2503(c) of the Internal Revenue Code, the second-trust instrument must 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 Section 2503(c) of the Internal Revenue Code.

- (4) If the property of the first trust includes shares of stock in an S corporation, as defined in Section 1361 of the Internal Revenue Code and the first trust is, or but for provisions of this Article other than this Section would be, a permitted shareholder under any provision of Section 1361 of the Internal Revenue Code, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under Section 1361(c)(2) of the Internal Revenue Code. 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 Article other than this Section, would be, a qualified subchapter-S trust within the meaning of Section 1361(d) of the Internal Revenue Code, the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.
- (5) If the first trust contains property that qualified, or would have qualified but for provisions of this Article other than this Section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under Section 2642(c) of the Internal Revenue Code the second-trust instrument must 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 a zero inclusion ratio under Section 2642(a) of the Internal Revenue Code.
- (6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-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 Section 401(a)(9) of the Internal Revenue Code and any applicable regulations, or any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code or the regulations. 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 1222 applies to the separate share.
- (7) If the first trust qualifies as a grantor trust because of the application of Section 672(f)(2)(A) of the Internal Revenue Code the second 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 Section 672(f)(2)(A) of the Internal Revenue Code.
- (8) In this paragraph (8), “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. Subject to paragraph (9) of this subsection (b), a second-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:
  - (A) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

- (B) the transfer of property held by the first trust or the first trust qualified, or but for provisions of this Article other than this Section, would have qualified for the tax benefit.
- (9) Subject to paragraph (4) of this subsection (b):
  - (A) except as otherwise provided in paragraph (7) of this subsection (b), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and
  - (B) except as otherwise provided in paragraph (10) of this subsection (b), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.
- (10) An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:
  - (A) the first trust and second trusts are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the second trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or
  - (B) the first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:
    - (i) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or
    - (ii) 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 second-trust instrument contains the same provision.

### Section 1220

#### *Duration of second trust.*

- (a) Subject to subsection (b), a second trust may have a duration that is the same as or different from the duration of the first trust.
- (b) To the extent that property of a second trust is attributable to property of the first trust, the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation applicable to property of the first trust.

### Section 1221

*Need to distribute not required.* An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

### Section 1222

*Savings provision.*

- (a) If exercise of the decanting power would be effective under this Article except that the second-trust instrument in part does not comply with this Article, the exercise of the power is effective and the following rules apply to the principal of the first trust subject to the exercise of the power:
  - (1) A provision in the second-trust instrument that is not permitted under this Article is void to the extent necessary to comply with this Article.
  - (2) A provision required by this Article to be in the second-trust instrument that is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this Article.
- (b) If a trustee or other fiduciary of a second trust discovers that subsection (a) applies to a prior exercise of the decanting power, the fiduciary shall take such appropriate corrective action as is consistent with the fiduciary's duties.

### Section 1223

*Trust for care of animal.*

- (a) In this Section:
  - (1) "Animal trust" means a trust or an interest in a trust created to provide for the care of one or more designated domestic or pet animals.
  - (2) "Protector" means a person described in paragraph (3) of subsection (b) of Section 408.
- (b) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this Article as if each animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the decanting power.
- (c) A protector for an animal has the rights under this Article of a qualified beneficiary.
- (d) Notwithstanding any other provision of this Article, if a first trust is an animal trust, in an exercise of the decanting power, the second trust must provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

### Section 1224

*(Reserved).*

### Section 1225

*Settlor.*

- (a) For purposes of the laws of this State other than this Article and subject to subsection (b), a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.
- (b) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, the intent of a settlor of the second trust, and the intent of the authorized fiduciary may be considered.

### Section 1226

#### *Later-discovered property.*

- (a) Except as otherwise provided in subsection (c), if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property otherwise belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust.
- (b) Except as otherwise provided in subsection (c), if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the decanting power remains part of the trust estate of the first trust.
- (c) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the decanting power.

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<sup>1</sup> ***Disclaimer.*** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

<sup>2</sup> § 3/1211; 3/1202(5).

<sup>3</sup> § 3/1212.

<sup>4</sup> § 3/1211(c)(3), (a)(3); 3/1212(c).

<sup>5</sup> § 1211(b).

<sup>6</sup> § 3/1212(c).

<sup>7</sup> § 3/1211(b).

<sup>8</sup> § 3/1212(c).

<sup>9</sup> § 3/1211(c)(1).

<sup>10</sup> § 3/1211.

<sup>11</sup> § 3/1212(c).

<sup>12</sup> § 3/1211(d).

<sup>13</sup> § 3/1212(c).

<sup>14</sup> § 3/1211(d).

<sup>15</sup> § 3/1212(c).

<sup>16</sup> § 3/1213.

<sup>17</sup> § 3/1219(b)(1).

<sup>18</sup> § 3/1219(b)(2).

<sup>19</sup> § 3/1219(b)(3).

<sup>20</sup> § 3/1219(b)(5).

<sup>21</sup> § 3/1219(b)(4).

<sup>22</sup> § 3/1219(b)(6).

<sup>23</sup> § 3/1219(b)(8).

<sup>24</sup> § 3/1219(b)(9), (10).

<sup>25</sup> § 3/1220.

<sup>26</sup> § 3/1216.

<sup>27</sup> § 3/1217.

<sup>28</sup> § 3/1207.

<sup>29</sup> § 3/1204(a).

<sup>30</sup> § 3/1204(b).

<sup>31</sup> § 3/12; 3/1205.

<sup>32</sup> § 3/1206.

<sup>33</sup> § 3/1222.

<sup>34</sup> § 3/1209.

<sup>35</sup> § 3/1214.

<sup>36</sup> § 3/1226.

**NEW YORK**  
State Decanting Summary<sup>1</sup>

<b>STATUTORY HISTORY</b>	
Statutory citation	N.Y. EST. POWERS & TRUSTS § 10-6.6
Effective Date	7/24/92
Amendment Date(s)	8/17/11; 11/13/13; 7/22/14; 11/20/15
<b>ABILITY TO DECANT</b>	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, unlimited discretion to invade principal <sup>2</sup> <i>Limited discretion:</i> Yes, power to invade principal without unlimited discretion <sup>3</sup>
2. Limitation on trustee who may decant?	Yes <sup>4</sup>
<b>CHANGES PERMITTED</b>	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No <sup>5</sup>
4. May new trust eliminate beneficiary's withdrawal rights?	No <sup>6</sup>
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No <sup>7</sup> <i>Limited discretion:</i> Yes <sup>8</sup>
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No <sup>9</sup> <i>Limited discretion:</i> No <sup>10</sup>
7. May remainder beneficiaries' interests be accelerated?	No <sup>11</sup>
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> Presumably no <i>Limited discretion:</i> Yes, but not required during extended term when new trust has longer term length than old trust <sup>12</sup>
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes <sup>13</sup> <i>Limited discretion:</i> Yes <sup>14</sup>
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> Yes, except for a grant of a broad special POA <sup>15</sup> <i>Limited discretion:</i> Yes <sup>16</sup>
11. Supplemental needs trust exception?	Yes <sup>17</sup>
<b>TAX RESTRICTIONS</b>	
12. Marital deduction savings provision?	Yes <sup>18</sup>
13. Charitable deduction savings provision?	Yes <sup>19</sup>
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) <sup>20</sup> ; 2642(c) <sup>21</sup> ; Catch-all <sup>22</sup>
16. Non-grantor trust to grantor trust conversion permitted?	Silent <sup>23</sup>
<b>OTHER RESTRICTIONS</b>	



17. Rule against perpetuities savings provision?	Yes <sup>24</sup>
18. May trustee increase trustee commission?	No, unless the court approves <sup>25</sup>
19. Other restrictions	
<b>NOTICE, CONSENT &amp; APPROVAL</b>	
20. Notice to interested parties required prior to decanting?	Yes <sup>26</sup>
21. Is decanting prohibited if a beneficiary objects?	No <sup>27</sup>
22. Court approval required to decant?	No <sup>28</sup>
<b>FIDUCIARY DUTIES</b>	
23. Provision re: purposes for exercise or explicit fiduciary duty?	Yes <sup>29</sup>
24. Provision that trustee has no duty to consider decanting?	Yes <sup>30</sup>
25. Standard of review?	No
<b>TRUSTS SUBJECT TO STATUTE</b>	
26. Provision on trusts subject to statute?	Yes <sup>31</sup>
<b>MISCELLANEOUS</b>	
27. Other unique considerations?	Common law decanting? <sup>32</sup>

**NEW YORK STATUTE  
N.Y. EST POWERS & TRUSTS § 10-6.6**

**§ 10-6.6 Exercise of a power of appointment; effect when more extensive or less extensive than authorized; trustee's authority to invade principal in trust**

(a) An exercise of a power of appointment is not void because its exercise is:

(1) More extensive than was authorized but is valid to the extent authorized by the instrument creating the power.

(2) Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.

(b) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such 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 such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).

(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (c) of section 10-3.4 of this article (including a presently

exercisable 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 could receive the principal outright under the terms of the invaded trust.

(2) If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in 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 such class.

(c) 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 shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.

(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.

(3) 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 such class.

(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.

(d) An exercise of the power to invade trust principal under paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of this article.

(e) 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, but not limited to, a term measured by the lifetime of a current beneficiary.

(f) 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 which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (b) of this section.

(g) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (b) and (c) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.

(h) An authorized trustee exercising the power under this section 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. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(i) Unless the authorized trustee provides otherwise:

(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall 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 shall 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; such assets shall remain the assets of the invaded trust.

(j) The exercise of the power to appoint to an appointed trust under paragraph (b) or (c) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date. The exercise of the power is irrevocable on such effective date, either thirty days following service of the notice or the effective date as set forth in the written consent.

(1) An authorized trustee may exercise the power authorized by paragraphs (b) and (c) of this section without the consent of the creator, or of the persons 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.

(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.

(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all 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 the subject of the appointment.

(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.

(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (b) or (c) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.

(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and, within twenty days of the effective date, the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.

(7) Prior to the effective date as provided herein, a trustee may revoke the exercise of the power to invade to a new trust. Where a trustee has served notice of the exercise of the power pursuant to subparagraph (2) of this paragraph, the trustee shall serve notice of the revocation of the exercise of the power to persons interested in the invaded trust and the appointed trust by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust. Where the notice of the exercise of the power was filed with the court, the trustee shall file the notice of revocation of the exercise of the power with such court.

(k) This section shall not be construed to abridge the right of any 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 any court having jurisdiction over the trust.

(1) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (b) or (c) of this section.

(m) A power authorized by paragraph (b) or (c) of this section may be exercised, subject to the provisions of paragraph (h) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under paragraph (b) or (c) of this section.

(n) An authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to effect any of the following:

(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (b) or (c) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-1.12 of this chapter;

(2) 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 eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section unless a court having jurisdiction over the trust specifies otherwise;

(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or

(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any 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.

(o) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section.

(p) An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power.

(q) (1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to change the provisions regarding the determination of the compensation of any 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 shall be determined in the same manner as in the invaded trust.

(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (b) or (c) of this section.

(r) Unless the invaded trust expressly provides otherwise, this section applies to:

(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.

(s) For purposes of this section:

(1) The term “appointed trust” means an irrevocable trust which receives principal from an invaded trust under paragraph (b) or (c) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust. For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be executed and acknowledged by the person establishing such trust shall be deemed satisfied by the execution and acknowledgment of the trustee of the appointed trust.

(2) The term “authorized trustee” means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) 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 non-fiduciary capacity).

(3) References to sections of the “internal revenue code” refer to the United States internal revenue code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and also refer to corresponding provisions of state law.

(4) The term “current beneficiary or beneficiaries” means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustee may distribute principal at the time of the exercise of the power, provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.

(5) The term “invade” shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

(6) The term “invaded trust” means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (b) or (c) of this section.

(7) The term “person or persons interested in the invaded trust” shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate’s court procedure act.

(8) The term “principal” shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

(9) The term “unlimited discretion” means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.

(10) The creator shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee’s authority to pay trust principal to the creator pursuant to section 7-1.11 of this chapter or by reason of the trustee’s authority under the trust instrument or any other provision of law to pay or reimburse the creator for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities.

(t) Cross-reference. For the exercise of the power under paragraph (b) or (c) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7 of this article.

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<sup>1</sup> **Disclaimer.** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual’s reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

<sup>2</sup> “An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such 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 such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).” § 10-6.6(b).

<sup>3</sup> “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 shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.” § 10-6.6(c).

<sup>4</sup> The term “authorized trustee” excludes the creator of the trust and a beneficiary to whom income or principal must be paid or who is or will become eligible to receive a distribution. § 10-6.6(s)(2).

<sup>5</sup> § 10-6.6(n)(1).

<sup>6</sup> § 10-6.6(n)(1), if currently exercisable only.

<sup>7</sup> The current beneficiaries may be “one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).” § 10-6.6(b). In *Matter of Johnson*, Surrogate’s Court decision 2011-2809/B (January 13, 2015), the court invalidated a decanting under the version of the statute in effect as of July 25, 2011 because the permissible appointees of the beneficiary’s power of appointment were more expansive under the second trust. In *Matter of Johnson*, Surrogate’s Court decision 2011-2810/A (January 13, 2015), the court invalidated a decanting under the version of the statute in effect as of July 25, 2011 because the class of permissible appointees and the class of takers in default were broader under the second trust.

<sup>8</sup> § 10-6.6(c).

<sup>9</sup> The successor and remainder beneficiaries of the appointed trust shall be one, more than one or all of the successor and remainder beneficiaries of such invaded trust. § 10-6.6(b).

<sup>10</sup> The successor and remainder beneficiaries of the appointed trust must be the same as the successor and remainder beneficiaries of the invaded trust. § 10-6.6(c).

<sup>11</sup> Only current beneficiaries of the invaded trust can be current beneficiaries of the appointed trust. 10-6.6(b). The interest of an income beneficiary (who is not a principal beneficiary), however, may be continued in the appointed trust. § 10-6.6(s)(4).

<sup>12</sup> 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.” § 10-6.6(c)(1). If the appointed trust has a longer term than the invaded trust, however, after the invaded trust’s original term, the appointed trust may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term. § 10-6.6(c)(2).

<sup>13</sup> § 10-6.6(b)(1).

<sup>14</sup> “[I]f the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.” § 10-6.6(c)(4).

<sup>15</sup> It is not necessary, however, to include a power of appointment that is in the invaded trust. “If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.” § 10-6.6(b)(3). “If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator’s spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator’s spouse.” § 10-6.6(b)(2).

<sup>16</sup> § 10-6.6(c)(4).

<sup>17</sup> § 10-6.6(n)(1).

<sup>18</sup> § 10-6.6(n)(5).

<sup>19</sup> § 10-6.6(n)(5).

<sup>20</sup> § 10-6.6(n)(5).

<sup>21</sup> § 10-6.6(n)(5).

<sup>22</sup> “An authorized trustee may not exercise a power authorized by paragraph (b) or (c) . . . [t]o jeopardize . . . 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.” § 10-6.6(n)(5).

<sup>23</sup> “The 2011 Recommendation of the Surrogate’s Court Advisory Committee states: ‘There is nothing contained in the proposed provision that precludes the authorized trustee from paying assets from a non-grantor trust to a grantor trust.’” N.Y. EST. POWERS & TRUSTS § 10-6.6, 2011 Recommendation of the Surrogate’s Court Advisory Committee.

<sup>24</sup> “An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power . . . .” § 10-6.6(p). Sections 9-1.1, 10-8.1 and 10-8.2 discuss the rule against perpetuities.

<sup>25</sup> § 10-6.6(q)(1).

<sup>26</sup> Thirty days’ notice is required to the creator, if living, to any person having the right to remove or replace the trustee and to any persons interested in the invaded trust and the appointed trust. § 10-6.6(j).

<sup>27</sup> § 10-6.6(j)(1).

<sup>28</sup> § 10-6.6(j)(1).



<sup>29</sup> “An authorized trustee exercising the power under this section 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.” § 10-6.6(h).

<sup>30</sup> § 10-6.6(l).

<sup>31</sup> “Unless the invaded trust expressly provides otherwise, this section applies to: (1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and (2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.” §10-6.6(r).

<sup>32</sup> *Matter of Hoppenstein*, 2015-2918A, NYLJ 1202784244139 (Surr. NY March 31, 2017) appears to recognize a common law decanting that did not comply with the decanting statute.

**CALIFORNIA**  
**State Decanting Summary<sup>1</sup>**

<b>STATUTORY HISTORY</b>	
Statutory citation	CAL. PROB. CODE §19501 ET SEQ.
Effective Date	1/1/19
Amendment Date(s)	
<b>ABILITY TO DECANT</b>	
1. Discretionary distribution authority required to decant?	<i>Unlimited discretion:</i> Yes, expanded discretion to distribute principal <sup>2</sup> <i>Limited discretion:</i> Yes, limited discretion to distribute principal <sup>3</sup>
2. Limitation on trustee who may decant?	No
<b>CHANGES PERMITTED</b>	
3. May new trust eliminate beneficiary's mandatory distribution rights?	No, as to income, annuity, or unitrust <sup>4</sup>
4. May new trust eliminate beneficiary's withdrawal rights?	No <sup>5</sup>
5. Must new and old trust beneficiaries be identical?	<i>Unlimited discretion:</i> No <sup>6</sup> <i>Limited discretion:</i> Yes <sup>7</sup>
6. Are beneficiaries of new trusts limited to current beneficiaries of old trust?	<i>Unlimited discretion:</i> No <sup>8</sup> <i>Limited discretion:</i> No <sup>9</sup>
7. May remainder beneficiaries' interests be accelerated?	No <sup>10</sup>
8. New and old trust require same distribution standard?	<i>Unlimited discretion:</i> No <sup>11</sup> <i>Limited discretion:</i> Yes <sup>12</sup>
9. May trustee grant a power of appointment in new trust?	<i>Unlimited discretion:</i> Yes <sup>13</sup> <i>Limited discretion:</i> Yes <sup>14</sup>
10. Must new trust grant identical power of appointment as old trust?	<i>Unlimited discretion:</i> No <sup>15</sup> <i>Limited discretion:</i> Yes <sup>16</sup>
11. Supplemental needs trust exception?	Yes <sup>17</sup>
<b>TAX RESTRICTIONS</b>	
12. Marital deduction savings provision?	Yes <sup>18</sup>
13. Charitable deduction savings provision?	Yes <sup>19</sup>
14. Beneficiary/trustee savings provision?	No
15. Other tax savings provisions?	2503(b) <sup>20</sup> ; 2642(c) <sup>21</sup> ; Sub S <sup>22</sup> ; 401(a)(9) <sup>23</sup> ; 672(f)(2)(A) <sup>24</sup> ; Catch-all <sup>25</sup>
16. Non-grantor trust to grantor trust conversion permitted?	Yes with limits <sup>26</sup>
<b>OTHER RESTRICTIONS</b>	
17. Rule against perpetuities savings provision?	Yes <sup>27</sup>
18. May trustee increase trustee commission?	Sometimes <sup>28</sup>

<b>19. Other restrictions?</b>	Decreasing trustee liability <sup>29</sup> or eliminating trustee remover <sup>30</sup>
<b>NOTICE, CONSENT &amp; APPROVAL</b>	
<b>20. Notice to interested parties required prior to decanting?</b>	Yes <sup>31</sup>
<b>21. Is decanting prohibited if a beneficiary objects?</b>	No
<b>22. Court approval required to decant?</b>	No <sup>32</sup>
<b>FIDUCIARY DUTIES</b>	
<b>23. Provision re: purposes for exercise or explicit fiduciary duty?</b>	Yes <sup>33</sup>
<b>24. Provision that trustee has no duty to consider decanting?</b>	Act does not create such a duty <sup>34</sup>
<b>25. Standard of review?</b>	No
<b>TRUSTS SUBJECT TO STATUTE</b>	
<b>26. Provision on trusts subject to statute?</b>	Yes <sup>35</sup>
<b>MISCELLANEOUS</b>	
<b>27. Other unique considerations?</b> <sup>36</sup>	Protection of charitable interests <sup>37</sup> ; saving provision for flawed decantings <sup>38</sup> ; decanting of pet trusts <sup>39</sup> ; provision re identity of settlor <sup>40</sup> ; subsequently discovered assets <sup>41</sup>

**CALIFORNIA STATUTE  
SB 909**

**SECTION 1.** Part 9 (commencing with Section 19501) is added to Division 9 of the Probate Code, to read:

**PART 9. Uniform Trust Decanting Act**

**19501.** This part may be cited as the Uniform Trust Decanting Act.

**19502.** For purposes of this part:

(a) “Appointive property” means the property or property interest subject to a power of appointment.

(b) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code (26 U.S.C. Secs. 2041(b)(1)(A), 2514(c)(1)) and any applicable regulations.

(c) “Authorized fiduciary” means any of the following:

(1) A trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries.

(2) A special fiduciary appointed under Section 19509.

(3) A special-needs fiduciary under Section 19513.

(d) “Beneficiary” means a person that meets one of the following conditions:

(1) Has a present or future, vested or contingent, beneficial interest in a trust.

(2) Holds a power of appointment over trust property.

(3) Is an identified charitable organization that will or may receive distributions under the terms of the trust.

(e) “Charitable interest” means an interest in a trust that meets one of the following conditions:

(1) Is held by an identified charitable organization and makes the organization a qualified beneficiary.

(2) Benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

(3) Is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

(f) “Charitable organization” means either of the following:

(1) A person, other than an individual, organized and operated exclusively for charitable purposes.

(2) A government or governmental subdivision, agency, or instrumentality, to the extent it holds funds exclusively for a charitable purpose.

(g) “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose, or another purpose the achievement of which is beneficial to the community.

(h) “Court” means the court in this state having jurisdiction in matters relating to trusts.

(i) “Current beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

(j) “Decanting power” or “the decanting power” means the power of an authorized fiduciary under this part to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

(k) “Expanded distributive discretion” means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

(l) “First trust” means a trust over which an authorized fiduciary may exercise the decanting power.

(m) “First trust instrument” means the trust instrument for a first trust.

(n) “General power of appointment” means a power of appointment exercisable in favor of a powerholder, the powerholder’s estate, a creditor of the powerholder, or a creditor of the powerholder’s estate.

(o) “Jurisdiction,” with respect to a geographic area, includes a state or country.

(p) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(q) “Power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in, or another power of appointment over, the appointive property. The term does not include a power of attorney.

(r) “Powerholder” means a person in which a donor creates a power of appointment.

(s) “Presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the relevant time.

(1) The term includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after one of the following, respectively:

- (A) The occurrence of the specified event.
- (B) The satisfaction of the ascertainable standard.
- (C) The passage of the specified time.

(2) The term does not include a power exercisable only at the powerholder's death.

(t) "Qualified beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined, satisfies one of the following conditions:

- (1) Is a distributee or permissible distributee of trust income or principal.
- (2) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (1) terminated on that date without causing the trust to terminate.
- (3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(u) "Reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of Section 674(b)(5)(A) of the Internal Revenue Code (26 U.S.C. Sec. 674(b)(5)(A)) and any applicable regulations.

(v) "Second trust" means either of the following:

- (1) A first trust after modification under this part.
- (2) A trust to which a distribution of property from a first trust is or may be made under this part.

(w) "Second trust instrument" means the trust instrument for a second trust.

(x) "Settlor," except as otherwise provided in Section 19525, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion.

(y) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(z) "Terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement.

(aa) "Trust instrument" means a trust executed by the settlor to create a trust or by any person to create a second trust that contains some or all of the terms of the trust, including any amendments.

**19503.** (a) Except as otherwise provided in subdivisions (b) and (c), this part applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

(b) This part does not apply to a trust held solely for charitable purposes.

(c) Subject to Section 19515, a trust instrument may restrict or prohibit exercise of the decanting power.

(d) This part does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this state other than this part, common law, a court order, or a nonjudicial settlement agreement.

(e) This part does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

**19504.** (a) In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

(b) This part does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this part.

(c) Except as otherwise provided in a first trust instrument, for purposes of this part, the terms of the first trust are deemed to include the decanting power.

**19505.** This part applies to a trust created before, on, or after January 1, 2019, that satisfies either of the following conditions:

(a) Has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state.

(b) Provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for the purpose of any of the following:

(1) Administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state.

(2) Construction of terms of the trust.

(3) Determining the meaning or effect of terms of the trust.

**19507.** (a) In this section, a notice period begins on the day notice is given under subdivision (c) and ends 59 days after the day notice is given.

(b) An authorized fiduciary may exercise the decanting power without the consent of any person and without court approval in compliance with this part.

(c) Except as otherwise provided in subdivision (h), an authorized fiduciary shall give notice of the intended exercise of the decanting power not later than 60 days before the exercise to all of the following:

(1) Each settlor of the first trust, if living or then in existence.

(2) Each qualified beneficiary of the first trust.

(3) Each holder of a presently exercisable power of appointment over any part or all of the first trust.

(4) Each person that currently has the right to remove or replace the authorized fiduciary.

(5) Each other fiduciary of the first trust.

(6) Each fiduciary of the second trust.

(7) The Attorney General, if subdivision (b) of Section 19514 applies.

(d) Unless the trust instrument provides otherwise, an authorized fiduciary shall give notice under subdivision (c) to the guardian ad litem for a qualified beneficiary who is a minor and has no representative or who is an unascertained or unborn person. If a guardian ad litem has not been appointed at the time of the notice, the authorized fiduciary shall seek the appointment of one. The court may appoint a guardian ad litem, for purposes of this section, in instances where the only matter before the court is that appointment.

(e) If an authorized fiduciary knows, or has reason to know, that a person entitled to notice under subdivision (c) is substantially unable to manage that person's own financial resources or resist fraud or undue influence, the authorized fiduciary shall give notice under subdivision (c) to that person and to the individual appointed to act on that person's behalf, including, but not limited to, an attorney-in-fact under a power of attorney.

If no such individual has been appointed at the time of the notice, the authorized fiduciary shall seek the appointment of such an individual. The court may appoint a guardian ad litem, for purposes of this section, in instances where the only matter before the court is that appointment.

(f) An authorized fiduciary is not required to give notice under subdivision (c) to a person who is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

(g) A notice under subdivision (c) shall include all of the following:

(1) A description of the manner in which the authorized fiduciary intends to exercise the decanting power, which shall include a statement as to the authorized fiduciary's reason for the proposed decanting and an explanation as to the differences between the first trust and the second trust or trusts.

(2) The proposed effective date for exercise of the power.

(3) A copy of the first trust instrument.

(4) A copy of all second trust instruments.

(5) A warning, set out in a separate paragraph in not less than 10-point bold type, or a reasonable equivalent thereof, that states the following:

“If you do not bring a court action to contest the proposed trust decanting (the proposed changes to the trust) within 59 days of this notice, you will lose your right to contest the decanting.”

(h) The decanting power may be exercised before expiration of the notice period under subdivision (a) if all persons entitled to receive notice waive the period in a signed waiver.

(i) The receipt of notice, waiver of the notice period, or expiration of the notice period does not affect the right of a person to file an application under Section 19509 that asserts either of the following:

(1) An attempted exercise of the decanting power is ineffective because it did not comply with this part or was an abuse of discretion or breach of fiduciary duty.

(2) Section 19522 applies to the exercise of the decanting power.

(j) The notice required by this section shall be served by mail to the last known address, pursuant to Section 1215, or by personal delivery.

**19508.** (a) Notice to a person with authority to represent and bind another person under this code or a first trust instrument has the same effect as notice given directly to the person represented.

(b) Consent of or waiver by a person with authority to represent and bind another person under this code or a first trust instrument is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

(c) A person with authority to represent and bind another person under this code or a first trust instrument may file an application under Section 19509 on behalf of the person represented.

(d) A settlor may not represent or bind a beneficiary under this part.

**19509.** (a) On application of an authorized fiduciary, a person entitled to notice under subdivision (c) of Section 19507, a beneficiary, or, with respect to a charitable interest, the Attorney General or other person that has standing to enforce the charitable interest, the court may do any of the following:

(1) Provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this part and is consistent with the fiduciary duties of the authorized fiduciary.

(2) Appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this part and to exercise the decanting power.

(3) Approve an exercise of the decanting power.

(4) Determine that a proposed or attempted exercise of the decanting power is ineffective because of either of the following:

(A) After applying Section 19522, the proposed or attempted exercise does not or did not comply with this part.

(B) The proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty.

(5) Determine the extent to which Section 19522 applies to a prior exercise of the decanting power.

(6) Provide instructions to the trustee regarding the application of Section 19522 to a prior exercise of the decanting power.

(7) Order other relief to carry out the purposes of this part.

(b) If an application is made under subdivision (a), the burden is on the authorized fiduciary to establish that notice was given as required by Section 19507 and that the authorized fiduciary may exercise the decanting power.

(c) On application of an authorized fiduciary, the court may approve either or both of the following:

(1) An increase in the fiduciary's compensation under Section 19516.

(2) A modification under Section 19518 of a provision granting a person the right to remove or replace the fiduciary.

**19510.** An exercise of the decanting power shall be made in a writing signed by an authorized fiduciary. The signed writing shall, directly or by reference to the notice required by Section 19507, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

**19511.** (a) For purposes of this section:

(1) "Noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. The term does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.

(2) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

(3) "Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(4) "Vested interest" means any of the following:

(A) A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power.

(B) A current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount, or a percentage of value of some or all of the trust property.

(C) A current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property.

(D) A presently exercisable general power of appointment.



(E) A right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

(b) Subject to subdivision (c) and Section 19514, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(c) Subject to Section 19513, in an exercise of the decanting power under this section, a second trust may not do any of the following:

(1) Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subdivision (d).

(2) Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subdivision (d).

(3) Reduce or eliminate a vested interest.

(d) Subject to paragraph (3) of subdivision (c) and Section 19514, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may do each of the following:

(1) Retain a power of appointment granted in the first trust.

(2) Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment.

(3) Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary.

(4) Create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

(e) A power of appointment described in paragraphs (1) to (4), inclusive, of subdivision (d) may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than, or different from, the beneficiaries of the first trust.

(f) If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

**19512.** (a) For purposes of this section, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(b) An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

(c) Under this section and subject to Section 19514, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust. For purposes of this subdivision, "substantially similar" means that there is no material change in a beneficiary's beneficial interests, except as provided in subdivision (d).

(d) A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if it satisfies any of the following conditions:

(1) The distribution is applied for the benefit of the beneficiary.

(2) The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this code.

(3) The distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary.

(e) If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

**19513.** (a) For purposes of this section:

(1) “Beneficiary with a disability” means a beneficiary of a first trust who the special needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated legally incompetent.

(2) “Governmental benefits” means financial aid or services from a state, federal, or other public agency.

(3) “Special needs fiduciary” means, with respect to a trust that has a beneficiary with a disability, any of the following:

(A) A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries.

(B) If no trustee or fiduciary has discretion under subparagraph (A), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries.

(C) If no trustee or fiduciary has discretion under subparagraphs (A) and (B), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

(4) “Special needs trust” means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

(b) A special needs fiduciary may exercise the decanting power under Section 19511 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if both of the following conditions are satisfied:

(1) A second trust is a special needs trust that benefits the beneficiary with a disability.

(2) The special needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

(c) In an exercise of the decanting power under this section, all of the following rules apply:

(1) Notwithstanding paragraph (2) of subdivision (c) of Section 19511, the interest in the second trust of a beneficiary with a disability may fulfill either of the following:

(A) Be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under Section 1396p(d)(4)(C) of the Public Health and Welfare Code (42 U.S.C. Sec. 1396p(d)(4)(C)).

(B) Contain payback provisions complying with reimbursement requirements of Medicaid law under Section 1396p(d)(4)(A) of the Public Health and Welfare Code (42 U.S.C. Sec. 1396p(d)(4)(A)).

(2) Paragraph (3) of subdivision (c) of Section 19511 does not apply to the interests of the beneficiary with a disability.

(3) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.

**19514.**

(a) For purposes of this section:

(1) "Determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time and that is unconditional or will be held solely for charitable purposes.

(2) "Unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986 on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

(b) If a first trust contains a determinable charitable interest, the Attorney General has the rights of a qualified beneficiary and may represent and bind the charitable interest.

(c) If a first trust contains a charitable interest, the second trust or trusts may not do any of the following:

(1) Diminish the charitable interest.

(2) Diminish the interest of an identified charitable organization that holds the charitable interest.

(3) Alter any charitable purpose stated in the first trust instrument.

(4) Alter any condition or restriction related to the charitable interest.

(d) If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subdivision (c).

(e) If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subdivision (c) shall be administered under the law of this state unless any of the following occur:

(1) The Attorney General, after receiving notice under Section 19507, fails to object in a signed writing delivered to the authorized fiduciary within the notice period.

(2) The Attorney General consents in a signed writing to the second trust or trusts being administered under the law of another jurisdiction.

(3) The court approves the exercise of the decanting power.

(f) This part does not limit the powers and duties of the Attorney General under law of this state other than this part.

**19515.** (a) An authorized fiduciary may not exercise the decanting power to the extent the first trust instrument expressly prohibits exercise of either of the following:

(1) The decanting power.

(2) A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(b) Exercise of the decanting power is subject to any restriction in the first trust instrument that expressly applies to exercise of either of the following:

(1) The decanting power.

(2) A power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

(c) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

(d) Subject to subdivisions (a) and (b), an authorized fiduciary may exercise the decanting power under this part even if the first trust instrument permits the authorized fiduciary or another person to modify the first trust instrument or to distribute part or all of the principal of the first trust to another trust.

(e) If a first trust instrument contains an express prohibition described in subdivision (a) or an express restriction described in subdivision (b), the authorized fiduciary shall include that provision or restriction in the second trust instrument.

**19516.** (a) If a first trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless either of the following occurs:

(1) All qualified beneficiaries of the second trust consent to the increase in a signed writing.

(2) The increase is approved by the court.

(b) If a first trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by this code unless either of the following occurs:

(1) All qualified beneficiaries of the second trust consent to the increase in a signed writing.

(2) The increase is approved by the court.

(c) (1) A change in an authorized fiduciary's compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subdivisions (a) and (b).

(2) For purposes of this subdivision, an incidental change to an authorized fiduciary's compensation includes, but is not limited to, an increase in the compensation of the authorized fiduciary for either of the following reasons:

(A) The second trust lasts longer than the first trust.

(B) The second trust has a greater value than the first trust.

**19517.** (a) Except as otherwise provided in this section, a second trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first trust instrument.

(b) A second trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(c) A second trust instrument may not reduce fiduciary liability in the aggregate.

(d) Subject to subdivision (c), a second trust instrument may reallocate fiduciary powers among fiduciaries as permitted by the law of this state other than this part.

**19518.** An authorized fiduciary may not exercise the decanting power to modify a provision in a first trust instrument granting another person power to remove or replace the fiduciary unless any of the following occurs:

(a) The person holding the power consents to the modification in a signed writing and the modification applies only to the person.

(b) The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed writing and the modification grants a substantially similar power to another person.

(c) The court approves the modification and the modification grants a substantially similar power to another person.

**19519.**

(a) For purposes of this section:

(1) “Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under Sections 671 to 677, inclusive, or Section 679 of the Internal Revenue Code (26 U.S.C. Secs. 671 to 677, 679).

(2) “Nongrantor trust” means a trust that is not a grantor trust.

(3) “Qualified benefits property” means property subject to the minimum distribution requirements of Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)), and any applicable regulations, or to any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)) or the regulations.

(b) An exercise of the decanting power is subject to all of the following limitations:

(1) If a first trust contains property that qualified, or would have qualified but for provisions of this part 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 second trust instrument shall 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.

(2) If the first trust contains property that qualified, or would have qualified but for provisions of this part 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 second trust instrument shall 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.

(3) If the first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)), the second trust instrument shall 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 Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)). If the first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for the exclusion from the gift tax described in Section 2503(b) of the Internal Revenue Code (26 U.S.C. Sec. 2503(b)) by application of Section 2503(c) of the Internal Revenue Code (26 U.S.C. Sec. 2503(c)), the second trust instrument shall 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 Section 2503(c) of the Internal Revenue Code (26 U.S.C. Sec. 2503(c)).

(4) If the property of the first trust includes shares of stock in an S-corporation, as defined in Section 1361 of the Internal Revenue Code (26 U.S.C. Sec. 1361) and the first trust is, or but for provisions of this part other than this section would be, a permitted shareholder under any provision of Section 1361 of the Internal Revenue Code (26 U.S.C. Sec. 1361), an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under Section 1361(c)(2) of the Internal Revenue Code (26 U.S.C. Sec. 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 part other than this section would be, a qualified subchapter-S trust within the meaning of Section 1361(d) of the Internal Revenue Code (26 U.S.C. Sec. 1361(d)), the second trust instrument shall not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(5) If the first trust contains property that qualified, or would have qualified but for provisions of this part other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under Section 2642(c) of the Internal Revenue Code (26 U.S.C. Sec. 2642(c)), the second trust instrument shall 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 a zero inclusion ratio under Section 2642(c) of the Internal Revenue Code (26 U.S.C. Sec. 2642(c)).

(6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second 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 Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)) and any applicable regulations, or any similar requirements that refer to Section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401(a)(9)) or the regulations. 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 19522 applies to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of Section 672(f)(2)(A) of the Internal Revenue Code (26 U.S.C. Sec. 672(f)(2)(A)), the second 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 Section 672(f)(2)(A) of the Internal Revenue Code (26 U.S.C. Sec. 672(f)(2)(A)).

(8) In 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. Subject to paragraph (9), a second 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 both of the following apply:

(A) The first trust instrument expressly indicates an intent to qualify for the benefit or the first trust instrument clearly is designed to enable the first trust to qualify for the benefit.

(B) The transfer of property held by the first trust or the first trust qualified, or, but for provisions of this part other than this section, would have qualified for the tax benefit.

(9) (A) Subject to paragraph (4), and except as otherwise provided in paragraph (7), the second trust may be a nongrantor trust, even if the first trust is a grantor trust.

(B) Subject to paragraph (4), and except as otherwise provided in paragraph (10), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

(10) An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed writing delivered to the fiduciary within the notice period and either of the following conditions is satisfied:

(A) The first trust and a second 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 second trust does not grant an equivalent power to the settlor or other person.

(B) The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless either of the following apply:

(i) The settlor has the power at all times to cause the second trust to cease to be a grantor trust.

(ii) 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 second trust instrument contains the same provision.

**19520.** (a) Subject to subdivision (b), a second trust may have a duration that is the same as, or different from, the duration of the first trust.

(b) To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation that apply to property of the first trust.

**19521.** An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

**19522.** (a) If exercise of the decanting power would be effective under this part, except that the second trust instrument in part does not comply with this part, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) A provision in the second trust instrument that is not permitted under this part is void to the extent necessary to comply with this part.

(2) A provision required by this part to be in the second trust instrument, which is not contained in the instrument, is deemed to be included in the instrument to the extent necessary to comply with this part.

(b) If a trustee or other fiduciary of a second trust determines that subdivision (a) applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

**19523.** (a) For purposes of this section:

(1) "Animal trust" means a trust or an interest in a trust described in Section 15212.

(2) "Protector" means either of the following:

(A) A person appointed in an animal trust to enforce the trust on behalf of the animal as described in subdivision (c) of Section 15212 or, if no person is appointed in the trust for that purpose, a person appointed by the court for that purpose.

(B) A nonprofit charitable corporation described in subdivision (e) of Section 15212 that has requested an accounting in writing.

(b) The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this part if each animal that benefits from the trust were an individual, if the protector consents in a signed writing to the exercise of the power.

(c) A protector for an animal has the rights under this part of a qualified beneficiary.

(d) Notwithstanding any other provision of this part, if a first trust is an animal trust, in an exercise of the decanting power, the second trust shall provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

**19524.** A reference in this code to a trust instrument or terms of the trust includes a second trust instrument and the terms of the second trust.

**19525.** (a) For purposes of the law of this state other than this part and subject to subdivision (b), a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

(b) In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust, and the authorized fiduciary may be considered.

**19526.** (a) Except as otherwise provided in subdivision (c), if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

(b) Except as otherwise provided in subdivision (c), if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

(c) An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

**19527.** A debt, liability, or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

**19529.** Nothing in this part limits a trustee's ability to petition for instructions or other approval under a trust pursuant Chapter 3 (commencing with Section 17200) of Part 5 or to petition for modification of a trust pursuant to Chapter 3 (commencing with Section 15400) of Part 2.

**19530.** The provisions of this part are severable. If any provision of this part or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

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<sup>1</sup> ***Disclaimer.*** These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Schiff Hardin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

<sup>2</sup> § 19511(b). See § 19502(k) for definition of "expanded distributive discretion."

<sup>3</sup> § 19512(b).

<sup>4</sup> If there is expanded discretion, no as to a "vested interest." § 19511(c)(3). "Vested interest" is defined in § 19511(a)(4). If there is limited discretion, the second trust must grant each beneficiary interests substantially similar to the beneficiary's interests under the first trust. § 19511(c).

<sup>5</sup> With respect to expanded discretion, see § 19511(c)(3). With respect to limited discretion, see § 19512(c).

<sup>6</sup> § 19511(c).

<sup>7</sup> § 19512(c).

<sup>8</sup> § 19511(c)



<sup>9</sup> § 19512.

<sup>10</sup> With respect to expanded discretion, see § 19511(c). With respect to limited discretion, see § 19512(c).

<sup>11</sup> § 19511.

<sup>12</sup> § 19512(c).

<sup>13</sup> § 19511(d), (e).

<sup>14</sup> If substantially similar to power granted to beneficiary under first trust. § 19512(c).

<sup>15</sup> § 19511(d), (e).

<sup>16</sup> § 19512(c).

<sup>17</sup> § 19513.

<sup>18</sup> § 19519(b)(1).

<sup>19</sup> § 19519(b)(2).

<sup>20</sup> § 19519(b)(3).

<sup>21</sup> § 19519(b)(5).

<sup>22</sup> § 19519(b)(4).

<sup>23</sup> § 19519(b)(6).

<sup>24</sup> § 19519(b)(7).

<sup>25</sup> § 19519(b)(8).

<sup>26</sup> § 19519(b)(9), (10).

<sup>27</sup> § 19520.

<sup>28</sup> § 19516.

<sup>29</sup> § 19517.

<sup>30</sup> § 19518.

<sup>31</sup> § 19507. California added subsections 19507(d) and (e). Subsection 19507(d) provides that unless the trust instrument provides otherwise, notice for a qualified beneficiary who is a minor and has no representative should be given to a guardian ad litem, even if it is necessary to have a guardian ad litem appointed for that purpose. The subsection also requires notice to a guardian ad litem in the case of a qualified beneficiary who is an unascertained or unborn person and has no representative. The reference to an unborn person is puzzling, however, because an unborn person would not be a qualified beneficiary.

Subsection 19507(e) requires that notice also be given to a representative of the authorized fiduciary who knows, or has reason to know, that the person is substantially unable to manage that person's own financial resources or resist fraud or undue influence.

The California statute requires that the notice also include the reason for the decanting and an explanation of the differences between the first and second trusts. In addition, the notice must state: "If you do not bring a court action to contest the proposed trust decanting (the proposed changes to the trust) within 59 days of this notice, you will lose your right to contest the decanting."

Further, California deleted the provision of the UTDA that provides that an attempted exercise is not ineffective because of the failure to give notice to a person if the authorized fiduciary acted with reasonable care to comply with the notice requirements.

<sup>32</sup> § 19509. The California statute provides that in a court action the burden is on the authorized fiduciary to establish that notice was given and that the authorized fiduciary may exercise the decanting power.

<sup>33</sup> § 19504.

<sup>34</sup> § 19504(b).

<sup>35</sup> § 19505.

<sup>36</sup> Unlike the UTDA, the California statute does not include a provision that a trustee may reasonably rely on the validity of a prior attempted decanting.

<sup>37</sup> § 19514.

<sup>38</sup> § 19522.

<sup>39</sup> § 19523.

<sup>40</sup> § 19525.

<sup>41</sup> § 19526.