

---

---

# A Brave New World: Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust and Estate Dispute Resolution Acts

by Gail E. Mautner and Heidi L. G. Orr  
*Seattle, Washington\**

*Editor's Synopsis: Nonjudicial dispute resolution procedures for trust and estate matters are increasingly popular to minimize the expense, complexity, and publicity of court procedures. This article addresses the nonjudicial resolution procedures in the Uniform Trust Code, which has now been adopted in almost half the states, as well as provisions in Washington, Oregon, and Idaho that appear to reach the farthest into this "brave new world" of trust and estate nonjudicial dispute resolution. The article addresses various practical issues, including the availability of virtual representation or special representatives to bind certain parties. The article addresses how the procedures apply in differing contexts, such as modifying or terminating trusts or streamlining trust administration. The article concludes with helpful practice tips in using nonjudicial resolution procedures.*

O wonder!  
How many goodly creatures are there here!  
How beauteous mankind is!  
O brave new world  
That hath such people in't!

## Scope of Article

As of the date this article was completed, twenty-two states<sup>2</sup> and the District of Columbia have adopted the Uniform Trust Code. In 2008 and 2009, the Uniform Trust Code was introduced in several other states (Connecticut, Massachusetts, New Jersey, and Oklahoma) and is under active consideration in several other states, including the authors' home state of

Washington. Washington, like its neighbor Idaho, has not yet adopted the Uniform Trust Code, but has instead adopted its own trust and estate dispute resolution act ("TEDRA").<sup>3</sup> Washington's other neighbor, Oregon, has adopted the Uniform Trust Code, but has also incorporated nonjudicial dispute resolution procedures into its act that are similar to Washington's and Idaho's TEDRA.

The Uniform Trust Code and TEDRA each provide a mechanism to use nonjudicial dispute resolution procedures to address trust disputes, modify and terminate trusts, and streamline trust administration. The nonjudicial dispute resolution procedures set forth in the Uniform Trust Code and TEDRA have launched estate planning and trust administration practitioners into a brave new world, giving them practical tools to assist clients (beneficiaries and fiduciaries alike) in reaching their goals, administering trusts more efficiently, dealing with the issues that trustors and testators never anticipated, and addressing the ever changing landscape of federal and state estate tax laws. These comprehensive statutory schemes also provide practitioners throughout the United States with a set of judicial procedures for resolving disputes that cannot be resolved through nonjudicial measures and to confirm or validate nonjudicial dispute resolution agreements. Although several Uniform Trust Code states have adopted provisions that expand the powers of trustors, beneficiaries, and trustees to address trust disputes with both judicial and nonjudicial procedures, there does not appear to be any particular regional flavor with respect to these expanded powers. The nonjudicial dispute resolution procedures adopted by

---

\* Copyright 2009 by Gail E. Mautner and Heidi L. G. Orr. All rights reserved. The authors gratefully acknowledge the contributions of Reuben J. Ortega, University of Iowa College of Law Class of 2009, and Brandon K. Miller, Seattle University School of Law Class of 2010, in the research for the preparation of this article.

<sup>1</sup> William Shakespeare, *The Tempest*, Act V, Scene I.

<sup>2</sup> Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Michigan (the Michigan Uniform Trust Code does not go into

effect until April 1, 2010), Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont (the Vermont Trust Code went into effect on July 1, 2009), Virginia, and Wyoming.

<sup>3</sup> Several other states have adopted portions of the Uniform Trust Code or other statutes addressing the modification and termination of trusts (some of which are based on the Restatement of Trusts). These state statutes are not addressed in this article.

---

the Pacific Northwest states of Washington, Oregon, and Idaho, however, do have a regional “spin” and appear to reach the farthest into this brave new world, and are leading the way in developing new methods to address trust and estate dispute resolution.<sup>4</sup>

This article will address nonjudicial dispute resolution procedures under the Uniform Trust Code and TEDRA, outline the differences between the statutes, and provide practical tips for using these statutes to address issues that arise in the course of administering trusts and estates. Section II provides some historic background for the enactment of the Uniform Trust Code and TEDRA. Section III outlines specific dispute resolution procedures of the Uniform Trust Code and TEDRA, Sections IV through VII address specific practical issues related to using nonjudicial dispute resolution procedures to address trust disputes, and Section VIII offers a summary of practical tips for using these statutes.

## History and Purpose

### *Uniform Trust Code*

The Uniform Trust Code was adopted in 2000 and has been amended several times since then. The Prefatory Note to the Uniform Trust Code discusses why its drafters created this new body of law:

The primary stimulus to the Commissioners’ drafting of the Uniform Trust Code is the greater use of trusts in recent years, both in family estate planning and in commercial transactions, both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relat-

ing to trusts, while numerous, are fragmentary. The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions.<sup>5</sup>

While there are numerous acts that relate to trusts and the administration of trusts (e.g., Uniform Prudent Investor Act, Uniform Principal and Income Act, Uniform Trustees’ Powers Act, and Uniform Custodial Trust Act), none of these acts provide a comprehensive guide to trust law and the administration of trusts. The purpose of the Uniform Trust Code was to provide such a comprehensive body of law.

The Uniform Trust Code includes important and useful provisions covering trust modification and termination as well as nonjudicial dispute resolution procedures to address trust issues. In order to “encourage nonjudicial resolution of disputes, the Uniform Trust Code provides more certainty for when such settlements are binding.”<sup>6</sup> The overall objective of the provisions related to modification and termination of trusts is to set forth provisions that will “enhance flexibility consistent with the principle that preserving the settlor’s intent is paramount.”<sup>7</sup>

### *Trust and Estate Dispute Resolution Acts*

Idaho and Washington have not adopted the Uniform Trust Code (although it is currently under consideration in Washington). Instead, each state has adopted its own trust and estate dispute resolution act. As noted supra, Oregon has adopted the Uniform Trust Code, but has added its own provisions for nonjudicial dispute resolution. Washington adopted the first version of its TEDRA statute in 1984<sup>8</sup> and significantly revised it in 1999, when it was proposed as a national dispute resolution act to the American Bar Association.<sup>9</sup> Technical amendments were also made in 2006, 2007, and 2008. Washington adopted its TEDRA as a means to provide “nonjudicial methods for the resolution of matters, such as mediation, arbitration, and

---

<sup>4</sup> TEDRA does have its critics and many of these critics believe that TEDRA goes too far in allowing trustees and beneficiaries to circumvent a trustor’s original intent. For a highly critical view of Washington’s TEDRA, see Kirsten M. Elliott, *ADR Gone Wild!: One State’s Experience with a Radical Trust and Estate Dispute Resolution Act*, American College of Trust and Estate Counsel 2007 Mary Moers Wenig Student Writing Competition, Honorable Mention. Other scholars, who have criticized the Uniform Trust Code’s provisions related to virtual representation, may be inclined to express similar concerns regarding TEDRA’s broad virtual representation provisions. See e.g., Martin D. Begleiter, *Serve the Cheerleader—Serve the World: An Analysis of*

*Representation in Estate and Trust Proceedings and Under the Uniform Trust Code and Other Modern Trust Codes*, 43 REAL PROP., TR. & EST. L.J. 311 (Summer 2008), for an excellent discussion of the doctrine of virtual representation.

<sup>5</sup> UNIF. TRUST CODE, Prefatory Note, 7C U.L.A. 362, 364 (2006).

<sup>6</sup> *Id.* at 366.

<sup>7</sup> *Id.* at 367.

<sup>8</sup> Washington Trust Act, WASH. REV. CODE Chapter 11.96. Repealed by 1999 Wash. Sess. Laws 177, 226, eff. Jan. 1, 2000.

<sup>9</sup> Wash. State Senate Bill Report SB 5196 (1999).

---

agreement.”<sup>10</sup> Washington’s TEDRA statute also provides for “judicial resolution of disputes if other methods are unsuccessful.”<sup>11</sup>

Idaho followed Washington and adopted its own TEDRA statute in 2005. Idaho’s TEDRA statute provides that the purpose of the chapter is to “set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates.”<sup>12</sup> Idaho’s TEDRA provisions are intended to provide “nonjudicial methods for the resolution of matters by agreement.”<sup>13</sup> As with Washington, Idaho’s TEDRA also provides for judicial resolution of disputes if a nonjudicial resolution cannot be obtained.<sup>14</sup>

As with the Uniform Trust Code, TEDRA allows parties interested in a trust to address trust issues, including modification and termination of trusts, and provides for judicial as well as nonjudicial procedures for dealing with such issues. Both Idaho and Washington’s TEDRA statutes have created a streamlined approach to the nonjudicial resolution of trust disputes.

## A Guide to Statutory Nonjudicial Procedures

### *Uniform Trust Code*

The following outlines important provisions of the Uniform Trust Code related to nonjudicial dispute resolution agreements.

#### Article 1—General Provisions and Definitions

Section 111 of the Uniform Trust Code addresses nonjudicial settlement agreements. Specifically, Section 111 provides that “interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.”<sup>15</sup> Matters that may be resolved by a nonjudicial settlement agreement include: (i) the interpretation or construction of trust terms; (ii) the approval of a trustee’s report or accounting; (iii) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of a necessary or desirable power; (iv) the resignation or appointment of a trustee; (v) the transfer of the situs of trust administration; and (vi) the liability of a trustee for an action relating to a trust.<sup>16</sup> Once a nonjudicial settlement agreement is signed,

any interested party may request the court to approve the agreement.<sup>17</sup>

#### Article 3—Representation

Article 3 of the Uniform Trust Code addresses representation of beneficiaries by others, either through fiduciaries or under the doctrine of virtual representation. The Uniform Trust Code also provides for the appointment of special representatives when there is no appropriate virtual representative of the interests of minor, incapacitated, unborn, or unascertained beneficiaries, as in situations where lineal ancestors (e.g., living parents) have a separate or conflicting interest.

a. *Section 301—Representation: Basic Effect.* Section 301 of the Uniform Trust Code provides that a person may receive notice and bind another person as his or her virtual representative. Section 301 provides that a person may represent and bind another person and such representation has the “same effect as if notice were given directly”<sup>18</sup> to the represented person. The consent of a person virtually representing another person is binding on the represented person unless the represented person objects to the representation before the consent becomes effective.<sup>19</sup> Except as provided elsewhere in the Uniform Trust Code, a person may represent a settlor who lacks capacity and may receive notice and give a binding consent on the settlor’s behalf.<sup>20</sup> Finally, a settlor cannot represent and bind a beneficiary with respect to the termination and modification of a trust.<sup>21</sup>

b. *Section 302—Representation by Holder of General Testamentary Power of Appointment.* Section 302 of the Uniform Trust Code provides that 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 dispute, the holder of the power may represent and bind persons whose interests are subject to the power.<sup>22</sup>

c. *Section 303—Representation by Fiduciaries and Parents.* Section 303 of the Uniform Trust Code provides that to the extent there is no conflict between the representative and the person represented, a conservator, guardian, agent, trustee, personal representative, or parent may represent and bind such respective incapacitated person, principal, beneficiary, estate, or minor child.<sup>23</sup>

---

<sup>10</sup> WASH. REV. CODE § 11.96A.010.

<sup>11</sup> *Id.*

<sup>12</sup> IDAHO CODE § 15-8-101(2).

<sup>13</sup> *Id.*

<sup>14</sup> IDAHO CODE § 15-8-201.

<sup>15</sup> UNIF. TRUST CODE § 111(b) (2000), 7C U.L.A. (2006).

<sup>16</sup> *Id.* § 111(d).

<sup>17</sup> *Id.* § 111(e).

<sup>18</sup> *Id.* § 301(a).

<sup>19</sup> *Id.* § 301(b).

<sup>20</sup> *Id.* § 301(c).

<sup>21</sup> *Id.* § 301(d) (amended 2004).

<sup>22</sup> *Id.* § 302.

<sup>23</sup> *Id.* § 303.

d. *Section 304—Representation by Person Having Substantially Identical Interest.* Section 304 of the Uniform Trust Code authorizes a person with a substantially identical interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated, or unborn individual, or person whose location is unknown and not reasonably ascertainable.<sup>24</sup>

e. *Section 305—Appointment of Representative.* Section 305 of the Uniform Trust Code provides for the appointment of a representative. If a court determines that an interest is not properly represented, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual.<sup>25</sup> A representative may act on behalf of the represented person with respect to any matter regardless of whether a judicial proceeding concerning the trust is pending.<sup>26</sup> Further, in making decisions, a representative may consider the general benefit of the decisions that would accrue to the members of the represented party's family.<sup>27</sup>

#### Article 4—Creation, Validity, Modification, and Termination of Trust

Article 4 of the Uniform Trust Code addresses modification and termination of trusts.

a. *Section 410—Modification or Termination of Trust; Proceedings for Approval or Disapproval.* Section 410 of the Uniform Trust Code provides that any proceeding to approve or disapprove a trust modification or termination may be commenced by a trustee or beneficiary, and in some cases the settlor of the trust.<sup>28</sup>

b. *Section 411—Modification or Termination of Noncharitable Irrevocable Trust by Consent.* Section 411 of the Uniform Trust Code provides that 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.<sup>29</sup> A settlor's power to consent to a trust's modification or termination may be exercised by an agent, conservator, or guardian.<sup>30</sup> A noncharitable irrevocable trust may be

modified or terminated upon consent of only the beneficiaries if the court concludes that the modification or continuance of the trust is not necessary to achieve any material purpose of the trust.<sup>31</sup> A spendthrift provision is not presumed to constitute a material purpose of the trust.<sup>32</sup> If not all the beneficiaries consent to a proposed modification or termination, then the court can approve the modification or termination if the court determines that the trust could have been modified or terminated if all the beneficiaries had consented and the interests of the beneficiary who did not consent will be adequately protected.<sup>33</sup>

c. *Section 412—Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively.* Section 412 of the Uniform Trust Code provides that "a 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."<sup>34</sup> A court may also "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."<sup>35</sup>

d. *Section 414—Modification or Termination of Uneconomic Trust.* Section 414 of the Uniform Trust Code provides that a trustee of a trust having a total value of 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.<sup>36</sup> A court may also 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.<sup>37</sup>

e. *Section 415—Reformation to Correct Mistakes.* Section 415 of the Uniform Trust Code provides that a court may reform the terms of a trust, even if the terms are unambiguous, "to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."<sup>38</sup>

f. *Section 416—Modification to Achieve Settlor's Tax Objectives.* Section 416 of the Uniform Trust Code provides that a court may modify the terms of a trust in a manner that is not contrary to the sett-

<sup>24</sup> *Id.* § 304.

<sup>25</sup> *Id.* § 305(a).

<sup>26</sup> *Id.* § 305(b).

<sup>27</sup> *Id.* § 305(c).

<sup>28</sup> *Id.* § 410(b).

<sup>29</sup> *Id.* § 411(a) (amended 2004). (The 2004 amendment to Uniform Trust Code Section 411(a) allows states to choose whether to adopt provisions requiring judicial approval of any trust modification or termination.)

<sup>30</sup> *Id.* § 411(a).

<sup>31</sup> *Id.* § 411(b).

<sup>32</sup> *Id.* § 411(c).

<sup>33</sup> *Id.* § 411(e).

<sup>34</sup> *Id.* § 412(a).

<sup>35</sup> *Id.* § 412(b).

<sup>36</sup> *Id.* § 414(a).

<sup>37</sup> *Id.* § 414(b).

<sup>38</sup> *Id.* § 415.

---

lor's probable intention in order to achieve the settlor's tax objectives.<sup>39</sup>

### Section 1004—Attorneys' Fees and Costs

Section 1004 of the Uniform Trust Code provides that in "a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."<sup>40</sup>

Appendix A to this Article contains selected provisions of the Uniform Trust Code. Although Oregon has not adopted a TEDRA-type statute (it instead adopted the Uniform Trust Code in 2005), Oregon has adopted several provisions that are similar to TEDRA. Appendix B contains selected provisions of the Oregon Uniform Trust Code.

### *Trust and Estate Dispute Resolution Acts*

Idaho and Washington have adopted similar TEDRA statutes, which contain nonjudicial procedures to address trust and estate matters.

### Matter

The "matters" that may be addressed and resolved through a nonjudicial procedure are broadly defined and include any issue, question, or dispute involving: (i) the determination of any class of credi-

tors, 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; (ii) the direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity; (iii) the determination of any question arising in the administration of an estate or trust or with respect to any nonprobate assets or any other asset or property interest passing at death, including, without limitation, questions relating to the construction of wills, trusts, community property agreements, or other writings, a change of personal representative or trustee, a change of the situs of a trust, an accounting from a personal representative or trustee, or the determination of fees for a personal representative or trustee; (iv) the grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law; and (v) the amendment, reformation, or conformation of a will or trust instrument to comply with statutes and regulations of the Internal Revenue Code in order to achieve qualification for deductions, elections, and other tax requirements.<sup>41</sup> Similar provisions address the administration of nonprobate assets.

### Virtual Representation; Special Representatives

a. *Virtual Representation.* Like the Uniform Trust Code, TEDRA adopts the common law concept of virtual representation and is intended to supplement the common law relating to the doctrine of virtual rep-

---

<sup>39</sup> *Id.* § 416.

<sup>40</sup> *Id.* § 1004. Section 1004 of the Uniform Trust Code is based on Chapter 215, Section 45 of the Massachusetts General Laws and "codifies the court's historic authority to award costs and fees, including reasonable attorneys' fees, in judicial proceedings grounded in equity." *See* UNIF. TRUST CODE § 1004 cmt.

Several adopting states deviate from the official text of Section 1004 of the Uniform Trust Code. Arizona and Utah have revised Section 1004 to allow reimbursement of fees and expenses to a trustee who acted in good faith in defending or prosecuting proceedings related to the administration of a trust (*see* ARIZ. REV. STAT. § 14-11004 and UTAH CODE ANN. § 75-7-1004). Florida allows a court to award attorneys' fees in actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers and in proceedings arising pursuant to the modification or termination of a trust (*see* Fla. Stat. ch. 736.1004). Florida has also adopted several other statutes addressing attorneys' fees with respect to trusts, which statutes address issues such as attorneys' fees for services to trusts, trustee's attorneys' fees, and costs in trust proceedings. *See id.* chs. 736-1005, 736-1006, 736-1007. Michigan will allow a trustee participating in a civil action in good faith to receive expenses, and disbursements, including reasonable attorneys' fees that the trustee incurred in connection with the pro-

ceeding and allows a court to reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust (*see* MICH. TRUST CODE § 7904). Tennessee allows costs related to nonjudicial agreements to be paid out of the trust if all parties agree and allows the mediator or arbitrator to award fees, costs, and expenses out of trust assets in any mediation or arbitration involving the administration of the trust (*see* TENN. CODE ANN. § 35-15-1004). Neither North Dakota nor Pennsylvania has adopted Section 1004 of the Uniform Trust Code and instead both have reserved the section for later use.

While the Uniform Trust Code clearly sets forth how fees, costs, and expenses are to be awarded in judicial proceedings, only Tennessee specifically allows the parties to agree as to the division and payment of fees, costs, and expenses with respect to nonjudicial agreements. *See id.* § 35-15-1004. Regardless of whether the Uniform Trust Code specifically allows interested parties to decide on attorneys' fees in a nonjudicial dispute resolution proceeding, it would seem that the parties to a nonjudicial agreement could agree as to the division and payment of attorneys' fees between the parties with respect to a nonjudicial agreement entered into pursuant to the Uniform Trust Code.

<sup>41</sup> WASH. REV. CODE § 11.96A.030(1); IDAHO CODE § 15-8-103(1).

---

resentation while not limiting the application of that doctrine.<sup>42</sup>

TEDRA provides that its notice requirements will be satisfied if notice is given to the living persons who would constitute the class of persons entitled to notice if an event related to an estate, trust, nonprobate asset, or interest affected by a power of attorney had happened immediately before the commencement of the proceeding requiring notice.<sup>43</sup> Similarly, the notice requirements under TEDRA will be satisfied if notice is given to a living person and the same interest in the matter will pass to the surviving spouse, or to persons who are, or might be, the distributees, heirs, issue, or other kindred of that person.<sup>44</sup> Finally, the notice requirements under TEDRA will be satisfied if notice of an event is given to the class of persons who, upon the happening of any future event, would take the interest upon the happening of the first event.<sup>45</sup>

b. *Special Representatives.* In the event a direct conflict exists between an interested party and the person such party wishes to represent, the interested party cannot virtually represent such other person. Under TEDRA, when a conflict of interest exists and there are minor, incompetent, unborn, or unascertained beneficiaries, a personal representative or trustee may petition the court to have a special representative appointed to represent such individual's interests in the matter.<sup>46</sup> The special representative, who must be a lawyer licensed to practice law or an individual with "special skill or training in the administration of...trusts,"<sup>47</sup> may enter into a binding agreement on behalf of the represented person or beneficiary.<sup>48</sup> A special representative may represent the interests of more than one person or class of persons.<sup>49</sup> A special representative is discharged from any responsibility with respect to the matter and will not have any further duties with respect to the estate or trust or with respect to any person interested in the estate or trust on the earlier of: (i) the expiration of six months from the date the

special representative was appointed; or (ii) the execution of a written agreement signed by all the parties or their virtual representatives.<sup>50</sup>

#### Binding Agreement

Under TEDRA, if all interested parties agree to a resolution of any matter, then the agreement shall be evidenced by a written agreement signed by all the parties. The written agreement is binding and conclusive on all persons interested in the estate or trust.<sup>51</sup> If a party who virtually represents another party signs the written agreement, then the party's signature constitutes the signature of all persons whom the party virtually represents and all of the virtually represented persons will be bound by the agreement.<sup>52</sup>

#### Entry of Agreement

Any party may file the written agreement (or a memorandum of the agreement) with the court having jurisdiction over the estate or trust.<sup>53</sup> Once filed, the agreement will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust.<sup>54</sup>

#### Attorneys' Fees

Washington's and Idaho's provisions with respect to attorneys' fees are virtually identical and can be found in the section of each state's TEDRA that addresses judicial resolution of disputes. Generally, both statutes provide that the court may order costs, including reasonable attorneys' fees, to be awarded to any party from any other party to the proceedings from the assets of the estate or trust involved in the proceedings or from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.<sup>55</sup>

---

<sup>42</sup> WASH. REV. CODE § 11.96A.120(1); IDAHO CODE § 15-8-205(2). See also extended discussion, Section II, *infra*.

<sup>43</sup> WASH. REV. CODE § 11.96A.120(2)(a); IDAHO CODE § 15-8-205(2)(a).

<sup>44</sup> WASH. REV. CODE § 11.96A.120(2)(b); IDAHO CODE § 15-8-205(2)(b).

<sup>45</sup> WASH. REV. CODE § 11.96A.120(2)(c); IDAHO CODE § 15-8-205(2)(c).

<sup>46</sup> WASH. REV. CODE § 11.96A.250(1)(a); IDAHO CODE § 15-8-305(1)(a).

<sup>47</sup> WASH. REV. CODE § 11.96A.250(3); IDAHO CODE § 15-8-305(3).

<sup>48</sup> WASH. REV. CODE § 11.96A.250(1)(c); IDAHO CODE § 15-8-305(1)(c).

<sup>49</sup> WASH. REV. CODE § 11.96A.250(1)(c); IDAHO CODE § 15-8-305(1)(c).

<sup>50</sup> WASH. REV. CODE § 11.96A.250(4); IDAHO CODE § 15-8-305(4).

<sup>51</sup> WASH. REV. CODE § 11.96A.220; IDAHO CODE § 15-8-302.

<sup>52</sup> WASH. REV. CODE § 11.96A.220; IDAHO CODE § 15-8-302.

<sup>53</sup> WASH. REV. CODE § 11.96A.230(1); IDAHO CODE § 15-8-303(1).

<sup>54</sup> WASH. REV. CODE § 11.96A.230(2); IDAHO CODE § 15-8-303(2).

<sup>55</sup> WASH. REV. CODE § 11.96A.150; IDAHO CODE § 15-8-208. At common law, the costs and expenses of litigation were often awarded only in cases where the losing party had been guilty of bad faith or fraud. Courts are now more likely to award costs and

---

Appendix C to this Article contains selected provisions of the Idaho Trust and Estate Dispute Resolution Act. Appendix D contains selected provisions of the Washington Trust and Estate Dispute Resolution Act.

### **Virtual Representation of Minor, Incapacitated, Unborn, and Unascertained Beneficiaries; Special Representatives**

In nearly all matters involving estates and trusts, there are beneficiaries, potential beneficiaries, or other interested parties who cannot represent themselves because of minority or incapacity or because such beneficiaries are unknown, unborn, or unascertained. In the event of a dispute, these beneficiaries must therefore be represented by another party either through the application of the doctrine of virtual representation or by appointment of an individual by the court to represent the absent party. Both the Uniform Trust Code and TEDRA adopt the common law doctrine of virtual representation. By using the doctrine of virtual representation, notice, accounting, and other information provided to a representing party will have the same effect as if provided directly to the represented party(ies). As a result, any actions taken by the representing party bind the represented party(ies) to the same extent as if those actions were taken directly by the represented party(ies).

#### ***Virtual Representation***

When attempting to address estate and trust issues that arise in a judicial proceeding, due process<sup>56</sup> requires that all persons who have an interest in the matter are represented and have an opportunity to be heard. This concept can be said to govern both judicial proceedings and the nonjudicial dispute resolution

---

expenses, including reasonable attorneys' fees, to the winning party. Generally, if a judicial proceeding is started with respect to an estate or trust, the court has authority to award fees and costs, including reasonable attorneys' fees. A court may award a party its own fees and costs from the corpus of the estate or trust, or charge a party's fees and costs against another party to the litigation.

Under TEDRA, courts award attorney fees to whomever, and from whomever, the court deems appropriate. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may, but need not, include whether the litigation benefits the trust involved. *See* WASH. REV. CODE § 11.96A.150(1). The court may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party from any party to the proceedings, from the assets of the trust involved in the proceedings,

process. Many trusts or estates have minor, incapacitated, unborn, or unascertained beneficiaries who cannot legally enter into binding agreements—judicial or nonjudicial. Therefore, it is necessary for someone else to represent such beneficiaries' interests with respect to the matter:

An orderly administration of justice requires that the owner of an interest shall have a day in court before a claim affecting his interest effectively secures judicial sanction. But an efficient administration of justice also requires that the presentation and final adjudication of controversies shall not be postponed indefinitely. The limitations of future interests, involving, as they often do, the limitation of interests in favor of unascertained or even unborn persons, bring these two requirements as to the administration of justice into conflict.<sup>57</sup>

The common law doctrine of virtual representation addresses such conflicts and is the concept that provides that the participation in a proceeding of one interested party can sometimes be deemed sufficient to protect the interests of minor, incapacitated, unborn, or unascertainable beneficiaries. Although the doctrine of virtual representation can address the inherent conflicts that exist between income and principal beneficiaries, current and remainder beneficiaries, personal representatives or trustees, and beneficiaries, and other parties, virtual representation will be inapplicable if the interest represented is not sufficiently protected.<sup>58</sup> Representation will be deemed to be sufficiently protective as long as it does not appear that the

---

or from any nonprobate asset that is the subject of the proceedings. *See* WASH. REV. CODE § 11.96A.150; *See* IDAHO CODE § 15-8-208. This reflects a significant change from prior common law in Washington, which provided that each litigant pay the fees of his or her attorney and other costs in the absence of an agreement, statute, or grounds in equity to the contrary.

As with other trust matters, the parties to a nonjudicial dispute resolution agreement entered into pursuant to TEDRA can agree as to the division and payment of attorneys' fees between the parties.

<sup>56</sup> Due process requires fair notice and fair opportunity to present one's case. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>57</sup> RESTATEMENT OF PROPERTY, Ch. 12: Protection of Future Interests Resulting From Requirements For Judicial Action Binding Upon Such Interests, Introductory Note (1936).

<sup>58</sup> *Id.* §185 cmt. e.

---

representing party acted in hostility with respect to the interest of the person represented.<sup>59</sup>

Prior to the Uniform Trust Code and TEDRA, the representation of minor, incapacitated, unborn, or unascertained beneficiaries through the doctrine of virtual representation was only available through judicial proceedings.<sup>60</sup> The extension of the doctrine of virtual representation to nonjudicial dispute resolution procedures has simplified the settlement process and made it possible to finalize nonjudicial dispute resolution agreements without having to seek court approval.

The Uniform Trust Code does not define all of the parties who may have an interest in a trust, other than providing that “‘interested persons’ means persons whose consent would be required to achieve a binding settlement were the settlement to be approved by the court”<sup>61</sup> and that the consent of the trustee of a trust would ordinarily be required in matters involving trust administration.<sup>62</sup> TEDRA, however, does define parties who may have an interest in a “matter.” Such interested parties include the trustor (if living), trustee, personal representative, heir, beneficiary, surviving spouse, guardian ad litem, creditor, any other person who has an interest in the subject of the proceeding, attorney general (with respect to matters involving charitable trusts, beneficiaries, or organizations),

guardian, special representative, attorney-in-fact, virtual representative, notice agent, and owner of a non-probate asset that is the subject of the proceeding.<sup>63</sup> Clearly, there are any number of individuals, entities, and organizations who could be potential parties in a dispute and it is important to carefully review the governing documents and all of the potential parties to determine who is an “interested person” or “interested party” and therefore must be a party to any nonjudicial dispute resolution agreement in order to ensure that it is binding and effective.

Once all of the parties interested in the matter have been identified, the parties must determine if the doctrine of virtual representation can be used for minor, incapacitated, unborn, or unascertained beneficiaries. If so, the representing party can engage in the dispute resolution process on behalf of such minor, incapacitated, unborn, or unascertained beneficiaries as long as there is no conflict between the representing party and the represented party(ies). If no conflict exists, a representing party may make decisions, enter into nonjudicial dispute resolution agreements, or participate in judicial proceedings related to a “matter” on behalf of such minor, incapacitated, unborn, or unascertained beneficiaries. In disputes that rise to the level of litigation, the court, upon its own motion or upon request of

---

<sup>59</sup> *Id.* § 185. This approach has been criticized, however:

The Restatement rule presumes adequate representation unless the interests of the representative are shown to be hostile to the interests of the represented person. Although the comments state that hostility does not depend on the effectiveness of the representor’s conduct, hostility is shown by the representor’s affirmative conduct demonstrating adversity to the represented party’s interests. The distinction made in the Restatement is between action, which can constitute hostility, and inaction, which does not. No analysis of the difference in effect on the represented party between action and inaction is attempted, nor is any explanation given of why action is more damaging than inaction. One suspects that the distinction is due to the Restatement focusing solely on the binding effect of the judgment.

Begleiter *supra* note 4 at 322.

<sup>60</sup> RESTATEMENT OF PROPERTY, §180 cmt. b. (1936).

<sup>61</sup> UNIF. TRUST CODE § 111(a).

<sup>62</sup> *Id.* § 111 cmt. Arizona and Oregon are the only Uniform Trust Code states that expand upon the definition of the term “interested person.” Arizona defines the term “interested person” to include “any trustee, heir, devisee, child, spouse, creditor, beneficiary, and other person who has a property right in or claim against a trust estate.” ARIZ. REV. STAT. § 14-1201(26). Oregon defines “interested persons” to mean any settlor of a trust who is living, all beneficiaries of the trust who have an interest in the subject of the agreement, any acting trustee of the trust, and the Attorney General if the trust is a charitable trust. OR. REV. STAT. § 130.045.

Other states have deviated from the Uniform Trust Code’s definition of “interested persons.” Florida defines the term “interested persons” as “persons whose interest would be affected by a settlement agreement.” See FLA. STAT. ch. 736-0111. In North Dakota, the term “interested persons” also includes a trustee of a trust (see N.D. CENT. CODE § 59-09-11). Ohio does not define “interested person” but does set forth the individuals or entities that must be party to a nonjudicial agreement, which parties shall include the settlor if living, all beneficiaries, all currently serving trustees, and creditors if their interest will be affected by the agreement. See OHIO REV. CODE ANN. § 5801.10. Pennsylvania does not define the term “interested person” and instead has reserved that section for later use, which suggests that Pennsylvania may adopt a definition of the term “interested person” in the future that fully defines the types of parties who may be parties to a nonjudicial agreement (see 20 PA. CONS. STAT. § 7710.1(a)). Tennessee does not define the term “interested persons” and instead provides that the trustee and qualified beneficiaries can enter into nonjudicial agreements. See TENN. CODE ANN. § 35-15-111.

Regardless of how the term “interested person” is defined in Uniform Trust Code states, practitioners should be cautious about making a trustor a party to any nonjudicial dispute resolution agreement (see *infra* notes 71, 126 and accompanying text).

<sup>63</sup> WASH. REV. CODE § 11.96A.030(4); See also IDAHO CODE § 15-8-103(4), which defines interested persons as the trustor, if living, all persons beneficially interested in the trust, persons holding powers over the trust 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 trustee of the trust.

---

one or more of the parties, may appoint a guardian ad litem to represent the interests of a minor, incapacitated, unborn, or unascertained person.<sup>64</sup>

The Uniform Trust Code provides for specific types of representation and limits those who can represent other parties.<sup>65</sup> Generally, under the Uniform Trust Code, a conservator, guardian, agent, trustee,

personal representative, or parent<sup>66</sup> can represent his, her, or its respective estate, ward, principal, beneficiary, persons interested in the estate, or child as long as no conflict of interest exists between the representing party and the represented party(ies).<sup>67</sup> In addition, a holder of a general testamentary power of appointment may represent and bind the permissible appointees or

---

<sup>64</sup> WASH. REV. CODE § 11.96A.160(1); IDAHO CODE § 15-8-209(1).

<sup>65</sup> Most states have adopted the provisions of Article 3 (i.e., Representation) of the Uniform Trust Code. Pennsylvania did not adopt Article 3 and instead adopted its own representation provisions. In Pennsylvania in any judicial proceeding, an order or decree of the court that binds the representative is binding upon a person, or class of persons, if the trustee notifies the representative in writing who he or she represents, the representative does not decline the representation, and the representative acts in good faith. In a nonjudicial resolution of a trust matter, notice to and consent, approval, or waiver or release by the representative is binding upon a person, or class of persons, represented if the trustee notifies the representative in writing who he or she represents, the representative does not decline, and the representative acts in good faith. *See* 20 PA. CONS. STAT. § 7722. Because a representing party has the right to decline to serve as representative, the parties to any judicial or nonjudicial proceeding would be forced to seek judicial appointment of a special representative pursuant to PA. CONS. STAT. 20 § 7724 in the event of a declination to serve. *See infra* note 86.

Pennsylvania has adopted several rules regarding representation. In addition to the general representation allowed for guardians of a person's estate and agents under a general power of attorney, the following rules also apply: (1) where property is vested in a class of persons, the living sui juris class members represent the minor, unborn, unknown, or unascertained class members; (2) where property will pass to a class of persons upon the occurrence of a future event, the living sui juris class members represent the minor, unborn, unknown, or unascertained class members; (3) where property will pass to a class of persons upon the occurrence of a future event, but the property will pass to another class of persons upon the occurrence of an additional future event, the class of persons who would take upon the occurrence of the first event represents the class of persons who would take upon the additional future event, provided their interests are identical or substantially similar; and (4) a person represents all minors or unborn individuals to the extent such persons are not otherwise represented if the interests of the representative and the person represented are substantially identical. *See id.* 20 § 7723. Similar to other Uniform Trust Code states, Pennsylvania does allow a representative to consider the general benefit accruing to the living members of the family of the person represented. *See id.* 20 § 7722.

<sup>66</sup> Parents have been criticized as proper virtual representatives of their minor children:

If a parent is allowed to represent a minor beneficiary who is made a party, the parent—unlike a fiduciary—is not under a duty to do anything in defense of the minor's interests. Without in any way denigrating the love and affection the parent has for his or her children, the fact is that a parent is not a fiduciary (in the sense of an execu-

tor, trustee, guardian, or conservator), has no duty to account to his minor children, and cannot be held liable for failure to act in the action. This is the reason a guardian ad litem, an officer of the court with a duty to appear and file a report, is appointed for an otherwise unrepresented minor or unborn, thus assuring adequate representation. Parental representation satisfies none of the tests, such as fiduciary duty or similarity of economic interest, demanded for adequate representation.

Begleiter *supra* note 4 at 365.

<sup>67</sup> UNIF. TRUST CODE § 303. Deviations from the official text of the Uniform Trust Code with respect to representation by fiduciaries and parents generally consist of the addition of fiduciaries who may represent a party or limiting or expanding authority.

The District of Columbia allows an individual to represent a grandchild or more remote descendant whom a parent may not represent and allows a qualified beneficiary to represent any beneficiary who may succeed to the qualified beneficiary's interest under the terms of a trust or pursuant to the exercise of a power of appointment (*see*, D.C. CODE ANN. § 19-1303.03). Alabama allows a parent or other direct ancestor to represent and bind minor or unborn issue if a conservator or guardian has not been appointed. *See* ALA. CODE § 19-3B-303(6). Arizona does not allow a parent to represent a child to consent to a modification or termination of a trust if the parent is the settlor of the trust (*see* ARIZ. REV. STAT. § 14-1406). Kansas only allows guardians to represent and bind a ward within the scope of the guardian's powers and duties (*see* KAN. STAT. ANN. § 58a-303). Florida allows a settlor to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report. *See* FLA. STAT. ch. § 736.0306. Missouri allows a guardian to represent and bind a ward if a conservator is not authorized to act with respect to the particular question or dispute and provides that a conservator may represent and bind a ward with respect to a particular question or dispute over which the conservator does not have authority (*see* MO. REV. STAT. § 456.3-303). New Hampshire allows guardians of the person to act if a guardian of the estate has not been appointed and specifically states that trustees and personal representatives may not bind beneficiaries or persons interested in the estate with respect to administration or distribution matters (*see* N.H. REV. STAT. ANN. § 564-B:3-303).

Importantly, North Carolina, North Dakota, and Wyoming have specifically addressed the issue of parents representing their minor children. Both North Carolina and North Dakota provide that if a disagreement arises between parents seeking to represent the same minor child, the parent who is a beneficiary of the trust that is the subject of the representation is entitled to represent the minor child. If no parent is a beneficiary of the trust that is the subject of the representation, the parent who is a lineal descendant of the settlor is entitled to represent the minor child. If no parent is a

---

takers in default.<sup>68</sup> Finally, a minor, incapacitated, or unborn individual or a person whose identity or location is unknown may be represented by a person having a substantially identical interest with respect to the

issue in dispute.<sup>69</sup> Importantly, the Uniform Trust Code Drafting Committee amended Section 301(d) to provide that a settlor cannot represent a beneficiary with respect to the termination or modification of a

lineal descendant of the settlor, then a guardian ad litem will be appointed to represent the minor child. This seems contradictory to the general rule that a representative can represent a person as long as there is no conflict of interest. Query whether this provision properly addresses the inherent conflict that exists if both the parent and child have differing beneficial interests in the same trust. See N.C. GEN. STAT. § 36C-3-303 and N.D. CENT. CODE § 59-11-03. North Dakota also allows a person to represent and bind that person's unborn issue. See N.D. CENT. CODE § 59-11-03. Wyoming, on the other hand, specifically addresses the potential conflict of interest that can exist between a parent a child. Wyoming provides that a parent with primary legal custody may represent and bind the parent's minor children if no representative has been appointed by a court and to the extent there is no conflict of interest between the parent and the person or class of persons represented with respect to the particular question or dispute. See WYO. STAT. ANN. § 4-10-303. With this provision, Wyoming's statute addresses the concerns pointed out by Begleiter *supra* note 4 discussed in note 66.

Ohio provides that if a minor or unborn child is not represented by a parent, then another person can represent the minor or unborn child if certain requirements are met and also provides that a trustee may represent and bind the beneficiaries of a trust (except that a trustee cannot represent the settlor, beneficiary, or the interests of any settlor or beneficiary in negotiating or entering into a nonjudicial agreement). See OHIO REV. CODE ANN. § 5801.10, 5803.03. Pennsylvania has not adopted Section 303 of the Uniform Trust Code and has instead adopted its own representation provisions, which are discussed *supra* note 65. Generally, however, Pennsylvania provides that a person represents the person's minor and unborn descendants. See PA. CONS. STAT. 20 § 7723(9). While generally following the official text of Section 303, South Carolina specifically states that the order of beneficiary representatives listed sets forth the priority each representative has relative to the others. See S.C. CODE ANN. § 62-7-303. Tennessee expands beneficiary representatives to include persons designated by the settlor to represent the beneficiaries of a trust and persons designated by the beneficiaries of a trust to represent them. In addition, Tennessee provides that a person may represent and bind the person's minor or unborn descendants if a guardian for the descendant has not been appointed. See TENN. CODE ANN. § 35-15-303. Virginia also allows grandparents or more remote ancestors to represent minor or unborn persons who are not otherwise represented. See VA. CODE ANN. § 55-543.03.

<sup>68</sup> UNIF. TRUST CODE § 302. Generally, Section 302 provides that as long as there is no conflict of interest, a person holding a general testamentary power of appointment can represent and bind persons whose interest as possible appointees, takers in default, or otherwise are subject to the power. Several states have deviated from the official text of the Uniform Trust Code with respect to holders of general powers of appointment.

The District of Columbia defines a qualified power of appointment as a power exercisable in favor of the power holder, power holder's estate, creditors, and creditors of the power holder's estate or all persons other than the power holder, the power holder's

estate, creditors, and creditors of the power holder's estate. See D.C. CODE ANN. § 19-1303.02. Alabama allows the holder of a lifetime power of appointment to represent and bind all persons whose interests are subject to the power. Further, to the extent that there is no conflict of interest between the holder of a power of appointment (other than a lifetime power of appointment) and the persons represented with respect to the particular question or dispute, the holder of a power of appointment may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. See ALA. CODE § 19-3B-302. Florida permits representation by the holder of a power of appointment to represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power, except in any matter determined by the court to involve fraud or bad faith by the trustee, a power of a trustee to distribute trust property, or a power of appointment held by a person while the person is the sole trustee. See FLA. STAT. ch. § 736.0302. Michigan provides that for purposes of granting consent or approval to the modification or termination of a trust or consent or approval of a nonjudicial agreement, only the holder of a presently exercisable or testamentary general power of appointment may represent and bind persons subject to the power. See MICH. TRUST CODE § 7302. Missouri defines the term "testamentary power of appointment" and sets forth the persons such power may be exercised in favor of. See MO. REV. STAT. § 456.3-302. North Carolina provides that the holder(s) of a power of revocation or a presently exercisable general power of appointment shall represent other persons to the extent their interests are subject to the power. See N.C. GEN. STAT. § 36C-3-302. North Dakota provides that the holder of a presently exercisable general power of appointment and the persons represented with respect to the particular question or dispute may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power and defines the term "presently exercisable general power of appointment" to include a testamentary general power of appointment having no conditions precedent to its exercise other than the death of the holder, the validity of the holder's last will and testament, and the inclusion of a provision in the will sufficient to exercise this power. See N.D. CENT. CODE § 59-11-02. In addition to the representation discussed *supra* note 65, Pennsylvania provides that the holder of a presently exercisable power or testamentary power of appointment represents all potential appointees and all takers in default of exercise of the power of appointment if the holder may appoint to the holder's estate, creditors, or creditors of the holder's estate or anyone other than the holder's estate, the holder's creditors, or the creditors of the holder's estate. See PA. CONS. STAT. 20 § 7723(7). South Carolina defines the term "presently exercisable power of appointment" to include a testamentary general power of appointment having no conditions precedent to its exercise other than the death of the holder, the validity of the holder's will and the inclusion of the provision in the will sufficient to exercise the power. See S.C. CODE ANN. § 62-7-302.

<sup>69</sup> UNIF. TRUST CODE § 304. Several states have deviated from the official text of the Uniform Trust Code with respect to persons

---

trust under Section 411(a) of the Uniform Trust Code.<sup>70</sup> The Committee recommended that states enact the amendment to Section 301(d) because the settlor's ability to represent and bind a beneficiary with respect to a termination or modification of an irrevocable trust might possibly result in inclusion of the trust in the settlor's gross estate.<sup>71</sup>

TEDRA, like the Uniform Trust Code, has also adopted the doctrine of virtual representation. Unlike the Uniform Trust Code, TEDRA does not limit the types of persons who may represent another party other than to provide that "[A] party is not virtually represented by a person receiving notice if a conflict of interest involving the matter is known to exist between the notified person and the party."<sup>72</sup> Under TEDRA, as long as no conflict of interest exists, where an interest in a matter exists and notice has been given to:

- (1) persons who comprise a certain class upon the happening of a certain event...;<sup>73</sup>
- (2) a living person, and the same interest, or a share in it, is to pass to the surviving spouse, or to persons who are, or might be, the distributees, heirs, issue, or other kindred of that liv-

---

having substantially identical interests. Modifications generally include provisions related to presumptive remainder beneficiaries, qualified beneficiaries representing unqualified beneficiaries, and sui juris beneficiaries.

Alabama provides that if there is no conflict of interest, a presumptive remainder beneficiary may represent contingent successor remainder beneficiaries. *See* ALA. CODE § 19-3B-304. Missouri allows a qualified beneficiary (having a substantially identical interest) to represent a beneficiary who is not a qualified beneficiary in court proceedings or with respect to nonjudicial agreements as long as there is no conflict of interest in any court proceeding or in a nonjudicial settlement agreement. *See* MO. REV. STAT. § 456.3-304. New Hampshire provides that the section does not expand or limit the virtual representation of sui juris beneficiaries. *See* N.H. REV. STAT. ANN. § 564-B:3-304. South Carolina provides that a minor, incapacitated, or unborn individual may be represented by a person having a substantially identical interest but that the person represented must be adequately represented. *See* S.C. CODE ANN. § 62-7-304.

Arizona, the District of Columbia, Missouri, North Carolina, North Dakota, Virginia, and Vermont all provide that a representative may represent a person having a substantially identical interest as long as there is no conflict of interest with respect to the particular question or issue or dispute. *See* ARIZ. REV. STAT. § 14-1407, D.C. CODE ANN. § 19-1303.04, MO. REV. STAT. § 456.3-304, N.C. GEN. STAT. § 36C-3-304, N.D. CENT. CODE § 59-11-04, VA. CODE ANN. 55-543.04, and VT. STAT. ANN. 14A.304. Pennsylvania also provides that certain rules with respect to representation apply to the extent there is no conflict of interest with respect to the matter at issue between the representative and the person or persons represented. *See* PA. CONS. STAT. 20 § 7723.

<sup>70</sup> UNIF. TRUST CODE § 301(d) (amended 2004). Arizona, the

ing person upon the happening of a future event...;<sup>74</sup> or

- (3) a person or class of persons, or both, upon the happening of any future event, and the same interest or a share of the interest is to pass to another person or class of persons, or both, upon the happening of an additional future event...;<sup>75</sup>

then notice may be given to:

- (1) ...the living persons who would constitute the class if the event happened immediately before the commencement of the proceeding requiring notice...;<sup>76</sup>
- (2) ...that living person...;<sup>77</sup> or
- (3) ...the living person or persons who would take the interest upon the happening of the first event...;<sup>78</sup>

respectively, and the:

- (1) ...living persons shall virtually represent all other members of the class;<sup>79</sup>

---

District of Columbia, Kansas, South Carolina, Utah, and Vermont omit the Uniform Trust Code official text of subsection (d) while New Hampshire does not limit this rule to only terminations or modifications of a trust under Section 411(a) (*See* N.H. REV. STAT. ANN. § 564-B:3-301). Section 301(d) is omitted in Florida because modification of a trust is only permitted after the settlor's death. Therefore, it is not possible for a settlor to represent a beneficiary. *See* FLA. STAT. ch. 736.0412. The omission of Section 301(d) by some states seems to indicate that these states are leaving the analysis of whether a trustor representing a beneficiary with respect to the termination or modification of a trust will result in inclusion of the trust in the trustor's gross estate with tax practitioners who understand the complexities of federal and state estate tax laws. The omitting of this provision gives trustors, beneficiaries, and trustees in these states greater freedom in addressing trust disputes.

<sup>71</sup> UNIF. TRUST CODE § 411 cmt. 2004 Amendments.

<sup>72</sup> WASH. REV. CODE § 11.96A.120(3); IDAHO CODE § 15-8-205(3).

<sup>73</sup> WASH. REV. CODE § 11.96A.120(2)(a); IDAHO CODE § 15-8-205(2)(a).

<sup>74</sup> WASH. REV. CODE § 11.96A.120(2)(b); IDAHO CODE § 15-8-205(2)(b).

<sup>75</sup> WASH. REV. CODE § 11.96A.120(2)(c); IDAHO CODE § 15-8-205(2)(c).

<sup>76</sup> WASH. REV. CODE § 11.96A.120(2)(a); IDAHO CODE § 15-8-205(2)(a).

<sup>77</sup> WASH. REV. CODE § 11.96A.120(2)(b); IDAHO CODE § 15-8-205(2)(b).

<sup>78</sup> WASH. REV. CODE § 11.96A.120(2)(c); IDAHO CODE § 15-8-205(2)(c).

<sup>79</sup> WASH. REV. CODE § 11.96A.120(2)(a); IDAHO CODE § 15-8-205(2)(a).

- (2) ...living person shall virtually represent the surviving spouse, distributees, heirs, issue, or other kindred of the person;<sup>80</sup> and
- (3) ...living person or persons shall virtually represent the persons and classes of persons who might take on the happening of the additional future event,<sup>81</sup>

respectively. The doctrine of virtual representation under TEDRA is quite broad and does not limit the type of person who can virtually represent another party (i.e., it would appear that TEDRA allows settlors to represent beneficiaries as long as no conflict of interest exists and does not address the issue of possible inclusion of a trust or asset in the settlor's estate). This places the burden of making sure that any planned modification, termination, or other activity with regard to the "matter" does not have adverse tax consequences squarely on the parties interested in the matter.

### *Special Representatives*

What happens if there are minor, incapacitated, unborn, or unascertained beneficiaries of a trust or estate and there is no one who can virtually represent such beneficiaries due to conflicts between the potential represented and representing party(ies)? If there is a conflict of interest between the potential representing party and the represented party(ies), the doctrine of virtual representation cannot be utilized. Instead, it is necessary to appoint a special representative to represent the interests of minor, incapacitated, unborn, or unascertained beneficiaries with respect to any nonjudicial dispute resolution procedure.

The Uniform Trust Code and TEDRA both provide for the appointment of a special representative who can represent the interests of minor, incapacitated,

unborn, or unascertainable beneficiaries. The appointment of a special representative is an important component of the Uniform Trust Code and TEDRA because it prevents current beneficiaries from excluding interested parties who may take from the estate or trust in the future and allows an unbiased third party to represent a party interested in the estate or trust when a conflict of interest exists or may exist. A special representative is charged with adequately representing the interests of future beneficiaries or minor, incapacitated, unborn, or unascertainable beneficiaries.

Although both the Uniform Trust Code and TEDRA provide for the appointment of special representatives, there are differences between the two acts. Section 305 of the Uniform Trust Code (dealing with the appointment of a special representative) is derived from the Uniform Probate Code, except the term "representative" is substituted for "guardian ad litem."<sup>82</sup> Based on the comments to Section 305 of the Uniform Trust Code, it appears that courts in states that have adopted the Uniform Trust Code have the power to choose the special representative, much like a court would choose a guardian ad litem in a probate involving minor children. Under the Uniform Trust Code, if a court determines that an interest is not properly represented, it may appoint a "[representative] to receive notice, give consent, and bind the minor, incapacitated, unborn, or unascertained beneficiary,..."<sup>83</sup> A special representative appointed pursuant to the Uniform Trust Code can be "appointed to act with respect to a nonjudicial dispute resolution agreement or to receive a notice on a beneficiary's behalf."<sup>84</sup> Once appointed, a special representative may act on the represented party's behalf with respect to any trust matter, regardless of whether a judicial procedure is pending<sup>85</sup> and may consider the benefit of the special representative's decision on the represented party's family.<sup>86</sup> The Uni-

<sup>80</sup> WASH. REV. CODE § 11.96A.120(2)(b); IDAHO CODE § 15-8-205(2)(b).

<sup>81</sup> WASH. REV. CODE § 11.96A.120(2)(c); IDAHO CODE § 15-8-205(2)(c).

<sup>82</sup> UNIF. TRUST CODE § 305 cmt.

<sup>83</sup> *Id.* § 305(a).

<sup>84</sup> *Id.* § 305 cmt.

<sup>85</sup> *Id.* § 305(b).

<sup>86</sup> *Id.* § 305(c). Only a few states deviate from the official text of the Uniform Trust Code with respect to the appointment of a special representative.

Alabama has added a section that provides that a guardian ad litem may be appointed to represent several persons or interests at the same time and that the guardian ad litem can base a decision on a finding that the living members of the represented party's family would generally benefit from an action. *See* ALA. CODE § 19-3B-305. Kansas also allows trustees of trusts to retain a special representative to represent minor, incapacitated, or unborn individ-

uals. *See* KAN. STAT. ANN. § 58a-305. North Carolina allows a representative to base a decision on a finding that the living members of the individual's family would generally benefit from an action. *See* N.C. GEN. STAT. § 36C-3-305. Both Pennsylvania and South Carolina provide that, if at any point in a judicial proceeding a court determines that the representation is or might be inadequate, the court may appoint a guardian ad litem or trustee ad litem (Pennsylvania) to represent the minor, incapacitated, unborn or unascertained person (South Carolina) or inadequately represented person (Pennsylvania). *See* PA. CONS. STAT. 20 § 7724 and S.C. CODE ANN. § 62-7-305. This seems to suggest that a judicial proceeding must have already been started in order to have a special representative appointed with respect to a trust. This also suggests that there is a gap in Pennsylvania and South Carolina law as to how a special representative would be appointed in a nonjudicial proceeding. In Utah, a court may appoint a guardian ad litem or other representative to act on behalf of a minor, incapacitated, or unborn individual. Utah specifically provides that a guardian ad litem or

---

form Trust Code, however, does not provide guidance with respect to how such special representatives are to be appointed or paid.<sup>87</sup>

Under TEDRA, a special representative can be nominated by the parties interested in the matter. The special representative must be an attorney or an individual with special skills or training in the administration of trusts or estates.<sup>88</sup> Petitions to appoint a special representative can be heard without notice (i.e., *ex parte*)<sup>89</sup> and the person appointed is then authorized to enter into nonjudicial agreements on behalf of the minor, incapacitated, unborn, or unascertainable beneficiary(ies). The special representative provisions contained in TEDRA give practitioners a tremendous amount of power. Rather than relying on the court to appoint a special representative (as would be the case

with a court appointed guardian ad litem<sup>90</sup>), TEDRA allows practitioners to select the special representative.<sup>91</sup> This aspect of TEDRA was somewhat controversial in Washington when the act was being adopted. Judges articulated the view that they should have control over the appointment of the special representative in order to keep more control over the nonjudicial resolution of disputed matters. The estate planning bar, on the other hand, wanted to be able to select the special representative in order to be able to choose the most appropriate, knowledgeable person to act in any given situation. This ability to select and appoint special representatives under TEDRA gives practitioners in Washington and Idaho a distinct advantage, because it allows the parties to select the person who the parties believe is most qualified, will understand

---

other representative may act on behalf of the represented party regardless of whether a judicial proceeding concerning the trust is pending. *See* UTAH CODE § 75-7-305.

<sup>87</sup> This “void” in the Uniform Trust Code has been criticized: Since one of the objects of the UTC is to keep trust administration out of court..., instituting a court proceeding to appoint a representative defeats the purpose. Moreover, the UTC gives no guidance as to what kind of proceeding would need to be instituted, the fee to be charged by the court to commence the proceeding, how the representative would be chosen (and paid), and whether a court will accept a petition to appoint a representative without notice and a hearing, among other questions.

Begleiter *supra* note 4 at 350.

<sup>88</sup> WASH. REV. CODE § 11.96A.250(3); IDAHO CODE § 15-8-305(3).

<sup>89</sup> WASH. REV. CODE § 11.96A.250(1)(a); IDAHO CODE § 15-8-305(1)(a).

<sup>90</sup> The appointment of a guardian ad litem in a nonjudicial dispute resolution procedure, however, does not necessarily guarantee adequate representation:

...There is one clear case involving a guardian ad litem. *Wogman v. Wells Fargo Bank & Union Trust Co.*, 267 P.2d 423 (Cal. Ct. App. 1954) involved an action to terminate a testamentary trust. The guardian ad litem was appointed to represent unborn and unascertained heirs of the testator’s daughter, the apparent remaindermen of the trust. The guardian ad litem filed an appearance but did not otherwise participate in the action. The trustee appealed from a decree terminating the trust and paying the corpus to the testator’s daughter. In reversing the trial court, the District Court of Appeals commented on the guardian ad litem’s actions in the case and on virtual representation:

[I]t can be stated as a general rule that whether there has been a true and legal virtual representation depends upon the facts of each case, and if it appears that there has been such representation, and that the rights of unborns have been considered and preserved, the doctrine will apply...

...[T]he statute...requires the court to appoint “a

suitable person to appear and act” as guardian for those not present. Note that the guardian is required not only to “appear,” but to “act” for the protection of those not present. It is incumbent on the trial court... and upon the appellate court...to determine whether such guardian has in fact acted to protect his wards. It follows that the rule in existence before the adoption of the statute, which rule required the appellate court to examine the record to see if those not present have in fact been truly represented, is still the law of this state.

What does the record show in this regard? It shows that on October 18, 1950, Eggers, at his own request, petitioned to be appointed guardian ad litem for the unborn and unascertained heirs.... On the same day he was so appointed. He was then, in the amended petition filed the same day, made a defendant.... [On the day the case went to trial, he] filed a written appearance, an admission of service, and a consent that the cause could proceed to trial. That is all the record shows. So far as the record shows, neither Eggers nor his counsel participated in any way in the trial. He has not joined in the appeal.

It is at once apparent that Eggers did not expressly consent to the termination of the trust. ...It is also apparent, if his failure to object amounted to an implied consent, that in no true sense were the unborn and unascertained heirs in fact represented. While the guardian did appear on their behalf, he did not “act” on their behalf. ...There was no true representation of these unborn and unascertained heirs in this case. This alone would require a reversal.

Begleiter *supra* note 4 at 383.

<sup>91</sup> Although TEDRA allows parties to a nonjudicial dispute resolution agreement to appoint a special representative, the court can always appoint a guardian ad litem. A court appointed guardian ad litem supersedes the special representative if so provided in the court order. (*See* WASH. REV. CODE § 11.96A.160; IDAHO CODE § 15-8-209; *See also* WASH. REV. CODE § 4.08.050, WASH. REV. CODE § 4.08.060, and IDAHO CODE § 3-5-306, which allow the court to appoint a guardian ad litem to represent a minor or incapacitated party in civil actions).

---

the issues involved, and will act reasonably and make rational, well thought out decisions with respect to the matter.

Oregon's version of the Uniform Trust Code expands the idea of a special representative to include provisions similar to TEDRA. While generally following Section 305 of the Uniform Trust Code, Oregon added several additional provisions regarding special representatives. Similar to Washington and Idaho, Oregon requires that a special representative have appropriate skills and experience necessary to represent the represented party.<sup>92</sup> As with TEDRA, in Oregon any person requesting the appointment of a special representative must file a petition with the court for the appointment of a special representative.<sup>93</sup> The petition must describe the proposed special representative, the need for a special representative, the special representative's qualifications, the actions the special representative will take, and when the special representative's authority will terminate.<sup>94</sup> Finally, in Oregon, a special representative is entitled to reasonable compensation for services and such compensation must be paid from the portion of the trust principal allocable to the represented beneficiaries.<sup>95</sup>

Once appointed under TEDRA, a special representative will carefully review the issues, determine what is in the best interests of the represented party(ies), and may negotiate and enter into nonjudicial dispute resolution agreements on behalf of the represented party(ies). In Idaho and Washington, a special representative is entitled to reasonable compensation for services and such compensation must be paid from the principal of the estate or trust whose beneficiaries are represented.<sup>96</sup>

What happens to the special representative once the dispute resolution process is complete? Does the special representative have any ongoing liability with respect to the trust or the parties interested in the trust? The answer is "yes"; however, that liability is limited under TEDRA. Under TEDRA, once a nonjudicial dispute resolution agreement is finalized, the special representative is discharged and has no further duties with respect to the matter or with respect to any person interested in the matter upon the earlier of six months from the date of his or her appointment or upon the execution

of a written agreement by all parties and virtual representatives.<sup>97</sup> Under Washington law, in the absence of a court order approving the agreement, the special representative remains subject to claims for the three year period following discharge.<sup>98</sup> The statute of limitations is shortened to the date of court approval of the nonjudicial dispute resolution agreement if the special representative seeks and obtains judicial approval of the agreement.<sup>99</sup> Idaho's TEDRA statute specifically allows for an action against a special representative to be brought, and any such action against a special representative must be brought before the earlier of one year from the date of execution of the agreement or the entry of a court order approving the written agreement.<sup>100</sup>

The Uniform Trust Code is silent with respect to what happens to a special representative once the dispute is resolved<sup>101</sup> and other than Oregon, no Uniform Trust Code state has addressed the discharge of a special representative. In Oregon, upon completion of the special representative's responsibilities, the special representative must move for a court order discharging the special representative. Upon the order of the court, the special representative will be discharged from any further responsibility with respect to the trust.<sup>102</sup> Oregon is silent, however, as to whether this discharge functions as a release of the special representative from all liability with respect to his or her actions and responsibilities prior to discharge.

Regardless of whether a special representative has been appointed or, if appointed, has petitioned for approval of a nonjudicial agreement, under TEDRA any party may file the agreement or a memorandum of it with the court (but may only do so within the first 30 days after execution in circumstances when the special representative has given his or her written consent). In cases where there is no special representative, the agreement or a memorandum of the agreement may be filed sooner than thirty days after execution.<sup>103</sup> Once filed, the agreement will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust. Appendix E contains a sample form of Memorandum of Agreement that would typically be used in Washington.

In Oregon, the trustee or any other person interest-

---

<sup>92</sup> OR. REV. STAT. § 130.120(4).

<sup>93</sup> OR. REV. STAT. § 130.120(5).

<sup>94</sup> *Id.*

<sup>95</sup> OR. REV. STAT. § 130.120(6).

<sup>96</sup> WASH. REV. CODE § 11.96A.250(3); IDAHO CODE § 15-8-305(3).

<sup>97</sup> WASH. REV. CODE § 11.96A.250(4); IDAHO CODE § 15-8-305(4). This is a "discharge" from further duties, but not necessarily a discharge from liability. *See infra*, notes 98 – 100.

<sup>98</sup> WASH. REV. CODE § 11.96A.070(3)(1).

<sup>99</sup> WASH. REV. CODE § 11.96A.240.

<sup>100</sup> IDAHO CODE § 15-8-305(5).

<sup>101</sup> Pennsylvania specifically provides that it "takes no position as to the liability, if any, of a representative to the person or persons represented." PA. CONS. STAT. Subchapter C, cmt.

<sup>102</sup> OR. REV. STAT. § 130.120(7).

<sup>103</sup> WASH. REV. CODE § 11.96A.230(1); IDAHO CODE § 15-8-303(1). *See infra* notes 136–142 and accompanying text.

---

ed in the trust may file the agreement or a memorandum of the agreement with the court. Notice of the filing of the agreement or memorandum of the agreement must be given within five days of the filing.<sup>104</sup> If no objection is filed with the court within 120 days of the filing of the agreement or memorandum, the agreement becomes effective and binding on all of the persons interested in the trust.<sup>105</sup> No other Uniform Trust Code state provides for an agreement or memorandum of an agreement to be filed with the court.

The effect of the doctrine of virtual representation and special representation sections of the Uniform Trust Code and TEDRA are that they allow the parties interested in a trust (or, in Washington and Idaho, “interested in a matter”) to more easily finalize nonjudicial agreements without the necessity of involving the court to determine the rights of minor, incapacitated, unborn, or unascertained beneficiaries.

### **Using Statutory Nonjudicial Procedures to Terminate or Modify Irrevocable Trusts**

Generally, the terms of a trust determine how long a trust will continue, and the trust will not be terminated until the expiration of that period.<sup>106</sup> Certain circumstances, however, such as fraud, duress, undue influence, or mistake will entitle the settlor to rescind or reform the trust or permit the early termination of a trust.<sup>107</sup> Other than these few instances, in the United States, the wishes of the settlor in creating the trust are paramount and beneficiaries cannot compel the termination or modification of a trust if doing so would run counter to the settlor’s intent.<sup>108</sup> Even so, if the settlor and all of the beneficiaries agree, they may compel the modification or termination of a trust, even if such modification or termination would defeat a material purpose of the trust.<sup>109</sup>

Trustors establish irrevocable trusts as a way to keep control over trust assets, in some cases for generations. But no trustor has a crystal ball through which he or she can see the future and anticipate the future needs of beneficiaries; rather trusts are created by trustors based on the facts known and assumptions made at the time of creation of the trust. Given the historical reluctance of courts to terminate or modify irrevocable trusts, what are beneficiaries and trustees to do when confronted with issues that the trustor or testator never anticipated, the ever changing landscape of

federal and state laws, poorly drafted trust documents (such as those churned out by trust mills), or changes in the circumstances of beneficiaries or trustees?

Although trustors establish irrevocable trusts as a way to keep control over assets, there are instances in which it makes sense to modify or terminate the trust. As state and federal laws change and unanticipated situations arise, and provided all of the parties interested in a trust agree, the Uniform Trust Code and TEDRA are excellent tools to modify or terminate an irrevocable trust to meet the changing needs and circumstances of beneficiaries and trustees. This ability can prove invaluable when beneficiaries and trustees are attempting to deal with various issues such as planning for Medicaid, estate planning, or passing assets on to other beneficiaries. In effect, both the Uniform Trust Code and TEDRA provide the parties interested in a trust (trustees and beneficiaries alike) with the ability to deal with situations that arise that may not have been foreseeable by the trustor when the trust was formed.

### ***Uniform Trust Code***

The Uniform Trust Code recognizes that there are situations where it may make sense to modify or terminate a trust, but provides that the “overall objective of these provisions is to enhance flexibility consistent with the principle that preserving the settlor’s intent is paramount.”<sup>110</sup> The Uniform Trust Code provides several options with respect to the modification and termination of noncharitable irrevocable trusts and whether the settlor can be a party to any modification or termination. The most important distinction between these options is whether court approval is necessary for the settlor and beneficiaries to jointly agree to terminate or modify an irrevocable trust. In 2004, Section 411(a) of the Uniform Trust Code was amended on the recommendation of the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel (“ACTEC”). The ACTEC Committee was concerned that Section 411(a), “without amendment, could potentially result in taxation for federal estate tax purposes of irrevocable trusts created in states which previously required that a court approve a settlor/beneficiary termination or modification; and... might result in inclusion of the trust in the settlor’s gross estate.”<sup>111</sup> The Drafting Committee recommended that states conform Section 411(a) to prior law on whether

---

<sup>104</sup> OR. REV. STAT. § 130.045(5).

<sup>105</sup> *Id.*

<sup>106</sup> 5 AUSTIN W. SCOTT, WILLIAM F. FRATCHER, & MARK L. ASCHER, *THE LAW OF TRUSTS*, § 33.1 at 2149 (5th ed. 2008).

<sup>107</sup> *Id.* § 35.1 at 2277.

<sup>108</sup> *Id.* § 34.1 at 2206.

<sup>109</sup> *Id.* § 34.2 at 2235.

<sup>110</sup> UNIF. TRUST CODE, art. 4 gen. cmt.

<sup>111</sup> UNIF. TRUST CODE § 411 cmt. 2004 Amendments.

<sup>112</sup> *Id.*

---

court approval is necessary for settlors and beneficiaries to jointly terminate or modify an irrevocable trust.<sup>112</sup>

Generally, under the Uniform Trust Code, if the settlor and all of the beneficiaries of a trust consent, an irrevocable trust can be modified or terminated even if the modification or termination is inconsistent with a material purpose of the trust. Some Uniform Trust Code states do require the parties to petition the court for judicial approval of the modification or termination. In

most states, if the court finds that the settlor and beneficiaries consent to the termination or modification of the trust, the court will approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust, while in other states the court must conclude that the modification of the trust is consistent with the material purposes of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust.<sup>113</sup> In most

---

<sup>113</sup> *Id.* § 411(a) (amended 2004). Section 411 of the Uniform Trust Code is the section in which the Uniform Trust Code states indicate how much latitude they are willing to give trustors, beneficiaries, and trustees with respect to the modification or termination of a trust. Section 411, when read in conjunction with other Uniform Trust Code sections, can give practitioners an idea of exactly how much freedom they have when working with trustors, beneficiaries, and trustees to resolve disputes, and whether they can avoid having to commence judicial proceedings to resolve such disputes.

States are split as to whether it matters if the termination or modification is inconsistent with a material purpose of the trust. The majority of states (Alabama, Arkansas, the District of Columbia, Kansas, Maine, Missouri, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wyoming) allow modification or termination of a trust upon agreement of the settlor and all beneficiaries even if the modification or termination is inconsistent with a material purpose of the trust. In Arizona, Michigan, New Hampshire, and North Dakota a trust may be modified or terminated by the beneficiaries (beneficiaries and trustee in Michigan) only if the court concludes that the modification or termination of the trust is consistent with a material purpose of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust. In these states, the settlor is not a party to any modification or termination. In Arkansas, Kansas, Nebraska, Oregon, and Pennsylvania a spendthrift provision is presumed to constitute a material purpose of a trust. In Arizona, Michigan, Missouri, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, and Virginia, there is no presumption as to whether a spendthrift provision constitutes a material purpose of a trust.

Florida has created separate sections addressing the judicial modification of irrevocable trusts. In Florida, a trustee or qualified beneficiary may apply for a modification of an irrevocable trust if the purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill, because of circumstances not anticipated by the settlor, compliance with the trust terms would defeat or substantially impair the accomplishment of a material purpose of the trust, or a material purpose of the trust no longer exists. In modifying a trust, the court may amend or change the terms of the trust, terminate the trust in whole or in part, or direct or prohibit the trustee to do acts that are not authorized or refrain from performing acts that are not permitted. *See* FLA. STAT. ch. 736.04113. A court may also modify an irrevocable trust if compliance with the terms of a trust is not in the best interests of the beneficiaries. *See id.* ch. 736.04115. Modification of a trust is only permitted after a settlor's death upon the unanimous agreement of the trustee and all qualified beneficiaries. An agreement to modify a trust will be binding on a beneficiary whose interest is properly represented by another person and only trusts that violate

the Rule Against Perpetuities may be modified. *See id.* ch. 736.0412.

Most Uniform Trust Code states require court approval, or, at the very least, judicial oversight, of the termination or modification of a trust under Section 411(a). In Arkansas, the District of Columbia, Kansas, Missouri, North Carolina, Pennsylvania, Tennessee, and Utah, court approval is not required for the modification or termination of a trust under Section 411(a) if the settlor and all beneficiaries consent (trustee and qualified beneficiaries in Tennessee). The remaining states all require some sort of court approval or judicial oversight of the modification or termination of the trust under Section 411(a) even if the settlor and beneficiaries are all in agreement as to such modification or termination.

It should be noted that in Tennessee, while court approval is not required for the modification or termination of a trust during a settlor's lifetime, notice must be given to the settlor, who then has sixty days to object to the modification or termination. It appears, therefore, that a settlor in Tennessee could commence a court proceeding to stop the modification or termination of a trust. *See* TENN. CODE ANN. § 35-15-411.

Unlike TEDRA, which allows a trustor to be a party to any modification or termination proceeding, most Uniform Trust Code states do not allow the settlor to be directly involved in the modification or termination process. In every state but Arizona, Florida, Michigan, New Hampshire, North Dakota, and Tennessee, a settlor may be a party to the modification or termination of a trust, but a settlor's power to consent to such modification or termination may only be exercised by an agent, conservator, or guardian.

Additional important deviations from the official text of Section 411 include: (1) Michigan, which allows termination or modification of a trust upon the consent of beneficiaries and a trust protector who is given the power under the terms of the trust to grant, veto, or withhold approval of termination or modification of the trust, or by a trustee or trust protector to whom a power to direct the termination or modification of the trust has been given by the terms of a trust (*See* MICH. TRUST CODE § 7411); (2) North Carolina, which provides that, in addition to a settlor and all beneficiaries being able to compel modification or termination of a trust, if any beneficiary is a minor or incompetent person or a person who is unborn or whose identity or location is unknown and is unable to be represented pursuant to the representation provisions under Article 3, the settlor or any competent adult beneficiary may institute a court proceeding to appoint a guardian ad litem. The court shall allow modification or termination if the court finds that, following the appointment of a guardian ad litem, all beneficiaries or their representatives have consented (*see* N.C. GEN. STAT. § 36C-4-411); and (3) Tennessee, which defines the term "noncharitable irrevocable trust" as a trust that is not revocable by the settlor with respect to which no federal or state income, gift, estate, or inheri-

---

states, a settlor's power to consent to a modification or termination of a trust may only be exercised by an agent, conservator, or guardian.<sup>114</sup> An irrevocable trust may also be modified or terminated without the settlor's consent if the court finds that all of the beneficiaries consent to the modification or termination and that the modification or continuance of the trust is not inconsistent with or necessary to achieve a material purpose of the trust.<sup>115</sup>

In addition to the general provisions providing for the modification or termination of a trust, the Uniform

Trust Code also provides that a court may modify or terminate a trust if, because of circumstances not anticipated by the settlor, modification or termination would further the purposes of the trust.<sup>116</sup> This is consistent with the common law doctrine of equitable deviation, as reflected in Restatement (Third) of Trusts Section 66(1).<sup>117</sup> Further, a court may modify the administrative provisions of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.<sup>118</sup> A court can modify or terminate an uneconomic trust,<sup>119</sup> can modify or

---

tance tax charitable deduction was allowed on the transfer to the trust and the value of all interests in the trust owned by charitable organizations does not exceed five percent of the value of the trust (see TENN. CODE ANN. § 35-15-411).

Oregon generally follows the same premise as other Uniform Trust Code states, but also requires that the Attorney General must consent to any modification or termination of a charitable trust. Oregon also adds provisions addressing how to file an agreement or memorandum of agreement, and how to note a hearing on a petition to approve the modification or termination of a trust. See OR. REV. STAT. § 130.045. The Oregon legislature recently amended several sections of the Oregon Uniform Trust Code to provide (among other things) than an irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries with court approval. (See SB 371, passed by the Oregon Senate on March 30, 2009 and the Oregon House of Representatives on May 26, 2009 and signed by the governor on June 16, 2009). This revision reflects a movement by the Oregon legislature away from its more recent prior TEDRA-type Trust Code provisions, bringing those provisions more into alignment with those of the Uniform Trust Code. Affected provisions include OR. REV. STAT. § 130.045, OR. REV. STAT. §130.195, OR. REV. STAT. § 130.200, and OR. REV. STAT. §130.205, among others.

Given that Arkansas, the District of Columbia, Kansas, Missouri, North Carolina, Oregon Pennsylvania, Tennessee, and Utah do not require court approval or limit court approval to certain situations, it appears that trustors, beneficiaries, and trustees in these states have much more freedom in administering trusts and addressing trust disputes.

<sup>114</sup> *Id.* § 411(a).

<sup>115</sup> UNIF. TRUST CODE § 411(b). Although there are slight deviations, almost all states allow a trust to be modified or terminated upon consent of all the beneficiaries if the court concludes that modification or the trust is not inconsistent with a material purpose of the trust or that continuance of the trust is not necessary to achieve a material purpose of the trust.

In Tennessee, a trust can be terminated by consent of the beneficiaries following the settlor's death. See TENN. CODE ANN. § 35-15-411. In Wyoming, a trust may be modified or terminated by a trust protector provided that the terms of the trust authorize a protector and grant the trust protector the power to modify or terminate the trust, and a trust may be modified or 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 or that modification is not inconsistent with a material purpose of the trust. See WYO. STAT. ANN. § 4-10-412.

<sup>116</sup> *Id.* § 412(a). Most states have not deviated significantly

from the official text of Section 412(a). New Mexico, however, requires that it must be established by clear and convincing evidence that there are circumstances not anticipated by the settlor and modification or termination will further the purposes of the trust. See N.M. STAT. ANN. § 46A-4-412. A settlor is not allowed to petition the court for a modification or termination of a trust in North Dakota. See N.D. CENT. CODE § 59-12-12. Oregon also provides that a trustee may terminate a trust if termination is appropriate due to reasons not anticipated by the settlor, termination is not inconsistent with a material purpose of the trust, all qualified beneficiaries have consented to the termination, the trustee is not a beneficiary of the trust and has no duty of support for any beneficiary of the trust, and, in the case of a charitable trust, the Attorney General has consented to the termination. See OR. REV. STAT. § 130.205. Pennsylvania also allows a court to make an allowance from the principal of a trust. See PA. CONS. STAT. 20 § 7740.2(a).

<sup>117</sup> The Restatement (Third) of Trusts §66(1) articulates a two-part test to determine whether equitable deviation will be applied to modify a trust provision. Under Section 66, a court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust. See *Niemann v. Vaughn Cmty. Church*, 154 Wash. 2d 365, 375, 113 P.3d 463 (2005), where the Washington Supreme Court adopted the Restatement (Third) of Trusts test to determine whether equitable deviation will be applied to allow modification of a trust provision as follows:

The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.

In both *Niemann* and a subsequent case, *In re Riddell*, 138 Wash. App. 485, 157 P.3d 888 (2007), Washington courts have relied on the doctrine of equitable deviation to modify a provision of a trust where "reasonably necessary in effectuating the primary purpose of the trust."

<sup>118</sup> UNIF. TRUST CODE § 412(b).

<sup>119</sup> *Id.* § 414. Several states have deviated from the official text of Section 414 of the Uniform Trust Code. Many states have modified Section 414(a) to replace \$50,000 with \$100,000. See e.g., Arizona, Arkansas, Kansas, Maine, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, South Carolina, Tennessee, Utah, Vermont, and Virginia. Wyoming has replaced \$50,000 with \$150,000. See WYO. STAT. ANN. § 4-10-415. Arizona allows a trustee to terminate a trust that has assets with a total value of less

---

reform a trust to correct mistakes,<sup>120</sup> or can modify a trust to achieve a settlor's tax objective.<sup>121</sup>

### **TEDRA**

While the Uniform Trust Code does contain important provisions relating to the modification or termination of trusts, most states require judicial approval or oversight in order for such modification or termination to take effect. The risk of proceeding under the Uniform Trust Code is that a court may not agree with the parties' wishes as to the modification, termination, or other action with respect to the trust and refuse to issue the requisite court order or may determine that the modification or termination of the trust is inconsistent with a material purpose of the trust. The 2004 amendment to Section 411(a) of the Uniform Trust Code also places the judgment as to whether a modification or termination of a trust has adverse tax consequences with a court that may not

understand the complexities of federal estate tax laws. Under Washington's TEDRA, there is no requirement that nonjudicial dispute resolution agreements be consistent with the settlor's original intent.<sup>122</sup>

TEDRA in both Washington and Idaho does not require judicial approval for the modification or termination of a trust for any reason. Rather, if all of the parties interested in the trust agree to the resolution of any matter, including the modification or termination of a trust, then the agreement must be evidenced by a written agreement signed by all of interested parties.<sup>123</sup> Once signed, the agreement or memorandum thereof may be filed with the court. The agreement or memorandum cannot be filed until thirty days have elapsed unless the special representative (if a special representative has been appointed) consents in writing to the filing.<sup>124</sup> Once filed, the agreement is binding on the parties as a final court order.<sup>125</sup> The ability of parties to modify or terminate trusts under TEDRA without court approval is an important component of TEDRA

---

than \$100,000 or is uneconomic to administer. *See* ARIZ. REV. STAT. § 14-10414. Oregon does not limit the dollar amount of trust assets and provides that a trustee may terminate a trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. *See* OR. REV. STAT. § 130.215.

Kansas does not allow modification or termination of a trust whose assets are distributable to the trustee or anyone the trustee is obligated to support. *See* KAN. STAT. ANN. § 58a-414. In addition to the termination of trusts consisting of property having a value of less than \$50,000, North Carolina also provides that a trustee may enter into an agreement or make other provisions to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. *See* N.C. GEN. STAT. § 36C-4-414. Ohio deviates from the official text by providing that the termination of an uneconomic trust does not apply to specific types of charitable trusts and to allow a court to appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration. This provision provides important protection to charitable donors, who could potentially argue for a reversion of the gifted property based on the terms of the trust prohibiting termination. *See* OHIO REV. CODE ANN. § 5804.14. In Pennsylvania, a trustee may terminate a trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration, the trustee has given written notice to the qualified beneficiaries at least sixty days prior to the proposed termination, and no beneficiary provides the trustee with a written objection to the termination. *See* PA. CONS. STAT. 20 § 7740.4(a). Tennessee provides that upon the termination of a trust, the trustee must distribute the trust property to the beneficiaries in such shares as the trustee (or the court in a court proceeding) determines, after taking into account the interests of income and remainder beneficiaries so as to conform as nearly as possible to the intention of the settlor. *See* TENN. CODE ANN. § 35-15-414.

In Wyoming, a trustee may terminate a trust having a value of less than \$150,000 by determining a plan of distribution that agrees, as nearly as possible, with the purposes of the trust, the trustee gives written notice to the qualified beneficiaries of his or her intent to dis-

tribute the assets in accordance with the plan unless a qualified beneficiary objects in writing within thirty days following receipt of the notice, and if no objection is received within thirty days, the trustee can proceed with distribution of the trust assets in accordance with the plan. If the trustee does receive written objection to the plan, the trustee may not distribute the trust assets without court approval, but may petition the court for authorization to distribute in accordance with the plan. *See* WYO. STAT. ANN. § 4-10-415.

<sup>120</sup> UNIF. TRUST CODE § 415. No state has deviated significantly from the official text of Section 415. Florida, however, does provide that in determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument. *See* FLA. STAT. ch. § 736.0415.

<sup>121</sup> UNIF. TRUST CODE § 416. No state has deviated significantly from the official text of Section 416.

<sup>122</sup> The 1984 Washington Trust Act incorporated an element of American common law that does not normally allow the terms of a trust to be changed even with the agreement of all the parties if some essential purpose of the trust remains to be fulfilled. For this reason, the Washington Trust Act required that nonjudicial dispute resolution agreements be "consistent with the settlor's intent." *See* WASH. REV. CODE § 11.96.070(4). This approach of requiring that the nonjudicial dispute resolution be consistent with the settlor's intent was changed in the 1999 legislative scheme. *See* WASH. REV. CODE § 11.96A.030. *See also*, Official Comments to SB 5196 (1999 WASH. LAWS 177) of the Washington State Bar Association ("Subsections (d) and (e) have been changed from the prior provisions of RCW 11.96.070 by removing the requirement that there be a determination that the requested action not be inconsistent with the purposes of the will or trust. By making this change, Washington formally accepts recent practice and adopts a rule that allows all interested parties to agree to the resolution of an issue or modification of the applicable document.")

<sup>123</sup> WASH. REV. CODE § 11.96A.220; IDAHO CODE § 15-8-302.

<sup>124</sup> WASH. REV. CODE § 11.96A.230(1).

<sup>125</sup> WASH. REV. CODE § 11.96A.230(2); IDAHO CODE § 15-8-

---

because it allows an issue to be resolved without ever becoming a matter of public record. Further, it allows practitioners who know federal estate tax issues better than state court judges to make the determination of whether modification or termination has adverse tax consequences to the settlor or beneficiaries and to appropriately address those tax issues or consequences prior to finalizing any modification or termination.<sup>126</sup>

### **Conclusion**

Through the use of the Uniform Trust Code and TEDRA, trust law has grown and changed in such a way as to allow trustors, beneficiaries, and trustees to modify (and often improve upon) or terminate trusts that no longer fit the parties' needs. The Uniform Trust Code and TEDRA have become useful tools in the arena of trust modification or termination since their inception. Both statutes have provided practitioners the ability to remedy easily problems and address issues that could not have been repaired previously without a court order, if at all.

### **Using Statutory Nonjudicial Procedures to Streamline Trust Administration**

Although an interested party can always resort to judicial intervention under the Uniform Trust Code or TEDRA, both types of statutes facilitate the use of nonjudicial agreements to streamline trust administration. By using the nonjudicial settlement procedures set forth in the Uniform Trust Code and TEDRA, the parties interested in a trust can streamline trust administration and deal with the myriad administrative issues (e.g., changes in trustee, situs, investment issues or opportunities, etc.) that can arise from time to time.

The nonjudicial procedures under Washington's and Idaho's TEDRA for streamlining the administration of a trust are the same as for nonjudicial modification or termination of a trust. In other words, once the parties have agreed upon the resolution of any administrative trust matter, the parties may enter into a written agreement setting forth the parties' understanding

and agreement with respect to the matter. Once signed, and as discussed in more detail in Section VII below, the agreement becomes binding on the parties and the agreement or a memorandum thereof may be filed with the court and once filed becomes binding on the parties as a final court order.<sup>127</sup>

Under the Uniform Trust Code it is possible to use nonjudicial settlement agreements to resolve administrative matters and streamline trust administration by keeping the parties out of court. Interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.<sup>128</sup> A nonjudicial settlement agreement under the Uniform Trust Code will only be valid 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.<sup>129</sup> The types of matters that may be resolved by a nonjudicial settlement agreement are generally limited to administrative matters that would not modify or terminate the trust and that can be easily dealt with among the parties interested in the trust. Such matters include the interpretation or construction of trust terms, the approval of a report or accounting, the direction to a trustee to refrain from certain acts or to grant certain powers, the resignation or appointment of a trustee, a change in trust situs, and trustee liability.<sup>130</sup> The Uniform Trust Code does not attempt to provide an exclusive list of the types of matters that may be settled nonjudicially. Presumably, however, unless a Uniform Trust Code state specifically allows a nonjudicial settlement agreement for trust modification or termination and does not require court approval for such modification or termination under that state's version of Section 411, the parties interested in a trust may not use nonjudicial settlement agreements for trust modification or termination and must instead seek court approval for such actions pursuant to Section 411. Once signed, any interested party may request the court to approve the nonjudicial settlement agreement.<sup>131</sup> The purpose of the nonjudicial settlement agreement provisions of Section 111 of the Uniform Trust Code is to facilitate the making of agreements by giving them the same effect as if approved by the court.<sup>132</sup>

303(2).

<sup>126</sup> In Washington, Idaho, and Oregon, the trustor, if living, is included in the definition of an "interested party" to any proceeding. In Ohio, the settlor, if living, is a party to any nonjudicial agreement. The inclusion of the trustor as a party to any nonjudicial dispute resolution agreement can have adverse income, gift, and/or estate tax consequences to the trustor. Many practitioners therefore have the trustor sign the nonjudicial dispute resolution agreement as having received notice of the actions taken therein, rather than as a party to the agreement itself.

<sup>127</sup> If a special representative has been appointed, the agreement or memorandum can only be filed within the first thirty days

of its execution upon the special representative's written consent. See *supra* note 103 and *infra* note 140 and accompanying text.

<sup>128</sup> UNIF. TRUST CODE § 111(b).

<sup>129</sup> *Id.* § 111(c); contrast TEDRA, which has no such requirement.

<sup>130</sup> *Id.* § 111(d).

<sup>131</sup> *Id.* § 111(e).

<sup>132</sup> *Id.* § 111 gen. cmt. Several states have deviated from the official text of the Uniform Trust Code. Kansas, North Carolina, and South Carolina have omitted Section 111(d)(1), which allows interested parties to enter into a nonjudicial agreement with respect to the interpretation or construction of the terms of a trust. This

---

The Uniform Trust Code's and TEDRA's nonjudicial dispute resolution agreement procedures can be invoked at any time by fiduciaries, beneficiaries, and/or other interested parties who have reached agreement with respect to the resolution of a particular administrative issue. In a trust administration situation, the Uniform Trust Code's and TEDRA's nonjudicial dispute resolution procedures can be used to change trustees or the situs of trust administration, create a mechanism for the distribution of trust property, address accounting issues, resolve questions regarding appropriate investments, release a trustee from liability, or resolve other "matters" arising in the administration of the trust. As neither the Uniform Trust Code, nor TEDRA, attempt to adopt an inclusive list of the types of matters that can be addressed in a nonjudicial dispute resolution agreement, it would follow that these methods could be used to agree on investment strategies, create trustee selection committees, correct mistakes in trust funding, correct mistakes with respect to distributions of assets, set forth procedures for the selection and distribution of tangible personal property, or any other issue or dispute that the parties encounter during a probate or trust administration. Importantly, the nonjudicial dispute resolution agreement provisions under the Uniform

Trust Code are limited so that they cannot be used to "produce a result not authorized by law, such as to terminate a trust in an impermissible manner."<sup>133</sup>

By using nonjudicial methods under the Uniform Trust Code and TEDRA to address trust administrative issues, the parties interested in a trust can streamline the resolution of trust administration issues without having to petition the court for instructions.

### **When Judicial Proceedings are Useful to Confirm Nonjudicial Agreements or Validate Nonjudicial Agreements**

Once the parties have reached agreement and have entered into a nonjudicial dispute resolution agreement, it sometimes becomes necessary or advisable to confirm, validate, or enforce the agreement. These situations can arise because the parties want to make sure they have "belt and suspender" protection with respect to the validity of the agreement, or because despite the utilization of virtual or special representation, there remain concerns regarding the binding effect of the agreement or when a party is not carrying out his or her obligations under the agreement. In these cases, the judicial proce-

---

deviation suggests that in such states it is necessary to seek judicial interpretation of ambiguous trust terms.

Alabama allows parties to enter into nonjudicial agreements for partial or final settlements between the parties. See ALA. CODE § 19-3B-111. Missouri specifically disallows nonjudicial agreements to terminate or modify a trust for the same reasons a court could do so. See MO. REV. STAT. § 456.1-111. Nebraska and North Dakota specifically provide that a spendthrift provision is presumed to constitute a material purpose of the trust. See NEB. REV. STAT. ANN. § 30-3811 and N.D. CENT. CODE § 59-09-11. New Hampshire allows the parties to a nonjudicial agreement to terminate or modify a trust. See N.H. REV. STAT. ANN. § 564-B:1-111. Ohio generally omits Section 111, but provides that parties to an agreement may resolve disputes involving the construction of trust language, modify the terms of a trust if the modification is not inconsistent with the purpose of the trust, and resolve any other matter that arises. See OHIO REV. CODE ANN. § 5801.10. Tennessee expands the term "matter" to include the extent or waiver of a trustee's bond, the governing law of a trust, and the criteria for distribution to a beneficiary where the trustee is given discretion. See TENN. CODE ANN. § 35-15-111. Other states (i.e., Florida, New Hampshire, Ohio [as to the modification of a trust], Oregon [as to the modification of a trust], and Pennsylvania) have either provided that the term "matter" for purposes of nonjudicial agreements includes the modification or termination of a trust or have otherwise provided for the nonjudicial modification or termination of a trust. Similar to TEDRA, which defines the term "matter," Pennsylvania has adopted the term "trust matter," which incorporates the list of examples set forth in Section 111(d) of the Uniform Trust Code and expands the definition to include the grant to a trustee of any necessary or desirable power, the exercise or nonexercise of

any power by a trustee, questions relating to the property or an interest in property held as part of a trust, an action or proposed action by or against a trust or trustee, the modification or termination of a trust, an investment decision, policy, plan or program of a trustee, and any other matter concerning the administration of a trust. See PA. CONS. STAT. 20 § 7710.1.

The states that have included Section 111(d)(1) (i.e., the interpretation or construction of the terms of a trust) and have defined the term "matter" to include the modification or termination of trusts, together with the deletion of Section 301(d) (i.e., a settlor may not represent and bind a beneficiary with respect to the termination or modification of a trust) and that allow the modification or termination of a trust under Section 411(a) without having to seek court approval, suggest that these states have given trustors, beneficiaries, and trustees the most freedom in administering trusts and resolving trust disputes. While no state has embraced all of the potential freedoms that might be gained through the Uniform Trust Code and while there is no specific regional distinction, a review of state Uniform Trust Code statutes suggests that the District of Columbia, Florida, Kansas, Oregon, Pennsylvania, South Carolina, Tennessee, and Utah go the farthest in broadening the availability of self-help in nonjudicial dispute resolution procedures. Appendix F to this Article contains a chart of Uniform Trust Code states and whether each state has adopted self-help provisions.

<sup>133</sup> *Id.* TEDRA does not include a similar provision, but is presumably subject to the common law prohibition on entering into contracts that are contrary to law or public policy. See WASH. REV. CODE § 11.96A.210 and IDAHO CODE § 15-8-301, which provide that the procedures under TEDRA are supplemental to, and may not derogate from, any other proceeding or provision authorized by statute or the common law.

---

dures contained in the Uniform Trust Code and TEDRA can be useful in confirming, validating, or enforcing nonjudicial dispute resolution agreements.

### ***Court Validation under the Uniform Trust Code***

While one of the purposes of the Uniform Trust Code is to encourage the resolution of disputes without court intervention, “the court is always available to the extent its jurisdiction is invoked by interested persons.”<sup>134</sup> Under the Uniform Trust Code, any party can request the court to approve the nonjudicial dispute resolution agreement.<sup>135</sup> As with the provisions related to the appointment of a special representative, the Uniform Trust Code is silent as to how a judicial proceeding is commenced for these purposes. Therefore, it is necessary for practitioners in such states to review their state’s rules of civil procedure or court rules to determine how to properly petition the court for judicial intervention.

### ***Binding Effect of TEDRA Agreements***

Under TEDRA, once signed, a nonjudicial dispute resolution agreement is binding and conclusive on all persons interested in the estate or trust.<sup>136</sup> If the parties wish, the agreement, or a memorandum of the agreement, may be filed with the court.<sup>137</sup> Once filed, the agreement (or memorandum thereof) will be deemed approved by the court and is equivalent to a binding court order.<sup>138</sup> Generally, any party may file the agreement (or memorandum thereof) with the court.<sup>139</sup> If a special representative is a party to the agreement, however, the agreement cannot be filed until after thirty days from the agreement’s execution, unless the special representative’s written consent is filed with the agreement.<sup>140</sup> In addition, an agreement (or a memorandum thereof) may also be filed with the court after a special representative has commenced a proceeding seeking approval and the court determines that the special representative has adequately represented and protected the represented party(ies).<sup>141</sup>

The provisions discussed above are an important component of TEDRA because they allow a matter to be resolved without ever becoming a matter of public

record (through a petition or otherwise). If the agreement (or a memorandum of the agreement) is to be filed with the court, the agreement may include provisions addressing jurisdiction, governing law, the waiver of notice of the filing of the agreement (or memorandum thereof), and the discharge of any special representative who has acted with respect to the agreement.<sup>142</sup> The parties’ interests in privacy can be protected by choosing not to file the agreement at all or by filing a memorandum summarizing the written agreement, while omitting details from the memorandum regarding specific dollar amounts or other information that the parties do not want placed in the public record. In addition, the filing of the agreement (or memorandum thereof), which contains a special representative’s consent to the filing of the agreement, coupled with the special representative’s ability to bring a petition for a court determination of whether the special representative adequately represented and protected the represented party(ies), provides special representatives an additional layer of protection against future liability for acts taken by the special representative during the dispute.

Oregon adopted a provision similar to TEDRA with respect to filing memoranda of nonjudicial agreements. As with TEDRA, in Oregon the trustee or any other person interested in the trust may file the agreement or a memorandum of the agreement summarizing the provisions of the agreement.<sup>143</sup> Within five days of filing the agreement (or memorandum thereof), the person filing the agreement (or memorandum thereof) must serve notice of the filing of the agreement or memorandum on each person interested in the trust.<sup>144</sup> If no objection is filed with the court within 120 days of the filing of the agreement or memorandum, the agreement becomes effective and binding on all of the persons interested in the trust.<sup>145</sup> No other Uniform Trust Code state has adopted provisions related to filing memoranda for nonjudicial agreements.

### ***Court Validation under TEDRA***

As with the Uniform Trust Code, TEDRA allows the parties to seek judicial approval of a nonjudicial dispute resolution agreement. The only instance where judicial approval is referenced under TEDRA, how-

---

<sup>134</sup> UNIF. TRUST CODE § 201 cmt.

<sup>135</sup> UNIF. TRUST CODE § 111(e).

<sup>136</sup> WASH. REV. CODE § 11.96A.220; IDAHO CODE § 15-8-302.

<sup>137</sup> WASH. REV. CODE § 11.96A.230(1); IDAHO CODE § 15-8-303(1).

<sup>138</sup> WASH. REV. CODE § 11.96A.230(2); IDAHO CODE § 15-8-303(2).

<sup>139</sup> WASH. REV. CODE § 11.96A.230(1); IDAHO CODE § 15-8-303(1).

<sup>140</sup> WASH. REV. CODE § 11.96A.230(1); IDAHO CODE § 15-8-303(1).

<sup>141</sup> WASH. REV. CODE § 11.96A.230(1); IDAHO CODE § 15-8-303(1).

<sup>142</sup> WASH. REV. CODE § 11.96A.220; IDAHO CODE § 15-8-302.

<sup>143</sup> OR. REV. STAT. § 130.045(5).

<sup>144</sup> OR. REV. STAT. § 130.045(5)(c).

<sup>145</sup> OR. REV. STAT. § 130.045(5)(e).

<sup>146</sup> WASH. REV. CODE § 11.96A.240; IDAHO CODE § 15-8-304.

---

ever, is where a special representative has been appointed. In such cases, within thirty days of execution of an agreement, the special representative may note a hearing for presentation of the agreement to the court.<sup>146</sup> At the hearing, the court will review the agreement on behalf of the parties represented by the special representative.<sup>147</sup> The court will determine whether the interests of the represented parties have been adequately represented and protected, and an order declaring the court's determination will be entered.<sup>148</sup> If the court determines that the interests of the represented persons have not been adequately represented and protected, the nonjudicial agreement will be declared of no effect.<sup>149</sup> Although the only reference to judicial approval under TEDRA is in instances where a special representative has been appointed, there are many circumstances under which practitioners will seek judicial approval of nonjudicial dispute resolution agreements. This is especially true in cases involving charitable organizations seeking equitable deviation from restrictions placed upon a charitable gift.

### Practice Tips

There are many potential stumbling blocks to using the Uniform Trust Code or TEDRA in practice, which can cause problems in the negotiation, drafting, and finalization or settlement of estate and trust matters. Therefore, it is very important that practitioners carefully draft and review Uniform Trust Code and TEDRA agreements before such documents are finalized or filed with the court.

#### *Draft to Avoid Adverse Tax Consequences*

When modifying or terminating an irrevocable trust it is very important to evaluate whether any modification or termination could result in adverse estate, gift, or generation-skipping transfer tax consequences to the trustor or beneficiaries. All potential tax issues should be carefully analyzed before settling on a course of action and entering into any binding nonjudicial agreement. If substantial revisions to a trust will be made with potential estate, gift, or generation-skipping transfer tax consequences, obtaining a favorable private letter ruling from

the Internal Revenue Service on the specific tax issues prior to the nonjudicial agreement becoming effective can also provide a measure of comfort.<sup>150</sup>

#### *Ensure That All Parties Have Been Identified and Are Represented*

One area that can cause serious complications in negotiation and drafting of nonjudicial agreements is failing to identify all of the parties interested in the matter. There are any number of individuals or entities who may have an interest in a matter and each interested party must be properly identified and given an opportunity to be heard. The failure to properly identify all of the parties interested in a matter can result in a nonjudicial agreement being deemed ineffective or a court determining that it does not have jurisdiction or that venue is improper in a judicial proceeding. In addition, the practitioner must make sure that in situations where a conflict exists or may exist, a virtual representative or special representative (or in the event of court proceedings, a guardian ad litem) is appointed to represent the interests of minor, incapacitated, unborn, or unascertained beneficiaries.<sup>151</sup>

#### *Determine How Best to Address Charitable Bequests and Gifts in Trust*

If a charity is an interested party to a matter, it is often necessary to notify the state agency having power and authority over charitable organizations (e.g., in Washington, the Attorney General's Office).<sup>152</sup> In many situations (e.g., modification or termination of a trust), the state agency is a necessary party to the nonjudicial agreement or judicial proceeding. The failure to notify the state agency having power and authority over charitable organizations can result in the nonjudicial agreement or court order being ineffective or nonbinding with respect to the charitable organization or the settlor's heirs. If a charitable organization is an interested party, practitioners should make early contact with the state agency having power or authority over charitable organizations in order to determine the agency's willingness to approve the proposed plan.<sup>153</sup>

---

<sup>147</sup> WASH. REV. CODE § 11.96A.240; IDAHO CODE § 15-8-304.

<sup>148</sup> WASH. REV. CODE § 11.96A.240; IDAHO CODE § 15-8-304.

<sup>149</sup> WASH. REV. CODE § 11.96A.240; IDAHO CODE § 15-8-304.

<sup>150</sup> See *supra* Part V.B.

<sup>151</sup> See *supra* Part IV.

<sup>152</sup> WASH. REV. CODE § 11.96A.030(4)(j). See also, ARIZ. REV. STAT. § 14-1201(26), IDAHO CODE § 15-8-103(4), OHIO REV. CODE ANN. § 5801.10, and OR. REV. STAT. § 130.145. See also, UNIF. TRUST CODE § 111(a) and cmt.

<sup>153</sup> Other interested parties could include heirs of the charitable donor, who (if not bound to a modification) could argue for a reversion based on a reversionary interest based on the terms of an inter vivos or testamentary gift containing restrictions on use or alienation. See, e.g., *Townsend v. Charles Schalkenbach Home for Boys*, 33 Wash. 2d 255, 205 P.2d 345 (1949); *McLaren v. Charles Schalkenbach Home for Boys*, 41 Wash. 2d 123, 247 P.2d 691 (1952); *In re The 1934 Deed to Camp Kilworth*, 148 Wash. App. 82, 201 P.3d 416 (2009).

---

### ***Make Sure Nonjudicial Agreements Meet Statutory Requirements***

Practitioners should make sure that all nonjudicial agreements meet the statutory requirements necessary to create a binding agreement. Practitioners should make sure that the nonjudicial agreement: (1) clearly and properly identifies the matter being resolved; and (2) names all of the parties interested in the matter. The nonjudicial agreement should include a general recitation of facts as well as provisions addressing venue, jurisdiction, governing law, waivers, virtual representation, the discharge of any special representative, and any future dispute resolution mechanism.<sup>154</sup>

### ***Understand the Judicial Procedures and Applicable Common Law***

If a practitioner is going to petition the court with respect to a matter, the practitioner must be aware of the relationship between the Uniform Trust Code or TEDRA, as the case may be, and other state statutes addressing trusts or estates as well as applicable civil rules. In most states the Uniform Trust Code and TEDRA supplement, but do not replace, other state statutes and relevant common law; accordingly, the practitioner must be careful not to ignore other statutes, case law, and court rules that may be applicable.

### ***Maintain Privacy***

If the parties to a nonjudicial agreement are concerned about privacy, TEDRA allows the parties to file with the court a memorandum of the agreement, rather than the agreement itself. This allows the parties to reach agreement and resolve issues without the dispute being placed in the public record. By filing a memorandum of agreement, the parties can omit

details regarding assets, dollar amounts, or other facts that the parties wish to remain private.<sup>155</sup>

### ***Consider Provisions to Limit Future Use of Uniform Trust Code or TEDRA to Reverse Provisions or Changes***

While the Uniform Trust Code and TEDRA are extremely helpful to practitioners dealing with trusts, some individuals may want to prevent future generations from utilizing the Uniform Trust Code or TEDRA to modify a trust. In such cases, the practitioner should consider adding language to the client's estate planning documents directing the trustee not to participate in any attempt to terminate or modify the terms of the trust. While untested at this time, it is possible that this type of provision could prevent modification or termination of a trust.<sup>156</sup>

### ***Require Mediation or Arbitration***

Practitioners can consider drafting provisions into a trust that encourage or require the parties to utilize nonjudicial dispute resolution procedures, such as mediation or arbitration.<sup>157</sup>

### **Conclusion**

The Uniform Trust Code and TEDRA can be used to modify trusts, terminate trusts, streamline estate and trust administration, resolve disputes, and address events that were not anticipated by the settlor when he or she initially created the bequest or trust. The Uniform Trust Code and TEDRA provide procedures for dealing with trust (and, in the case of TEDRA, also estate) disputes and, assuming that a practitioner carefully navigates through these types of matters, are very valuable tools that may be used to advise clients with respect to the many issues that

---

<sup>154</sup> WASH. REV. CODE § 11.96A.220; IDAHO CODE § 15-8-302.

<sup>155</sup> WASH. REV. CODE § 11.96A.230; IDAHO CODE § 15-8-303.

<sup>156</sup> Existing case law addressing the acceptance of the terms or provisions of a will may support the position that if a beneficiary accepts the benefits of a will or trust, such beneficiary could not then utilize the dispute resolution procedures of the Uniform Trust Code or TEDRA to terminate or modify trust provisions in trusts established pursuant to wills or trusts that direct the trustee not to participate in any such attempt to terminate or modify the terms of a trust. *See Tennant v. Satterfield*, 216 S.E.2d 229, 232 (W. Va. 1975) ("The general rule with regard to acceptance of benefits under a will is that a beneficiary who accepts such benefits is bound to adopt the whole contents of that will and is estopped to challenge its validity. ...Acceptance of a beneficial legacy or trans-

fer is presumed, but the presumption is rebuttable by express rejection of the benefits or by acts inconsistent with acceptance. Without acceptance by the intended transferee, the transfer does not occur..."); *Wait v. Huntington*, 40 Wash. Terr. 9, 1873 WL 1382 (1873) (a beneficiary takes only by benevolence of the testator, who may attach lawful conditions to the receipt of the gift); *Amer. Cancer Soc., St. Louis Dev. v. Hammerstein*, 631 S.W.2d 858, 864 (Mo. App. 1981) (beneficiary takes only by the benevolence of the testator, who may attach lawful conditions to the receipt of the gift). These cases are cited in the American College of Trust and Estate Counsel Arbitration Task Force Report (Sept. 18, 2006).

<sup>157</sup> For a discussion of arbitration in the context of will and trust disputes, *see* American College of Trust and Estate Counsel Arbitration Task Force Report (Sept. 18, 2006).

---

can arise with respect to trusts and estates. The Uniform Trust Code and TEDRA have launched practitioners into a brave new world and serve as a model for statutory reform to allow for effective nonjudicial resolution of trust disputes. Although several Uniform Trust Code states have broadened the avail-

ability of nonjudicial dispute resolution procedures available to trustors, beneficiaries, and trustees, the statutory provisions adopted by Washington, Idaho, and Oregon make it clear that these states have reached furthest in stretching the boundaries for “self-help” in trust and estate dispute resolution.

---

## APPENDIX A

### Selected Provisions of the Uniform Trust Code

#### Section 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.

#### Section 301. Representation: Basic Effect.

- (a) Notice to a person who may represent and bind another person under this [article] has the same effect as if notice were given directly to the other person.
- (b) The consent of a person who may represent and bind another person under this [article] is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.
- (c) Except as otherwise provided in Sections [411 and] 602, a person who under this [article] may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor’s behalf.
- [(d) A settlor may not represent and bind a beneficiary under this [article] with respect to the termination or modification of a trust under Section 411(a).]

#### 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 persons 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.

#### **Section 305. Appointment of Representative.**

- (a) If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A [representative] may be appointed to represent several persons or interests.
- (b) A [representative] may act on behalf of the individual represented with respect to any matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending.
- (c) In making decisions, a [representative] may consider general benefit accruing to the living members of the individual's family.

#### **Section 410. Modification or Termination of Trust; Proceedings for Approval or Disapproval.**

- (a) In addition to the methods of termination prescribed by Sections 411 through 414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.
- (b) A proceeding to approve or disapprove a proposed modification or termination under Sections 411 through 416, or trust combination or division under Section 417, may be commenced by a trustee or beneficiary, [and a proceeding to approve or disapprove a proposed modification or termination under Section 411 may be commenced by the settlor]. The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 413.

#### **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.

**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.

**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.

**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 that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

**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.

**Section 1004. Attorney's Fees and Costs.**

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

---

---

## APPENDIX B

### Selected Provisions of the Oregon Uniform Trust Code

#### 130.045 UTC 111. Nonjudicial settlement agreements.

- (1) For purposes of this section, ‘interested persons’ means any settlor of a trust who is living, all beneficiaries of the trust who have an interest in the subject of the agreement, any acting trustee of the trust, and the Attorney General if the trust is a charitable trust subject to the enforcement or supervisory powers of the state or the Attorney General under the provisions of ORS 128.610 to 128.750.
- (2) Except as otherwise provided in subsection (3) of this section, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.
- (3) A nonjudicial settlement agreement is valid only to the extent the agreement does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.
- (4) Matters that may be resolved by a nonjudicial settlement agreement include:
  - (a) The interpretation or construction of the terms of the trust or other writings that affect the trust.
  - (b) The approval of a trustee’s report or accounting.
  - (c) Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power.
  - (d) The resignation or appointment of a trustee and the determination of a trustee’s compensation.
  - (e) Transfer of a trust’s principal place of administration.
  - (f) Liability of a trustee for an action or failure to act relating to the trust.
  - (g) Determining classes of creditors, beneficiaries, heirs, next of kin or other persons.
  - (h) Resolving disputes arising out of the administration or distribution of the trust.
  - (i) Modifying the terms of the trust, including extending or reducing the period during which the trust operates.
- (5)
  - (a) Any interested person may file a settlement agreement entered into under this section, or a memorandum summarizing the provisions of the agreement, with the circuit court for any county where trust assets are located or where the trustee administers the trust.
  - (b) After collecting the fee provided for in subsection (7)(a) of this section, the clerk shall enter the agreement or memorandum of record in the court’s register.
  - (c) Within five days after the filing of an agreement or memorandum under this subsection, the person making the filing must serve a notice of the filing and a copy of the agreement or memorandum on each person interested in the trust whose address is known at the time of the filing. Service may be made personally, or by registered or certified mail, return receipt requested. The notice of filing shall be substantially in the following form:

CAPTION OF CASE  
NOTICE OF FILING  
OF SETTLEMENT AGREEMENT OR  
MEMORANDUM OF  
SETTLEMENT AGREEMENT

You are hereby notified that the attached document was filed by the undersigned in the above entitled court on the \_\_\_ day of \_\_\_\_\_, \_\_. Unless you file objections to the agreement within 120 days after that date, the agreement will be approved and will be binding on all persons interested in the trust.

If you file objections within the 120-day period, the court will fix a time and place for a hearing. At least 10 days before the date of that hearing, you must serve a copy of your objections and give notice of the time and place of the hearing to all persons interested in the trust. See ORS 130.045.

Signature

- 
- 
- (d) Proof of mailing of the notices required under this subsection must be filed with the court. Proof of service may be made by a certificate of service in the form provided by ORCP 7 F, by a signed acceptance of service or by a return receipt from the postal authorities.
  - (e) If no objections are filed with the court within 120 days after the filing of the agreement or memorandum, the agreement is effective and binding on all persons interested in the trust.
  - (6) (a) If objections are filed with the court within 120 days after the filing of a settlement agreement or memorandum under this section, the clerk of the court shall collect the fee provided in subsection (7)(a) of this section. Upon the filing of objections, the court shall fix a time and place for a hearing. The person filing the objections must serve a copy of the objections on all persons interested in the trust and give notice to those persons of the time and place fixed by the court for a hearing. Service must be made at least 10 days before the date set by the court for the hearing. Service of the objections may be made personally or by registered or certified mail, return receipt requested.
  - (b) Proof of mailing of objections must be filed with the court. Proof of service may be made by a certificate of service in the form provided by ORCP 7 F, by a signed acceptance of service or by a return receipt from the postal authorities.
  - (c) The court shall approve an agreement entered into under this section after a hearing upon objections filed under this subsection unless:
    - (A) The agreement does not reflect the signatures of all persons required by this section;
    - (B) The agreement is not authorized by this section; or
    - (C) Approval of the agreement would not be equitable.
  - (d) An agreement approved by the court after a hearing is binding on all persons interested in the trust.
  - (e) Persons interested in the trust may waive the notice required under subsection (5) of this section. If all persons interested in the trust waive the notice, the agreement is effective and binding on all persons interested in the trust upon filing of the agreement or memorandum with the court.
  - (7) (a) The clerk of the circuit court shall collect in advance a fee of \$65 for the filing of an agreement or memorandum of agreement under subsection (5) of this section, and a fee of \$32.50 for the filing of objections under subsection (6) of this section.
  - (b) In addition to the filing fees provided for in paragraph (a) of this subsection, the clerk shall charge and collect in proceedings under this section all additional fees authorized by law for civil actions, suits or proceedings in circuit court
  - (c) A pleading or other document is not considered filed unless the fees required by this subsection are paid. Filing fees may not be refunded to any party.

### **130.100 UTC 301. Representation; basic effect.**

- (1) Notice to a person who may represent and bind another person under ORS 130.100 to 130.120 has the same effect as if notice were given directly to the other person. Notice to a representative must comply with ORS 130.035 (4).
- (2) The consent of a person who may represent and bind another person under ORS 130.100 to 130.120 is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.
- (3) Except as otherwise provided in ORS 130.200 and 130.505, a person who is authorized to represent a financially incapable settlor under ORS 130.100 to 130.120 may receive notice and give binding consent on the settlor's behalf.
- (4) A settlor may not represent and bind a beneficiary under ORS 130.100 to 130.120 with respect to the termination or modification of an irrevocable trust under ORS 130.200 (1).

### **130.105 UTC 302. Representation by holder of testamentary power of appointment.**

To the extent there is no conflict of interest between the holder of a 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 are subject to the power as permissible appointees, as takers in default or by other reason. [2005 c.348 §17; 2007 c.33 §1]

---

---

**130.110 UTC 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) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- (3) A trustee may represent and bind the beneficiaries of the trust;
- (4) A personal representative of a decedent's estate may represent and bind persons interested in the estate; and
- (5) A parent may represent and bind the parent's minor or unborn child if a conservator for the child has not been appointed.

**130.115 UTC 304. Representation by person having substantially identical interest.**

Unless otherwise represented, a minor, financially incapable individual or unborn individual, or a person whose identity or 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 represented.

**130.120 UTC 305. Appointment of special representative.**

- (1) If the court determines that the interest of a person is not represented under ORS 130.100 to 130.120, or that the otherwise available representation might be inadequate, the court may appoint a special representative to receive notice, give consent and otherwise represent, bind and act on behalf of a minor, financially incapable individual or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable. A special representative may be appointed to represent several persons or interests, if the interests of the persons represented do not conflict.
- (2) A special representative may act on behalf of the individual represented with respect to any matter that the court has authorized, whether or not a judicial proceeding concerning the trust is pending.
- (3) In making decisions, a special representative may consider general benefit accruing to the living members of the individual's family.
- (4) A person appointed as special representative must have appropriate skills and experience necessary to adequately represent the individual in the matter for which the special representative is appointed. A special representative may not have an interest in the trust that is the subject of the appointment of the special representative. A special representative may not be related to a personal representative of an estate with an interest in the trust, or to a trustee, beneficiary or other person with an interest in the trust.
- (5) A person requesting the appointment of a special representative must file a petition with the court describing the proposed special representative, the need for a special representative, the qualifications of the special representative, the person or persons who will be represented, the actions that the special representative will take and the approximate date or event when the authority of the special representative will terminate. The person seeking to serve as special representative must file a consent to serve.
- (6) A special representative appointed under this section is entitled to reasonable compensation for services. The trustee shall pay compensation to the special representative from the principal of the trust that is attributable to those beneficiaries who are represented. If the beneficiaries who are represented do not have principal that is attributable to them, compensation is an administrative expense of the trust.
- (7) Upon completion of the responsibilities of the special representative, the special representative shall move the court for an order discharging the special representative. Upon order of the court, a special representative appointed under this section shall be discharged from any further responsibility with respect to the trust.

**130.195 UTC 410. Modification or termination of trust; proceedings for approval or disapproval.**

- (1) In addition to the methods of termination prescribed by ORS 130.200, 130.205, 130.210 and 130.215, a trust terminates:
  - (a) To the extent the trust is revoked or expires pursuant to the terms of the trust;
  - (b) If no purpose of the trust remains to be achieved; or

- 
- 
- (c) To the extent one or more of the purposes of the trust have become unlawful, contrary to public policy or impossible to achieve.
  - (2) A proceeding to approve or disapprove a proposed modification or termination under ORS 130.045, 130.200, 130.205, 130.210, 130.215, 130.220 and 130.225, or trust combination or division under ORS 130.230, may be commenced by a trustee or beneficiary. A proceeding to approve or disapprove a proposed modification or termination under ORS 130.200 may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under ORS 130.210.

**130.200 UTC 411. Modification or termination of irrevocable trust by consent.**

- (1) An irrevocable trust may be modified or terminated with approval of the court upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. The Attorney General must consent to any modification or termination of a charitable trust. A settlor's power to consent to a trust's modification or termination may be exercised by:
  - (a) An agent or attorney-in-fact under a power of attorney only to the extent expressly authorized by the terms of the trust;
  - (b) The settlor's conservator with the approval of the court supervising the conservatorship if an agent or attorney-in-fact is not authorized by the terms of the trust; or
  - (c) The settlor's guardian with the approval of the court supervising the guardianship if an agent or attorney-in-fact is not authorized by the terms of the trust and a conservator has not been appointed.
- (2) An 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. An irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that the modification is not inconsistent with a material purpose of the trust. The Attorney General must consent to any modification or termination of a charitable trust.
- (3) For the purposes of subsections (1) and (2) of this section, a spendthrift provision in the terms of the trust is rebuttably presumed to constitute a material purpose of the trust.
- (4) Upon termination of a trust under subsection (1) or (2) of this section, the trustee shall distribute the trust property as agreed to by the beneficiaries and, in the case of a charitable trust requiring the Attorney General's consent, as agreed to by the Attorney General.
- (5) A proposed modification or termination of the trust under subsection (1) or (2) of this section may be approved by the court without the consent of all beneficiaries if the court finds that:
  - (a) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
  - (b) The interests of any beneficiary who does not consent will be adequately protected.
- (6) A binding nonjudicial settlement agreement relating to modification or termination of a trust may be entered into by all interested persons, as defined in ORS 130.045.

**130.205 UTC 412. Modifications or termination because of unanticipated circumstances or inability to administer trust effectively.**

- (1) The court may modify the administrative or dispositive terms of a trust or terminate the trust if modification or termination will further the purposes of the trust and the modification or termination is requested by reason of circumstances not anticipated by the settlor. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
- (2) 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 would impair the trust's administration.
- (3) A trustee may terminate a trust if:
  - (a) Termination is appropriate by reason of circumstances not anticipated by the settlor;
  - (b) Termination will not be inconsistent with the material purposes of the trust;
  - (c) All qualified beneficiaries have consented to the termination;
  - (d) The trustee is not a beneficiary of the trust and has no duty of support for any beneficiary of the trust; and
  - (e) In the case of a charitable trust, the Attorney General has consented to the termination.
- (4) 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.

---

---

**130.215 UTC 414. Modification or termination of uneconomic trust.**

- (1) After notice to the qualified beneficiaries, a trustee may terminate a trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. A trustee may not terminate a trust under this section if the trustee is a beneficiary of the trust or has a duty of support for a beneficiary of the trust.
- (2) The court may modify or terminate a trust, or remove the trustee and appoint a different trustee, if the court finds that the value of the trust property is insufficient to justify the cost of administration.
- (3) 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.
- (4) This section does not apply to an easement for conservation or preservation.

**130.220 UTC 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 the person requesting reformation proves by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

**130.225 UTC 416. Modification to achieve settlor's tax objectives.**

The court may modify the terms of a trust to achieve the settlor's tax objectives if the modification is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

**130.815 UTC 1004. Attorney fees and costs.**

In a judicial proceeding involving the validity or administration of a trust, the court may award costs and expenses and reasonable attorney's fees to any party, to be paid by another party or from the trust.

---

---

## APPENDIX C

### Selected Provisions of the Idaho Trust and Estate Dispute Resolution Act

#### 15-8-103. Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise:

- (1) "Matter" includes any issue, question, or dispute involving:
  - (a) 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;
  - (b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;
  - (c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to:
    - (i) The construction of wills, trusts, devolution agreements, and other writings;
    - (ii) A change of personal representative or trustee;
    - (iii) A change of the situs of a trust;
    - (iv) An accounting from a personal representative or trustee; or
    - (v) The determination of fees for a personal representative or trustee;
  - (d) The grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law;
  - (e) 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 in order to more efficiently allocate exemptions or to achieve qualification for deductions, elections, and other tax requirements including, but not limited to, the qualification of any gift thereunder for the benefit of a surviving spouse who is not a citizen of the United States for the estate tax marital deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the Internal Revenue Code, the qualification of any gift thereunder as a qualified conservation easement as permitted by federal law, or the qualification of any gift for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust; and
  - (f) With respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, including actual joint tenancy property, property subject to a devolution agreement, or assets subject to a pay on death or transfer on death designation:
    - (i) The ascertaining of any class of creditors or others for purposes of section 15-6-107, Idaho Code;
    - (ii) The ordering of a custodian of any of the decedent's records relating to a nonprobate asset to do or abstain from doing any particular act with respect to those records;
    - (iii) The determination of any question arising in the administration of a nonprobate asset under section 15-6-107, Idaho Code;
    - (iv) The determination of any questions relating to the abatement, rights of creditors, or other matter relating to the administration, settlement, or final disposition of a nonprobate asset under title 15, Idaho Code; and
    - (v) The resolution of any matter referencing this chapter, including a determination of any questions relating to the ownership or distribution of an individual retirement account on the death of the spouse of the account holder as contemplated by section 11-604A(6), Idaho Code;
    - (g) The resolution of any other matter that could affect the nonprobate asset.

...

(4) "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.

---

---

**15-8-205. Application of Doctrine of Virtual Representation.**

- (1) This section is intended to adopt the common law concept of virtual representation. This section supplements the common law relating to the doctrine of virtual representation and the provisions of section 15-1-403, Idaho Code, and shall not be construed as limiting the application of that common law doctrine or the provisions of section 15-1-403, Idaho Code.
- (2) Any notice requirement in this chapter is satisfied if notice is given as follows:
  - (a) Where an interest in an estate, trust, or nonprobate asset, or an interest that may be affected by a power of attorney, has been given to persons who comprise a certain class upon the happening of a certain event, notice may be given to the living persons who would constitute the class if the event had happened immediately before the commencement of the proceedings requiring notice, and the persons shall virtually represent all other members of the class;
  - (b) Where an interest in an estate, trust, or nonprobate asset, or an interest that may be affected by a power of attorney, has been given to a living person, and the same interest, or a share in it, is to pass to the surviving spouse or to persons who are, or might be, the distributees, heirs, issue, or other kindred of that living person upon the happening of a future event, notice may be given to that living person, and the living person shall virtually represent the surviving spouse, distributees, heirs, issue, or other kindred of the person; and
  - (c) Except as otherwise provided in this subsection (2), where an interest in an estate, trust, or nonprobate asset, or an interest that may be affected by a power of attorney, has been given to a person or a class of persons, or both, upon the happening of any future event, and the same interest or a share of the interest is to pass to another person or class of persons, or both, upon the happening of an additional future event, notice may be given to the living person or persons who would take the interest upon the happening of the first event, and the living person or persons shall virtually represent the persons and classes of persons who might take upon the happening of the additional future event.
- (3) A party is not virtually represented by a person receiving notice if a conflict of interest involving the matter is known to exist between the notified person and the party.
- (4) An action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise virtually represented.

**15-2-208. Cost—Attorney’s Fees.**

- (1) Either the district court or the court on appeal may, in its discretion, order costs, including reasonable attorney’s fees, to be awarded to any party:
  - (a) From any party to the proceedings;
  - (b) From the assets of the estate or trust involved in the proceedings; or
  - (c) From any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.
- (2) This section applies to all proceedings governed by this chapter including, but not limited to, proceedings involving trusts, decedent’s estates and properties, and guardianship matters. Except as provided in section 12-117, Idaho Code, this section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, unless such statute specifically provides otherwise.

**15-8-301. Purpose.**

The purpose of this part 3 is to provide a binding nonjudicial procedure to resolve matters through written agreements among the parties interested in the estate or trust. The procedure is supplemental to, and may not derogate from, any other proceeding or provision authorized by statute or the common law.

**15-8-302. Binding Agreement.**

Sections 15-8-301 through 15-8-305, Idaho Code, shall be applicable to the resolution of any matter, as defined in section 15-8-103, Idaho Code, other than matters subject to chapter 5, title 15, Idaho Code, or a trust for a minor or other incapacitated person created at its inception by the judgment or decree of a court unless the judgment or decree provides that sections 15-8-301 through 15-8-305, Idaho Code, shall be applicable. If all parties agree to a resolution of any such matter, then the agreement shall be evidenced by a written agreement signed by all parties. Subject to the provisions of section 15-8-304, Idaho Code, the written agreement shall be binding and conclusive on

---

---

all persons interested in the estate or trust. The agreement shall identify the subject matter of the dispute and the parties. If the agreement or a memorandum of the agreement is to be filed with the court under section 15-8-303, Idaho Code, the agreement may, but need not, include provisions specifically addressing jurisdiction, governing law, the waiver of notice of the filing and the discharge of any special representative who has acted with respect to the agreement. If a party who virtually represents another person under section 15-8-205, Idaho Code, signs the agreement, then the party's signature constitutes the signature of all persons whom the party virtually represents, and all the virtually represented persons shall be bound by the agreement.

**15-8-303. Entry of Agreement with Court—Effect.**

- (1) Any party, or a party's legal representative, may file the written agreement or a memorandum summarizing the written agreement with the court having jurisdiction over the estate or trust. However, if a special representative is a party to the written agreement, the agreement or a memorandum of its terms may not be filed within thirty (30) days of the agreement's execution by all parties unless the written consent of the special representative is filed along with, or included within, the provision of such agreement or memorandum. The agreement or a memorandum of its terms may be filed after a special representative has commenced a proceeding under section 15-8-304, Idaho Code, only after the court has determined that the special representative has adequately represented and protected the parties represented. Failure to complete any action authorized or required under this subsection does not cause the written agreement to be ineffective and the agreement is nonetheless binding and conclusive on all persons interested in the estate or trust.
- (2) On filing the agreement or memorandum, the agreement will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust.

**15-8-305. Special Representative.**

- (1)(a) The personal representative or trustee may petition the court having jurisdiction over the matter for the appointment of a special representative to represent a person who is interested in the estate or trust and:
  - (i) Who is a minor;
  - (ii) Who is incompetent or disabled;
  - (iii) Who is yet unborn or unascertained; or
  - (iv) Whose identity or address is unknown.

The petition may be heard by the court without notice.

...

- (1)(c) The special representative may enter into a binding agreement on behalf of the person or beneficiary. The special representative may be appointed for more than one (1) person or class of persons if the interests of such persons or class are not in conflict. The petition shall be verified. The petition and order appointing the special representative may be in the following forms:

...

- (3) The special representative must be a lawyer licensed to practice before the courts of this state, or an individual with special skills or training in the administration of estates or trusts. The special representative may not have an interest in the affected estate or trust, and may not be related to a person interested in the estate or trust. The special representative is entitled to reasonable compensation for services, which must be paid from the principal of the estate or trust whose beneficiaries are represented.
- (4) The special representative shall be discharged from any responsibility and shall have no further duties with respect to the estate or trust or with respect to any person interested in the estate or trust, on the earlier of:
  - (a) The expiration of six (6) months from the date the special representative was appointed, unless the order appointing the special representative provides otherwise; or
  - (b) The execution of the written agreement by all parties or their virtual representatives.
- (5) Any action against a special representative must be brought before the earlier of:
  - (a) One (1) year from the discharge of the special representative; or
  - (b) The entry of an order by a court of competent jurisdiction under section 15-8-304, Idaho Code, approving the written agreement executed by all interested parties in accordance with the provisions of section

---

---

## APPENDIX D

### Selected Provisions of the Washington Trust and Estate Dispute Resolution Act

#### 11.96A.010. Purpose.

The overall purpose of this chapter is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under Title 11 RCW. The provisions are intended to provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement. The [this] chapter also provides for judicial resolution of disputes if other methods are unsuccessful.

#### 11.96A.030. Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) “Matter” includes any issue, question, or dispute involving:
  - (a) 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;
  - (b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;
  - (c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee;
  - (d) The grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law;
  - (e) 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 in order to achieve qualification for deductions, elections, and other tax requirements, including the qualification of any gift thereunder for the benefit of a surviving spouse who is not a citizen of the United States for the estate tax marital deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the internal revenue code, the qualification of any gift thereunder as a qualified conservation easement as permitted by federal law, or the qualification of any gift for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust; and
  - (f) With respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, including joint tenancy property, property subject to a community property agreement, or assets subject to a pay on death or transfer on death designation:
    - (i) The ascertaining of any class of creditors or others for purposes of chapter 11.18 or 11.42 RCW;
    - (ii) The ordering of a qualified person, the notice agent, or resident agent, as those terms are defined in chapter 11.42 RCW, or any combination of them, to do or abstain from doing any particular act with respect to a nonprobate asset;
    - (iii) The ordering of a custodian of any of the decedent’s records relating to a nonprobate asset to do or abstain from doing any particular act with respect to those records;
    - (iv) The determination of any question arising in the administration under chapter 11.18 or 11.42 RCW of a nonprobate asset;
    - (v) The determination of any questions relating to the abatement, rights of creditors, or other matter relating to the administration, settlement, or final disposition of a nonprobate asset under this title;
    - (vi) The resolution of any matter referencing this chapter, including a determination of any questions relating to the ownership or distribution of an individual retirement account on the death of the spouse of the account holder as contemplated by RCW 6.15.020(6);

...

---

(4) “Party” or “parties” means each of the following persons who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner:

- (a) The trustor if living;
- (b) The trustee;
- (c) The personal representative;
- (d) An heir;
- (e) A beneficiary, including devisees, legatees, and trust beneficiaries;
- (f) The surviving spouse or surviving domestic partner of a decedent with respect to his or her interest in the decedent’s property;
- (g) A guardian ad litem;
- (h) A creditor;
- (i) Any other person who has an interest in the subject of the particular proceeding;
- (j) The attorney general if required under RCW 11.110.120;
- (k) Any duly appointed and acting legal representative of a party such as a guardian, special representative, or attorney-in-fact;
  - (l) Where applicable, the virtual representative of any person described in this subsection the giving of notice to whom would meet notice requirements as provided in RCW 11.96A.120;
  - (m) Any notice agent, resident agent, or a qualified person, as those terms are defined in chapter 11.42 RCW; and
  - (n) The owner or the personal representative of the estate of the deceased owner of the nonprobate asset that is the subject of the particular proceeding, if the subject of the particular proceeding relates to the beneficiary’s liability to a decedent’s estate or creditors under RCW 11.18.200.

**11.96A.120. Application of doctrine of virtual representation.**

- (1) This section is intended to adopt the common law concept of virtual representation. This section supplements the common law relating to the doctrine of virtual representation and shall not be construed as limiting the application of that common law doctrine.
- (2) Any notice requirement in this title is satisfied if notice is given as follows:
  - (a) Where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to persons who comprise a certain class upon the happening of a certain event, notice may be given to the living persons who would constitute the class if the event had happened immediately before the commencement of the proceeding requiring notice, and the persons shall virtually represent all other members of the class;
  - (b) Where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to a living person, and the same interest, or a share in it, is to pass to the surviving spouse or surviving domestic partner or to persons who are, or might be, the distributees, heirs, issue, or other kindred of that living person upon the happening of a future event, notice may be given to that living person, and the living person shall virtually represent the surviving spouse or surviving domestic partner, distributees, heirs, issue, or other kindred of the person; and
  - (c) Except as otherwise provided in this subsection, where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to a person or a class of persons, or both, upon the happening of any future event, and the same interest or a share of the interest is to pass to another person or class of persons, or both, upon the happening of an additional future event, notice may be given to the living person or persons who would take the interest upon the happening of the first event, and the living person or persons shall virtually represent the persons and classes of persons who might take on the happening of the additional future event.
- (3) A party is not virtually represented by a person receiving notice if a conflict of interest involving the matter is known to exist between the notified person and the party.
- (4) An action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise virtually represented.

**11.96A.150. Costs—Attorneys’ fees.**

- (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the

---

---

estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

**11.96A.210. Purpose.**

The purpose of RCW 11.96A.220 through 11.96A.250 is to provide a binding nonjudicial procedure to resolve matters through written agreements among the parties interested in the estate or trust. The procedure is supplemental to, and may not derogate from, any other proceeding or provision authorized by statute or the common law.

**11.96A.220. Binding agreement.**

RCW 11.96A.210 through 11.96A.250 shall be applicable to the resolution of any matter, as defined by RCW 11.96A.030, other than matters subject to chapter 11.88 or 11.92 RCW, or a trust for a minor or other incapacitated person created at its inception by the judgment or decree of a court unless the judgment or decree provides that RCW 11.96A.210 through 11.96A.250 shall be applicable. If all parties agree to a resolution of any such matter, then the agreement shall be evidenced by a written agreement signed by all parties. Subject to the provisions of RCW 11.96A.240, the written agreement shall be binding and conclusive on all persons interested in the estate or trust. The agreement shall identify the subject matter of the dispute and the parties. If the agreement or a memorandum of the agreement is to be filed with the court under RCW 11.96A.230, the agreement may, but need not, include provisions specifically addressing jurisdiction, governing law, the waiver of notice of the filing as provided in RCW 11.96A.230, and the discharge of any special representative who has acted with respect to the agreement.

If a party who virtually represents another under RCW 11.96A.120 signs the agreement, then the party's signature constitutes the signature of all persons whom the party virtually represents, and all the virtually represented persons shall be bound by the agreement.

**11.96A.230. Entry of agreement with court—Effect.**

- (1) Any party, or a party's legal representative, may file the written agreement or a memorandum summarizing the written agreement with the court having jurisdiction over the estate or trust. The agreement or a memorandum of its terms may be filed within thirty days of the agreement's execution by all parties only with the written consent of the special representative. The agreement or a memorandum of its terms may be filed after a special representative has commenced a proceeding under RCW 11.96A.240 only after the court has determined that the special representative has adequately represented and protected the parties represented. Failure to complete any action authorized or required under this subsection does not cause the written agreement to be ineffective and the agreement is nonetheless binding and conclusive on all persons interested in the estate or trust.
- (2) On filing the agreement or memorandum, the agreement will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust.

**11.96A.250. Special representative.**

- (1)(a) The personal representative or trustee may petition the court having jurisdiction over the matter for the appointment of a special representative to represent a person who is interested in the estate or trust and:
  - (i) Who is a minor; (ii) who is incompetent or disabled; (iii) who is yet unborn or unascertained; or (iv) whose identity or address is unknown. The petition may be heard by the court without notice....
- (3) The special representative must be a lawyer licensed to practice before the courts of this state or an individual with special skill or training in the administration of estates or trusts. The special representative may not have an interest in the affected estate or trust, and may not be related to a person interested in the estate or trust. The special representative is entitled to reasonable compensation for services that must be paid from the principal of the estate or trust whose beneficiaries are represented.

- 
- (4) The special representative shall be discharged from any responsibility and shall have no further duties with respect to the estate or trust or with respect to any person interested in the estate or trust, on the earlier of:
- (a) The expiration of six months from the date the special representative was appointed unless the order appointing the special representative provides otherwise, or
  - (b) the execution of the written agreement by all parties or their virtual representatives. Any action against a special representative must be brought within the time limits provided by RCW 11.96A.070(3)(c)(i).

**11.96A.260. Findings—Intent.**

The legislature finds that it is in the interest of the citizens of the state of Washington to encourage the prompt and early resolution of disputes in trust, estate, and nonprobate matters. The legislature endorses the use of dispute resolution procedures by means other than litigation. The legislature also finds that the former chapter providing for the nonjudicial resolution of trust, estate, and nonprobate disputes, \*chapter 11.96 RCW, has resulted in the successful resolution of thousands of disputes since 1984. The nonjudicial procedure has resulted in substantial savings of public funds by removing those disputes from the court system. Enhancement of the statutory framework supporting the nonjudicial process in \*chapter 11.96 RCW would be beneficial and would foster even greater use of nonjudicial dispute methods to resolve trust, estate, and nonprobate disputes. The legislature further finds that it would be beneficial to allow parties to disputes involving trusts, estates, and nonprobate assets to have access to a process for required mediation followed by arbitration using mediators and arbitrators experienced in trust, estate, and nonprobate matters. Finally, the legislature also believes it would be beneficial to parties with disputes in trusts, estates, and nonprobate matters to clarify and streamline the statutory framework governing the procedures governing these cases in the court system.

Therefore, the legislature adopts RCW 11.96A.270 through 11.96A.320, that enhance \*chapter 11.96 RCW and allow required mediation and arbitration in disputes involving trusts, estates, and nonprobate matters that are brought to the courts. RCW 11.96A.270 through 11.96A.320 also set forth specific civil procedures for handling trust and estate disputes in the court system. It is intended that the adoption of RCW 11.96A.270 through 11.96A.320 will encourage and direct all parties in trust, estate, and nonprobate matter disputes, and the court system, to provide for expeditious, complete, and final decisions to be made in disputed trust, estate, and nonprobate matters.

**11.96A.270. Intent—Parties can agree otherwise.**

The intent of RCW 11.96A.260 through 11.96A.320 is to provide for the efficient settlement of disputes in trust, estate, and nonprobate matters through mediation and arbitration by providing any party the right to proceed first with mediation and then arbitration before formal judicial procedures may be utilized. Accordingly, any of the requirements or rights under RCW 11.96A.260 through 11.96A.320 are subject to any contrary agreement between the parties or the parties' virtual representatives.

---

---

**APPENDIX E**

**Sample Memorandum of Agreement**

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN THE MATTER OF	)	
	)	
	)	NO. _____
JANE DOE TRUST U/W	)	
OF JOHN DOE	)	MEMORANDUM OF AGREEMENT
	)	PURSUANT TO RCW 11.96A OF THE
	)	TRUST & ESTATE DISPUTE
	)	RESOLUTION ACT (TRUST)
_____	)	

The undersigned certifies that the following described agreement (the "Agreement") was duly executed, as described below in connection with the Jane Doe Trust u/w of John Doe (the "Trust"), pursuant to RCW 11.96A.220. This document is intended to constitute a memorandum of the Agreement, which memorandum may be filed pursuant to RCW 11.96A.230(2), whereupon the Agreement becomes binding as a final order.

The Agreement Pursuant to RCW 11.96A Regarding the Jane Doe Trust u/w of John Doe was signed on \_\_\_\_\_, 2009 by the currently serving trustee of the Trust, by the current beneficiary of the Trust, and by the contingent beneficiaries of the Trust.

Under the Agreement, the trustee, current beneficiary, and contingent beneficiaries agreed: (1) to identify individuals who may act as successors to the individual trustee of the Trust; (2) to establish a trustee selection committee; and (3) to identify, nominate, and appoint the individuals who will serve on the trustee selection committee.

The parties waived notice of the filing of this memorandum of the Agreement.

DATED this \_\_\_\_ day of \_\_\_\_\_ 2009.

LAW FIRM

By \_\_\_\_\_  
Attorney, Bar No. \_\_\_\_\_  
Attorneys for \_\_\_\_\_

## APPENDIX F

### Uniform Trust Code States—Availability of Nonjudicial or “Self-Help” Procedures

State	UTC 111(d)(1)	Allow Nonjudicial Modification and/or Termination	UTC 411				
			UTC 301(d)	Possible Parties to Modification or Termination	Court Approval Necessary	Spendthrift Provision Presumed to be Material	Modification/Termination Not Inconsistent with Material Purpose
Alabama	Enacted	No	Enacted	Settlor, All Beneficiaries	Yes	No	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
Arizona	Enacted	No	Omitted	Beneficiaries Only	Yes	No	Presumption Court must conclude that modification or termination is not necessary to achieve material purpose
Arkansas	Enacted	No	Enacted	Settlor, All Beneficiaries	No	Yes	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
District of Columbia	Enacted	No	Omitted	Settlor, All Beneficiaries	No	No	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)

State	UTC 111(d)(1)	Allow Nonjudicial Modification and/or Termination	UTC 411				
			UTC 301(d)	Possible Parties to Modification or Termination	Court Approval Necessary	Spendthrift Provision Presumed to be Material	Modification/Termination Not Inconsistent with Material Purpose
Florida	Enacted	Yes	Omitted	Trustee, Qualified Beneficiaries	Yes	No	Court must conclude that purpose of the trust has been fulfilled or has become illegal, impossible, wasteful, or impracticable to fulfill, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust, or a material purpose of the trust no longer exists. Court may also conclude that compliance with the terms of a trust is not in the best interests of the beneficiaries
Kansas	Omitted	No	Omitted	Settlor, Qualified Beneficiaries	No	Yes	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
Maine	Enacted	No	Enacted	Settlor, All Beneficiaries	Yes	No	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)

State	UTC 111(d)(1)	Allow Nonjudicial Modification and/or Termination	UTC 411				
			UTC 301(d)	Possible Parties to Modification or Termination	Court Approval Necessary	Spendthrift Provision Presumed to be Material	Modification/Termination Not Inconsistent with Material Purpose
Michigan	Enacted	No	Enacted	Trustee, Qualified Beneficiaries, and Trust Protector	Yes	No Presumption	Court must conclude that modification or termination of the trust is consistent with the material purposes of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust
Missouri	Enacted	No	Enacted	Settlor, All Beneficiaries	No	No Presumption	Modification or termination may be inconsistent
Nebraska	Enacted	No	Enacted	Settlor, All Beneficiaries	Yes	Yes	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
New Hampshire	Enacted	Yes	Enacted	Beneficiaries Only	Yes	No Presumption	Court must conclude that modification or termination is not necessary to achieve material purpose
New Mexico	Enacted	No	Enacted	Settlor, All Beneficiaries	Yes	No Presumption	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)

State	UTC 111(d)(1)	Allow Nonjudicial Modification and/or Termination	UTC 411				
			UTC 301(d)	Possible Parties to Modification or Termination	Court Approval Necessary	Spendthrift Provision Presumed to be Material	Modification/Termination Not Inconsistent with Material Purpose
North Carolina	Omitted	No	Enacted	Settlor, All Beneficiaries	No	No Presumption	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
North Dakota	Enacted	No	Enacted	Beneficiaries Only	Yes	No Presumption	Court must conclude that modification or termination is not necessary to achieve material purpose
Ohio	Enacted	Modification Only	Enacted	Settlor, All Beneficiaries	Yes	No Presumption	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
Oregon	Enacted	Modification Only	Enacted	Settlor, All Beneficiaries	Yes	Yes	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
Pennsylvania	Enacted	Yes	Omitted	Settlor, All Beneficiaries	No	Yes	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that <i>(Con't. on next page)</i>

State	UTC 111(d)(1)	Allow Nonjudicial Modification and/or Termination	UTC 411				Modification/ Termination Not Inconsistent with Material Purpose
			UTC 301(d)	Possible Parties to Modification or Termination	Court Approval Necessary	Spendthrift Provision Presumed to be Material	
Pennsylvania <i>(Continued from previous page)</i>							continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
South Carolina	Omitted	No	Omitted	Settlor, All Beneficiaries	Yes	No Presumption	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
Tennessee	Enacted	No	Enacted	Trustee, Beneficiaries	No	No Presumption	Modification or termination may be inconsistent (during settlor's life), but following settlor's death court must conclude that continuance is not necessary to achieve any material purpose of the trust or that modification is not inconsistent with a material purpose of the trust (beneficiaries)
Utah	Enacted	No	Omitted	Settlor, All Beneficiaries	No	No	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)

State	UTC 111(d)(1)	Allow Nonjudicial Modification and/or Termination	UTC 411				
			UTC 301(d)	Possible Parties to Modification or Termination	Court Approval Necessary	Spendthrift Provision Presumed to be Material	Modification/ Termination Not Inconsistent with Material Purpose
Vermont	Enacted	No	Omitted	Settlor, All Beneficiaries	Yes	No	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
Virginia	Enacted	No	Enacted	Settlor, All Beneficiaries	Yes	No Presumption	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)
Wyoming	Enacted	No	Enacted	Settlor, Beneficiaries, Trustee, Trust Protector	Yes	No	Modification or termination may be inconsistent (settlor and beneficiaries); court must conclude that continuance or modification is not necessary to achieve or is not inconsistent with any material purpose of the trust (beneficiaries)