Special Session II-A

Show Me the Money!
Settlors, Beneficiaries and the Dynasty Trust

Planning with Trusts Series

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I. Introduction.

These materials focus on substantive and procedural issues involved in seeking judicial reformation, termination, or modification of trusts, and in crafting nonjudicial settlement agreements (NJSA) to produce modifications that "could be properly approved by a court." The procedural considerations involved are far more complex than is the case when a trust instrument contains provisions designed to allow decanting or amendment by a trustee or trust protector. Because substantive law in statutes and court decisions as well as procedures in court proceedings vary in detail from state to state, this discussion should be viewed as a checklist of principles that must be considered in every state. Because it is the only body of uniform statutory trust law available, many of these principles are viewed through the provisions of the Uniform Trust Code (UTC). Throughout the discussion, any reference to an "action" or "proceeding" refers to a court proceeding to reform, terminate, or modify a trust unless stated otherwise.

The objective of any judicial proceeding, or of any nonjudicial settlement agreement, is a result that is binding on all persons whose interests are affected – both parties and nonparties to the case or the NJSA. The first step in the process is to identify what you want to accomplish, and then to identify those beneficiaries whose interests in the trust will be affected and the steps necessary to bind them.

II. Jurisdiction.

A. Generally.

The subject of jurisdiction has many facets. Among the first to consider is the forum state in which an action can or may be brought, and that may depend on many things, such as what you are trying to accomplish (is it an in rem or an in personam proceeding?), who the "indispensable" parties may be, whether the goal will require personal jurisdiction over any beneficiary, where the trust was created, the principal place of administration of the trust, whether two states have concurrent jurisdiction, and, rarely, whether a case may be subject to removal to a federal court when it meets the requirements of diversity of residence and amount in controversy.

B. Principal Place of Administration.

A comment to section 108 of the UTC states that the location of a trust's principal place of administration ordinarily determines which court has primary if not exclusive jurisdiction over a trust. However, the UTC does not establish default rules for determining a trust's principal place of administration absent a valid designation in the trust itself,[1] although some states adopting the UTC have done so.[2] In comments to section 108, the drafters state that the place where the trustee is located is ordinarily the principal place of administration, but also refer to the "difficult and variable situations sometimes involved" when there are cotrustees in different states or an institutional trustee with trust operations in more than one state. Once the principal place of administration is determined, the UTC provides that the trustee submits to personal jurisdiction in the courts of that state, and beneficiaries are subject to the in rem jurisdiction of courts of that state "with respect to their interests in the trust."

The importance of clear drafting in designating a trust's principal place of administration is illustrated by a case in which the trust provided that "[a]ll questions concerning the validity, construction and

[1] Unif. Trust Code, Art. 1, § 108.

[2] For example, South Carolina, Alabama, Florida, and Pennsylvania versions of section 108 add rules determining the principal place of administration when not validly designated in the trust instrument.

administration of this agreement and any trust created hereunder shall be judged and resolved in accordance with the laws of the State of Florida."[3] The provision was held not to designate a principal place of administration where the trustee resided and administered the trust in New York and none of the beneficiaries had any connection with Florida. The court held that the principal place of administration was New York.

Note that the law governing the validity of a trust's creation or the meaning and effect of its terms is generally independent of the forum in which an action may be brought, as courts are free to apply the law of another jurisdiction when appropriate. Along those lines, the UTC provides that a trust settlor may designate different jurisdictions for a trust's principal place of administration and its governing law. The comment to UTC §108 explains that "[d]esignating the principal place of administration should be distinguished from designating the law determining the meaning and effect of the trust's terms, as authorized by Section 107." When there is no controlling designation of governing law in the trust, UTC §107 provides that the "meaning and effect" of the trust's terms are determined by the law of the jurisdiction having the most significant relationship to the matter at issue. This is an important consideration when bringing an action to *construe* ambiguous terms of a trust that does not designate governing law because rules such as whether extrinsic evidence is admissible to resolve ambiguity differ between states. If you have a choice of possible forums due to a *forum non conveniens* argument, for example, the applicable law of the different states should be considered.

C. Concurrent Jurisdiction.

If courts of two or more states may have concurrent jurisdiction over a matter (cotrustees in different states, for example) and the proper court is not determined by a uniform act such as the Uniform Reciprocal Enforcement of Support Act (URESA), the courts usually apply the principle of priority as a matter of comity. In other words, the case will be heard in the court that first acquires jurisdiction of the parties.[4] Depending on the issue at hand and the governing law, the principle of priority may lead to the proverbial race to the courthouse.

D. In Rem Jurisdiction.

Most states would consider an action affecting the beneficiaries' interest in trust property to be properly brought in the forum state of the trust's principal place of administration, which is ordinarily where the trustee is located and where the trust assets are deemed to be located.[5] Section 202 of the UTC adopts the rule that with respect to their interests in the trust beneficiaries are subject to jurisdiction of the courts at the principal place of administration "regarding any matter involving the trust." Thus virtually any action to reform or modify provisions of an irrevocable trust, up to and including termination of the trust, will be considered *in rem* actions for which personal jurisdiction over beneficiaries is not required.

However, although personal jurisdiction over beneficiaries through service of process is not necessary in an *in rem* action, due process requires that the beneficiaries receive notice and an opportunity to be heard.[6] Such notice is given pursuant to a state's statutes and rules of civil procedure designed to give actual notice to the beneficiary, and may include constructive service by publication. Notice under UTC section 109 is not sufficient notice of a judicial proceeding.

E. In Personam Jurisdiction.

Personal jurisdiction over beneficiaries is rarely needed in actions to reform, modify, or even terminate an irrevocable trust. Such actions do not result in money judgments against a beneficiary or compel any action

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3 *Meyer v. Meyer*, 931 So.2d 268 (Fla. 5th DCA 2006).

4 *E.g, Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ainsworth*, 630 So. 2d 1145 (Fla. 2d DCA 1993).

5 *See Hanson v. Denckla*, 387 U.S. 235, 246 (1958) ("The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State").

6 *See, Mullane v. Central Hanover Bank & Trust Co., et al*, 339 U.S. 306 (1950.

by the beneficiary. If personal jurisdiction is required, as in a case to compel a beneficiary to return an overdistribution or to pay an apportioned share of estate tax, service of process will be necessary. Beneficiaries may be scattered nationwide, and if personal service is necessary it will most likely be pursuant to an applicable long-arm statute. Section 202(b) of the UTC provides that "by accepting a distribution" from a trust a beneficiary submits personally to the jurisdiction of the court at the principal place of administration "regarding any matter involving the trust." This provision has to be considered a long-arm provision, and constitutional law principles would require, in addition, that the beneficiary have some "minimum contacts" with the state of the principal place of administration such that he or she could expect to be sued there.[7] The State of Florida modified its version of UTC § 202 to make it a comprehensive long-arm statute delineating acts that would subject a trustee or beneficiary to personal jurisdiction in a Florida court, assuming that the minimum contacts test is met.[8]

F. Forum Non Conveniens.

When all is said and done, the doctrine of *forum non conveniens* gives a trial court the discretion to decline to hear a case if in its discretion the convenience of witnesses or the ends of justice would be better served in another forum. The doctrine can result in a change of venue within a state or the dismissal of a case that should be heard in another state. Florida, for example, has adopted in a rule of civil procedure the federal standard for determining whether a case should be dismissed in favor of the courts of another state. Rule 1.061, Fla.R.Civ.P. The rule provides:

> An action may be dismissed on the ground that a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida when:
>
> (1) the trial court finds that an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties;
>
> (2) the trial court finds that all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice;
>
> (3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and
>
> (4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.

III. Parties and Representation.

A. Generally.

In considering those who must be joined as parties in a judicial proceeding or in a nonjudicial settlement agreement under various provisions in the UTC, keep always in mind that the term "beneficiary" is defined to include a person who has a present or future beneficial interest in a trust, vested or contingent, and a person who holds a power of appointment over trust property in a capacity other than that of a trustee.[9] "Beneficiary" can be and often will be a far larger class than "qualified beneficiary."

Except for combining or dividing trusts under section 417 and the termination of an uneconomic trust having property valued under a statutory minimum, all modification, reformation, and termination provisions under the UTC other than nonjudicial settlement agreements require court action.

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7 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

8 Section 736.0202(2), Fla. Stat. (2017).

9 UTC § 103(2).

B. When Modifying/Terminating a Noncharitable Irrevocable Trust by Consent.

Under UTC § 411, a noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and *all beneficiaries*. The consent of all beneficiaries will very possibly require the consent of those who can represent other beneficiaries who are minors, incapacitated persons, or who cannot be found or are unascertainable. The principles of representation are discussed in paragraphs III. F and G below. A trustee is not required to approve a consensual modification or termination by the settlor and all beneficiaries, and the comments to section 411 states that such modification or termination may be carried out over the trustee's objection. Paradoxically, the comment also states that the trustee has *standing* to object to a proposed consensual modification or termination. However, it is abundantly clear that a trustee would have to be made a party to a proceeding for approval (or disapproval) of a proposed modification or termination as the trustee is an indispensable party in such actions and must be bound by the court's decision.

Also under section 411 a court may terminate a noncharitable irrevocable trust upon consent of *all of the beneficiaries* if it determines that continuance of the trust is not necessary to achieve any material purpose of the trust.[10] Further, such a 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.[11]

C. When Modification or Termination is Because of Unanticipated Circumstances.

Under UTC § 412, 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.[12] In addition, a court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable, wasteful, or impair the trust's administration.

The consent of trust beneficiaries is not required, but a court proceeding under UTC § 412 is an in rem proceeding that requires the joinder of all beneficiaries. The comment to the section appears to contemplate that the settlor is deceased, but nothing would prohibit its application to an irrevocable trust whose settlor is still living. In fact, section 410(b) of the UTC provides that a proceeding under section 412, as well as other sections, may be commenced by a trustee or a beneficiary.

D. When Court Modification or Termination of Uneconomic Trust.

Pursuant to UTC § 414 a 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. Removal of a trustee requires in personam jurisdiction over the trustee, but recall that UTC § 202 provides that a trustee submits to personal jurisdiction in the state of the trust's principal place of administration. The joinder of all beneficiaries would be necessary if court action is required to modify or terminate an uneconomic trust, but as to the beneficiaries the action is in rem.

E. When a Reformation to Correct Mistakes.

Section 415 of the UTC provides for reformation of the terms of an irrevocable trust by a court due to a unilateral mistake of law or fact that results in a misstatement of the settlor's intention. Proof by clear and convincing evidence is required. Reformation differs from modification in that the purpose of reformation

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10 *In Re Pike Family Trusts*, 38 A.3d 329 (Me. 2012).

11 *In Re Trust D*, 234 P.3d 793 (Kan.2010) (modification was inconsistent with a material purpose); *Vaughn v. Huntington Nat'l Bank*, No. 2008 AP 03 0023, 2009 WL 342697 (Ohio Ct. App. Feb. 10, 2009) (modification denied because material purpose remained although all beneficiaries consented).

12 *Ladysmith Rescue Squad, Inc. v. Newlin*, 694 S.E.2d 604 (Va. 2010); *In Re Revocable Trust of Moeder*, 978 N.E.2d 754 (Ind.Ct.App. 2012); *Evans v. Evans*, 20 N.E.3d 1139 (Ohio Ct.App. 2014) (modifications denied because no proof that circumstances relied upon to justify modification were not anticipated by the settlor); *City of Augusta v. AG*, 943 A.2d 582 (Me. 2008); *Shriner's Hosp. for Children v. Firstar Bank, N.A.*, 89 P.3d 898 (Kan. 2004) (modification approved because of unanticipated circumstances).

is to make the trust say what it was intended to say from its inception, but does not say due to mistake.[13] An action for reformation may be brought by a living settlor or a beneficiary, and all beneficiaries (and the settlor, if living) should be considered indispensable parties.[14]

F. When Representation is by Fiduciaries, Parents, and Holders of General Powers of Appointment.

The UTC is consistent with the law of most states, if not all, in providing that individuals can be represented by their fiduciaries such as guardians, conservators, agents, trustees, personal representatives, and executors when there is no conflict of interest with respect to the particular matter or dispute.[15] Agents may represent a settlor with respect to modification or termination of a trust only when the authority is specifically granted either in the trust or a power of attorney. *Id.* When there is no conflict of interest, UTC § 302 provides that the holder of a general testamentary power of appointment may represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise. Parents may represent the interests of their minor and unborn children if there is no conservator or guardian appointed to the extent there is no conflict of interest.

G. When Relying on Virtual Representation.

Unless otherwise represented, when there is no conflict of interest between them, a minor, incapacitated, or unborn individual or a person whose identity of location is unknown or not reasonably ascertainable, may be represented and bound by another having a substantially identical interest. It is the province of the court to determine that there is no conflict of interest between a party and the person or persons represented, and that the representation is adequate. UTC § 304. The comment to section 304 states specifically that it does not expressly require that the representation be adequate, "the drafters preferring to leave this issue to the courts."

Virtual representation means vicarious representation by a surrogate that the represented party did not choose. It is "virtual," rather than "actual" representation because there is no formal representative relationship, such as principal-agent or trustee-beneficiary. Virtual representation in court proceedings, where the doctrine originated, is both a rule accommodating the joinder of absent but necessary parties and a rule of preclusion. It aims to bind otherwise necessary parties in a particular lawsuit or court proceeding to a final judgment in the case under theories of res judicata and collateral estoppel even though they are "nonparties" because they cannot be served with process. Virtual representation falls under the general rubric of "nonparty preclusion," and *precludes* a represented party from relitigating claims or issues that were or could have been litigated in the original case.

Virtual representation is an important tool for the efficient resolution of trust matters in nonjudicial matters such as beneficiary consents and releases as well as NJSA's. In its most basic form, virtual representation allows certain parties to represent and bind the interests of other parties. The underlying theory behind virtual representation is that, if the economic interests of the representative and the person being represented are substantially the same, and such interests would be affected in the same way by the proposed action, then the presence of the representative can be relied upon to raise any potential issues that the person represented would have made (or in the case of a consent, acquiring the representative's consent can insure that the proposed action would not have adversely affected the person being represented).

The concept of virtual representation can trace its origins back to eighteenth century England. While the "necessary parties rule" generally required all persons with an interest in an action before the English Court of Chancery to be joined as a party in the interests of justice; there was also an "impossibility exception." This exception was used in cases where (i) the interested parties were so numerous that joining all parties

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[13] *Megiel-Rollo v. Megiel*, 162 So.3d 1088 (Fla.2d DCA 2015); *In Re John P. Harris Testamentary Trust*, 69 P.3d 1109 (Kan. 2003) (reformation allowed to correct drafting errors); *Clairmont v. Larson*, 831 N.W.2d 388 (N.D. 2013)(reformation allowed based on mistake of law); *Reid v. Estate of Sonder*, 63 So.3d 7 (Fla. 3d DCA 2011) (reformation denied because evidence did not establish that trust terms were contrary to settlor's intent).

[14] *In Re Paul F. Suhr Trust*, 2010 Kan. Unpub. LEXIS 1 (modification to achieve tax objectives due to scrivener error).

[15] UTC § 302.

was not a practical possibility or (ii) the identity of one or more parties was unknown. Representation was necessary to bind such absent parties. In the late nineteenth century United States, this theory expanded through the common law to permit representation of unborn persons. By the 1930s, the doctrine was familiar enough to be included in the first Restatement of Property which, among other things, specifically allowed for a presumptive taker of an interest to represent a person who was not a presumptive taker. Since then, the Uniform Probate Code and the UTC have further developed the doctrine to allow parents, in certain instances, to represent their minor children.

Virtual representation doesn't work if there is conflict of interest between the adult, competent person signing the document and the minors, unborns, unascertainable beneficiaries, contingent remaindermen or others who are being virtually represented. The existence of a conflict of interest may be a subjective test and difficult to determine with certainty. It is important to carefully examine the facts and circumstances surrounding a particular matter or question in dispute to determine whether a conflict of interest exists rendering virtual representation inapplicable and the appointment of a guardian ad litem appropriate.

Virtual representation should be analyzed not only in economic terms, but also in terms of non-economic interests, such as assessing the impact of an NJSA on the powers, rights, roles and responsibilities of the interested parties. For example, in 2013, subsection (e) was added to Section 3547 of Title 12 of the Delaware Code to create three factual scenarios where a material conflict of interest between the purported representative and beneficiary will be presumed. These three scenarios track language that is part of Delaware Court of Chancery Rule 100 regarding consent petitions. First, a material conflict of interest will be presumed if the purported representative will be appointed to a fiduciary or non-fiduciary role with respect to the trust, unless the representative already serves in such a role and will not receive greater authority, broader discretion, or increased protection as a result of the judicial proceeding or nonjudicial matter. Second, a material conflict of interest will be presumed if the purported representative currently holds a fiduciary or non-fiduciary office and will receive greater authority, broader discretion, or increased protection by reason of the judicial proceeding or non-judicial matter. Third, a material conflict of interest will be presumed if the purported representative has any other actual or potential conflict of interest with the represented trust beneficiary with respect to the particular question or dispute to be resolved, such as a conflict resulting from different investment horizons or different interests in present income and capital growth such as the conflict that commonly exists between current income beneficiaries (who prefer income) and remainder beneficiaries (who prefer preservation of principal).

Additionally, assessing virtual representation could be made more complicated if one must assess subjective criteria in addition to objective criteria. In a recent case in Delaware, *Mennen v. Wilmington Trust Co.*[16], the court rejected the defendant-trustee's argument that the adult plaintiff-beneficiary bound his children via virtual representation even though they all shared the same beneficial interest under the trust document. The Court noted that under 12 *Del. C.* § 3547(a), "Delaware's virtual representation statute unambiguously limits virtual representation to circumstances where the putative representative has 'no material conflict of interest.'" The Court found that John Mennen could not represent his children with respect to the challenged investments because he had a material conflict of interest with his children. The Court reached this conclusion based on two factual findings, both of which involved John's subjective state of mind with respect to the matters at issue. Even though the Court ruled that Representative had the same beneficial interest as his children (the represented) under the trust agreement, the court found that a conflict existed because (1) the Representative was dependent on the trust as his sole source of income and he had no personal interest in or focus on growth of the trust assets for the next generation, and (2) the Representative's close personal relationship and dependence on the Trustee gave the Representor a myopic and unrealistic view of Trustee's actions. Trustees often rely on virtual representation when sending account statements or obtaining releases and consents from beneficiaries in connection with various aspects of trust administration, including trust terminations, distributions, decantings and trust mergers. Following Mennen, trustees should be cautioned against relying exclusively upon the terms of a governing instrument, direct economic consequences or other strictly objective criteria when identifying conflicts of interest. Using subjective criteria such as a person's thoughts, feelings and values at a particular point in time to identify the existence of a material conflict of interest can be difficult and may potentially introduce elements of risk and uncertainty for trustees.

[16] Final Report (Post-Trial) by Master in Chancery, *Mennen v. Wilmington Trust Co.*, A.3d, 2015 WL 1914599 (Del. Ch. 4/24/2015), *aff'd*. Del. Supr. (June 21, 2017).

Economic conflicts of interest are relatively easy to identify, but examples of non-economic conflicts of interest may be much more difficult to catch. Failing to identify them can give rise to fatal infirmities with respect to the validity of an NJSA or the ability to bind parties to a release. A non-economic conflict of interest can give rise in any circumstance where the bound parties may have a divergent interest from the adult party who signs the NJSA and purports to bind them. For example, if an NJSA adds a mechanism to remove and appoint fiduciaries and the signing party is given the power to remove and appoint fiduciaries or is even given a new fiduciary capacity, that difference in the parties' respective power can give rise to a conflict of interest. If an ambiguity in a trust instrument is being construed in such a way that the parties may have different rights or interests in the result, that could be a conflict. If an NJSA is limiting the beneficiaries' right to obtain information or accountings concerning the trust, and that impacts the signing beneficiaries differently than those who are virtually represented, that could present a conflict.

In *Taylor v. Sturgell,*[17] a unanimous Supreme Court expanded on its prior decisions on nonparty preclusion in *Hansberry v.* Lee[18] and *Richards v. Jefferson County.*[19] The Court reemphasized the "deep-rooted historic tradition that everyone should have his own day in court," and the limited exceptions to the fundamental rule that one is not bound by a judgment in litigation in which he is not made a party by service of process.[20] The Court rejected "[a]n expansive doctrine of virtual representation that would recognize, in effect, a common law kind of class action."[21] Among the six categories of permissible nonparty preclusion identified by the Court, the one most relevant to a trust modification or termination case are the "limited circumstances" in which a "nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who was a party' to the suit."[22] It is the expansion of this category of nonparty preclusion that the Court sought to limit in *Taylor*.

Although not required by the UTC, adequacy of representation has been emphasized by the Supreme Court since the decision in *Hansberry*, and is continued in *Taylor*. At a minimum, representation is adequate, and due process is served, only if two things are present: (1) the interests of the nonparty and her representative are "aligned," and (2) the party representing another must either understand that she is acting in a representative capacity or the trial court must have taken care to protect the interests of the nonparty.[23] Interests are aligned when there is no conflict of interest between them – generally meaning that their economic interests are the same and will be affected identically by the court's decision – on the theory that in representing her own interests the party is presumed to pursue her own economic self-interests and thus those of the nonparty.[24] Said another way, ". . . having aligned interests essentially means that a nonparty to the first suit would, in the second suit, advance the same arguments and seek the same outcome as a party in the first suit."[25] If those elements of adequate representation are not present, due process is violated and the resulting judgment is not preclusive as to the nonparty.

In a court proceeding to modify, reform, or terminate a trust, the trial court should make a finding that the interests of a party who is representing others are "aligned" with the interests of the persons represented, i.e., that there is no conflict of interest between them, and that the representation is adequate.[26] If those

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17 553 U.S. 880 (2008).

18 311 U.S. 32 (1940).

19 517 U.S. 793 (1996).

20 *Taylor*, 553 U.S. at 892-93, 898.

21 *Id.* at 901.

22 *Taylor*, 553 U.S. at 894.

23 *Taylor*, 553 U.S. at 900.

24 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, 319.

25 Martin H. Redish and William J. Katt, "*Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*," 84 Notre Dame L.Rev. 1877 (July 2009).

26 Note that adequate representation can involve much more than the lack of a conflict of interest. Because the adequacy of representation or conflict of interest are issues that may surface after either a nonjudicial agreement or a final judgment, the agreement or judgment is subject to collateral attack by a nonparty. Representation of a class of grandchildren by an 18-year old beneficiary has been held inadequate, as has ineffective representation by counsel serving as guardian ad litem. *See Matter of Will of Maxwell*, 704 A.2d 49 (App. Div. 1997), *cert. den.*, 708 A.2d 65 (1998), and *Wogman v. Wells Fargo Bank & Union Trust Co.*, 267 P.2d 423 (Cal. Ct. App. 1954).

findings cannot be made, the alternative in a court proceeding is the appointment of a guardian ad litem to represent those who are not *sui juris*, are unknown, or are unascertainable.

IV. Nonjudicial Settlement Agreements.

With the growing popularity of long-term and even perpetual trusts, there is a strong likelihood that some type of modification to a trust will become necessary in the future to protect the trust's intended purpose or to respond to unanticipated changes affecting the creator of the trust or its beneficiaries. Changes that occur in the tax environment, family situations, or trust laws make new opportunities available to existing trusts. Ambiguities and questions may arise about how to effectively administer the trust. In the past, the main way of solving issues that arose with irrevocable trusts was expensive and often involved going to court. Fortunately, resolutions by nonjudicial means are now common place. These options include decanting, merger, administrative power of amendment, consent modifications, and non-judicial settlement agreements ("NJSA").

An NJSA is generally authorized by a statute which provides settlors, beneficiaries, and fiduciaries with a tool for resolving matters arising with respect to the administration of a trust without the time and expense of court involvement. More than half of all United States jurisdictions have adopted some form of the Uniform Trust Code (UTC), which includes provisions for an NJSA. The comments to UTC Section 111 provides that the resolution of disputes by nonjudicial means is encouraged and Section 111 facilitates the making of such agreements by giving them the same effect as if approved by the court. Under the typical NJSA statute, the trustees and beneficiaries of a trust may settle matters relating to a trust by private agreement, without the need for court involvement. In some states, an NJSA may expressly be used to modify a trust. In others, modification is not specifically listed as one of the matters that can be addressed by an NJSA, but there are other broad areas of relief that can be effective to accomplish beneficiary and trustee objectives. An NJSA is an extremely useful tool to address flexibility in changes. Some common reasons for pursuing an NJSA include:

- Appoint or remove trustees,
- Correct errors or resolve ambiguities,
- Divide a pot trust to separate shares or merge trusts that are not substantially identical,
- Modernize outdated trust provisions,
- Ratify trustee actions,
- Release trustee liability,
- Approve accountings,
- Change from a grantor trust to a nongrantor trust or vice versa,
- Change interests of a beneficiary,
- Grant or limit a beneficiaries power of appointment,
- Resolve conflicts or litigation,
- Divide trustee responsibility by converting to a directed trust,
- Include silent trust provisions, and
- Include new provisions that take advantage of changes to trust laws.

The UTC broke new ground in allowing the application of its representation provisions to bind unborn or unascertained trust beneficiaries in the case of a UTC § 111 nonjudicial settlement agreement.[27] The excellent compilation of state statutes on virtual representation maintained by Susan Bart[28] shows that as of July 1, 2016, twenty-five states[29] and the District of Columbia had UTC-based statutes allowing virtual representation in nonjudicial settlement agreements, nine states had statutes not based on the UTC that allow virtual representation in nonjudicial settlement agreements,[30] and nine states had virtual representation statutes that do not allow nonjudicial settlement agreements.[31] There are seven states that do not have virtual representation statutes.[32]

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27 UNIFORM TRUST CODE § 111 cmt.

28 Virtual Representation Statutes Chart (Rev. July 1, 2016), www.actec.org.

29 Alabama, Arizona, Arkansas, Florida, Illinois, Iowa, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia and Wyoming.

30 Delaware, Idaho, Minnesota, Nevada, New York, Pennsylvania, South Dakota, Texas, and Washington.

31 Alaska, Colorado, Connecticut, Hawaii, Indiana, Massachusetts, Montana, Rhode Island, and Wisconsin.

Section 111 of the UTC allows "interested persons" to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust as long as it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by a court. The UTC defines "interested persons" as those whose consent would be required in order to achieve a binding settlement that is subject to court approval.[33] This requires reference to the substantive law of the forum to determine who must be joined by virtue of being considered "indispensable" parties.[34]

Depending upon the jurisdiction in which a trust is located, an NJSA might offer varying degrees of utility. The UTC Section 111 includes a list of permissible matters involving a trust that can be addressed by an NJSA. This list is designated as "nonexclusive", but the comments to the UTC make clear that an NJSA cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner. [35] There is no other mention of prohibiting or permitting a modification or termination.

States have altered Section 111 for a number of reasons but three of the main reasons are to specifically permit or prohibit modification or termination of a trust, to remove the reference to not violating a material purpose and to make changes to expand or restrict the list of permissible changes. For example, the Illinois statute provides a clear list of issues that are permissible subjects for an NJSA and, for certain items on the list, has eliminated the requirement under the prior version of the statute that such items are valid "only to the extent its terms and conditions could be properly approved under applicable law by a court of competent jurisdiction" as well as eliminated the requirement that certain matters not conflict with the material purpose of the trust.[36] In addition, Illinois has included a much broader list of matters, including modification of the trust. The Illinois NJSA Statute permits agreements to terminate trusts (subject to court approval), and a catch-all provision allowing other agreements, but only to the extent that they could otherwise be approved by a court.

Other states have also expanded the list of permissible matters listed in the UTC. Mississippi and North Dakota have included the extent or waiver of a bond of the trustee, the governing law of the trust, and the criteria for distribution to beneficiaries to the list. Pennsylvania has added extensively to the UTC Section 111 list, including 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, any other matter concerning the administration of a trust. West Virginia has added a similar list of additional matters as Pennsylvania. Wisconsin's additional matters that may be resolved by NJSA include the liability or release from liability of a trustee for an action, relating to the trust, the criteria for distribution to a beneficiary where the trustee is given discretion, the resolution of disputes arising out of the administration or distribution of the trust, an investment action the appointment of and powers granted to a directing party or a trust protector, direction to a directing party or to a trust protector to perform or refrain from performing a particular act or the grant of a power to a directing party or trust protector. Wyoming has added an election to treat the trust as a qualified spendthrift trust under Article 5 of the Wyoming Act and modification of the trust to comply with W.S. 4-10-510.

Some states have made the list more restrictive. Kansas has adopted a statute that is more restrictive, opting to exclude the interpretation or construction of the trust, or granting or restricting powers of the trustee, from the list of permissible subjects of an NJSA. South Carolina has also excluded the interpretation or construction of the trust from the list of expressly permitted matters.

Three critical aspects of a binding nonjudicial settlement agreement that modifies or terminates a trust are that:

- It must be entered into by all persons who would be required to be represented in a court action to obtain the particular result embodied in the agreement;

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32 California, Georgia, Kentucky, Louisiana, Maryland, Mississippi, and Oklahoma.

33 UTC § 111(a).

34 Florida's version of UTC § 111 defines "interested persons" as persons whose interests would be affected by the settlement agreement, a formulation that may exclude beneficiaries who would otherwise be considered indispensable parties under Florida law in a court proceeding. Section 736.0111, Fla. Stat. (2017).

35 UNIF. TRUST. CODE cmt. §111 (2010).

36 760 ILCS 5/16.1(d)(3) (2010).

- It must not include terms and conditions that could not be properly approved by a court under applicable law; and

- It must not violate a material purpose of the trust.

In determining the "interested persons" who are necessary parties to a NJSA it is necessary to determine those persons who would be indispensable parties in a court proceeding to get the particular result that you are seeking. In determining whether the result of the NJSA is something that could be approved by a court you must look at the statutes allowing judicial modification, reformation, and termination as well as the common law of the principal place of administration and decide that you could bring an action under the "applicable law" to get the result you want because it does not violate a material purpose of the trust.[37]

It is critical that all potentially interested parties are bound by the NJSA, either directly or through virtual representation, so that one or more parties cannot later challenge the NJSA. The required parties to an NJSA vary from state to state but in most UTC states, the consent of "interested persons" (the parties whose consent or joinder would be required to enter into a binding court-approved settlement) is required.[38] The comments to UTC § 111 states "Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee's administration, such as approval of a trustee's report or resignation." Thus, "interested persons" may vary from state to state and, in some cases, these statutes and the UTC may not make it clear which consents are required.

In certain states, such as Arizona, persons with a tenuous connection to the trust may be required to consent, such as a spouse of a beneficiary, a creditor of the trust, or person holding no interest in a trust other than a power of appointment.[39] Florida requires the consent of persons whose interests would be affected by the NJSA.[40] A few states define the necessary parties to a NJSA more concretely. For example, Delaware defines "interested persons" providing a specific, discrete list of necessary parties including: (1) trustees and other fiduciaries; (2) trust beneficiaries, who will generally be those with a present interest in the trust and those whose interest in the trust would vest, without regard to the exercise or non-exercise of any power of appointment, if the present interests in the trust terminated on the date of the nonjudicial settlement agreement; (3) the trustor of the trust, if living; and (4) all other persons having an interest in the trust according to the express terms of the governing instrument (such as, but not limited to, holders of powers and persons having other rights, held in a nonfiduciary capacity, relating to trust property).[41]

At least ten other states (including Arizona, Idaho, Illinois, Minnesota, Ohio, Oregon, Pennsylvania, Tennessee, Washington, and West Virginia) clearly define who must sign a NJSA. New Hampshire uses a UTC style definition, but excludes the settlor and includes trustees, persons with the power to enforce a trust, and if the trust is a charitable trust, the director of charitable trusts.[42] In Illinois, the 2015 amendment made clear that not only the trustee consent is required, but could also require the consent of any trust advisor, investment advisor, distribution advisor, trust protector or other holder, or committee of holders, of fiduciary or nonfiduciary powers, if the person then holds powers material to the particular question or dispute to be resolved or affected by the agreement.[43]

Compliance with the relevant virtual representation statute is necessary to bind minor, unborn, contingent and unascertainable beneficiaries. Most NJSA statutes expressly cross-reference and invoke the state virtual

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37 For example, the Pennsylvania Supreme Court determined that a trust could not be modified by a court to add a provision allowing beneficiaries to remove and replace the corporate trustee without cause because the exclusive provision regarding such removal and replacement was the Pennsylvania adoption of UTC § 706. *In Re Trust Under Agreement of Taylor*, 164 A.3d 1147 (Pa. 2017). This should establish that in Pennsylvania, a NJSA cannot modify a trust to allow trustee removal and replacement without cause because that is not a result that could be properly approved by a court.

38 UTC § 111(a).

39 *See* Ariz. Rev. Stat. Ann. § 14-1201(28).

40 Fla. Stat. Ann. § 736.0111(a).

41 12 *Del. C.* § 3338(e); Delaware Court of Chancery Rule 101(a)(7).

42 N.H. Rev. Stat. Ann. §564-B:1-111(a).

43 760 ILCS 5/16.1(d)(1).

representation statute, or are included as part of the virtual representation statute. However, some states, like Florida, have no explicit reference making it unclear that virtual representation applies.[44]

If interested persons include all beneficiaries, keep in mind that "beneficiaries" includes those having a present or future beneficial interest in the trust, vested or contingent, and anyone holding a power of appointment over trust property in a capacity other than that of trustee. Furthermore, if you are not going to seek court approval of the NJSA, you are necessarily determining, without court review, that parties who are virtually representing other necessary parties who are minors, unborn, unascertainable, etc., have no conflicts of interest with the represented parties and that the representation is adequate. This judgment can strain credulity when parents are representing unborn children.

The implications of *Taylor v. Sturgell* are troubling when virtual representation is relied upon in nonjudicial settlement agreements that are limited to terms and conditions that "could be properly approved by a court." If due process requires that a court determine that no conflict exists between a representative and the represented nonparty, and that the representation is adequate, who is the impartial fact-finder who makes those determinations when a court is not involved? The alternative of appointing a guardian ad litem is not available.

V. NJSA Outer Limits.

More than one lawyer has been heard to lament that there seems to be no such thing as an irrevocable trust since widespread enactment of UTC or UTC-inspired legislation authorizing nonjudicial settlement agreements and virtual representation. As outlined above, the rules are there to read, and when NJSAs are used for such limited purposes as are stated in UTC § 111(d) there is manageable cause for worry. Many corporate fiduciaries will participate in nonjudicial settlement agreements only as they affect administrative rather than dispositive terms of a trust and, even then, require judicial approval of the agreement. Many other corporate fiduciaries advise that they prefer decanting to a new trust when possible and rarely are parties to a NJSA.

Below are some examples of modifications that have been proposed or incorporated in nonjudicial settlement agreements. For these gems we are indebted to our corporate fiduciaries:

- A Florida credit shelter trust was modified to become a charitable remainder trust, changing the spouse's income interest to a unitrust, eliminating the interests of the children, and providing for the remainder to go to a charity specified by the spouse or the trustees.

- A proposed NJSA to modify the estate tax apportionment clause under a <u>will</u> that provided the executor "shall" apportion the tax and "shall" seek reimbursement ("shall" was in bold and underlined in the will) in a state in which NJSA was not available to modify a will. The executor did not want to chase grandchildren and an ex-wife to collect small amounts of apportioned taxes on inherited IRAs and insurance benefits.

- Using an NJSA to approve a merger of trusts with different powers of appointment.

- Proposed NJSA to change from per stirpes to per capita distribution of a spray pot trust at the great-grandchild's level.

- Using decanting to change the trust paragraph on "grantor's intent," presumably because a court would not bless a change manifestly contrary to the grantor's intent, and thus the unavailability of a NJSA was evident even to these miscreants.

A. States That Expressly Allow For Modification or Expressly Prohibit It.

Eight states, Florida, Illinois, Missouri, New Hampshire, Ohio, Oregon, Pennsylvania and West Virginia, have NJSA statutes that have varied from UTC Section 111 to expressly authorize trust modification. The Florida statute provides that an NJSA may not be used to produce a result not authorized by other provisions of the Code, including, but not limited to, terminating or modifying a trust in an "impermissible manner." At least 3 States have NJSA statutes that have varied from UTC Section 111 to expressly

[44] Fla. Stat. Ann. § 736.0111.

prohibit modification: Iowa and Michigan, and Kansas provides in its NJSA statute that the statute provides a finite list of things that can be addressed by an NJSA, thus effectively precluding modification. All of the other NJSA statutes are silent on whether an NJSA can be used to modify a trust, although the list of items that can be addressed with an NJSA, as provided in the UTC, is a non-exclusive list, so it is arguably possible.

1. Tax Consequences of NJSA.

Often an NJSA is used to construe a governing instrument, resolve disputes, settle the disposition of trust funds and address many other types of issues. In all cases, the income, gift, and estate tax consequences of NJSAs must be considered. Below is a list of a few of the possible tax consequences that can result from utilizing NJSAs.

A. Gift Tax Issues. If the beneficiary consents to shifting of his or her beneficial interest to another person resulting in the possibility of a decrease in the beneficiary's interest, then the beneficiary may be views as making a gift. If there is no collusion and the agreement is in settlement of bonafide litigation or dispute, then the modification will likely not be viewed as a gift.[45]

B. GST Tax Issues. When an NJSA is used in connection with a trust that is exempt from generation skipping transfer ("GST") tax, particular care is required top ensure that the NJSA will not adversely affect the trust's status as exempt from GST tax under Treasury Regulations Section 26.2601-1(b)(1)(i) and will not result in GST tax under the provisions of Chapter 13 of the Code. The Code does not set forth any rules regarding the circumstances under which a modification to the terms of a GST tax exempt trust will cause the trust to cease to qualify as an exempt trust. In 2000, the Treasury Department promulgated Treasury Regulations Section 26.2601-1(b)(4) (the "Safe Harbor Regulations"), establishing safe harbors that describe certain modifications to an exempt trust that will not cause the trust to cease to qualify as a GST tax exempt trust.[46] Prior to the promulgation of the Safe Harbor Regulations, the Service ruled that a modification to an exempt trust causes the trust to cease to qualify as an exempt trust if the modification changes the quality, value or timing of any powers, beneficial interests, rights or expectancies originally provided for under the terms of the trust.[47] Further, the Service ruled that a construction of the terms of a trust document or a clarification that fairly resolves an ambiguity does not cause a loss of exempt status to an Exempt Trust.[48] The Safe Harbor Regulations do not attempt to set forth a standard under which a GST exempt trust ceases to qualify as an exempt trust, but rather set forth four safe harbors under which a modification, judicial construction, settlement agreement or trustee action with respect to an exempt trust should not cause the trust to cease to qualify as an exempt trust.[49]

Two of the safe harbors are particularly relevant to NJSA's: the safe harbor governing court-approved settlements (the "Settlement Safe Harbor") and the safe harbor governing modifications not otherwise governed by the other three safe harbors (the "Other Changes Safe Harbor").[50] In addition, the Safe Harbor Regulations clarify that a change in the state of situs of an exempt trust will not cause the trust to cease to qualify as an exempt trust.[51]

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45 *See Comm'r v. Vease*, 314 F.2d 79 (9th Cir. 1983) and *Grossman v. Campbell*, 368 F.2d 206 (5th Cir. 1966).

46 T.D. 8912, 65 FR 79735-79740 (December 20, 2000), corrected at 66 FR 11108 (February 22, 2001); amended by T.D. 9102, 69 FR 12-22 (January 2, 2004).

47 *See, e.g.*, PLR 200006001 (November 5, 1999); PLR 200015003 (December 16, 1999); PLR 200052007 (September 25, 2000).

48 *See, e.g.*, PLR 9226043 (March 27, 1992); PLR 9411016 (December 15, 1993); PLR 199944027 (August 6, 1999).

49 *See* Treas. Reg. § 26.2601-1(b)(4)(i)(A), (B), (C) and (D).

50 Treas. Reg. § 26.2601-1(b)(4)(i)(B) and (D).

51 Treas. Reg. § 26.2601-1(b)(4)(i)(E), Example 4.

An exempt trust will be entitled to rely on the Settlement Safe Harbor with respect to a modification of a trust if the modification satisfies the following requirements: (i) the modification is pursuant to a court-approved settlement of a bona fide issue regarding the administration of the trust or the construction of terms of the governing instrument; (ii) the settlement is the product of arm's length negotiations; and (iii) the settlement is within the range of reasonable outcomes under the governing instrument and applicable state law addressing the issues resolved by the settlement.[52] A settlement that results in a compromise between the positions of the relevant parties and reflects the parties' assessment of the relative strengths of their positions generally will satisfy requirement (iii) listed above.[53]

The Service has issued numerous private letter rulings that found modifications to exempt trusts did not cause the trusts to cease to qualify as exempt trusts under the Settlement Safe Harbor. For example, the Service addressed a trust document in which an ambiguity existed as to whether the assets of the trust on termination would be distributed to the settlor's children or grandchildren. The Service ruled that the settlement entered into by the potential beneficiaries of the trust, including representation of the interests of unborn heirs, which created new sub-trusts for the benefit of each line of each of the settlor's children, qualified for the Settlement Safe Harbor.[54] The Service has issued numerous other rulings finding that a settlement agreement resolving an ambiguity in a trust document qualifies for the Settlement Safe Harbor.[55]

An exempt trust will be entitled to rely on the Other Changes Safe Harbor with respect to a modification of a trust if the modification satisfies the following requirements: (i) the modification is a judicial or non-judicial modification that is valid under state law; (ii) the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in Section 2651 of the Code) than the person or persons who held the beneficial interest prior to the modification; and (iii) the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.[56]

In PLR 200420011, a court approved certain modifications to a trust pursuant to the terms of a settlement agreement.[57] The modifications included adding a provision to the trust to specify how a grandchild's trust share would be distributed upon termination of the trust if the grandchild was not then living and had no descendants then living. The ruling cites Treasury Regulations Section 26.2601-1(b)(4)(i)(B), (C) and (D) and concludes that the modifications do not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation than the person or persons who held the beneficial interest prior to the modification and does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. In PLR 201223012, the trust failed to provide whether the assets should be distributed per capita or per stirpes upon termination.[58] The court modified the trust to provide for a per stirpes distribution on termination. The private letter ruling concluded that the modifications were consistent with applicable state law and that, therefore, the proposed modifications would not alter the inclusion ratio of the trust. The ruling cites both Treasury Regulations 26.2601-1(b)(4)(i)(C) and (D).

In *Commissioner v. Estate of Bosch*,[59] the Supreme Court concluded that a state trial court's determination of a property interest does not conclusively bind federal authorities, including the Service, when the state trial court makes the determination in a proceeding to which the United States is not a party. Some tension exists between the *Bosch* standard and the Treasury Regulations, as *Bosch* requires a state trial court decision to be consistent with the law as expressed by the state's highest court for the decision to bind federal authorities for tax purposes[60]

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52 Treas. Reg. § 26.2601-1(b)(4)(i)(B).
53 Treas. Reg. § 26.2601-1(b)(4)(i)(B)(2).
54 PLR 200631008 (May 4, 2006).
55 *See* PLR 200738005 (May 29, 2007); PLR 200638020 (June 15, 2006); PLR 200615006 (January 5, 2006).
56 Treas. Reg. § 26.2601-1(b)(4)(i)(D).
57 PLR 200420011 (December 19, 2003).
58 PLR 201223012 (February 28, 2012).
59 387 U.S. 456 (1967).
60 *See Bosch*, 387 U.S. at 464-65.

whereas the Treasury Regulations safe harbors the settlement of a bona fide dispute that is the product of arm's length negotiations if the settlement is within the range of reasonable outcomes had the dispute been litigated to conclusion.[61]

2. Consent Modification Statute.

A. UTC Section 411.

Uniform Trust Code Section 411 provides: "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."

B. States Permitting Consent Modification of Trusts.

Thirty-seven states permit modification of irrevocable non-charitable trusts in some fashion. Most of those have adopted UTC Section 411 or some variation of it. States have taken many different approaches to the parties whose consent is required, the necessity of a court order, the presence of a material purpose limitation (which often depends upon whether the settlor is a party to the consent modification), and other statutory restrictions that may be imposed in order to validly modify a trust. It is important to review the laws governing a trust to ascertain what state law requirements exist.

C. Tax Consequences.

With regard to consent modifications, the IRS ruled in PLR 201233008 that the power to modify a trust with the consent of the grantor did not cause the assets of the trust to be includible in the estate of the grantor because the power to modify the trust with the consent of all of the beneficiaries arose only by the powers granted by state statute. Of course, PLRs cannot be relied upon by taxpayers as precedent, but based on the analysis of this PLR, the changes to the terms of the trust agreement should not cause adverse estate or gift tax consequences for the grantor on the basis of the power granted by the Delaware statute.

The IRS analyzed Section 2036(a), which provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death – (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom. In addition, the IRS analyzed Section 2038(a)(1), which provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period on the date of the decedent's death. Additionally, Treasury Regulation Section 20.2038-1(a)(2) provides that § 2038 does not apply if the decedent's power could be exercised only with the consent of all parties having an interest (vested or contingent) in the transferred property, and if the power adds nothing to the rights of the parties under local law.

When the settlor and all beneficiaries enter into a consent modification, there may be concerns with regard to the potential gift tax consequences for the beneficiaries of a trust when they agree to a consent modification that causes a shift of beneficial interests in the trust which could give rise

[61] *See id.* § 26. 2601-1(b)(4)(B).

to gift tax considerations. When evaluating the changes being made to the documents, it may be difficult to assess whether there is any shift of value with respect to the beneficial interests and, even if there is, whether it is possible to place any value on that.

D. Pennsylvania Taylor Case.

In the case *In re Trust U/A Edward Winslow* Taylor,[62] the Pennsylvania Supreme Court recently addressed the issue of whether Pennsylvania's consent modification statute which is based on UTC Section 411 can be used to modify a trust to add a provision that allows the beneficiaries to remove and appoint the trustee (a so-called portability clause) in light of the fact that Pennsylvania has also adopted UTC Section 706 which addressed the beneficiaries' ability to remove and appoint trustees. The trust agreement did not provide the beneficiaries with the power to remove the corporate trustee. The beneficiaries petitioned the Philadelphia Orphan's Court to modify the trust, seeking to add a provision giving the beneficiaries the power to remove the corporate trustee from time to time without cause.

Wells Fargo, the trustee, opposed the petition and moved for judgment on the pleadings, arguing that in Pennsylvania, trustees must be removed in accordance with the dictates of section 7766(b) of Pennsylvania's Uniform Trust Act (UTA). Wells Fargo contended that a trust agreement may not be modified pursuant to section 7740.1 to provide beneficiaries of a trust with the power to remove the trustee without court approval. The Beneficiaries filed a cross-motion for judgment on the pleadings, asserting that section 7740.1 does permit such a modification. The Orphans' Court thus held that the "beneficiaries' attempt to use the broad modification provisions in section 7740.1(d) to eviscerate section 7766 must therefore yield to the specific removal provisions in section 7766." The Pennsylvania Superior Court reversed the Orphan's Court decision. The Pennsylvania Supreme Court found that because UTA Section 7766 provides more specific requirements for the removal of a trustee, and UTA Section 7740.1 provides a general power to modify a trust instrument with no explicit language with respect to whether the modification power extends to the modification of other statutory provisions of the UTA, an ambiguity exists necessitating the application of the cannons of statutory construction. The Pennsylvania Supreme Court concluded that permitting beneficiaries to modify a trust agreement pursuant to UTA Section 7740.1 to add a portability clause would have the effect of nullifying, excluding or cancelling the effectiveness of Section 7766. The Court reasoned that "[t]o obtain modification of the trust agreement under section 7740.1 to permit beneficiaries to remove and replace the trustee – at any time thereafter (including on the day of approval of the modification), at their discretion, and without cause or judicial approval – the beneficiaries need show only that modification would not be inconsistent with a material purpose of the trust.4 20 Pa.C.S. § 7740.1(b). In significant contrast, to remove and replace a trustee under section 7766, beneficiaries have to demonstrate, by clear and convincing evidence to the satisfaction of the Orphans' Court, that: (1) removal serves the best interests of the beneficiaries of the trust, (2) removal is not inconsistent with a material purpose of the trust, and (3) the beneficiaries have identified a suitable successor trustee. 20 Pa.C.S. § 7766(b). In addition, beneficiaries also have to show that the current trustee (1) has committed a serious breach of trust, (2) has demonstrated a lack of cooperation among cotrustees substantially impairing the administration of the trust, (3) has not effectively administered the trust as a result of unfitness, unwillingness or persistent failures, or (4) there has been a substantial change of circumstances (not including a corporate reorganization). 20 Pa.C.S. § 7766(b)(1)-(4)." The Pennsylvania Supreme Court held that the legislative intent of the Pennsylvania General Assembly was clear: "the scope of permissible amendments under section 7740.1 does not extend to modifications to add a portability clause permitting beneficiaries to remove and replace a trustee at their discretion; instead, removal and replacement of a trustee is to be governed exclusively by section 7766."

There are many states that have enacted both Sections 411 and 706 of the UTC, and the *Taylor* case could potentially cause concerns about whether courts in other jurisdictions may follow suit

[62] *In re Trust Under Agreement of Taylor*, No. 15 EAP 2016, 2017 WL 3044242 (Pa. July 19, 2017) , *rev'g* 124 A.3d 334 (Pa. Super. Ct. 2015).

with the Pennsylvania Supreme Court and limit the modification power under the UTC consent modification statutes, whether the matter relates to the perceived conflict with the trustee removal provisions of UTC Section 706, or any other UTC provisions that are arguably in conflict.