

**WASHINGTON TRUST LAWS' EXTREME MAKEOVER:  
BLENDING WITH THE UNIFORM TRUST CODE AND  
TAKING REFORM FURTHER WITH INNOVATIONS IN  
NOTICE, SITUS, AND REPRESENTATION**

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*Abstract:* Washington trust laws were comprehensively revised in 2011 and 2013, resulting in the integration of concepts from the Uniform Trust Code and the addition of some novel provisions. This article discusses in depth the evolution of Washington law regarding the duties to inform and report, the situs of a trust, and representation of interested parties. In addition, this article discusses other UTC provisions that were integrated into Washington statutes and gives an explanation of any departures from UTC language and prior Washington law.

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## INTRODUCTION

The Washington State legislature passed a sweeping update of the Washington trust statutes in its 2011 legislative session (the “2011 Legislation”).<sup>1</sup> The 2011 Legislation was a product of a Washington State Bar Association task force formed in 2003 (the “2003 Task Force”) to evaluate the Uniform Trust Code (UTC), which was approved by the National Conference of Commissioners on Uniform State Laws in 2000.<sup>2</sup> The 2003 Task Force<sup>3</sup> initially determined that instead of a wholesale adoption of the UTC, it would develop and propose a bill that incorporated aspects of the UTC but essentially preserve the structure and substance of the existing Washington trust statutes. Washington already had a well-developed statutory framework for trust law as a result of major efforts by the state bar that resulted in legislation in 1984

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1. S.B. 1051, 62d Leg., Reg. Sess. (Wash. 2011).

2. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 144 (2002). The Uniform Trust Code was amended in 2004. All references to the UTC in this Article shall include the UTC as adopted in 2000 and as was later amended.

3. The task force was formed by the WSBA Real Property, Probate, and Trust Section. Members of the task force were: Alfred M. Falk, Ann T. Wilson, Frederick G. Emry, II, Ivan K. Landreth, Jr., Marcia K. Fujimoto, Michael D. Carrico, Thomas M. Culbertson, Watson B. Blair, W.C. Twig Mills, and Karen E. Boxx, co-author of this Article, who served as task force chair.

and 1999.<sup>4</sup> Some existing Washington law had even been used as models for UTC provisions.<sup>5</sup> The 2003 Task Force wanted to retain the groundbreaking innovations already part of Washington trust law while recognizing that there were still gaps and room for improvement. The resulting 2011 Legislation, which became law January 1, 2012, included many provisions of the UTC as written, several UTC provisions that were amended by the 2003 Task Force to better suit Washington trust practice, and some provisions that addressed issues that were not covered by the UTC but which the 2003 Task Force believed were necessary. Implementation of the 2011 Legislation raised numerous issues within the Washington practitioner community, and the Real Property, Probate, and Trust section of the state bar formed another task force (the “2012 Task Force”) to consider amendments to the 2011 Legislation.<sup>6</sup> The result of the second task force was Senate Bill 5344, which was signed into law on May 16, 2013 and became effective July 28, 2013 (the “2013 Legislation”).<sup>7</sup>

This Article first gives a brief description of the scope, purpose, and history of the UTC and a brief summary of the status of Washington law on trusts before 2011. It then covers in depth three significant aspects of the Washington 2011 and 2013 Legislation: the trustee’s duty to keep beneficiaries informed, determination of a trust’s situs, and representation of beneficiaries by other beneficiaries or third parties. First, the issue of required notice to beneficiaries has been one of the most controversial aspects of the UTC,<sup>8</sup> and the new Washington statutes have adopted those provisions with significant modifications. Second, the UTC drafters declined to address the determination of situs because of its complexity,<sup>9</sup> but the 2003 Task Force believed this was a critical issue that needed resolution. Washington law now contains an innovative provision that redefines situs for the era of cloud computing

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4. S.B. 5196, 56th Leg., Reg. Sess. (Wash. 1999); Substitute H.B. 1213, 48th Leg., Reg. Sess. (Wash. 1984).

5. For example, UTC section 1007 is based on RCW sections 11.100.140 and 11.98.100. U.T.C. § 1007 cmt (2010).

6. The members of the 2012 Task Force were Douglas C. Lawrence (as Committee Chair), Katie S. Groblewski, Karen E. Boxx, Akane R. Suzuki, James A. Flagert, Alfred M. Falk, and Janis A. Cunningham.

7. S.B. 5344, 63d Leg., Reg. Sess. (Wash. 2013).

8. See John Spencer Treu, *The Mandatory Disclosure Provisions of the Uniform Trust Code: Still Boldly Going Where No Jurisdiction Will Follow—A Practical Tax-Based Solution*, 82 MISS. L. J. 597 (2013).

9. See English, *supra* note 2, at 156.

and national corporate trustees.<sup>10</sup> Third, Washington provisions regarding representation of interested parties by other parties with interests in the trust needed updating. Since 1984, Washington has had a broad virtual representation statute that is more expansive than common law. Both the 2011 and 2013 Legislation substantially updated that statute by retaining its expansion of the common law doctrine, by including provisions of the UTC and by making the application of the statute more streamlined for modern trusts and estates practice. After discussion of the three most complex areas that were updated, this Article gives a brief description of other UTC provisions that were integrated into Washington statutes, such as a statutory duty of loyalty and codification of *cy pres*, together with an explanation of any departures from UTC language and prior Washington law. Supplementing this Article are materials on the Washington Law Review website, such as a summary of the UTC provisions that were not adopted by either the 2011 or 2013 Legislation, together with a cross-reference to existing and unmodified Washington statutes that cover the issues in the omitted UTC sections.

#### I. BACKGROUND ON WASHINGTON TRUST LAW AND THE UTC

Trust law began in courts of equity<sup>11</sup> as far back as the fourteenth century<sup>12</sup> and has been developed over centuries of judicial decisions, so its source has primarily been case law rather than statutes. Because case law often leaves gaps, the Uniform Law Commissioners set out to create a comprehensive codification of trust law, in order “to update, fill out, and systematize the American law of trusts.”<sup>13</sup> The result of this effort, the UTC, has so far been enacted in twenty-five states and the District of Columbia.<sup>14</sup> Other states are considering enactment, and some states,

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10. See *infra* Part III.C.

11. John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1080 (2007).

12. *Id.* at 1071.

13. See English, *supra* note 2, at 144.

14. Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. UNIF. LAW COMM’N, *Legislative Fact Sheet—Trust Code*, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Aug. 18, 2013).

like Washington, have enacted some but not all of the provisions.<sup>15</sup> The drafting of the UTC was coordinated with the drafting of the Restatement (Third) of Trusts, so there is significant consistency between the two.<sup>16</sup>

While Washington trust law has a significant grounding in judicial decisions, an increasing number of issues have been addressed by statute. The Washington Trust Act of 1984<sup>17</sup> reorganized and expanded the provisions of Revised Code of Washington (RCW) Title 11 dealing with trusts. Those provisions were further revised and expanded in 1994,<sup>18</sup> 1997,<sup>19</sup> 1999 (the Trusts and Estates Dispute Resolution Act),<sup>20</sup> and 2002 (the Washington Principal and Income Act of 2002).<sup>21</sup> When the 2003 Task Force was formed to review the UTC and consider its adoption in Washington, the members agreed that Washington had already made significant steps to codify and clarify trust law, and that the case law and other experiences with existing statutes were important resources that should be retained. The 2003 Task Force therefore decided to retain most of Washington's existing statutes and organization, but also to review the UTC for sections that would fill gaps in Washington law or improve existing Washington statutes. Where possible, the 2003 Task Force retained the UTC language so that the interpretation of that language by courts in the other states that had adopted the UTC could be used as guidance. The 2003 Task Force intended for the UTC comments to be used as a guide for interpretation, to the extent they are consistent with Washington's version of the UTC. The 2012 Task Force followed the same principles when integrating UTC language.

Much of the UTC is a codification of well-established common law principles because that was a primary goal of the drafters.<sup>22</sup> However, the 2003 Task Force believed that common law should remain the primary source of Washington trust law and that codification of well-established principles was unnecessary. It therefore chose not to adopt several sections of the UTC, even though there was no corresponding

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15. See, e.g., Kara Blanco, Comment, *The Best of Both Worlds: Incorporating Provisions of the Uniform Trust Code into Texas Law*, 38 TEX. TECH L. REV. 1105, 1106 (2006).

16. See English, *supra* note 2, at 148.

17. Substitute H.B. 1213, 48th Leg., Reg. Sess. (Wash. 1984).

18. Substitute H.B. 2270, 53d Leg., Reg. Sess. (Wash. 1994).

19. S.B. 5108, 55th Leg., Reg. Sess. (Wash. 1997).

20. S.B. 5196, 56th Leg., Reg. Sess. (Wash. 1999).

21. S.B. 6267, 57th Leg., Reg. Sess. (Wash. 2002).

22. See English, *supra* note 2, at 144.

Washington statute and the UTC provision was consistent with Washington common law. Therefore, any UTC provision that was not adopted and does not have a corresponding Washington statute is not necessarily inconsistent with Washington law. The UTC itself is intended to be supplemented by common law, including the Restatement,<sup>23</sup> and the Washington statutory revisions are intended only to override existing common law to the extent the issue is expressly addressed in the statute.

The 2012 Task Force, largely in reaction to comments from the estate planning practitioner community, revised several of the statutes enacted by the 2011 Legislation. The 2013 Legislation introduced additional concepts from the UTC that the 2012 Task Force felt would both clarify the implementation of the ideas enacted in the 2011 Legislation and satisfy Washington practitioners.

## II. DUTIES TO INFORM AND REPORT TO BENEFICIARIES

This Part first describes Washington law regarding a trustee's duty to keep beneficiaries informed as it existed before the 2011 Legislation was adopted. This Part next summarizes the UTC's approach to the duty to keep beneficiaries informed, and finally explains how Washington's 2011 and 2013 Legislation integrated portions of the UTC version of this duty into Washington law.

The common law has long recognized a general duty of the trustee to keep beneficiaries informed about trust administration.<sup>24</sup> This duty is considered necessary to give the beneficiaries enough information to protect themselves from potential breaches of the trustee's fiduciary duty.<sup>25</sup> However, there has been significant disagreement among jurisdictions about which beneficiaries are owed the duty to inform, how to comply with the duty, and how to balance some trustors' desire to keep a trust secret from the beneficiaries with the concern that a secret trust may leave beneficiaries' interests vulnerable.<sup>26</sup> The UTC attempted to tackle this problem in section 813. However, even within the jurisdictions that have adopted the UTC, the duty to keep beneficiaries

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23. *See id.* at 148.

24. *See* RESTATEMENT (THIRD) OF TRUSTS § 82 (2008); RESTATEMENT (SECOND) OF TRUSTS § 173 (1959); RESTATEMENT OF TRUSTS § 173 (1935); *see also* ALAN NEWMAN, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 962 (3d ed. 2012) [hereinafter BOGERT (Third)].

25. BOGERT (Third), *supra* note 24, § 962.

26. *See* Philip J. Ruce, *The Trustee and the Remainderman: the Trustee's Duty to Inform*, 46 REAL PROP. TR. & EST. L.J. 173 (2011).

informed, and in particular any obligation of mandatory reporting, has been adopted in different and inconsistent formats.<sup>27</sup> Ultimately, while Washington did not adopt the UTC approach wholesale, the 2013 Legislation brought Washington law closer to the UTC than the 2011 Legislation had, while still preserving the application of Washington-specific case law on this issue.

A. *Prior Washington Law*

In Washington, before the enactment of the 2011 and 2013 Legislation, the duty of a trustee to keep beneficiaries informed was determined by statute, by the trust terms, and by the common law.<sup>28</sup> The seminal Washington case that both confirmed the long-standing concept of a trustee's general duty to keep beneficiaries informed and introduced the concept of providing notice in advance of a significant nonroutine transaction is *Allard v. Pacific National Bank*.<sup>29</sup> *Allard* involved a suit for breach of fiduciary duty raised by two equal lifetime income beneficiaries of a trust managed by Pacific National Bank as trustee.<sup>30</sup> The sole asset of the trust was a building that was subject to a ninety-nine-year lease.<sup>31</sup> The trustee ultimately sold the sole asset of the trust to the lessee of the property without having explored the fair market value of the property.<sup>32</sup> One month after the sale transaction was completed, the trustee notified the current income beneficiaries about the sale.<sup>33</sup>

In *Allard*, the income beneficiaries asserted that the trustee had a duty to inform them in advance of the proposed sale of the trust's sole asset, particularly where the trustee knew that the beneficiaries had expressed a desire to retain the building.<sup>34</sup> The trustee argued that it had full authority under the terms of the trust agreement to manage and invest assets, including the sale of trust assets, and that it had exercised good faith and honest judgment when consummating the sale of the trust property.<sup>35</sup> In addition, the trustee argued that since the trust document did not require it to obtain the consent of the beneficiaries in advance of

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27. See Treu, *supra* note 8, at 610–21.

28. See *In re Estate of Ehlers*, 80 Wash. App. 751, 757, 911 P.2d 1017, 1021 (1996).

29. 99 Wash. 2d 394, 663 P.2d 104 (1983).

30. *Id.* at 396, 663 P.2d at 106.

31. *Id.*

32. *Id.* at 397, 663 P.2d at 107.

33. *Id.*

34. *Id.* at 401, 403, 663 P.2d at 108–10.

35. *Id.* at 401, 663 P.2d at 109.



a sale, there was no correlating duty to inform them of the proposed sale.<sup>36</sup>

The Washington State Supreme Court ultimately held that “the trustee’s fiduciary duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests.”<sup>37</sup> Expounding upon this general duty, the Court, citing Professor Bogert’s treatise,<sup>38</sup> held that if beneficiaries are to be able to hold a trustee accountable, they must know of the nature of the trust property and how it is being managed.<sup>39</sup> The Court indicated that this general duty to inform normally is met by trustees delivering periodic statements of trust activities to the trust beneficiaries.<sup>40</sup> The Court then went further to hold that in the case of a “nonroutine transaction which significantly affects the trust estate and the interests of the beneficiaries,” a trustee must inform beneficiaries of all material facts related to the transaction before the transaction takes place.<sup>41</sup> It is this last principle for which this case is widely cited and recognized outside of Washington and by the UTC.<sup>42</sup>

In 1984, the year after *Allard* was decided, the Washington legislature enacted RCW 11.100.140<sup>43</sup> to clarify the principles raised in *Allard*, specifically those surrounding the meaning of a “nonroutine transaction.”<sup>44</sup> RCW 11.100.140 partially overruled *Allard* by providing that absent a “compelling circumstance,” written notice must be sent to the trustor and to adult mandatory and discretionary income beneficiaries at least twenty days in advance of specifically enumerated “significant nonroutine transactions.” Absent the characterization as a “significant nonroutine transaction,” RCW 11.100.140(6) provides that the trustee is not absolutely required to provide advance notice of an intended action, to obtain an independent appraisal, or to sell in an open-

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36. *Id.* at 403, 663 P.2d at 110.

37. *Id.* at 404, 663 P.2d at 110 (citing *Esmieu v. Schrag*, 88 Wash. 2d 490, 563 P.2d 203 (1977)).

38. *Id.* (citing GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 961 (2d ed. 1962)).

39. *Id.*

40. *Id.* The Court failed to indicate the type of beneficiaries that should receive the periodic statements.

41. *Id.* at 404–05, 663 P.2d at 110.

42. U.T.C. § 813 cmt (2010).

43. An Act Relating to Trusts, ch. 149, sec. 114, 1984 Wash. Sess. Laws 648, 703 (codified as amended at WASH. REV. CODE § 11.100.140 (2012)).

44. H. REP. ON H.B. 1213, Reg. Sess., at 2 (Wash. 1984); S. REP. ON ESHB 1213, Reg. Sess., at 2 (Wash. 1984).

market transaction.<sup>45</sup>

Instead of the subjective standard set forth in *Allard*, there are several “significant nonroutine transactions” that trigger the trustee’s duty to provide advance notice: (1) a sale, option lease, or other agreement that is binding for ten years or more regarding trust real estate that constitutes twenty-five percent or more of the value of the trust principal; (2) the sale of tangible personal property that constitutes twenty-five percent or more of the value of the trust principal; (3) the sale of closely-held business stock if the stock being sold constitutes twenty-five percent or more of the corporation’s outstanding shares; and (4) the sale of stock in a corporation that divests the trust of a controlling interest in the corporation.<sup>46</sup> The written notice must set forth such material facts as are necessary to advise the recipient of the nature and terms of the intended transaction.<sup>47</sup> The trustor may waive the application of RCW 11.100.140 in the trust document and in turn, beneficiaries may also waive the trustee’s duty to provide them with the notice.<sup>48</sup> Without the specific waiver of the application of RCW 11.100.140, a trustee, in Washington, must comply with this statute or risk suit for breach of his fiduciary duty to keep beneficiaries informed. Presumably, if a beneficiary objects to the content of the notice, the trustee must be prepared to defend the manner, method, and details of the transaction disclosed in the notice.

While RCW 11.100.140 refined a subset of the trustee’s duty to keep beneficiaries informed, the general principles continue to apply. For example, in an unpublished case, *Flohr v. Flohr*,<sup>49</sup> the Washington Court of Appeals, Division One, held that neither *Allard* nor RCW 11.100.140 relieves a trustee from his general duty to respond to the request of a remainderman for trust information.<sup>50</sup> The court of appeals relied on the decision in *Tucker v. Brown*,<sup>51</sup> which itself cited to the Restatement, holding that a trustee is under a duty to give a beneficiary, upon his reasonable request, complete, and accurate information as to the nature and amount of the trust property.<sup>52</sup> In *Flohr*, a remainder beneficiary

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45. WASH. REV. CODE § 11.100.140(6) (2012). This subsection of the statute is the only portion that truly “overrules” the holdings of *Allard*.

46. *Id.* § 11.100.140(2).

47. *Id.* § 11.100.140(4).

48. *Id.* § 11.100.140(5).

49. *Flohr v. Flohr*, No. 47734-0-I, 2002 WL 528778 (Wash. Ct. App. Apr. 8, 2002), *review denied*, 149 Wash. 2d 1002, 67 P.3d 1096 (2003).

50. *Id.* at \*6.

51. 20 Wash. 2d 740, 150 P.2d 604 (1944).

52. *Flohr*, 2002 WL 528778, at \*6.

repeatedly requested accountings of the trust assets over several years after she was concerned that the value of the trust was greatly diminished.<sup>53</sup> The trustee never provided her with any information.<sup>54</sup> The loss to the trust estate was only discovered after the remainderman filed a request for an accounting with the court.<sup>55</sup>

In another recent case, *Cook v. Brateng*,<sup>56</sup> the Washington Court of Appeals, Division Two, reaffirmed the general principles of the duty to keep beneficiaries informed, but muddied the waters with regards to advance notice of a trustee's intended actions. This case appeared to confirm that even in the case of a significant nonroutine transaction that does not fall into the enumerated categories of RCW 11.100.140, a trustee may still have a general duty to provide advance notice of the transaction, despite the language of RCW 11.100.140(6). In *Cook*, the trustor had created a revocable trust and had later become incapacitated. The trustee was his daughter, who was also a remainder beneficiary of the trust.<sup>57</sup> The trust language required reporting semiannually to the beneficiaries who were then eligible to receive mandatory or discretionary distributions of income.<sup>58</sup> The only beneficiary meeting this criteria while the trustor was alive was the trustor himself, and the trust document specifically required that the trust make distributions exclusively for the trustor's benefit.<sup>59</sup> The other vested remainderman, the trustee's brother, ultimately sued the trustee after the trustor's death for breach of trust.<sup>60</sup> He claimed that she failed to disclose that she used liquid trust resources to care for the trustor, and that while she personally provided care for the trustor, she intended to reimburse herself for her services to the trustor.<sup>61</sup>

The court in *Cook* held that the trustee had not breached her duty to inform the remainderman for two reasons. First, neither the trust document nor the accounting statute<sup>62</sup> required her to provide reports to remaindermen.<sup>63</sup> Second, since the remainderman had never made a

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53. *Id.* at \*4.

54. *Id.*

55. *Id.*

56. 158 Wash. App. 777, 262 P.3d 1228 (2010).

57. *Id.* at 782, 262 P.2d at 1230.

58. *Id.* at 782–83, 262 P.2d at 1230.

59. *Id.* at 782, 262 P.2d at 1230.

60. *Id.* at 784, 262 P.2d at 1231.

61. *Id.*

62. WASH. REV. CODE § 11.106.020 (2012).

63. *Cook*, 158 Wash. App. at 786–87, 262 P.3d at 1232.

request for information to her or by petition to the court, she hadn't failed to respond to a request for information.<sup>64</sup> In addition, the court, citing *Allard*, held that the trustee had a duty to inform the remainder beneficiary about matters that would significantly affect his interest.<sup>65</sup> However, the court held that unlike in *Allard*, the actions of the trustee in this case were routine and did not warrant notice.<sup>66</sup> While the court does not explicitly state that the notice of an action with significant effect must be in advance, one can infer that this was its intent, particularly with the stated reliance on *Allard*. In another post-RCW 11.100.140 case, the Washington Court of Appeals, Division Three, in *Waits v. Hamlin*,<sup>67</sup> also held that a trustee owes duties to inform the beneficiaries periodically of the status of the trust, its property, and how it is being managed.<sup>68</sup> The court also went further to hold that the trustee has a duty to provide advance notice to beneficiaries of a nonroutine transaction that significantly affects the beneficiaries even when the transaction does not fit within the categories enumerated in RCW 11.100.140.<sup>69</sup>

The courts of appeals, in *Cook* and *Waits*, never specifically analyzed the application of RCW 11.100.140(6) to the facts of either case, even though both cases were regarding matters that occurred after the statute was enacted. The only case to have specifically analyzed a trustee's duty to inform beneficiaries in advance of a transaction that does not fit within the enumerated categories of RCW 11.100.140 is the unreported case of *Conran v. Seafirst Bank*.<sup>70</sup> In this case, the Washington Court of Appeals, Division One, held that the trustee had no duty to give advance notice to remainder beneficiaries of an open market sale of specific shares of publicly traded stock.<sup>71</sup> The remainderman argued that *Allard* provided for two different general duties to beneficiaries, including a duty to inform the future trust beneficiaries of all material facts "in connection with a nonroutine transaction which significantly affects the

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64. *Id.* at 787, 262 P.3d at 1232.

65. *Id.* at 789, 262 P.3d at 1233.

66. *Id.* The actions were considered routine because the trust clearly provided for the trustee to spend any amount of trust assets to care for the trustor, and the beneficiaries could reasonably expect the types of expenses that were incurred for this purpose.

67. 55 Wash. App. 193, 776 P.2d 1003 (1989), *review denied*, 113 Wash. 2d 1025, 782 P.2d 1071 (1989).

68. *Id.* at 201, 776 P.2d at 1008.

69. *Id.* at 202, 776 P.2d at 1009.

70. *Conran v. Seafirst Bank*, No. 40075-4-I, 1998 WL 40659, at \*8 (Wash. Ct. App. Feb. 2, 1998).

71. *Id.* at \*2-3.

trust estate” and a separate duty to provide information “that would aid [the beneficiaries] in protecting their interests.”<sup>72</sup> He argued that this second duty still afforded the obligation of the trustee to provide advance notice in some cases.<sup>73</sup> The court held that, based upon legislative history, RCW 11.100.140(6) overruled all of the *Allard* holdings regarding the duty to notify beneficiaries in advance, unless the transaction fell squarely within the enumerated categories of RCW 11.100.140.<sup>74</sup> The court also went further to state that despite the holding in *Waits*, the enactment of RCW 11.100.140 precluded the trustee from having any “statutory duty to inform the beneficiaries as to the status of the trust after January 1, 1985.”<sup>75</sup>

Since the *Conran* case is unpublished, it cannot be cited as precedent, and therefore, the interpretation of *Allard* as expressed in *Cook* and *Waits* is good law in Washington. *Cook* is the most recently decided case of all of them. While the court of appeals in *Waits* was clear in its recitation that the duty to keep beneficiaries informed included providing both periodic information and advance notice of transactions that significantly affect the beneficiaries, the more recent case, *Cook*, was less clear. The interplay of these two cases with RCW 11.100.140(6) is also unclear, and unfortunately, the only case to have directly reviewed the issue is unreported.

Consistent with the case law, the Washington Trustees’ Accounting Act specifically imposes a duty on the trustee to provide an annual statement to each adult income beneficiary of a trust unless otherwise waived by the trustor in the trust document.<sup>76</sup> The obligation to provide this statement is in addition to any information that should be provided as part of the general duty to keep beneficiaries informed or any advance notice specific to RCW 11.100.140. The annual statement provided pursuant to the accounting statute should include a listing of all current receipts and disbursements made by the trustee.<sup>77</sup> In addition, any adult income beneficiary may request an itemized statement of all trust property.<sup>78</sup>

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72. *Id.* at \*6 (quoting *Allard v. Pac. Nat’l Bank*, 99 Wash. 2d 394, 404–05, 663 P.2d 104, 110 (1983)).

73. *Id.* at \*8.

74. *Id.*

75. *Id.*

76. WASH. REV. CODE § 11.97.010(1) (2012); *id.* § 11.106.020. The reference to “adult income beneficiary” was changed by the 2013 Legislation. See *infra* Part V.E.

77. WASH. REV. CODE § 11.106.020.

78. *Id.*

Since there is overlap between the information that is to be provided under the accounting statute and that required by the general duty to keep beneficiaries informed, compliance with this statute may satisfy all or a part of a trustee's general duty, depending upon the relevant activities of the trust administration. However, unless waived, the duty to provide the annual statement and to respond to a request for one is a separate fiduciary obligation of the trustee to provide information. A trustee has been penalized by having trustee fees denied when a request for an account statement by a beneficiary was delivered untimely and only after petition to the court, but was complete, accurate, and showed no harm to the beneficiaries.<sup>79</sup> However, the trustee was not found to have breached any fiduciary duty.<sup>80</sup> Presumably, if the untimely account had uncovered harm to the beneficiaries, the trustee would have been liable for both the harm and the breach of fiduciary duty for the untimely account.

Regardless of whether the duty to provide statements and a listing of assets under the trustee's Accounting Act is waived in the trust, any trustee may file an intermediate account of trust activity with the court.<sup>81</sup> Any trustor or beneficiary may petition the court to direct the trustee to file an account of the trust.<sup>82</sup> The beneficiaries (and presumably the trustor) do not have an absolute right to an accounting when petitioning to request one; rather, the court may order one in the exercise of its discretion.<sup>83</sup>

The trustee's duty to keep beneficiaries informed is not entirely clear in Washington, particularly given how case law has interpreted the interplay between *Allard* and RCW 11.100.140. In addition, the overlapping types of information to be produced as described in the case law, RCW 11.100.104 and RCW 11.106.020, as well as the ability of the trustor to modify many of these obligations in the trust document, create a maze of standards for a Washington trustee. However, even assuming that the courts of appeals are incorrect in their holdings in *Cook* and *Waits* regarding the duty to provide advance notice to beneficiaries, it

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79. *In re Estate of Ehlers*, 80 Wash. App. 751, 758, 911 P.2d 1017, 1021 (1996).

80. *Id.* at 761, 911 P.2d at 1023.

81. WASH. REV. CODE § 11.106.030.

82. *Id.* § 11.106.040; *cf. In re Estate of Hitchcock*, 140 Wash. App. 526, 531, 167 P.3d 1180, 1183 (2007) (holding that waiver of "all duties imposed by [the trustees' accounting act] and from provisions of the probate statutes" in the trust document, did not relieve trustees from their obligation to provide trust beneficiary with an accounting of trust upon a petition requesting an account).

83. *In re Estate of Ehlers*, 80 Wash. App. at 758, 911 P.2d at 1021.

would generally be appropriate to surmise that in Washington, before the 2011 and 2013 Legislation, the general duty to keep beneficiaries informed includes the obligation to communicate regularly with the beneficiaries by providing periodic statements of the trust activity and to respond to reasonable requests from at least the current and remainder trust beneficiaries. In addition, the trustee might also consider providing some type of advance notice of an activity that may significantly affect the interests of the beneficiaries, even if such activity does not fall within the definition of a “significant nonroutine transaction” as defined by statute.<sup>84</sup> Further, unless waived in the trust document, the trustee must timely comply with the separate obligations outlined in RCW 11.106.020 regarding an annual statement or a requested listing of trust assets, and in RCW 11.100.140 if a proposed action does fall within the statutory definition of a “significant nonroutine transaction.” Unlike the UTC, Washington law has not historically had a clear path for the trustee to follow regarding the beneficiaries to whom the duty is owed and the information that must be given to them. Compliance with the duty to inform under Washington law has always been heavily fact dependent.

#### *B. Duties to Inform and Report Under the UTC*

Section 813 of the UTC provides for a trustee’s general obligation to keep trust beneficiaries reasonably informed. It also provides for specific duties to deliver certain types of administration information to trust beneficiaries.<sup>85</sup> To understand how the duty to keep beneficiaries informed works in the context of the UTC, it is important to understand the terminology used by the UTC. Under the UTC, the “qualified beneficiaries” are essentially the current mandatory or discretionary trust beneficiaries and the presumptive remaindermen who exist at the time that the qualified beneficiary status is being determined.<sup>86</sup> While not specifically defined in the UTC, the plain meaning of the “permissible distributee[s]” of a trust are the trust beneficiaries who are currently eligible to receive mandatory or discretionary trust distributions.<sup>87</sup>

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84. The potential benefit of providing advance notice of an action may be greater when the trustee is aware that the beneficiaries have expressed an interest in or attachment to certain trust property.

85. U.T.C. § 813 (2010).

86. *Id.* § 103(13). The qualified beneficiaries also include those types of trust beneficiaries described in UTC section 110, although for the purposes of this Article, the authors refer to the more common situation of permissible distributees and presumptive remaindermen.

87. *See, e.g.*, OR. REV. STAT. § 130.010(10) (2011). The Oregon adoption of the UTC defined “permissible distributee” in this way, which is not contradictory to the manner in which UTC section 103(13) refers to these types of beneficiaries.

Finally, under the UTC, a “beneficiary” is a person that “has a present or future beneficial interest in a trust, vested or contingent; or in a capacity other than that of trustee, holds a power of appointment over trust property.”<sup>88</sup> Generally speaking, a permissible distributee is also a qualified beneficiary, and both categories are also considered beneficiaries under the UTC; however, it is possible to be just a beneficiary who is neither a permissible distributee or a qualified beneficiary (referred to in this Article as a nonqualified beneficiary).

### 1. *General Duty to Inform*

Section 813(a) of the UTC provides for an affirmative general duty of the trustee to “keep the qualified beneficiaries of a trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”<sup>89</sup> This section also provides that any beneficiary may request information and the trustee must respond to such request, if reasonable under the circumstances.<sup>90</sup> The comments to section 813(a) indicate that the limitation of this duty to the qualified beneficiaries was intentional and was meant to extend the trustee’s affirmative duty only to the “stakeholders” of the trust.<sup>91</sup> The use of the term “beneficiary” in relation to the right to request information allows for more remote, contingent beneficiaries an opportunity to ask for information, recognizing that the UTC did not want to eliminate the rights of the more remote beneficiaries to trust administration.<sup>92</sup> However, in the context of a request for information, there is no stated timeline for a trustee to respond to a request and the trustee has the discretion to determine whether the request is reasonable.

There is no bright line rule regarding how to satisfy the general duty to keep the qualified beneficiaries informed. The trustee must ultimately determine what information to provide to the beneficiaries. The comments to section 813 indicate that the general duty is essentially satisfied with respect to at least the permissible distributees if the trustee provides them with the annual report described in section 813(c) (and described in Part II.B.2 below). One can therefore surmise that the trustee must consider whether any additional information should be delivered to the remaindermen (i.e., the remaining qualified

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88. U.T.C. § 103(3).

89. *Id.* § 813(a).

90. *Id.*

91. *See id.* § 813(a) cmt.

92. *Id.*



beneficiaries), considering that the interests of the remaindermen are by nature different than those of the permissible distributees. The general duty to keep qualified beneficiaries informed may also require that the trustee provide advance notice to the qualified beneficiaries of a proposed transaction with trust property in order to permit the beneficiary to protect his or her interest. The comments of section 813, citing *Allard* discussed above, indicate that advance notice of transactions involving the sale of real estate, closely-held business assets, or unique trust assets may be necessary or at least prudent practice.<sup>93</sup>

## 2. *Specific Reporting Requirements*

In addition to the general duty described above, section 813(b) and (c) provide for specifically enumerated duties to provide certain trust administration information to certain types of beneficiaries (referred to in this Article as “reporting requirements”). The trustee has a duty to provide an entire copy of the trust instrument to a beneficiary upon request, rather than just parts that the trustee deems relevant to a beneficiary.<sup>94</sup> The duty to provide notice of the acceptance of trusteeship and of trustee contact information is triggered when a trustee accepts the office of trustee (either when an irrevocable trust is created or upon a successive change of trustee), and must be delivered to the qualified beneficiaries within sixty days of such acceptance.<sup>95</sup> Acceptance of the trusteeship is described in UTC section 701. The duty to provide notice of the existence of a trust is independent of the duty to provide notice of acceptance of the trusteeship, although occasionally they will overlap.

To comply with the requirement to provide notice of the existence of trust, the trustee must provide four pieces of information to the qualified beneficiaries: (1) notice that the trust exists; (2) the identity of the settlor or settlors; (3) notice of the right to request a copy of the trust instrument; and (4) notice of the right to a trustee’s report, within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable.<sup>96</sup> While the notice of the existence of a trust is a critical step towards fully informing

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93. See U.T.C. § 813(a) cmt (referencing *Allard v. Pac. Nat’l Bank*, 99 Wash. 2d 394, 663 P.2d 104 (1983)).

94. *Id.* § 813(b) cmt.

95. *Id.* § 813(b)(2).

96. *Id.* § 813(b)(2)–(3).

beneficiaries about the trust from which they benefit, the requirement to deliver such notice as triggered by knowledge of the irrevocability trust, as opposed to acceptance of the trusteeship, seems impractical at best.<sup>97</sup>

The trustee also has the duty to provide a trustee report at least annually and upon the termination of the trust.<sup>98</sup> The trust reports must be delivered to the permissible distributees and to other qualified or nonqualified beneficiaries who request it.<sup>99</sup> In addition, the last serving trustee must send a trustee report to the qualified beneficiaries in the event of a vacancy of the trusteeship.<sup>100</sup> The trustee report must include a listing of the trust assets (including their current, fair market value, if possible), the trust liabilities, trust receipts and disbursements, and the source and amount of the trustee's compensation.<sup>101</sup> The comments to section 813 of the UTC make it clear that the trustee report does not need to equate a formal accounting.

### 3. *Duties for a Revocable Trust—Statutory Exception*

While a trust is revocable, and the trustor has the capacity to revoke the trust, the duties delineated in UTC section 813 are only owed to the trustor of the trust, thereby creating a statutory exception.<sup>102</sup> In 2004, the language referencing the trustor's capacity to revoke the trust was bracketed, recognizing both that determining the trustor's capacity to revoke the trust may be difficult and impractical and that some jurisdictions may wish to treat the revocable trust as a will substitute, making the revocable trust relevant to the beneficiaries only at the death of the trustor.<sup>103</sup> Section 603(b) of the UTC provides that during the period of permissible exercise, the holder of a power of withdrawal will be treated the same as the trustor of a revocable trust described in section

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97. Acquiring knowledge that an irrevocable trust exists (e.g., the death of the trustor of a revocable trust) may occur well before any trustee has formally accepted the trusteeship, and in some cases, it is important to preserve the ability to reject a trusteeship to avoid the application of non-resident state income tax to a trust sited in a state without income tax. Presumably, if a person nominated to be trustee acts in haste to deliver any of the notices described in UTC section 813(b) in order to comply with the sixty-day timeline, he or she may have simultaneously accepted the trusteeship under UTC section 701(a)(2), precluding later rejection of the trusteeship.

98. U.T.C. § 813(c).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* § 603(a).

103. *Id.* § 603(a) cmt to 2004 amend.

603(a).<sup>104</sup>

#### 4. *Waiver of the Duties to Inform*

The UTC operates as a set of default provisions that may be waived or modified by the trustor in the trust document, except for the provisions contained in UTC section 105. The UTC does not preclude the trustor from waiving the general duty to keep the qualified beneficiaries informed.<sup>105</sup> However, the UTC does preclude a trustor from waiving the duty to inform qualified beneficiaries who are twenty-five or older of the existence of the trust, the trustee's identity, and the beneficiary's right to request trust reports.<sup>106</sup> In addition, the UTC precludes the trustor from waiving the trustee's duty to respond to any beneficiary's request for reasonable trust administration information.<sup>107</sup> The Uniform Law Commissioners, in 2004, bracketed both of these "mandatory reporting requirements" because there was such a lack of consensus about the adoption of the mandatory rules.<sup>108</sup>

A beneficiary may always waive his or her right to notice, to administration information the trustee would otherwise be required to deliver (e.g., advance notice of a compensation change) or to trustee reports.<sup>109</sup> A beneficiary may withdraw his or her waiver at any time.<sup>110</sup> Waiver by a beneficiary does not relieve the trustee from any liability resulting from actions that notice or a report would have otherwise

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104. A holder of a power of withdrawal is defined in UTC section 103(11) as having a "presently exercisable general power of appointment other than a power: (A) exercisable by a trustee and limited by an ascertainable standard; or (B) exercisable by another person only upon consent of the trustee or a person holding an adverse interest." *Id.* § 103(11). Practically speaking, this means that a beneficiary who holds a right to withdraw a contribution to trust so that the contribution qualifies for the annual exclusion from federal gift tax (often referred to as a *Crummey* power) is treated as a trustor for the purposes of UTC section 813 for the duration of the right of withdrawal. *See Crummey v. Comm'r*, 397 F.2d 82, 84–86 (9th Cir. 1968). If the right of withdrawal is unlimited or is cumulative, then there may be portions of a trust for which the trustee needs only to deliver information to the beneficiary holding the withdrawal right. This provision was not adopted in Washington.

105. *Id.* § 105 cmt.

106. *Id.* § 105(b)(8).

107. *Id.* § 105(b)(9).

108. However, the Commissioners still included these mandatory reporting requirements despite the classic objections to providing trust information to a beneficiary: (1) the beneficiary is too immature to know about the amount of assets held in trust; (2) the beneficiary is not yet self-sufficient and will never be if knowledge of the trust assets occurs too early; and (3) the settlor is in the best position to know of the effect of trust wealth on a beneficiary and should therefore be able to control the flow of information. *See id.* § 105(b)(8)–(9) cmts.

109. *Id.* § 109(c).

110. *Id.* § 813(d).

disclosed. Only informed consent or a bona fide release by a beneficiary may absolve a trustee from liability for actions.<sup>111</sup> Therefore, for a trustee who would like to have the benefit of triggering the statute of limitations on breach of trust claims, disclosure of trust administration to a beneficiary, rather than waiver of the right to receive or obtain information by a beneficiary, is key.

### C. *Washington's 2011 Legislation*

The 2003 Task Force was split on the approach to codifying a duty to provide mandatory notice or information to beneficiaries. It polled members of the WSBA Real Property, Probate, and Trust Section (WSBA RPPT), and that poll indicated that members wanted to retain a mandatory duty to provide notice.<sup>112</sup> The 2003 Task Force then decided that its general approach would be to codify the common law duty of notice and give some certainty to trustees regarding the extent of that duty, given the lack of specific directions under common law.

#### 1. *General Duty to Inform*

The 2011 Legislation intended to both codify the law in Washington as it existed before the 2011 Legislation and to incorporate a modified version of the UTC. The legislation introduced new provisions that codified the general duty of a trustee to keep beneficiaries “reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”<sup>113</sup> While the statute’s description of the duty is similar to the language in section 813(a) of the UTC, it also is an apt description of the general duty as it existed in Washington case law before the 2011 Legislation.<sup>114</sup>

Unlike the UTC’s general duty, which is affirmatively owed only to the qualified beneficiaries and then to non-qualified beneficiaries upon reasonable request, the 2011 Legislation specified that the general duty was owed to a broader group of persons. The Washington general duty was owed to all of the “persons interested in the trust” and to all persons “who would be entitled to notice [of judicial proceedings regarding the trust under RCW Chapter 11.96A].”<sup>115</sup> “Persons interested in the trust”

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111. *Id.* § 817(c).

112. The poll was taken at the 2006 WSBA RPPT midyear. Copies of the ballots are on file with the Washington Law Review.

113. WASH. REV. CODE § 11.97.010(3) (2012).

114. *See supra* notes 28–84 and accompanying text.

115. WASH. REV. CODE § 11.97.010(3).

included not only all beneficiaries of the trust, but it also included the trustor, if living, any person holding powers over the trust assets, and the Attorney General in certain circumstances where charitable interests are involved.<sup>116</sup> For all practical purposes, the “persons interested in the trust” are the same as the persons entitled to notice of judicial proceedings involving a trust. However, this group could be narrowed by utilizing virtual representation by persons with similar interests.<sup>117</sup> This group of individuals to whom the Washington general duty was owed under the 2011 Legislation is referred to in this Article below as the “Interested Parties.”

Unlike the UTC, which merely indicates in its comments that compliance with specific reporting requirements will satisfy the general duty to inform, the 2011 Legislation provided a roadmap for trustees to comply with the general duty. RCW 11.97.010(3) incorporated a “safe harbor” for trustees, whereby if a trustee prepared and disseminated a report regarding trust activity, the trustee was presumed to have satisfied the general duty to provide information with respect to the recipients.<sup>118</sup> To comply with the statute, the “safe harbor” report had to include information about the trust administration for the reporting period that are relevant of the items specifically listed in the statute, namely:

- (1) A statement of receipts and disbursements of principal and income;
- (2) A statement of the assets and liabilities of the trust and their values at the beginning and ending of the reporting period;
- (3) Trustee compensation paid;
- (4) All agents hired by the trustees, their relationship and any compensation paid;
- (5) Disclosure of any pledge, mortgage, option, lease, or other agreement affecting trust property for five or more years that was entered into during the reporting period;
- (6) Adequate disclosure of all transactions engaged in where a trustee personally benefitted; and
- (7) Notice to the recipient that they may request a formal accounting and that they have three years to sue the trustees for breach of trust based upon the actions disclosed in the report.<sup>119</sup>

The delivery of the “safe harbor” report was not mandatory, nor was a

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116. *Id.* § 11.96A.030(6).

117. *See infra* Part III.

118. WASH. REV. CODE § 11.97.010(3), *amended by* S.B. 5344, 63d Leg., Reg. Sess. § 7 (Wash. 2013) (removing the safe harbor presumption).

119. WASH. REV. CODE § 11.97.010(3)(a)–(h).

time period for delivery prescribed by the statute. The determination of whether to deliver the report and thereafter how often to deliver the report was to have been made entirely by the trustee.

The 2011 Legislation also provided that the preparation and dissemination of the “safe harbor” report triggered the running of the statute of limitations, with respect to each report recipient, for a breach of trust claim related to the content disclosed in the report.<sup>120</sup> The modification to the statute of limitations is described further in Part V.B. of this Article.

By providing a list of items to include in a “safe harbor” report, the 2011 Legislation introduced greater certainty regarding compliance with the general duty to inform than the existing case law provided for trustees. It also went further than the UTC by specifically indicating that the delivery of a safe harbor report created a presumption that the general duty was satisfied.<sup>121</sup> However, a trustee who wanted to ensure that he was meeting the general duty to inform under the 2011 Legislation had to deliver “safe harbor” reports to all of the Interested Parties related to the trust, which was a potentially unwieldy number of recipients.<sup>122</sup>

Another component of the general duty to inform that the 2011 Legislation integrated into Washington law was the trustee’s duty to respond to any beneficiary’s request for information, unless it was unreasonable under the circumstances.<sup>123</sup> In addition, the 2011 Legislation included another provision that mandated that the trustee respond to the request of an Interested Person within sixty days if the Interested Person requested “information reasonably necessary to enable [him or her] to enforce his or her rights under the trust.”<sup>124</sup> These duties to respond to requests for information modified the scope of the trustee’s duty to respond to requests under pre-2011 Washington law and went further than the UTC as well. Prior Washington case law and the UTC generally provided that the trustee had a duty to provide information to any trust beneficiary upon request.<sup>125</sup> The new Washington standard provided an opportunity for any Interested Party to request information

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120. *Id.* § 11.96A.070(1)(b).

121. *Id.* § 11.97.010(3).

122. *Id.*

123. *Id.* § 11.97.010(4).

124. *Id.* § 11.97.010(5).

125. *Allard v. Pac. Nat’l Bank*, 99 Wash. 2d 394, 403–05, 663 P.2d 104, 110–11 (1983); U.T.C. § 813 (2010).

from the trustee.<sup>126</sup> There was also a response period with which to comply, where there had never been one before in Washington and was not one in the UTC.

## 2. *Specific Reporting Requirements*

The 2011 Legislation integrated a slightly modified set of the reporting requirements set forth in sections 813(b) and (c) of the UTC. The new RCW 11.97.010(2) provided that the trustee, for all trusts that were created or became irrevocable after December 31, 2011, was required to deliver notice of several pieces of information: (1) the existence of trust; (2) the identity of the trustor(s); (3) the trustee's contact information; and (4) the right to request trust administration information that is reasonably necessary to enable the beneficiary to protect his interest. This new mandatory notice had to be delivered to all Interested Parties within sixty days of the date of acceptance of the position of trustee or of the date that the trustee of a formerly revocable trust acquired knowledge that such trust had become irrevocable.<sup>127</sup> This specific notice may be referred to in this Article as the "sixty days' notice requirement."

After enactment of the 2011 Legislation, many Washington estate planning practitioners indicated that compliance with this new mandatory duty to provide sixty days' notice was objectionable to many of their clients who wished to create trusts in Washington. While the timeframe and triggering events for the mandatory notice under the Washington law was the same as the UTC, the Washington version of the mandatory notice had to be delivered to a broader category of people than the qualified beneficiaries.<sup>128</sup> To accommodate the difference between the UTC's representation statutes and the Washington virtual representation statute,<sup>129</sup> the 2011 Legislation specifically indicated that the new mandatory notice for the benefit of a minor could be delivered to the minor's parent if no guardian had been appointed for the minor.<sup>130</sup> In addition, the 2011 Legislation specifically indicated that the new mandatory notice did not have to be delivered to a charity whose only interest in the trust was a future interest that could be revoked; instead,

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126. WASH. REV. CODE § 11.97.010(5).

127. *Id.* § 11.97.010(2).

128. *Compare id.*, with U.T.C. § 103(13) (defining "qualified beneficiary").

129. The UTC allowed representation of a minor by a parent, but that provision was not adopted in the 2011 Legislation. *See infra* notes 257–360 and accompanying text.

130. WASH. REV. CODE § 11.97.010(2).

the notice could be delivered to the Attorney General.<sup>131</sup>

The 2011 Legislation did not specifically adopt the UTC section 813(b)(1) duty to provide a copy of the trust upon request of a beneficiary. Instead, under the 2011 Legislation all Interested Parties could request information about the trust terms from the trustee.<sup>132</sup> The statute effectively then stated that delivery of the entire trust instrument was presumed to have “satisf[ied] the trustee’s obligations under this subsection” if the request was concerning terms of the trust and if the request also was reasonably necessary to allow the requesting party the ability to enforce his or her rights under the trust.<sup>133</sup> The analysis of whether the request involved trust terms and whether the request was necessary was entirely dependent upon the trustee’s independent determination. By creating a presumption upon the delivery of the entire trust instrument, the statute also left room for the trustee to determine that the beneficiary did not need to see the entire trust instrument.

The 2011 Legislation did not include sections 813(b)(4) or 813(c) of the UTC regarding advance notice of trustee compensation and mandatory periodic trustee reports. Instead, those items were integrated into the new Washington law vis-à-vis the “safe harbor” reports described above in Part II.C.1.

### 3. *Duties for a Revocable Trust—Statutory Exception*

The 2011 Legislation adopted the core provisions of the UTC regarding revocable trusts. Essentially, while a trust is revocable, the rights of beneficiaries are subject to the control of the trustor and the duties of the trustee are owed only to the trustor.<sup>134</sup> The 2011 Legislation declined to include the bracketed UTC language that also required that the trustor specifically have capacity for this exception to apply.<sup>135</sup> For the purposes of the duties to inform, this meant that for revocable trusts, while the trustor was alive, only the trustor was entitled to information about trust administration, thereby creating an exception to the duties to inform.

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131. *Id.*

132. *Id.* § 11.97.010(5).

133. *Id.*

134. *Id.* § 11.103.040.

135. *See* U.T.C. § 603(a) (2010); *infra* notes 454–455 and accompanying text (discussing Washington’s version of UTC section 603).



#### 4. *Waiver of the Duties to Inform*

The 2011 Legislation did not permit any waiver or modification of the trustee's general duty to keep beneficiaries informed or of any of the specific reporting requirements.<sup>136</sup> The 2011 Legislation also declined to include the option to appoint a third-party representative or surrogate to accept trust information on behalf of beneficiaries.<sup>137</sup> The 2011 Legislation did include a new provision in the virtual representation statute, allowing a person holding a power of appointment to virtually represent persons whose interests were subject to the power of appointment.<sup>138</sup> The 2003 Task Force included that provision to allow a trustor who did not want the trustee to be forced to give the sixty days' notice to remaindermen the ability to avoid notice by including a power of appointment.<sup>139</sup>

Unlike the UTC,<sup>140</sup> the 2011 Legislation did not include the specific ability of a beneficiary to waive the right to receive trust information from the trustee. However, the legislation did include the UTC provision specifically validating a beneficiary's consent, release, and ratification of a trustee's act unless it was obtained by improper means.<sup>141</sup> This statute implies that a beneficiary could knowingly consent to not receive trust information.

#### D. *Washington's 2013 Legislation*

The 2013 Legislation significantly modified the 2011 Legislation regarding the trustee's duty to keep beneficiaries informed. There was considerable discussion among estate planning practitioners about the practicality of many of the provisions relating to the duty to inform as adopted by the 2011 Legislation. In particular, there was appreciable discord about the duty to provide mandatory notice as required by the 2011 Legislation. The 2013 Legislation sought to incorporate more concepts from the UTC in an effort to standardize the law where desirable and to make it easier and more efficient to comply with the

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136. WASH. REV. CODE § 11.97.010(1).

137. For an example of a statute that provides such an option see OR. REV. STAT. § 130.020(3)(b) (2011).

138. WASH. REV. CODE § 11.96A.120(3)(d).

139. As discussed in Part IV of this Article, reliance on the virtual representation statutes as a "waiver" of the duty to inform is not a perfect solution due to potential conflicts of interest among beneficiaries.

140. U.T.C. § 813(d).

141. WASH. REV. CODE § 11.98.107 (discussed *infra* Part V.Q.).

provisions adopted by the 2011 Legislation.

1. *General Duty to Inform*

The 2013 Legislation moved the notice-related requirements to RCW 11.98 and adopted the UTC definitions of “permissible distributee” and “qualified beneficiary” for purposes of RCW 11.98.<sup>142</sup> The 2013 Legislation modified the general duty to require the trustee to keep all qualified beneficiaries of a trust “reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”<sup>143</sup> In addition, the revised general duty also now requires the trustee to respond promptly to any beneficiary’s request for information related to the administration of the trust, unless the request is unreasonable under the circumstances.<sup>144</sup> The revised general duty is taken verbatim from section 813(a) of the UTC. There are four significant changes from the 2011 Legislation: (1) the narrower scope of beneficiaries to whom the general duty is owed; (2) the method of compliance with the general duty; (3) the removal of a time period in which to respond to a request for information; and (4) an additional exception to the application of the general duty.

The use of the phrase “qualified beneficiaries” limits the potential persons to whom the general duty to inform is owed. The result of this limitation is that the information need not be affirmatively furnished to Interested Parties who are not also qualified beneficiaries. However, in an effort not to preclude more remote trust beneficiaries from having access to trust information, beneficiaries with remote remainder interests (i.e., nonqualified beneficiaries) may request information from the trustee. The class of persons who can request information from the trustee no longer includes anyone beyond trust beneficiaries (e.g., the trustor). The sixty-day time period for response to a reasonable request that was included in the 2011 Legislation no longer exists.<sup>145</sup> The 2012 Task Force felt that the function of the sixty-day time period was to provide leverage to a beneficiary who was requesting information, but that compliance with the time period might be difficult for the trustee. In order to provide some leverage for beneficiaries, the 2013 Legislation instead included a provision allowing a qualified beneficiary to obtain an order for costs and reasonable attorney’s fees if he or she is forced to

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142. S.B. 5344, 63d Leg., Reg. Sess. § 8(1)–(2) (Wash. 2013).

143. *Id.* § 16(1).

144. *Id.*

145. *See* WASH. REV. CODE ANN. § 11.97.010 (West 2013).

compel production of information from the trustee.<sup>146</sup>

The 2013 Legislation also removed the “safe harbor report” language from the general duty to inform statute, effectively removing any presumption that the trustee has complied with the duty by providing certain enumerated information.<sup>147</sup> The practitioner community was specifically concerned about the presumption, fearing that it might serve to create a minimum level of communication from the trustee, when that minimum level was potentially a higher standard than originally provided for under Washington law. The 2013 Legislation did not remove the correlating report section from the statute of limitations section.<sup>148</sup> Therefore, a trustee who would like to trigger the running of the statute of limitations for a breach of trust claim still has a guideline to follow regarding the necessary information to disseminate.

The removal of the “safe harbor” also means that the manner and method of compliance with the general duty to keep beneficiaries informed is the same as articulated in Washington case law described in Part II.A, with the exception of the change in the types of beneficiaries to whom the duty is owed and the application of the statutory exceptions described in Part II.D.3 below.<sup>149</sup> The trustee is entirely responsible for determining the timing and method of complying with the general duty.

Generally, the more information that is shared, the more likely the trustee has satisfied this general duty. With respect to periodic reporting, in some cases, providing the qualified beneficiaries with a copy of an annual account or brokerage statement and responding to any reasonable requests for relevant information may be sufficient to satisfy the duty. As mentioned in Part II.A, there may be other circumstances where a trustee may consider providing the qualified beneficiaries with additional information or information in advance of a transaction. The trustee will have to be flexible and adjust his or her reporting to beneficiaries to suit the activity in and assets of the trust. Note that, as indicated in Part II.A of this Article, compliance with the general duty does not preclude a trustee from also having to comply with the specific and independent reporting required by RCW 11.100.140 and RCW 11.106.020.

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146. See S.B. 5344 § 16(1).

147. See *id.*

148. See *infra* notes 386–393 and accompanying text.

149. See *supra* notes 118–120 and accompanying text.

## 2. *Specific Reporting Requirements*

The 2013 Legislation slightly modified the scope of and the triggering events for the mandatory reporting described in Part II.C.2 of this Article to make it more similar to UTC sections 813(b)(2) and (3). The trustee, for all trusts that were created or became irrevocable after December 31, 2011, is now required to deliver notice of several pieces of information: (1) the existence of the trust; (2) the identity of the trustor(s); (3) the trustee's contact information; and (4) the right to request trust administration information that is reasonably necessary to enable the beneficiary to protect his interest.<sup>150</sup> Like the general duty to inform, the class of persons who are entitled to this notice is now limited to the qualified beneficiaries. This approach mirrors UTC sections 813(b)(2) and (3).

The trustee must deliver this notice within sixty days from the acceptance of the position of the trustee.<sup>151</sup> The 2013 Legislation removed any reference tying the sixty-day notice period to "knowledge" that a trust has become irrevocable and instead used the phrase "acceptance of the position of trustee" to provide for a clear point that triggers the sixty-day notice period.<sup>152</sup> In addition, the 2013 Legislation incorporated the "acceptance of trusteeship" statute from the UTC to provide further clarification to the trustee, which is discussed further in Part IV of this Article. In addition, the changes made to the virtual representation statute in the 2013 Legislation allow delivery of a minor's report to a parent and a divestible charity's interests to the Attorney General so specific reference in the notice statute to those categories of beneficiaries became unnecessary and were deleted.<sup>153</sup> The changes to the Washington virtual representation statute are discussed in detail in Part IV of this Article.

The 2013 Legislation also clarified the statute regarding the obligation to provide beneficiaries with a copy of the trust upon request. The new statute made it clear that the trustee is deemed to have satisfied a request regarding the trust terms if the trustee provides a copy of the complete trust document.<sup>154</sup> The result of the language is the same as it was under the 2011 Legislation.<sup>155</sup> The trustee may still determine

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150. S.B. 5344 § 16(2).

151. *Id.*

152. *Id.*

153. *Id.* § 5(4)(f), 5(10).

154. *Id.* § 16(1).

155. *See supra* notes 132–133 and accompanying text.

whether to provide the complete copy of the trust document.<sup>156</sup> Also, like the 2011 Legislation, the 2013 Legislation did not include any reference to sections 813(b)(4) or 813(c) of the UTC regarding advance notice of trustee compensation and mandatory periodic trustee reports. Because the “safe harbor” reports were also removed, the trustee will have to independently determine whether providing advance notice of compensation changes and whether annual trustee reports and reports upon termination of trust are necessary under the case law defining the general duty. As stated above, it is clear that some type of periodic reporting is part of the trustee’s duty under Washington law,<sup>157</sup> although there are no cases that discuss advance notice of a change in trustee compensation.

### 3. *Duties for Revocable Trusts or “Spousal Trusts”—Statutory Exceptions*

The 2013 Legislation clarified that there are two statutory exceptions to the general duty to inform and the specific reporting requirements, by maintaining one exception from 2011, and adding a new one. The provisions adopted in RCW 11.103.040 of the 2011 Legislation were maintained. Slight modifications were made to confirm that this principle continues to apply while a trustor of a revocable trust was living.<sup>158</sup> In addition, a reference was added in RCW 11.103.040 to the new duty to inform provisions of RCW 11.98, clarifying how this principle applied to the trustee’s duty to inform.<sup>159</sup> The 2013 Legislation introduced a new provision providing for a general exception to the duty to inform in the case of a trust where the spouse<sup>160</sup> of the trustor is the only permissible distributee and the descendants of the spouse and trustor are remaindermen. In such a case, as long as the spouse has capacity, the trustee only has to deliver the requisite trust information to the trustor’s spouse. A similar exception was implemented, for example,

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156. S.B. 5344 § 16(1).

157. *See supra* Part II.A.

158. S.B. 5344 § 16(4); *see also infra* Part V.K. (describing changes made to RCW Chapter 11.103, and removing any references to the trustor’s ability or capacity to revoke the revocable trust).

159. S.B. 5344 § 16(4); *see also infra* Part V.K.

160. *See* S.B. 5344 § 16(3). While the statute as adopted references “domestic partner” in addition to the spouse of the trustor, the inclusion of the term will soon be superfluous. Due to RCW 26.60.100, domestic partners in Washington who do not dissolve the partnership before June 30, 2014, will become spouses for purposes of Washington law.

in the Oregon adoption of the UTC.<sup>161</sup> However, the 2012 Task Force chose not to limit this exception to cases of “surviving spouses,” particularly where “spousal benefits trusts”<sup>162</sup> became very popular estate planning vehicles in 2012.

#### 4. *Waiver of the Duties to Inform and the Statutory Exceptions*

As a general prohibition, the new RCW 11.97.010 provides that the trustor may not modify the trustee’s general duty to provide information to the qualified beneficiaries or to respond to the request of any trust beneficiary.<sup>163</sup> In addition, RCW 11.97.010 provides that the definitions of “qualified beneficiary” and “permissible distributee” may not be modified by the trustor.<sup>164</sup> Any reference to the inability to waive the mandatory sixty-day notice implemented in the 2011 Legislation has been removed. The 2013 Legislation did not modify any provisions regarding a beneficiary’s ability to waive the application of any duties owed to him or her.

Specific provisions permitting the waiver or modification of the duty to provide the sixty days’ notice of the existence of trust and of the application of the “spousal trust” statutory exception in a separate writing were also included in the notice provisions of RCW 11.98.<sup>165</sup> The 2012 Task Force wanted to provide a mechanism to allow the trustor to modify the mandatory notice requirement in trusts that are already irrevocable without having to actually modify the trust document itself. A similar approach was taken, for example, in the Oregon adoption of the UTC.<sup>166</sup>

Because the new statutory structure creates exceptions to the duties to inform and then permits waiver or modification of the sixty days’ notice obligation itself and of the exceptions to the duties to inform, this Article will review each scenario independently, even if repetitive.

Section 16(5) of Senate Bill 5344 permits the trustor to waive or modify the specific duty of the trustee to provide sixty days’ notice of

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161. *See* OR. REV. STAT. § 130.710(8) (2011).

162. A spousal benefits trust is an inter vivos irrevocable trust created by a trustor for the lifetime benefit of his or her spouse. It was a technique used frequently in 2012 to utilize the trustor’s available federal exemption equivalent amount in advance of the potential decrease in such amount from \$5 million to roughly \$1 million for federal estate tax law purposes.

163. Nothing in section 16(1) of Senate Bill 5344 may be modified by the trustor. *See* S.B. 5344 § 16(1).

164. *Id.* § 7.

165. *Id.* § 16(5).

166. *See, e.g.*, OR. REV. STAT. § 130.020(3).

the existence of trust. The new RCW 11.97.010, by omission, impliedly permits the trustor to waive or modify the specific duty to provide the sixty days' notice. The major difference between these two provisions is that section 16(5) of Senate Bill 5344 permits waiver or modification by a separate writing in addition to waiver or modification by the terms of the trust document. These provisions ultimately allow the trustor to, for example, provide that the trustee shall not be required to deliver notice of the existence of trust, or alternatively, that the trustee be required to deliver such notice only to the qualified beneficiaries that are over a certain age.

Section 16(5) of Senate Bill 5344 also permits the trustor to waive or modify the application of the "spousal trust" exception to the duties to inform. The new RCW 11.97.010, also by omission, impliedly permits this waiver or modification, but as described above, section 16(5) of Senate Bill 5344 permits waiver or modification by a separate writing in addition to waiver or modification by the terms of the trust document. These waiver provisions ultimately allow the trustor to, for example, provide that the trustee must provide marital trust administration information to the remainder beneficiaries (e.g., his and his spouse's children) for the duration of trust, regardless of whether his spouse has capacity.

The new RCW 11.97.010, again by omission, impliedly permits the trustor to waive or modify, in the trust agreement, the "revocable trust" exception to the duties to inform. This waiver provision allows the trustor to, for example, provide that another beneficiary—perhaps his spouse—is entitled to and must receive trust administration information while he is alive, particularly if he is incapacitated. The ability to waive or modify the "revocable trust" exception by a separate writing was not included in section 16(5) of Senate Bill 5344 because in the revocable trust context, the 2012 Task Force felt that it was best practice for the trustor to incorporate the waiver or modification into the terms of a revocable trust by actually amending the trust.

##### *5. Effective Dates of the New Notice-Related Provisions*

The 2011 Legislation contains a general effective date provision that states that it applies to all existing trusts and trusts created after the date of the act, except as otherwise provided,<sup>167</sup> and the 2013 Legislation has a similar provision.<sup>168</sup> The provisions regarding the duty to inform in the

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167. H.B. 1051, 62d Leg., Reg. Sess. § 40 (Wash. 2011).

168. S.B. 5344 § 28.

2011 and 2013 legislation, however, have a specific effective date provision. The 2011 Legislation provided that the sixty days' notice of the existence of a trust required under RCW 11.97.010(2) applied only to trusts that were either created or became irrevocable after December 31, 2011<sup>169</sup> and the 2013 Legislation also provides that the revised sixty days' notice requirements under RCW 11.98 apply only to trusts that are created or become irrevocable after December 31, 2011.<sup>170</sup> As mentioned above, a trustor may waive or modify certain duties to inform at any time, even after creation or irrevocability of the trust,<sup>171</sup> so a trustor wanting to take advantage of the new waiver provisions can do so now.

In the absence of a waiver or modification by the trustor, the sixty days' notice provisions of the 2011 Legislation were binding on trustees and their actions for the period from January 1, 2012<sup>172</sup> until July 28, 2013.<sup>173</sup> However, as described above,<sup>174</sup> the Court of Appeals held in *In re Estate of Ehlers* that delivering an untimely accounting per RCW 11.106 that was complete, accurate, and showed no harm to the beneficiaries was not a breach of the trustee's fiduciary duty.<sup>175</sup> Presumably, by analogy, if the trustee's specific duty is waived later by the trustor and no harm to the beneficiaries has occurred, then a trustee's failure to deliver the sixty days' notice during the gap between the 2011 and 2013 Legislation will not, by itself, give rise to an actionable breach of fiduciary duty claim.

### III. DETERMINATION OF TRUST SITUS

#### A. *Role of Trust Situs*

Trusts are particularly likely to have interstate implications, because of the length of time a trust can last and the number of relevant contacts, such as the domiciles of the interested parties and the location of the trust assets. While the settlor and the trustee may be relatively stable geographically, the initial beneficiaries are frequently residents of other states either at the commencement of the trust or later during the trust

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169. H.B. 1051 § 12(2).

170. S.B. 5344 § 16(2)(b)

171. *Id.* § 16(5).

172. This is the effective date of the 2011 Legislation.

173. This is the effective date of the 2013 Legislation.

174. See *supra* Part II.A.

175. *In re Estate of Ehlers*, 80 Wash. App. 751, 761, 911 P.2d 1017, 1023 (1996).



term, and subsequent beneficiaries are even more likely to reside in other states. The location of trust assets has become more problematic in the digital age. The situs of real property is easily ascertained, but rules of thumb in determining the situs of personalty, such as the location of a stock certificate,<sup>176</sup> are useless in a paperless financial system. Courts and statutes often attempt to resolve issues regarding multistate trusts by identifying a “domicile” for the trust, called the trust situs.<sup>177</sup> Determination of a trust’s situs is usually dependent on the “principal place of administration,”<sup>178</sup> which is often determined with reference to the place where the books and records of the trust are kept.<sup>179</sup> Trust situs and the principal place of administration are outmoded concepts as trustees are often national banks or trust companies and records are stored in the cloud. The UTC drafters declined to define principal place of administration “[b]ecause of the difficult and variable situations sometimes involved.”<sup>180</sup>

Nevertheless, identifying one state as the situs of a trust remains relevant for several reasons. The first reason is determining whether a trust is subject to a state’s income tax. This determination, however, is made by the taxing state and another state’s claim of situs would not limit the ability of the taxing state to assess tax against the trust.<sup>181</sup> The only limitation on the taxing state is constitutional. The U.S. Supreme Court has stated that “due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”<sup>182</sup> While there has been no U.S. Supreme Court decision on what connections are necessary to allow a state to tax a trust, several state courts have ruled on the issue.<sup>183</sup> Most recently, in

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176. For example, Facebook and Microsoft are two corporations that do not issue paper stock certificates, and physical stock certificates are becoming extremely rare.

177. *See, e.g.*, HAW. REV. STAT. ANN. § 554A-8 (West 2006) (“Except as specifically provided in the trust, the provisions in this chapter shall apply to any trust with a situs in Hawaii, whenever established.”).

178. JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO TRUSTS AND TRUST ADMINISTRATION § 17.04[C] (2009).

179. *See, e.g.*, MICH. COMP. LAWS ANN. § 700.7209 (West 2013); WASH. REV. CODE § 11.96A.030(7) (2010), amended by 2011 Wash. Sess. Laws 2102, 2108.

180. U.T.C. § 108 cmt. (2010).

181. *See In re Dorrance’s Estate*, 163 A. 303, 311 (Pa. 1932), cert. denied, 287 U.S. 660 (1932); see also *In re Dorrance’s Estate*, 115 N.J. Eq. 268 (N.J. Prerog. Ct. 1934), aff’d, 189 A. 639 (N.J. Ch. 1937), aff’d, 184 A. 743 (N.J. 1936), cert. denied, 298 U.S. 678 (1936).

182. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1953).

183. *E.g.*, *Chase Manhattan Bank v. Gavin*, 733 A.2d 782 (Conn. 1999); *Dist. of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. 1997); *Blue v. Dep’t of Treasury*, 462 N.W.2d 762 (Mich. Ct. App. 1990); *Swift v. Dir. of Revenue (In re Swift)*, 727 S.W.2d 880 (Mo. 1987).

*Trust for McNeil v. Commonwealth*<sup>184</sup> the Pennsylvania Commonwealth Court held that taxing a trust located in Delaware solely on the basis that the grantor was a Pennsylvania resident when the trust was established in 1959 was not constitutional under the Commerce Clause of the U.S. Constitution.<sup>185</sup> Because a Washington statute cannot affect another state's determination of the ability to tax a trust, the issue of state tax is not addressed in in this Article.<sup>186</sup>

The two remaining issues that are relevant to trust situs are jurisdiction and choice of law. The identification of the situs of a trust is not necessarily determinative on these issues but trust situs is a significant factor. With respect to jurisdiction, when controversies arise regarding a trust with multistate contacts, the proper forum has to be determined. If the issue involves real property held in the trust, then the court of the state where the land is located unquestionably has in rem jurisdiction.<sup>187</sup> A controversy involving personalty or pertaining to the relationship between the trustee and beneficiary will be more problematic. Even if the settlor has established trust situs in one state, that state does not necessarily have exclusive jurisdiction. For example, in *McElroy v. McElroy*,<sup>188</sup> the California Supreme Court stated:

Ordinarily the beneficiary of a trust may enforce his rights by proceeding either against the trust property or against the trustee personally . . . . Where, as in this case, the proceeding is brought to enforce the trustees' obligation, and the judgment does not undertake to operate directly on the corpus of the trust, the court's power to act is based upon jurisdiction over the trustees and not upon the location of the trust res.<sup>189</sup>

The leading case on trust jurisdiction is *Hanson v. Denckla*.<sup>190</sup> The trust in question had been established in Delaware by a Pennsylvania woman, and the trustee was a Delaware trust company.<sup>191</sup> It was a revocable trust where the trustor was the income beneficiary and upon her death the remaining trust assets were to be distributed to whomever

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184. 67 A.3d 185, 195 (Pa. Commw. Ct. 2013).

185. *Id.* at 198.

186. See SCHOENBLUM, *supra* note 178, at tbl.11-54 (2009) (providing a chart of the contacts that will result in subjecting a trust to tax in the individual states).

187. VA AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 646, at 510-11 (4th ed. 1987).

188. 198 P.2d 683, 684 (Cal. 1948).

189. *Id.*; see also *In re Probyn*, 99 N.Y.S.2d 651 (N.Y. App. Div. 1950).

190. 357 U.S. 235 (1958).

191. *Id.* at 238.

she appointed by will or by lifetime instrument, or to her issue if she did not exercise the power of appointment. She moved to Florida and exercised the power of appointment. When she died, two of her daughters challenged the validity of the power of appointment in Florida court, and the Florida court held it was invalid under Florida law.<sup>192</sup> The executor of her estate brought an action in Delaware to determine the validity of the exercise of the power of appointment, and the Delaware court held that it was not bound by the Florida decision and that the exercise of the power of appointment was valid.<sup>193</sup> The U.S. Supreme Court held that the Florida judgment was void because, under Florida law, the trustee was an indispensable party and the Florida court did not have personal jurisdiction over the Delaware trust company.<sup>194</sup> The Delaware trust company's sole contact with Florida was passive, in that their existing client had moved to that state, and that was not sufficient to assert personal jurisdiction.<sup>195</sup> The majority opinion, however, indicated that the Florida court could have rendered a valid judgment as to controversies between the beneficiaries that were subject to the Florida court's jurisdiction.<sup>196</sup> The scope of such a judgment is problematic because it would not bind the trustee or other beneficiaries.

In *Rose v. Firststar Bank*,<sup>197</sup> there was a similar issue of whether the Rhode Island beneficiaries of a trust established in Ohio could sue the Ohio bank serving as trustee in Rhode Island. The trust had been set up under the will of an Ohio resident. The Ohio trustee had administered the trust out of its Cincinnati office and had regularly submitted accountings for approval to the Ohio court. The beneficiaries moved to Rhode Island after the trust was established, and the trustee communicated with the beneficiaries in Rhode Island, sending statements, distributions and other documents. The trustee had no other contact with Rhode Island.<sup>198</sup> The Rhode Island Supreme Court held that, similar to the trustee in *Hanson v. Denckla*, the fact that a beneficiary moves to a state does not create personal jurisdiction in that state over the trustee.<sup>199</sup> In contrast, in *Nile v. Nile*,<sup>200</sup> the Massachusetts

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192. *Id.* at 243–44.

193. *Lewis v. Hanson*, 128 A.2d 819, 835 (Del. 1957).

194. *Hanson v. Denckla*, 357 U.S. 235, 255 (1958).

195. The trust company in question, Wilmington Trust Company, now has several offices in Florida so the court could exert general jurisdiction over Wilmington.

196. *Hanson*, 357 U.S. at 254.

197. 819 A.2d 1247 (R.I. 2003).

198. *Id.* at 1251.

199. *Id.* at 1252–53. The court noted the irony of the beneficiaries' claim of personal jurisdiction

court distinguished *Hanson v. Denckla* and asserted personal jurisdiction over a nonresident successor trustee. The court justified Massachusetts jurisdiction because the trust had been established as a revocable trust and the settlor was the trustee until his death, and the settlor had sufficient contacts with Massachusetts so that “jurisdiction extends to the trustees as his personal representatives.”<sup>201</sup>

In *Walton v. Harris*,<sup>202</sup> the trust was established in Massachusetts, with Massachusetts trustees. A beneficiary of the trust (the trustor’s daughter) moved to Florida, and her share of the trust was separated from the other share and an Illinois resident was appointed as trustee.<sup>203</sup> The Illinois trustee resigned and was replaced by a Florida trustee. The trust beneficiary’s daughter, who was a secondary beneficiary of the trust, sued the Illinois and Florida trustees in Massachusetts state court. The court held that Massachusetts had jurisdiction over the Illinois and Florida trustees because the settlor intended the trust to be a Massachusetts trust and even though administration had moved to Florida, “[t]he situs of the daughter’s trust remains in the Commonwealth.”<sup>204</sup> In *United States Trust Co. v. Bohart*,<sup>205</sup> the issue was whether the Connecticut court had jurisdiction over nonresident trust beneficiaries in an action filed by the trustee for approval of its final accounting. The trust had been established by Connecticut residents and had a Connecticut choice of law provision, but was being administered in New York by a New York trustee.<sup>206</sup> The beneficiaries were residents of Texas. The Connecticut Supreme Court held that assertion of personal jurisdiction over the beneficiaries was constitutional because they “should reasonably have foreseen being hailed into [Connecticut] court to defend this case. They held their interest in the trust under the terms of a trust agreement that had been executed by Connecticut residents.”<sup>207</sup>

The UTC and the Uniform Probate Code both have provisions that give jurisdiction over the trustee and beneficiaries to the courts in the

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in light of their substantive claims that included allegations of unresponsiveness and insufficient communication.

200. 734 N.E.2d 1153 (Mass. 2000).

201. *Id.* at 1158.

202. 647 N.E.2d 65 (Mass. App. Ct. 1995).

203. *Id.* at 67.

204. *Id.* at 69.

205. 495 A.2d 1034 (Conn. 1985).

206. *Id.* at 1037.

207. *Id.* at 1040.

state that is the “principal place of administration” even though that term is not defined in either statute.<sup>208</sup>

Jurisdiction over the parties and the trust can therefore turn on determination of the trust situs, coupled with other factors. Trust situs can also aid a court in asserting jurisdiction over the trust when all parties want a matter heard in a particular state court. For example, in *In re Peierls Family Inter Vivos Trusts*,<sup>209</sup> the beneficiaries and two of the trustees of a number of related trusts petitioned the Delaware court to remove a corporate trustee, appoint a Delaware trust company as trustee, change the situs of the trust to Delaware and establish that Delaware law governs the trust administration.<sup>210</sup> The petitioners wanted to convert the trusts to directed trusts,<sup>211</sup> allowed under Delaware law but not under New York law, which was the choice of law made by the trust agreement. The court denied the petition, upholding the choice of law made in the trust agreement. The court also noted that “moving the situs or place of administration of a trust from one state to another does *not* automatically result in a change in the law that applies.”<sup>212</sup> A Delaware statute provided “[e]xcept as otherwise expressly provided by the terms of a governing instrument or by court order, the laws of this State shall govern the administration of a trust while the trust is administered in this State”<sup>213</sup> and the petitioners asserted that appointing a Delaware trustee would trigger application of Delaware law. The choice of New York law in the trust agreement overrode this provision. Even if it had not, the court noted that because the proposed directed trust reformation would strip the Delaware trust company of most substantive decisions and allocate those duties to nonresidents, there were “serious questions” whether the trust would actually be administered in Delaware. The *Peierls Trusts* case illustrates that moving trusts to take advantage of more favorable laws in another state can be difficult and the notions of situs and administration play an important role.

Choice of law is only somewhat dependent on a determination of a trust’s situs, but can turn on a determination of trust situs or its sister

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208. U.T.C. § 202 (2010); UNIF. PROBATE CODE § 7-103 (amended 1993).

209. 59 A.3d 471 (Del. Ch. 2012).

210. *Id.* at 474.

211. Directed trusts, authorized in about thirty states, allow a trust document to delegate responsibilities to a third party, such as investment decisions that are normally responsibilities of the trustee. See Arden Dale, *Estate Plans with Reins*, WALL ST. J. (Sept. 13, 2008), <http://online.wsj.com/article/SB122126441328630621.html>.

212. *In re Peierls*, 59 A.3d at 483 (emphasis in original).

213. DEL. CODE ANN. tit. 12, § 332(b) (2007).

concept, principal place of administration. Choice of law in trust matters depends on a number of factors, such as whether the trust property is real property or personalty, whether the trust is testamentary or inter vivos, and what issue needs resolution, such as the validity, construction, or administration of the trust.<sup>214</sup> Traditionally, the law of place of trust administration would determine whether the trust is valid.<sup>215</sup> Some courts refer to the law of the situs of the trust as controlling without specifying how that would be identified.<sup>216</sup>

The Restatement (Second) of Conflict of Laws recommends the law of the state with the most significant relationship, which again points to state of trust administration.<sup>217</sup> The state of trust administration is determined by settlor intent, and the trustee's principal place of trust business is one of the factors indicating where the settlor intended.<sup>218</sup> For trust administration issues, the Restatement would choose the state where the trust administration is "most substantially related,"<sup>219</sup> unless the trust agreement has a governing law clause. The UTC has a choice of law provision based on the Restatement approach, and "[u]sually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions."<sup>220</sup>

An unpublished case in Kansas illustrates the various factors that courts consider when applying the UTC standard of governing law and determining a trust's principal place of administration. The Kansas appellate court held that the "principal place of administration" of a trust was in Kansas because (1) the trust was revocable initially and had been created in Kansas by a then-Kansas resident; (2) the decedent's will was probated in Kansas; (3) the decedent's spouse was a resident of Kansas; (4) the trustee was a Kansas resident (and not yet an Oklahoma resident) when the trust's legal issues began; and (5) the trustee had previously submitted to jurisdiction in Kansas by answering and making a

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214. See Jeffrey Schoenblum, *Governing Law Clauses for Trusts*, in 44TH ANNUAL PHILLIP E. HECKERLING INSTITUTE ON ESTATE PLANNING § 1405 (2009).

215. RESTATEMENT (SECOND) OF TRUSTS § 270, reporter's note (1959).

216. See, e.g., *Warner v. Fla. Bank & Trust*, 160 F.2d 766, 773 (5th Cir. 1947) ("Matters of administration are determined by the law of the situs or the seat of the trust, and the domicile of the trustee of intangible personal property including shares of stock is usually the seat of the trust."); *Comm'r v. Brown*, 122 F.2d 800, 802 (3d Cir. 1941).

217. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. c (1971).

218. *Id.* § 267 cmt. c.

219. *Id.* § 272 cmt. d.

220. U.T.C. § 107 cmt. (2010).

counterclaim in the case.<sup>221</sup> Because the testator had designated Kansas as the governing law of the trust, under the Kansas Uniform Trust Code the most important factual question in determining whether Kansas law applied was whether another state had a more significant relationship to the trust.<sup>222</sup> The factors described above, taken together, outweighed the trust's connection to Texas, which was where the decedent died, and to Oklahoma, which was where the trustee lived and maintained contact with the broker for the sole trust asset, an IRA.<sup>223</sup>

Choice of law therefore is made based on several factors, but those factors can rely on the outmoded and vague concepts of situs and principal place of administration. Identifying one place of administration can be problematic, as seen in the *Peierls Trusts* case, where under modern configurations of directed trusts, decision-making can occur in several different states. Although choice of law may seem to be less of a concern in trust issues because of the relative uniformity of state laws in the area,<sup>224</sup> significant variations in underlying issues, such as the definition of family, remain. For example, a trust established by a domiciliary of one state that provides for a beneficiary's spouse may raise choice of law issues if the beneficiary's marriage to his same-sex spouse is valid in his state of residence but not recognized in the trustor's state of domicile.

Issues of jurisdiction and choice of law for multistate trusts are too complex to be fully addressed here,<sup>225</sup> but in resolving both questions, courts often attempt to define one home state for the trust. The UTC continues that approach with its focus on "principal place of administration," which controls jurisdiction over the trust and its parties.<sup>226</sup> As noted by Professor Jeffrey Schoenblum<sup>227</sup> in his discussion of what he calls "the elusive meaning of trust situs," "[l]ayering one undefined and misunderstood phrase on top of another in the process of resolving choice of law controversy is not likely to lead to a rational and predictable set of outcomes."<sup>228</sup>

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221. *Commerce Bank v. Bolander*, No. 94,569, 2007 WL 1041760, at \*1–13 (Kan. Ct. App. Apr. 6, 2007).

222. *Id.* at \*4, \*6.

223. *Id.* at \*5.

224. See SCOTT & FRATCHER, *supra* note 187, § 553 (noting that a number of states that have enacted the UTC).

225. See generally *id.* ch. 14.

226. U.T.C. § 202 (2010).

227. Centennial Professor of Law, Vanderbilt University School of Law.

228. SCHOENBLUM, *supra* note 178, § 17.041[C], at 17–55.

### B. *Prior Washington Law*

Under prior Washington law, a trust had a situs in Washington if the trust document so provided, or if the trust was silent, if the “principal place of administration” of the trust was in Washington.<sup>229</sup> The principal place of administration of a trust was the trustee’s “usual place of business where the day-to-day [trust records] are kept, or the trustee’s residence if the trustee has no such place of business.”<sup>230</sup> No case law in Washington provided any further description of a trust’s “principal place of administration.” The consequences of identifying Washington as the situs of the trust, as recognized by the prior statutes, were limited to determining venue<sup>231</sup> and triggering the change of situs provisions of RCW 11.96A.045. Although there is no reported case law, presumably the classification of Washington as the trust situs would gain access to Washington courts and the application of Washington law.

### C. *Situs Under Washington’s New Law*

When the 2003 Task Force considered the issue, it realized that at the very least Washington’s out-of-date references to where the trust books and records are kept had to be removed. It acknowledged the difficulties recognized by the UTC drafters, but decided that a clear method to establish Washington situs was critical. In particular, Task Force members raised situations where interested parties had connections to Washington and wanted to take advantage of Washington’s liberal statutes allowing nonjudicial agreements to modify trusts. The Task Force recognized that the current reality of multistate contacts had already created the potential for a trust to have multiple states as situs, giving multiple states’ courts’ jurisdiction to hear disputes (assuming personal jurisdiction issues are resolved), and creating complex choice of law issues. Because this situation already existed, the Task Force decided the statutory approach should be to allow a trust’s interested parties to assert Washington as the situs as long as there was a Washington connection. With such a statute, if the parties are in agreement then Washington jurisdiction and choice of law would be enforced, and the controversy when parties to a trust did not agree would not be substantially changed from the existing uncertainty in any

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229. WASH. REV. CODE § 11.96A.030(9) (2011).

230. *Id.* § 11.96A.030(7).

231. *Id.* § 11.96A.050(1); *Carnevali v. Carnevali*, No. 57032-3-I, 2006 WL 2113263 (Wash. Ct. App. July 31, 2006).



controversy involving multiple states.

The 2003 Task Force used a Pennsylvania statute<sup>232</sup> as a model. Pennsylvania adopted the UTC in 2006, but replaced UTC section 108 with this statute. It provides that a trust situs designated in a trust agreement is valid if there is a specified connection with the selected situs.<sup>233</sup> The statute combines the notion of situs with the identification of the county where venue is proper, and refers to situs in a particular county. If there is no choice in the trust agreement, then the statute distinguishes between testamentary trusts and living trusts. Testamentary trusts have a situs in the county where letters were granted to the personal representative of the estate and where letters might have been granted if no letters were granted. If no letters could have been granted, testamentary trusts may have situs in any county where any trustee lives or does business. For a living trust, if the settlor is still alive and was a Pennsylvania resident either when the trust became irrevocable or when a petition is filed with the court, if the trust is still revocable, situs is either the county of the settlor's principal residence or where any of the trustees live or do business. After the domiciliary settlor of a living trust dies, situs can be in any county where a trustee lives or does business.<sup>234</sup> If the settlor of a living trust is not a Pennsylvania domiciliary, then situs can be a county where a trustee has a principal place of business or is a resident, where all or part of the trust administration occurs, or where one or more of the beneficiaries reside.<sup>235</sup> Although the statute refers to counties, it is used as a basis to give jurisdiction to a Pennsylvania court.<sup>236</sup> The statute has been criticized for creating the potential for more than one situs,<sup>237</sup> but that potential exists even without a statute when the standards of establishing situs are so vague.

The 2003 Task Force determined that leaving the issue of situs undefined not only left the current uncertainty in place but also created problems for trust beneficiaries and trustees who agreed on the desired situs but were uncertain as to how to establish that situs. Establishing

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232. 20 PA. CONS. STAT. ANN. § 7708 (West Supp. 2013).

233. *Id.* Connections sufficient to validate a choice of situs include the residence or principal place of business of a trustee, the occurrence of all or a part of the trust administration, or the residence of one or more of the beneficiaries.

234. *Id.* § 7708(2).

235. *Id.* § 7708(3).

236. *E.g., In re Trust of Pennington*, 219 A.2d 353 (Pa. 1966) (Pennsylvania court properly exercised jurisdiction over trust accounting by Pennsylvania bank which was trustee of inter vivos trust created by settlor who was a New Jersey resident); SCHOENBLUM, *supra* note 178, at 17–42.

237. SCHOENBLUM, *supra* note 178 at 17–42.

trust situs not only aids in jurisdiction but can also affect choice of law.<sup>238</sup> Also, if a statute defined situs, protection can be provided for parties who would be prejudiced by the assertion of jurisdiction in a particular state. It began with the Pennsylvania statute as a model but expanded the procedure and clarified that the provisions related to the trust's relationship with the state of Washington rather than specific counties.

Washington's new statute regarding situs is applicable to all trusts, regardless of the date of execution of the trust.<sup>239</sup> There are now various ways for a trust to qualify for Washington situs, all of which are dependent upon the language in the trust document, the type of trust, and the location of beneficiaries, the trustee, the trustor, and trust real property.

The first way to qualify for Washington situs is where the trust document designates Washington as the trust's situs or Washington law as the governing law of the trust. If this is the case, then only one connection to Washington is required to establish Washington situs.<sup>240</sup> The requirement of a connection is satisfied where the trust possesses one of several allowable connections to Washington: (1) a resident trustee or a trustee with a place of business in Washington; (2) more than an insignificant aspect of trust administration occurring in Washington; (3) a resident trustor at the creation of the trust or at the time the trust became irrevocable; (4) at least one resident qualified beneficiary; or (5) Washington real property as an asset.<sup>241</sup>

If the trust document does not designate Washington as the trust's situs or Washington law as the governing law of the trust, then the trustee may qualify for Washington situs by registering the trust as a Washington trust, but only if one of the above-described connections exists.<sup>242</sup> Registration of the trust includes filing a statement with the clerk of the appropriate Washington county.<sup>243</sup> The appropriate county for filing includes several possibilities: (1) if the trust is a testamentary trust, the county where the will is being administered or was completed;

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238. *Id.* at 17–42 n.180 (recommending that a trustee “take affirmative steps to establish unambiguously a trust situs of administration in a state such as California [that does not require court supervision of testamentary trusts]”).

239. H.B. 1051, 62d Leg., Reg. Sess. § 40 (Wash. 2011).

240. WASH. REV. CODE § 11.98.005(1) (2012).

241. *Id.* This list is similar to but modified from the list of connections in the Pennsylvania statute.

242. *Id.* § 11.98.005(2).

243. *Id.*

(2) the county where a qualified beneficiary resides; (3) the county where the trustee resides or has a place of business; or (4) the county where a real property asset is located.<sup>244</sup> The statement must include the contact information for the trustee, the date of the trust, the name of the trustor, the name of the trust, and the applicable “connection” requirement.<sup>245</sup> Within five days from filing the statement, the trustee must deliver notice of the filing to each qualified beneficiary.<sup>246</sup> The notice affords each recipient the opportunity to object to the registration as a Washington trust.<sup>247</sup> If no recipient objects to the registration within thirty days from the initial filing of the statement, then such registration is deemed the equivalent of an order entered by a court declaring that the situs of the trust is Washington.<sup>248</sup>

If the trust document does not designate Washington as the trust’s situs or Washington law as the governing law of the trust, and if the trustee does not register the trust as a Washington trust, then a trust may still qualify for a Washington situs if the situs has not been already determined by judicial proceeding in another jurisdiction, and if additional certain requirements are met, depending upon the type of trust.

If the trust is a testamentary trust, the situs is Washington if the trustor’s will was admitted to probate in Washington, or if no probate occurred, either (1) a qualified beneficiary resides in Washington, (2) the trustee resides in or has a place of business in Washington, or (3) Washington real property is held in the trust.<sup>249</sup>

If the trust is an inter vivos irrevocable trust and the trustor is still living, then the situs is Washington if Washington is the trustor’s domicile or a trustee resides in or has a place of business in Washington.<sup>250</sup> This provision is modeled on the Pennsylvania statute but varies in that the situs can be established while the trust is still revocable without having to initiate a court proceeding. This is important in Washington because it allows the interested parties to qualify for Washington situs and use the Washington nonjudicial agreement procedures.<sup>251</sup>

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244. *Id.* § 11.96A.050.

245. *Id.* § 11.98.005(2)(a).

246. *Id.* § 11.98.005(2)(b).

247. *Id.*

248. *Id.* § 11.98.005(2)(c).

249. *Id.* § 11.98.005(3)(a).

250. *See id.* § 11.98.005(3)(b)(i).

251. *Id.* § 11.96A.220. The situs provision was amended in the 2013 Legislation to clarify this

If the trust is an inter vivos trust and the trustor is deceased, then the situs is Washington if the trustor was domiciled in Washington at the time the trust became irrevocable and one of several requirements is satisfied: (1) the trustor's will was admitted to probate in Washington; (2) a qualified beneficiary resides in Washington; (3) a trustee resides in or has a place of business in Washington; or (4) Washington real property is an asset of the trust.<sup>252</sup>

If the situs of a trust is not determined under any of the above-described methods, then its situs may be determined judicially, but not by a non-judicial binding agreement.<sup>253</sup> The trustee may petition the superior court of the appropriate county, which may be one of several options: (1) the county where a qualified beneficiary resides; (2) the county where the trustee resides or has a place of business; or (3) the county where a real property asset is located.<sup>254</sup> In the petition, the trustee must assert that the trust has met at least one of the connection requirements described above.<sup>255</sup> For the purposes of the judicial proceeding, the procedural rules of RCW 11.96A.080–200 must be followed, which essentially requires that the trustee provide service of a summons and a copy of the filed petition to all parties with an interest in the trust and in the determination of situs for the trust.<sup>256</sup>

In essence, the statutory scheme created by the 2003 Task Force allows situs to be designated in order of priority. First, the trustor can select situs as Washington, as long as there is a Washington connection. Second, if the trustor has not designated situs, the trustee can choose Washington as the situs by registering the trust, subject to having a Washington connection and subject to any objections raised by the beneficiaries. If neither the trustor nor the trustee has established Washington as the trust situs, then situs can be established under certain fact patterns, and if none of those fact patterns apply, the court can choose Washington as trust situs, as long as there is a Washington connection.

The 2003 Task Force recognized that this was an innovative approach to situs. It expands on Pennsylvania's liberal approach by allowing the trustee to select situs, and in default of prior methods, allowing a court to impose Washington situs. The philosophy was to open Washington

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point. S.B. 5344, 63d Leg., Reg. Sess. § 9 (Wash. 2013).

252. WASH. REV. CODE ANN. § 11.98.005(3)(b)(ii) (West 2013).

253. *Id.* § 11.98.005(3)(c).

254. *Id.* § 11.96A.050.

255. *Id.*

256. *Id.* § 11.96A.100.

courts and the application of Washington law to all trusts with a Washington connection. It does not resolve the problem of competing claims of situs where the parties disagree, but that problem exists independently of the statute and is likely unresolvable in light of the multistate nature of current trust business and the expansion of jurisdiction and choice of law considerations. The statute does give a level of certainty to parties who agree on Washington as the appropriate situs and gives parties who are in disagreement specific tests of trust situs and an opportunity for judicial resolution. Ultimately, the 2003 Task Force believed that multiple possibilities of trust situs is inevitable and growing, and that the law should, instead of clinging to the outdated idea that a trust is an entity with one home, recognize that a trust is a web of relationships, jurisdiction should be expansive and choice of law should focus on the interests at stake.

#### IV. REPRESENTATION

In some circumstances, the common law allows living competent persons who are interested in a trust or estate to represent other relevant parties with similar interests. This concept, which includes the doctrine of virtual representation, limits the number of necessary parties when resolving disputes, and is a tremendous benefit to parties wishing to avail themselves of Washington's nonjudicial trust and estate dispute resolution process.<sup>257</sup> Washington codified portions of the common law of virtual representation in the 1984 Act, and has subsequently amended those provisions. The UTC included codification of representation as well. The scope of the Washington and UTC provisions vary, however. This section describes the various scenarios where representation can be used, discusses the evolution of the Washington provisions, compares Washington provisions with the UTC, and identifies some remaining interpretive issues with the Washington statute. This section also proposes an amendment to the Washington statute for further clarification.

##### A. *General Overview*

Representation allows for a living person to act on behalf of another

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257. *Id.* § 11.96A.220; see Bruce P. Flynn et al., *Nonjudicial Dispute Resolution Agreements in Trusts and Estates—The Washington Experience and a Proposed Act*, 20 ACTEC NOTES 138, 140 (Spring 1994) (“[Virtual representation] can greatly streamline the process by eliminating the procedural complexities involved in appointing guardians and guardians ad litem, and can significantly reduce costs.”).

individual or a potentially interested party in a dispute or non-judicial matter, such as by receiving notice or giving consent on behalf of the represented party. There are generally three different categories of representation, namely, virtual representation, fiduciary representation, and court-appointed representation.<sup>258</sup> Virtual representation permits, in certain situations, living beneficiaries to represent unborn, minor, or unascertained future beneficiaries, and in some cases, living, adult beneficiaries who have interests in the trust similar to the interests of the person representing them.<sup>259</sup> Fiduciary representation permits, in certain situations, trustees or personal representatives to represent beneficiaries, guardians to represent wards, and attorneys-in-fact to represent principals. Court-appointed representation permits a guardian ad litem or another third-party representative appointed by the court to represent specific beneficiaries for specific purposes.

Virtual representatives do not owe fiduciary duties to their represented parties and are not subject to court review. There is no liability ascribed to a virtual representative if, after binding action is taken by the representative, the represented party does not like or approve of the result.<sup>260</sup> The concept behind virtual representation has always been that the representing party's self-interested involvement will adequately represent the interests of the represented party, as long as their interests in the matter align.<sup>261</sup> Instead of imposing liability on the representative, the virtual representation is generally inapplicable if the interest represented was not sufficiently protected.<sup>262</sup> Whether virtual representation is adequate rests upon whether the representative acted in "hostility to the interest" of the person represented.<sup>263</sup> Hostility can be shown by the representative's affirmative conduct demonstrating adversity to the represented party's interests.<sup>264</sup> The more modern interpretation of "hostility" in the context of virtual representation is the existence of a conflict of the economic interests of the representative and

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258. *See, e.g.*, U.T.C. Art. III; RESTATEMENT (FIRST) OF PROP. §§ 181–86 (1936).

259. A classic example of virtual representation is: a trust is established for Ann for life, remainder to Ann's children, but if any of Ann's children die before her, leaving children, then the children of the deceased child would take their parent's share. Ann has one son, Tom. Tom can virtually represent his children's contingent interests in the trust because Tom's children's interest is the same as Tom's.

260. RESTATEMENT (FIRST) OF PROP. § 185 cmt. b.

261. *Id.* §§ 181, 183, 185 cmt. c.

262. *Id.* § 185 cmt. e.

263. *Id.*

264. *Id.* § 185 cmt. d.

the represented party.<sup>265</sup> The disqualifying hostility (or conflict) is normally to be determined at the time that representation would otherwise occur, since the use of virtual representation is essentially a jurisdictional concept.<sup>266</sup> It is therefore imperative that the determination of whether a conflict exists between the representative and the represented party or parties be made to ensure that the representation is effective and correspondingly, that the resolution of the dispute is binding, or the delivery of notice or information is proper.

Liability in the context of fiduciary representation and court-appointed representation is different. Representation by a fiduciary is subject to the principles of fiduciary law. Therefore, when acting as a representative, such a fiduciary must meet fiduciary standards of care, or risk suit for breach of fiduciary duty by or on behalf of the principal.<sup>267</sup> Liability in the context of court-appointed representatives is also different because they are subject to court review,<sup>268</sup> and are appointed with specific powers according to statutory schemes which may provide for liability (or a release therefrom).

## *B. Prior Washington Law*

### *1. Fiduciary Representation*

While not specifically codified in Washington, Washington law has permitted representation of persons by their fiduciaries through either the application of the common law or through other chapters of RCW Title 11. Depending on the scope and type of fiduciary relationship, fiduciaries have the general duty to administer or manage assets and affairs for the benefit of the persons they represent.<sup>269</sup> For example, a personal representative is charged with the duty to administer the estate for the benefit of the estate beneficiaries.<sup>270</sup> In doing so, the personal representative may act as the representative for the estate's beneficiaries, in the context of the collection and management of estate

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265. 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, 326, 337–38 (2008).

266. *Id.* at 375.

267. *Id.* at 359–63.

268. *See, e.g.*, WASH. REV. CODE § 11.96A.070(3) (2012).

269. *See, e.g., id.* § 11.48.010.

270. *Id.* § 11.48.010; *In re Estate of Larson*, 103 Wash. 2d 517, 694 P.2d 1051 (1985); *In re Winslow's Estate*, 30 Wash. App. 575, 636 P.2d 505 (1981).

assets<sup>271</sup> or acting as a party in a lawsuit on behalf of the estate.<sup>272</sup> In addition, a guardian of the estate and guardian of the person of an incapacitated person has the ability to stand in the shoes of the incapacitated person, and, with court oversight, manage their assets and their health and welfare.<sup>273</sup> Further, a principal has always had the ability to grant an attorney-in-fact any number and types of powers to act on his or her behalf.<sup>274</sup>

## 2. *Court-Appointed Representation*

Washington law has always recognized the ability to have a court-appointed guardian ad litem to represent the interests of a party when necessary.<sup>275</sup> However, the adoption of the 1984 Act added the ability to appoint a “special representative” to represent beneficiaries of trusts and estates in disputes where the trust or estate beneficiaries are minors, incapacitated, unborn, or unascertained.<sup>276</sup> The “special representative” may be appointed by the court upon the request of the trustee or personal representative involved in a dispute that is subject to resolution under RCW 11.96A.<sup>277</sup> The special representative is unique in that he or she may only enter into a non-judicial binding agreement on behalf of the represented party under RCW 11.96A, and may not represent a party in the context of an active litigation dispute for which a guardian ad litem would traditionally serve.<sup>278</sup> The “special representative” is required to be an individual with specialized training in trusts and estates matters, and may be used instead of the traditionally court-appointed guardian ad litem. While the special representative is appointed by the court, the decisions made by the special representative are not subject to the review of the court unless the special representative specifically requests such review in the context of a release from serving.<sup>279</sup> However, the

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271. WASH. REV. CODE § 11.48.020. *See generally id.* § 11.48.

272. *See, e.g.,* Griffith v. James, 91 Wash. 607, 158 P. 251 (1916).

273. *See, e.g.,* WASH. REV. CODE § 11.92.060. *See generally id.* §§ 11.88, 11.92.

274. *See, for example,* RCW 11.94.050, where if the principal does not enumerate specific powers, but creates a general durable power of attorney, the attorney-in-fact has “all powers of absolute ownership of the principal” except certain estate planning related powers. *See generally* § 11.94.

275. *See* §§ 11.88.090, 11.96A.160, 4.08.050, 4.08.060.

276. This section has been restated and moved to RCW chapter 11.96A (2012). *Id.* § 11.96A.250 (original version at ch. 149, 1984 Wash. Sess. Laws § 61, 648, 681–82 (originally codified at WASH. REV. CODE § 11.96.170 (1985))).

277. *Id.* § 11.96A.250.

278. *Id.*

279. *Id.* § 11.96A.240.



authority of a court appointed guardian ad litem may supersede that of a special representative.<sup>280</sup>

### 3. *Virtual Representation*

Virtual representation was first codified in Washington in the 1984 Act<sup>281</sup> and was then restated and moved to the new RCW 11.96A in 1999, as part of the Trust and Estate Dispute Resolution Act (TEDRA).<sup>282</sup> The comments to the 1984 Act and of the TEDRA drafting committee explain the adoption of the virtual representation section as supplemental to the common law, stating specifically:

This enactment is meant to be supplemental to the common law doctrine. This enactment is not intended to prevent the application of the common law doctrine.

This section and the Doctrine of Virtual Representation provide rules that simplify the requirements for notifying the possible beneficiaries of future interests, particularly unborn and uncertain beneficiaries. *See* Restatement of the Law of Property, sections 180-186 (1936).<sup>283</sup>

Virtual representation was a critical part of an innovation introduced in Washington's 1984 Trust Act, allowing parties interested in a trust or estate to resolve issues nonjudicially.<sup>284</sup> Traditionally, resolution of these types of issues required court proceedings and the appointment of a guardian ad litem to represent the interests of minor, unborn, and unascertained beneficiaries.<sup>285</sup> In order to reduce court congestion and save time and money for the interested parties, the 1984 Trust Act authorized the use of nonjudicial binding agreements among all interested parties.<sup>286</sup> If the agreement or a memorandum of the

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280. *Id.* § 11.96A.160(2).

281. Ch. 149, sec. 54, § 11.96.110, 1984 Wash. Sess. Laws 648, 680 (originally codified at WASH. REV. CODE § 11.96.110 (1985)).

282. Ch. 42, sec. 305, 1999 Wash. Sess. Laws 177, 185–86 (codified as amended at WASH. REV. CODE § 11.96A.120 (2012)).

283. REAL PROP., PROBATE, & TRUST SECTION, WASH. STATE BAR ASS'N, *Comments to the Trust and Estate Dispute Resolution Act*, WSBARPPT.COM, <http://www.wsbarppt.com/comments/tedra99.pdf> (last visited Sept. 16, 2013) [hereinafter *TEDRA Comments*].

284. Ch. 149, sec. 54, § 11.96.110, 1984 Wash. Sess. Laws 648, 680 (current version at WASH. REV. CODE §§ 11.96A.120, 11.96A.220 (2012)); TRUST TASK FORCE, WASH. STATE BAR ASS'N, *Comments on the 1984 Revision of the Washington Trust Act*, WSBARPPT.COM, available at <http://www.wsbarppt.com/comments/tra85.pdf> (see section sixty-one, discussing RCW 11.96.170).

285. Flynn et al., *supra* note 257, at 138.

286. *See* Ch. 149, sec. 54, § 11.96.110, 1984 Wash. Sess. Laws 648, 680 (current version at WASH. REV. CODE §§ 11.96A.120, 11.96A.220 (2012)).

agreement is filed with the court, then the agreement has the force of a court order.<sup>287</sup> In order for these nonjudicial agreements to bind all parties, minor, unborn, and unascertainable parties had to have representation. That issue was resolved by the use of virtual representation when available, and if not available, by the appointment of a special representative to represent the parties unable to represent themselves.<sup>288</sup>

As codified in Washington, there have historically been three permissible types of virtual representation of trust beneficiaries by other trust beneficiaries. The first type is “horizontal” virtual representation, which allows for a living adult member of a class of beneficiaries to represent all unborn or unascertainable members of the same class.<sup>289</sup> For example, a trustor creates a trust that provides a lifetime income interest to his spouse, and after his spouse’s death, the remainder passes equally to his then living children. The devise to his “then living children” is a class gift in trust. If the trustor has only one living adult child at the time that representation is determined, then that child may virtually represent all of the yet unborn children of the trustor. In the context of horizontal representation, no living, competent, adult beneficiaries can be virtually represented. This subsection was essentially a codification of common law representation of unborn persons.<sup>290</sup>

The second type is “vertical” virtual representation of the future beneficiaries of an interest in trust where the future beneficiaries bear some relation to the beneficiary who would be the representative.<sup>291</sup> Virtual representation, in this case by a current trust beneficiary, requires that the represented parties be a surviving spouse or domestic partner, distributee, heir, issue, or other kindred of the beneficiary. In all cases representation may occur only if those future beneficiaries who are being represented have the “same interest” in the trust as the initial beneficiary who is to act as the representative.<sup>292</sup> For example, a trustor creates a trust giving a lifetime income interest in trust to his child, and at his

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287. See Ch. 149, sec. 61, §11.96.170(4), 1984 Wash. Sess. Laws 648, 682 (current version at WASH. REV. CODE § 11.96A.230); see also Flynn et al., *supra* note 257, at 142.

288. Flynn, et al., *supra* note 257, at 141.

289. See WASH. REV. CODE § 11.96A.120(3)(a); Ch. 149, sec. 54, § 11.96.110(1), 1984 Wash. Sess. Laws 648, 680; S.B. 5344, 63d Leg., Reg. Sess. § 5(b) (Wash. 2013).

290. RESTATEMENT (FIRST) OF PROP. § 183 (1936).

291. See WASH. REV. CODE § 11.96A.120(3)(b); Ch. 149, sec. 54, § 11.96.110(2), 1984 Wash. Sess. Laws 648, 680; S.B. 5344 § 5(7).

292. WASH. REV. CODE § 11.96A.120(3)(b).

child's death, his child's spouse will also have a lifetime income interest in trust. At the death of the child's spouse, the remainder in trust will pass to the then living children of the child and his spouse. Assume that the trustor's child and the child's spouse are both alive, and that they have two adult children. The trustor's child can virtually represent his spouse because they both have the same lifetime income interest in the trust. The trustor's child cannot virtually represent his living, adult children because their interests differ: the child has a lifetime income interest, but the children have a vested remainder interest. Note that through the use of this section, a living, competent adult may be virtually represented. This subsection was a codification of a common law rule of virtual representation.<sup>293</sup>

The third type is "vertical" virtual representation of successive future interests, without any requirement that the represented party have a particular relationship to the representative. Virtual representation in this case allows current living contingent remainder beneficiaries (or a living member of the class of contingent remainder beneficiaries) to represent future successive contingent remainder beneficiaries who take the "same interest" in trust upon a successive future event.<sup>294</sup> For example, a trustor creates a trust that provides a lifetime income interest to his spouse, and after his spouse's death, the remainder passes equally to his then living children. If he has no then living children, then the remainder passes equally to his sibling's then living children. If no such children are then living, the remainder passes to a charity. Through the use of this subsection, the living, competent adults who are children of the trustor's siblings can represent the interests of the charity. This subsection goes beyond what was contemplated by common law, which traditionally only permitted representation of living persons if their interest was created by indefinite language, such as "heirs," "next of kin," or "surviving spouse."<sup>295</sup> This subsection followed a modern trend which started with the enactment of a similar broad statute in New York in 1967.<sup>296</sup>

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293. RESTATEMENT (FIRST) OF PROP. §181(b).

294. See WASH. REV. CODE § 11.96A.120(3)(c); Ch. 149, sec. 54, § 11.96.110(3), 1984 Wash. Sess. Laws 648, 680; S.B. 5344 § 5(8).

295. See RESTATEMENT (FIRST) OF PROP. § 181.

296. N.Y. SURR. CT. PROC. ACT LAW § 315 (Consol. 2013). Cf. Begleiter, *supra* note 265, at 323–24.

### C. *Representation Under the Uniform Trust Code*

Representation was codified in Article 3 of the UTC. Section 301 of the UTC defines the scope of representation as it applies to the entire code. In section 301, the UTC makes clear that delivering notice to a representative on behalf of the represented beneficiary is effective, except in cases where civil procedure rules require notice be delivered to the actual beneficiary to be represented.<sup>297</sup> The UTC also makes clear that the consent of the representative is binding on the represented party, unless an objection is raised prior to the consent being given (discussed further below).<sup>298</sup>

#### 1. *Limitations to Representation*

The UTC codified various limitations to representation. Throughout Article 3, the UTC specifically provides for the traditional bar<sup>299</sup> to representation, which precludes representation where a conflict of interest exists between the representative and the represented party.<sup>300</sup> The determination of a conflict of interest is not based upon the nature of the beneficiaries' technical interests in trust, but rather upon an analysis of the facts of each case, the economic impacts of the matter at hand, and the relationships of the parties.<sup>301</sup> The determination of a conflict is situational and, if one exists, nullifies the effectiveness of the representation.<sup>302</sup>

Another limitation provided for in the UTC is the ability of a represented party to object to and nullify the representation before consent is given.<sup>303</sup> Although the possibility of a beneficiary objecting to representation could undercut the flexibility of virtual representation, the ability to object is a necessary provision to protect due process rights of beneficiaries.<sup>304</sup> For example, in *Barber v. Barber*,<sup>305</sup> a guardian ad litem was appointed to represent the unborn and unascertained heirs of the

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297. U.T.C. § 301 & cmts (2010).

298. *Id.* § 301.

299. RESTATEMENT (FIRST) OF PROP. §§ 181–186.

300. U.T.C. §§ 302–304. This codifies the principle in the Restatement that representation is not adequate if the representative is hostile to the represented party. *See* RESTATEMENT (FIRST) OF PROP. § 181.

301. *See* U.T.C. § 304 cmts. (citing RESTATEMENT (FIRST) OF PROP. § 185).

302. *See generally id.* §§ 302–304 cmts.

303. *Id.* § 301.

304. *See id.* § 301 cmts. (citing *Barber v. Barber*, 837 P.2d 714 (Alaska 1992)).

305. 837 P.2d 714.

trustor in the context of a dispute regarding the sale of trust property. The petitioner was a competent adult and contingent remainderman of the trust.<sup>306</sup> In the course of various court hearings on the matter, the guardian ad litem sought to expand the authority of his representation to virtually represent all “non-income beneficiaries” of the trust, including the petitioner.<sup>307</sup> The Alaska Supreme Court held that, in general, Alaska statutes specifically required that notice of hearings regarding trust matters be given to “interested parties,” including an adult, competent contingent beneficiary.<sup>308</sup> In addition, the Court held that the trial court had no statutory authority to expand the scope of representation of the guardian ad litem to those beneficiaries beyond unborns and unknowns, because the petitioner was a known and competent, adult beneficiary.<sup>309</sup> The *Barber* case does not specifically address whether virtual representation of a competent, adult beneficiary is in and of itself a violation of due process.

Another set of limitations in the UTC relates specifically to the trustor. First, the trustor may not represent and bind beneficiaries in the context of trust terminations or modifications.<sup>310</sup> This provision was added to the UTC in 2004, to assuage concerns that the ability of the trustor to garner such a power may result in inclusion of irrevocable trusts established by the trustor in his or her gross estate for federal estate tax purposes.<sup>311</sup> Second, an incapacitated trustor may be represented by any relevant representative described in UTC Article 3, except that such representative may not act to revoke the trustor’s revocable trust or terminate an irrevocable trust established by the trustor without specific authority or court order.<sup>312</sup> This provision supports the policy illustrated by provisions in the UTC that protect the trustor’s intentionally created estate plan.<sup>313</sup>

## 2. *Virtual Representation*

The UTC provides for virtual representation by permitting those with a substantially identical interest in the trust to represent a minor,

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306. *Id.*

307. *Id.* at 716.

308. *Id.* at 717.

309. *Id.*

310. U.T.C. § 301 (2010).

311. *Id.* §§ 301 cmts., 411 cmts.

312. *Id.* § 301.

313. *Id.* §§ 411, 602, 301 cmts.

incapacitated, or unborn beneficiary, or a beneficiary whose identity or location is unknown and not reasonably ascertainable.<sup>314</sup> The comments to UTC section 304 describe “substantially identical interests” as follows:

Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor’s children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interest is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remainderman may be able to represent alternative remaindermen with respect to approval of a trustee’s report but not with respect to interpretation of the remainder provision or termination of the trust.<sup>315</sup>

The UTC does not explicitly distinguish between horizontal or vertical representation in its virtual representation section; however, the comments to section 304 indicate that this section is meant to apply in a vertical representation context.<sup>316</sup> Note, however, that the UTC does not provide for virtual representation of a competent adult or entity beneficiary, even in the virtual representation context. However, the UTC makes clear that its provision is intended to supplement rather than override common law, so such representation should be available if consistent with a state’s common law.<sup>317</sup>

Virtual representation under the UTC also permits a parent to represent and bind his or her minor child, which was adapted from the Uniform Probate Code.<sup>318</sup> It also provides for the ability of a holder of a general testamentary power of appointment to represent the persons whose interests in the trust are subject to that power as either takers in default or as permissible appointees.<sup>319</sup>

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314. *Id.* § 304.

315. *Id.* § 304 cmts.

316. *Id.*

317. *Id.* § 303; *see also* RESTATEMENT (FIRST) OF PROP. § 181 (1936). For example, under the Restatement, if property has been given to *C* for life, remainder to *C*’s heirs, and *C* has a son and a brother, *C*’s son can virtually represent *C*’s brother. *C*’s son would be *C*’s heir if *C* died immediately but *C*’s brother would be heir if *C*’s son predeceased *C*. RESTATEMENT (FIRST) OF PROP. § 181 cmt. c, *illus.*

318. U.T.C. §§ 303(6), 303 cmts.

319. *Id.* §§ 302, 603; *see also* RESTATEMENT (FIRST) OF PROP. § 181(c) (1936 & Supp. 1948).

### 3. *Fiduciary Representation*

The UTC provides for fiduciary representation by permitting (1) a conservator or guardian to represent and bind the estate or person that the conservator or guardian controls; (2) a guardian to represent and bind the estate of an incapacitated person if a conservator has not been appointed; (3) an agent having authority to act with respect to the particular question or dispute to represent and bind the principal; (4) a trustee to represent and bind the beneficiaries of the trust; and (5) a personal representative to represent and bind persons interested in the estate.<sup>320</sup> The UTC recognizes that fiduciary representation has long been a part of the law.<sup>321</sup> The main modification to longstanding law that was made by the UTC was in section 303(2), which blends the traditionally separate duties of a guardian and conservator.<sup>322</sup>

### 4. *Court-Appointed Representation*

The UTC provides for court-appointed representation by allowing the court to appoint a representative to act on behalf of a minor, incapacitated, or unborn beneficiary, or a beneficiary whose identity or location is unknown and not reasonably ascertainable where the court believes that no other representation is available or adequate.<sup>323</sup> The contemplated court-appointed representative is a different role than the typical guardian ad litem.<sup>324</sup>

### E. *Washington's Adaptation of Representation in 2011 and 2013*

RCW 11.96A.120 was significantly revised by the 2011 and 2013 Legislation to fill various gaps in Washington's approach to representation and to modernize the statute. The collective changes have reorganized and clarified the section language, broadened the applicability of virtual representation, confirmed fiduciary representation, and refined court-appointed representation.

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320. U.T.C. § 303(1)–(5).

321. *Id.* § 304.

322. *Id.* §§ 303(6), 303 cmts. In Uniform Act parlance, a guardian deals with personal issues such as health care and residential placement, and a conservator handles an incapacitated person's financial affairs. *See* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 102 (1997). In Washington, the terms “guardian of the person” and “guardian of the estate” are used. *See* WASH. REV. CODE § 11.88 (2012).

323. U.T.C. § 305.

324. *See id.* § 305 cmt.

### 1. *Limitations on Representation*

First and foremost, all of the Washington representation subsections provide that, as a condition precedent to the representation, the interests of the representative and the represented party may not be in conflict.<sup>325</sup> Next, the 2013 Legislation incorporated much of UTC section 301, verbatim. It incorporated UTC section 301(a) and (b), which validate the concept of substitute notice and the ability of the representative to give binding consent.<sup>326</sup> The new statute also included, directly from the UTC, sections that clarify when virtual representation of or by a trustor is not permitted.<sup>327</sup> For example, the statute now indicates that the provisions of RCW 11.96A.120 cannot supersede the rules of RCW Chapters 11.88 or 11.92 related to the representation of an incapacitated person, where court supervision already exists via a court appointed guardian.<sup>328</sup> Representation of a trustor is also subject to RCW 11.103.030, which requires court approval for the guardian to represent a trustor in amending or modifying the trust.<sup>329</sup> In addition, the new statute provides that a trustor may not represent any beneficiary in the context of a trust modification or termination.<sup>330</sup>

Also taken verbatim from the UTC, the new statute specifically gives the represented party the ability to object to representation prior to the representative's consent.<sup>331</sup> Under Washington law, both historically and in the current revised statute, there are statutorily permitted situations when adult beneficiaries may be virtually represented without the overt requirement to provide notice of a hearing on the matter in question, of the virtual representation itself, or to require the beneficiary's involvement in a non-judicial matter. For example, pursuant to RCW 11.96A.030(5), the "parties" who must be joined for an effective non-judicial binding agreement related to a trust matter would include the trustor, if living, the trustee, the trust beneficiaries, and where applicable, the virtual representative of any of those described persons if "the giving of notice to [the representative] would meet the notice requirements of RCW 11.96A.120."<sup>332</sup> Unlike in *Barber*,<sup>333</sup> RCW

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325. See generally WASH. REV. CODE ANN. § 11.96A.120(4) (West 2013).

326. *Id.* § 11.96A.120(1)–(2).

327. S.B. 5344, 63d Leg., Reg. Sess. § 5(3) (Wash. 2013); U.T.C. § 301(c)–(d).

328. WASH. REV. CODE § 11.96A.120(3)(b) (2012).

329. *Id.* §§ 11.96A.120, 11.103.030.

330. *Id.* § 11.96A.120(3)(a).

331. S.B. 5344, 63d Leg., Reg. Sess. § 5(1)–(2) (Wash. 2013); U.T.C. § 301(a)–(b).

332. WASH. REV. CODE § 11.96A.030(5)(i).

333. *Barber*, 88 W. Wash. L.J. 101 (2013).



11.96A.120(1) specifically validates the concept of constructive notice to a represented party, provided, of course, that a conflict of interest does not exist between the representative and the represented party. Therefore, the represented party does not need to be a party to the non-judicial agreement and may not ever know that it occurred.<sup>334</sup> The section allowing a represented party to object does not override the ability of the representative to accept notice on behalf of the represented party and does not create additional notice requirements.

## 2. *Fiduciary Representation*

The new subsections of RCW 11.96A.120(4)(a) through (e), which were adapted from the UTC, specifically codify fiduciary representation in Washington, permitting fiduciaries with specific statutory authority (e.g., a guardian) or with specifically granted authority (e.g., an agent acting under a power of attorney) to virtually represent an individual. The codification of fiduciary representation assists practitioners from a practical perspective,<sup>335</sup> and is not a significant change from prior Washington law.<sup>336</sup> However, new RCW 11.96A.120(4)(b), which was

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333. 837 P.2d 714 (Alaska 1992).

334. *Cf.* Begleiter, *supra* note 265, at 337–38, 369. This article analyzes case law in New York, a jurisdiction that specifically authorizes the virtual representation of competent adult contingent trust beneficiaries. While the author indicates that courts are hesitant to apply virtual representation in these cases, the courts in New York have not invalidated this concept, which was enacted in New York in 1967. The cases reviewed by the author indicate that the courts scrutinize the potential economic-based conflicts of interest between the beneficiaries to determine whether virtual representation of a living contingent beneficiary is permissible. The author also purports that review of the conflict of interest at all times, rather than at the beginning of a matter, serves to bolster the effectiveness of this type of virtual representation.

335. For example, this section also now clearly permits any required notice for a RCW Title 11 matter (e.g., the notice of the pendency of probate) where a fiduciary estate holds an interest (e.g., a trust established under a will) to be given to the fiduciary as long as there is no conflict between the fiduciary and the beneficiaries. Correlating language was also added to RCW 11.28.237, which requires notice of the opening of a probate to be sent to the heirs, devisees, or legatees of the decedent within twenty days of appointment of the personal representative. In another example, RCW 11.96A.120(4)(c) requires that the ability of an attorney-in-fact to act as virtual representative of his or her principal must be specifically granted in the durable power of attorney. While many practitioners include enumerated powers that are granted to the attorney-in-fact in their durable power of attorney form, RCW Chapter 11.94 does not describe the specific types of powers that are, by default, included in a durable power. The specific requirement regarding representation therefore provides some guidance to practitioners regarding content in light of the broad grant of authority described in RCW Chapter 11.94.

336. *See* U.T.C. § 303 cmt. (“This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law.”); *see also* WASH. REV. CODE § 11.96A.120 (1999); *TEDRA Comments, supra* note 283, § 305.

added by the 2013 Legislation, provides that the guardian of the person of an incapacitated beneficiary may bind and represent such person if a guardian of the person's estate has not been appointed. This statute expands the authority of a guardian of the person under RCW Chapters 11.88 and 11.92. However, the adoption of this subsection provides yet another method for representation to streamline the resolution of matters in a cost-effective way. For example, an individual may have chosen to create a revocable living trust with all of her assets to avoid the need to appoint a guardian of her estate upon future incapacity. If the individual later becomes incapacitated while all of her assets are in trust, she may have a guardian of her person appointed to care for her health needs. If an issue involving the assets held in the trust were to arise, absent any other available representative, the guardian of her person may represent her instead of requiring the new appointment of a guardian of her estate to act on her behalf.

### 3. *Virtual Representation*

Modifications were made to the Washington virtual representation statute in 2011 and 2013 to incorporate UTC provisions and to clarify the scope of the Washington approach. Further clarification would be beneficial, however. This section first describes the current Washington statute and then makes a proposal for further amendment.

#### a. *Parent for Child*

New section RCW 11.96A.120(4)(f) permits parents to accept notice on behalf of minor and unborn children who do not have court-appointed guardians. Initially omitted from the statute in 2011, this provision was added in the 2013 Legislation to further streamline the utility of virtual representation and to incorporate UTC section 303(f). This provision may be unavailable in some circumstances in Washington, because if community property is contributed to a trust, both parents would be considered trustors of the trust. The trustor is prohibited from representing a beneficiary in the context of a termination or modification of trust.<sup>337</sup> In addition, representation by the parent-trustor, while not determinative, may indicate retained control of gifted property by the parent under I.R.C. section 2036.<sup>338</sup>

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337. S.B. 5344, 63d Leg., Reg. Sess. § 5(3)(a) (Wash. 2013).

338. See I.R.C. § 2036 (2006).

*b. Representation of Minor, Unborn, Unascertainable, and Missing Beneficiaries*

New section RCW 11.96A.120(5) includes a provision that is identical to UTC section 304. It greatly expands the utility of virtual representation in Washington. First, it permits living adult beneficiaries to virtually represent living minor beneficiaries and unborn, unascertainable, and known but unlocatable beneficiaries if they have “substantially identical” interests. Practically, this revision to the statute acts to supplement the horizontal representation section, which requires notice to all “living persons” who are beneficiaries.<sup>339</sup> Without this new subsection, a special representative or guardian ad litem would need to be appointed to represent living minor, incapacitated, or known but unlocatable beneficiaries who are class members. The new section is not limited to horizontal representation and allows virtual representation in any circumstance where a present, competent adult holds an interest that is “substantially the same” as a minor, unborn, incapacitated, or missing beneficiary. Most instances of vertical representation would be covered by RCW 11.96A.120(7) and (8); but if there is a scenario not included in those sections that involved a minor, unborn, incapacitated, or unlocatable beneficiary, this section will allow representation. The addition of this section, using verbatim UTC language, raises an interpretive question regarding whether “substantially identical” interests is different from the “same interest” standard contained in RCW 11.96A.120(6), (7) and (8). While the common law indicates that the interpretive trend for the phrase “same interest” is to equate it with “substantially identical interest,” the use of the two phrases in the same statute may warrant further amendment for clarification.

*c. Holder of Power of Appointment*

New section RCW 11.96A.120(9) contains a modified version of UTC section 302. The 2011 Legislation first introduced this section. It provides that the holder of a testamentary or lifetime general power of appointment may virtually represent permissible appointees and takers in default.<sup>340</sup> In addition, the holder of a limited power of appointment that only excludes the holder, his creditors, his estate, and the creditors of his estate as permissible appointees, can virtually represent permissible

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339. WASH. REV. CODE § 11.96A.120(6) (2012).

340. *Id.* § 11.96A.120(3)(d).

appointees and takers in default.<sup>341</sup> The Washington statute had expanded upon the UTC to include holders of certain limited powers since the holders of any power, general or limited, could affect or eliminate the interest of a permissible appointee or distributee.

This section was further revised by the 2013 Legislation to broaden the permissible virtual representation by power-holders. As in the 2011 statute, the holder of a general appointment, whether exercisable during life or at death, may still represent the takers in default or the permissible distributees.<sup>342</sup> However, representation by a limited power-holder was modified significantly in 2013. First, the type of limited power of appointment to which the virtual representation may apply was broadened. The statute no longer requires that the limited power of appointment be the broadest possible limited power. The intent of this particular change was to make the application of this power more practical because the committee felt that most practitioners were using a more restrictive limited powers in their practice (e.g., a power to appoint among the trustor's lineal descendants and charities). The holder of a limited power of appointment, whether exercisable at death or during life, may now represent permissible appointees and takers in default, but only if the takers in default to be represented are also permissible appointees.<sup>343</sup> Without this limitation, a trustor could give a limited power to an undesirable permissible appointee as a straw man, making it unlikely that the power would be exercised. This "straw man" power of appointment could then serve to eliminate the need to give any notice or information to the takers in default, even though they would be the parties with a real interest in the trust. This concern does not carry over to general powers of appointment on the theory that the holder of a general power is tantamount to an owner of the property<sup>344</sup> and should therefore be able to virtually represent any persons with a contingent following interest.

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341. A limited power of appointment that only excludes the holder of the power, his creditors, his estate, and the creditors of his estate is the broadest power that avoids taxation of the power holder. I.R.C. § 2041. The 2003 Task Force recognized that trustors may want to give a power of appointment to an income beneficiary to avoid the notice requirements but would not want to create tax issues for the holder of the power, so they included this option.

342. WASH. REV. CODE § 11.96A.120(9); S.B. 5344 § 5(9).

343. WASH. REV. CODE ANN. § 11.96A.120(9) (West 2013).

344. The holder of a general power of appointment can take the property for herself and is considered the owner of such property for gift and estate tax purposes. *See* I.R.C. § 2041.

*d. Representation of Charities by the Attorney General*

New section RCW 11.96A.120(10) includes the Attorney General as a permissible virtual representative for charitable interests in a trust that are subject to change or divestment, as long as the charity is not a trustee or a permissible distributee. This section was meant to replace similar language formerly included in RCW 11.97.010(2) by the 2011 Legislation, which allowed for delivery of the mandatory sixty days' notice to the Attorney General instead of to a divestible charity. The language used in the former RCW 11.97.010(2) referred to a "charity's future interest that may be revoked." The language in the new virtual representation section is broader to allow for the Attorney General to virtually represent the various types of charitable interests in trusts; recognizing that some trustors create specific, charitably-minded trusts, while others create trusts with remote contingent charitable interests. New section RCW 11.96A.120(10) provides that if a specific charity is aware of or is involved in the trust administration (e.g., as trustee or as a permissible distributee), then the Attorney General may not act as the charity's representative. However, if the charity is unnamed (e.g., the trustor allows the trustee to choose a charitable beneficiary) or its interest is divestible (e.g., the trustor retained the right to change the beneficiary), then the charitable interest may be represented by the Attorney General.

*4. Court Appointed Representation*

There were no changes to the ability to appoint a guardian ad litem to represent the interests of a beneficiary. However, a change was made in 2013 Legislation to the statute that establishes the procedure for appointing a special representative.<sup>345</sup> Instead of only allowing a personal representative or a trustee to petition the court for the appointment of a special representative, the 2013 Legislation modified the statute to permit any party to a matter in dispute, or the parent of a minor party to a dispute, to request the appointment of a special representative.<sup>346</sup> This change reflects the fact that modern practice incorporates the use of a special representative in many types of matters,<sup>347</sup> not only those that involve a personal representative or a trustee. This section does not preclude a party who is conflicted for the

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345. WASH. REV. CODE § 11.96A.250 (2012).

346. *Id.* § 11.96A.250(1).

347. This refers to special representative as defined in RCW 11.96A.030. *See id.* § 11.96A.030.

purposes of virtual representation from petitioning the court for the appointment of a special representative for a beneficiary. In fact, many times, a parent may be the most logical virtual representative for his or her child, but may be subject to a conflict that precludes representation. It may be that the parent is in the best position to understand the circumstances of the child-beneficiary and to know that the appointment of a special representative is the best course of action. The court may always consider the interests of the petitioner in the matter when determining whether the proposed special representative is appropriate.<sup>348</sup>

#### *D. Remaining Issues in Washington Law of Representation*

When undertaking the revision of the trust statutes, both of the Task Forces attempted to address some interpretive areas of the virtual representation statute and to modernize the statute by incorporating concepts from the UTC, while retaining the longstanding provisions of RCW 11.96A.120. The resulting law has some overlap and construction issues that should be addressed.

##### *1. Semantic Issues*

Before the 2011 Legislation, RCW 11.96A.120 referred only to virtual representation in the context of the delivery of notice under Title 11. For example, RCW 11.96A.120(2)(a) said, in part, “Any notice requirement in this title is satisfied if notice is given as follows . . . notice may be given to the living persons who would constitute the class . . . and the persons shall *virtually represent* all other members of the class.”<sup>349</sup> It was not explicitly stated that the statute allowed for representation in a situation where notice was not required, such as the execution of a non-judicial binding agreement, but involvement and consent was required. However, the practice and interpretation of the statute was broad because the common law context of virtual representation included not only notice, but the ability to represent in judicial proceedings, and bind represented parties.<sup>350</sup>

By the 2011 Legislation, RCW 11.96A.120 was modified to include various provisions of the UTC, which uses the phrase “may represent and bind” in its representation statutes. The new language of

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348. *Id.* § 11.96A.250(1)(b).

349. WASH. REV. CODE § 11.96A.120(2)(a) (2010) (emphasis added).

350. *See* RESTATEMENT (FIRST) OF PROP. § 181 (1936).

RCW 11.96A.120 mixed pre-2010 Washington statutory phrases with UTC phrases, which caused some confusion among practitioners. The updated language of RCW 11.96A.120(1) regarding fiduciary representation used the UTC phrase “may represent and bind.” The updated language of RCW 11.96A.120(3)(a) through (c) and (4), regarding virtual representation and the conflict of interest exception, maintained the original pre-2010 references to satisfying “notice requirements” via virtual representation. The updated language of RCW 11.96A.120(3)(d) regarding representation by a power holder stated that the representative “may accept notice *and* virtually represent and bind” persons.<sup>351</sup> Practitioners were concerned that because the language of RCW 11.96A.120(3)(d) included references to both acceptance of notice and giving binding consent, that somehow the disparate references in the earlier sections were significant. For example, since RCW 11.96A.120(1) referred only to the ability of fiduciaries to “represent and bind” a party, there were concerns that the fiduciaries could not also accept notice on behalf of a beneficiary. While this may have been largely a semantic issue, it caused sufficient ambiguity that the 2013 Legislation sought to standardize the language in the various sections of the statute. However, there are still inconsistencies that should be corrected.

## 2. “Same Interest” Concept

The sections of RCW 11.96A.120 before the 2011 and 2013 Legislation permitted “vertical” virtual representation only where the living person who would be the representative had the “same interest” as the beneficiary to be represented. There is no precedent in Washington that defines “same interest” in the trusts and estates context. Over the last fifty years, the legal usage of that phrase has changed, which is best illustrated by a review of New York case law.<sup>352</sup> In earlier cases, courts used the phrase “same interest” in the trusts and estates context to indicate that the representative and the party being represented needed to have the “same technical interest” in a trust or estate (e.g., an income interest beneficiary could not have ever represented a remainderman).<sup>353</sup> In later years, interpreting the same New York representation statute, courts used the phrase “same interest” to mean that the representative

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351. WASH. REV. CODE § 11.96A.120(3)(d) (2012) (emphasis added).

352. See Begleiter, *supra* note 265, at 323–46.

353. See, e.g., *In re Collins’ Trust*, 130 N.Y.S.2d 834, 835 (N.Y. Sup. Ct. 1954); *In re Pratt*, 64 N.Y.S.2d 470, 471 (N.Y. Sup. Ct. 1946).

and the party being represented instead need to have the same economic interest in the issue at hand.<sup>354</sup>

In an article describing the application of virtual representation as adopted in TEDRA, the meaning of “same interest” was clearly described as requiring the same technical interest in trust. Elsewhere, in the comments to TEDRA, the drafting committee indicates that a conflict of interest exists and virtual representation is not possible when the “economic interests” of the representative and the person represented conflict with regard to the issue at hand. It is unclear whether this reference to an “economic interest” in the conflict of interest context would also apply to the interpretation of the meaning of the phrase “same interest” in the statute. Arguably, based on a plain reading of the statute, the reference to “same interest” is a condition precedent to virtual representation being permissible in the first place, while the “conflict of interest” exception precludes virtual representation that is otherwise de facto permissible. The 2011 Legislation did not address the meaning of this phrase, and unfortunately, the 2013 Legislation may have confused the matter further with the verbatim adoption of UTC Section 304 alongside the existing Washington statutes.

### 3. *Timing of Determination of No Conflict*

As noted above,<sup>355</sup> one person cannot represent another if there is a conflict of interest between the representative and the represented party as to the matter at issue. In the context of nonjudicial dispute resolution, the conflict test is applied at the start of the resolution process to determine whether any court appointed representatives are required, and the conflict issue may or may not be revisited during the course of the resolution process.<sup>356</sup> Likewise, in the context of delivering a report, notice, or trust information, the conflict test is applied at the time of delivery.<sup>357</sup> The Washington statute is silent on the extent to which the conflict determination must be repeated. However, the basis for allowing virtual representation is the “identity of interests,” which ensures adequate representation of the represented parties’ interests. Any conflict that may arise in the course of the resolution process will disqualify the

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354. See, e.g., *In re Estate of Levy*, 496 N.Y.S.2d 911, 912 (N.Y. Sup. Ct. 1985); *In re Sanders*, 474 N.Y.S.2d 215, 218 (N.Y. Sup. Ct. 1984).

355. See *supra* Part IV.E.1.

356. See Begleiter, *supra* note 265, at 369.

357. *Id.*



representative.<sup>358</sup> In addition, a trustee should be aware of the fact that representation for the purposes of delivering a report, notice, or trust information should be reviewed each time an action is taken. If a court later determines that there was a conflict of interest that prevented use of virtual representation, then the agreement reached, order entered, or notice or information delivered will not be binding on the represented parties. Virtual representation should not be used unless the lack of conflict is clear.<sup>359</sup>

#### 4. *Overlap*

The 2011 and 2013 Legislation added provisions from the UTC, but in order to avoid limiting existing representation available in Washington, the existing statutory provisions, now to be codified at RCW 11.96A.120(6), (7) and (8), were preserved. The result is significant overlap among the sections, which could result in confusion.

#### 5. *Proposed Amendment to RCW 11.96A.120*

In order to address the issues identified in this section, the 2012 Task Force has proposed an amendment to the virtual representation statute. The proposal is attached as Appendix A. The overlap and confusion between sections to be codified as RCW 11.96A.120(6), (7), and (8) are now clarified. Under the existing statute, it is unclear whether representation of any remainder interest, including a vested remainder, would fit under subsection (8), or whether representation by a holder of a vested, as opposed to a contingent, remainder was limited to situations where the subsequent interest holders were related. The characterization of vested and contingent remainders can vary and is not well understood by most lawyers and courts.<sup>360</sup> Under the proposal, the holder of any interest, whether currently vested or contingent upon future events, can virtually represent all subsequent holders of a substantially identical interest, as long as there is no conflict of interest. In addition, the proposal uses the “substantially identical interest” language throughout the statute and clarifies that the conflict of interest test applies

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358. *See id.* at 375.

359. *See id.* at 349.

360. *See, e.g., Horton v. Bd. of Educ.*, 32 Wash. 2d 99, 201 P.2d 163 (1949) (grant of remainder interest to university was not subject to any express contingency but because the trust remainder was subject to reduction by discretionary distributions to income beneficiary the court held it was a contingent remainder); *see also* UNIF. PROBATE CODE § 2-707 (2010) (all remainder interests, even if vested, are subject to survival requirement).

throughout the representation, not just at the initial determination of whether representation is permissible.

## V. OTHER CHANGES

This Part discusses various other provisions of the UTC that were adopted into Washington law in the 2011 and 2013 Legislation. In certain instances, UTC language was adopted verbatim and in other instances, UTC language or concepts were modified. Where possible, a discussion of how the 2011 and 2013 Legislation changed prior Washington law is also included.

### A. *Duty of Loyalty*

RCW 11.98.078 codifies and clarifies the trustee's duty of loyalty. In particular, it clarifies what transactions are subject to the no further inquiry rule, and what transactions can be defended by a trustee on the basis of fairness. It is based on UTC section 802, but was significantly revised by the 2003 Task Force. Existing law relies on common law to define the trustee's duty of loyalty, which is central to the trustee's role. This section not only codifies the duty, but sets forth clearer boundaries to the duty, making it one of the most significant sections in the bill.

Before the 2011 Legislation, Washington courts depended on the common law to define the trustee's duty of loyalty.<sup>361</sup> Under the common law, a trustee's duty of loyalty requires the trustee to "administer the trust solely in the interest of the beneficiary."<sup>362</sup> The duty of loyalty prohibits the trustee from self-dealing, which is transacting in her individual capacity with the trust, or entering into transactions where the trustee is not directly dealing with the trust, but nevertheless has a conflict of interest.<sup>363</sup> If a trustee breaches her duty of loyalty by self-dealing, there is no further inquiry and the transaction is voidable by the beneficiaries regardless of the fairness of the transaction.<sup>364</sup> As stated in *Scott and Ascher on Trusts*,

[u]nder this rule, a trustee who has violated the duty of loyalty is liable without further inquiry into whether the breach has resulted in any actual benefit to the trustee, whether the trustee

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361. *See In re Guardianship of Eisenberg*, 43 Wash. App. 761, 766–68, 719 P.2d 187, 191–92 (1986) (referring to Restatement (Second) of Trusts for rules defining trustee's duties).

362. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

363. IIA SCOTT & FRATCHER, *supra* note 187, §§ 170–170.25.

364. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 543 (2d rev. ed. 1993).

has acted in good faith, whether the transaction was fair, or even, in some cases, whether the breach has caused any actual harm to either the trust or its beneficiaries.<sup>365</sup>

For example, if a trustee purchased property from the trust, paying fair market value, and the property later increased in value, the beneficiaries could, on the basis of no further inquiry, demand that the trustee return the property to the trust, getting only a refund of the trustee's purchase price. If the breach is a less direct conflict, a trustee may be able to uphold the transaction by proving fairness.<sup>366</sup> To be able to defend a transaction on the basis of fairness, under the common law a trustee would have to show that her own interests in the particular transaction were not sufficient to bring it into the zone of self-dealing.<sup>367</sup> The categories of transactions that expand the zone of self-dealing beyond direct transactions between trustee and trust include sale of property to the trustee's spouse or attorney, or to a corporation in which the trustee has a substantial interest.<sup>368</sup> Under the common law, the duty of loyalty could be waived by the trustor, and a particular self-dealing transaction could be nevertheless allowed if approved in advance by a court or approved or ratified by the beneficiaries.<sup>369</sup>

The UTC not only codified the common law of the duty of loyalty; it also drew more clear lines around the self-dealing prohibition. Under UTC section 802, any transaction entered into by the trustee involving the investment or management of trust property for the trustee's personal account or "which is otherwise affected by a conflict between the trustee's fiduciary and personal interests"<sup>370</sup> is voidable by beneficiaries. This language appears to be broader than the common law formulations<sup>371</sup> because there is no requirement that the conflict be significant or substantial. However, the UTC distinguishes between direct self-dealing, where the trustee has directly entered into the transaction with the trust, and transactions that involve affiliates of the trustee (such as the spouse or other related parties). Direct self-dealing is

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365. 3 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.2, at 1080 (4th ed. 2006).

366. *In re Estate of Rothko*, 372 N.E.2d 291 (N.Y. 1977).

367. See Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 MO. L. REV. 279, 287 (2002).

368. See SCOTT ET AL., *supra* note 365, §§ 17.2.1.4, 17.2.1.3.

369. See *id.* §§ 17.2.12, 17.2.13.

370. U.T.C. § 802(b) (2010).

371. See UNIF. PROBATE CODE § 3-713 (2010); see RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. c (1959).

irrebuttably presumed to be affected by a conflict and therefore voidable (which is the classic no further inquiry rule).<sup>372</sup> If the transaction was with a related party,<sup>373</sup> then the presumption that the transaction was affected by the conflict (and is therefore voidable) can be rebutted by a showing that “the transaction was not affected by a conflict between personal and fiduciary interests.”<sup>374</sup> Under common law, if the transaction with a related party was considered to be in the zone of self-dealing, the no further inquiry rule applied and the transaction was voidable. The UTC changes that approach, and sets a presumption for transactions with affiliates, but allows the trustee to rebut the presumption by a showing that the conflict of interest did not affect the transaction. The fairness of the transaction (e.g., whether a fair price was paid) can be used as evidence that the conflict did not affect the transaction; but fairness alone does not authorize the transaction. However, this is a loosening of the common law duty. Under the common law, transactions with someone as close as a spouse or a corporation controlled by the trustee would trigger the no further inquiry rule. But under the UTC, transactions with affiliates as close as those can be defended by the trustee with arguments that the conflict in fact did not affect the transaction. The UTC broadens the reach of self-dealing, however, by allowing a beneficiary to challenge a transaction, even if the trustee or listed affiliate was not involved, if the beneficiary can show that the transaction was affected by a conflict between the trustee’s fiduciary and personal interests. The beneficiary does not have the advantage of the presumption of voidability that is given when the trustee or an affiliate is involved. If the beneficiary can show the conflict affected the transaction, though, the beneficiary can void the transaction. By contrast, under common law, if the transaction was outside the zone of self-dealing, then the trustee could defend the transaction by showing the transaction was fair.<sup>375</sup>

RCW 11.98.078 adopted the UTC approach, with one significant change. The text of the UTC statute did not specify how the presumption of voidability for affiliate transactions could be rebutted; only the

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372. See U.T.C. § 802.

373. The related parties that trigger this presumption are enumerated in the statute and are: spouse, descendants, siblings, parents, or spouses of such relatives, of the trustee, agent, or attorney of trustee or a corporation or other person or enterprise in which the trustee or a person that owns a significant interest in the trustee, has an interest that might affect the trustee’s best judgment. *Id.* § 802(b)(6).

374. *Id.* § 802 cmt.

375. See Boxx, *supra* note 367, at 279.

comments addressed that issue. The Washington statute states expressly that “[t]he presumption is rebutted if the trustee establishes that the conflict did not adversely affect the interests of the beneficiaries.”<sup>376</sup> Similar to the UTC approach, fairness of the transaction could be used to rebut the presumption, but there could be other elements that adversely affected the beneficiaries, such as the loss of a business opportunity, so fairness is not an absolute defense. The Washington statute also added language to clarify that a transaction between the trustee and the trust is irrevocably presumed voidable: “A sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account that is voidable under subsection (2) of this section may be voided by a beneficiary without further proof.”<sup>377</sup>

The UTC includes the common law exceptions to voidability: (1) if the trust agreement authorized the transaction; (2) if there was court approval of the transaction; (3) if the beneficiary consented, ratified, or released the trustee; (4) if the beneficiary did not comply with the statute of limitations; and (5) if the transaction predated the trustee’s term as trustee or such time that the trustee expected to become trustee.<sup>378</sup> The Washington statute includes the UTC provisions.<sup>379</sup>

The UTC contains a provision that a transaction between a trustee and a beneficiary that does not involve trust property can be voidable unless the trustee proves the transaction was fair to the beneficiary.<sup>380</sup> The 2003 Task Force decided not to include that provision because of concerns that national banks that serve as trustee in one state could unwittingly be entering into potentially voidable transactions in another state. The UTC also contains a provision that if a trustee individually takes a trust business opportunity, that transaction is presumptively void. The 2003 Task Force did not include this provision in the Washington statute because such a transaction would already be covered in the general duty of loyalty as imposed under the statute and common law, and was therefore not necessary.<sup>381</sup> It is important to note that the intention of the drafters was to preserve the scope of the common law of duty of loyalty, except as specifically modified in the statute.

The UTC also included exceptions to the duty of loyalty for routine

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376. WASH. REV. CODE § 11.98.078(3)(b) (2012).

377. *Id.* § 11.98.078(4).

378. U.T.C. § 802(b).

379. WASH. REV. CODE § 11.98.078(2).

380. U.T.C. § 802(d).

381. SCOTT ET AL., *supra* note 365, § 17.2.9.

transactions involving corporate trustees. Under section 802(f), a trustee can invest in mutual funds for which the trustee provides services, even if the mutual fund pays a fee to the trustee. However, the investment must still meet the standards of the prudent investor rule, and the trustee must give the beneficiaries annual notice about the fees they are receiving.<sup>382</sup> The Washington statute includes that provision, which is noteworthy because it creates an additional notice requirement for some corporate trustees.<sup>383</sup> Under UTC section 802(h), several transactions which could potentially be considered self-dealing are authorized as long as they are fair to the beneficiaries: (1) appointment and compensation of the trustee; (2) a transaction between a trust and another trust, estate, or guardianship in which the trustee or beneficiary is involved; (3) a deposit in a financial institution operated by the trustee; and (4) an advance by the trustee to protect the trust. The Washington statute has a similar provision, but it states more clearly that such transactions cannot be voided if fair to the beneficiaries. It replaces the provision regarding an advance with a provision authorizing “[a]ny loan from the trustee or its affiliate,” and it adds to the list of authorized transactions, “[a] delegation and any transaction made pursuant to the delegation from a trustee to an agent that is affiliated or associated with the trustee.”<sup>384</sup> Finally, the Washington statute includes the codification of the common law duty of impartiality set forth in UTC section 803.<sup>385</sup>

A related amendment in the 2011 Legislation added language to RCW 11.100.090, which restricts the trustee from selling or buying investments from itself or related entities. The amendment limits the restriction to circumstances not authorized under the statutory duty of loyalty.

### *B. Statute of Limitations*

The statute of limitations applicable to claims brought against trustees was significantly revised in the 2011 Legislation. Under previous law, there was a three-year statute of limitations that began to run upon the earlier of discovery of the breach, termination of the trust or the trustee’s repudiation of the trust, or discharge of the trustee.<sup>386</sup> Thus, if a breach was not “discovered,” then the statute did not begin to run until the end

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382. See Boxx, *supra* note 375, at 300–01 (explaining the reasons for this exception).

383. WASH. REV. CODE ANN. § 11.98.078(5) (West 2013).

384. WASH. REV. CODE § 11.98.078(6) (2012).

385. *Id.* § 11.98.078(7).

386. WASH. REV. CODE § 11.96A.070 (2010).

of the trustee's involvement with the trust. The revised section allows a trustee to start the running of the clock by furnishing a report that adequately disclosed the basis for a potential claim, and states the time limits for filing a claim.<sup>387</sup> However, if no report is sent, then the beneficiary can bring an action up to three years after termination of the trust or discharge of the trustee, even if the breach was discoverable much earlier.<sup>388</sup> One noteworthy difference from the former law is that in order to start the statute running, the trustee must affirmatively provide information to the beneficiary, including time limits to filing claims. Under previous law, if the beneficiary discovered the potential claim independently of trustee communication, that would be sufficient to start the three-year statute running.<sup>389</sup> The change in the statute therefore puts the burden on the trustee to take action before the statute starts to run. However, the new statute offers a "safe harbor" form of report so that the trustee can be reasonably assured that the three-year period has been triggered.<sup>390</sup> The new Washington statute is based on UTC section 1005, with two significant variations. First, the UTC has a limitations period of one year upon furnishing a report, rather than three years;<sup>391</sup> if no report is given, claimants have five years from termination of the trust or discharge of the trustee, instead of three years.<sup>392</sup> Second, the UTC does not spell out what constitutes an adequate report. The Washington provisions are based on a California statute that prescribes a report to beneficiaries that satisfies notice provisions.<sup>393</sup>

### C. *Rules of Construction*

Section 112 of the UTC provides that the rules of construction for wills are also applicable to construction of trusts, both revocable and irrevocable. Section 112 is now codified in Washington at RCW 11.97.020. Because trusts, particularly revocable living trusts, are commonly used as will substitutes, the trend is to unify the rules applicable to each,<sup>394</sup> and this section furthers that goal.

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387. WASH. REV. CODE ANN. § 11.96A.070(1)(a) (West 2013).

388. *Id.* § 11.96A.070(1)(c).

389. WASH. REV. CODE § 11.98.070(1)(a)(i) (2010).

390. WASH. REV. CODE § 11.96A.070(1)(b) (2012).

391. *Compare id.* § 11.96.070(a), with U.T.C. § 1005(a) (2010).

392. *Compare* WASH. REV. CODE § 11.96.070(c), with U.T.C. § 1005(c).

393. *See* CAL. PROB. CODE § 16063 (2011).

394. *See* U.T.C. § 112 cmt. (2010); *see* RESTATEMENT (THIRD) OF TRUSTS § 25(2) cmt. e (2003).

#### D. Consolidation of Trusts

The 2013 Legislation modified RCW 11.98.080 to clarify the statute and to integrate the methods provided for in the UTC. Prior Washington law permitted consolidation of trusts if certain criteria were met: (1) the trust provisions permit; (2) all persons interested in the trusts affirmatively consent; (3) a non-judicial agreement is entered into by all persons interested in the trusts; or (4) consolidation is ordered judicially.<sup>395</sup> In addition, consolidation of trusts was only permitted if further criteria were satisfied: (1) the trusts to be consolidated were substantially similar; (2) consolidation isn't inconsistent with the intent of the trustor; and (3) if consolidation would not materially impair the interests of the beneficiaries.<sup>396</sup>

The 2013 Legislation integrated the UTC method of consolidation of trusts into the Washington statute in order to create a more efficient option for consolidation. New RCW 11.98.080 has eliminated the need for parties interested in the trust to consent to consolidation. Instead, it permits the trustee to provide advance notice of a proposed consolidation to the qualified beneficiaries and gives them thirty days to object to the proposal.<sup>397</sup> If no objection is received, then the trustee may proceed with the proposal and the consolidation has the effect of a binding court order.<sup>398</sup> The remaining requirements and additional options of the prior version of RCW 11.98.080 remain intact.

#### E. UTC Definitions

As discussed in Part II.D.1, the 2013 Legislation integrated the UTC definitions of “qualified beneficiaries” and “permissible distributees” throughout RCW Chapter 11.98 and also used those definitions in selected other sections, such as venue, where appropriate.<sup>399</sup> These two definitions identify the types of beneficiaries to whom certain notices are to be given or from whom consents are to be received. The 2012 Task Force believed that using these definitions throughout RCW Chapter 11.98 struck a balance between making certain trust administration activities less burdensome and costly but still protecting the interests of

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395. See WASH. REV. CODE § 11.98.080.

396. *Id.*

397. WASH. REV. CODE ANN. § 11.98.080(2)(a) (West 2013).

398. *Id.*

399. See *id.* §§ 11.96A.050, 11.98.080(2)(a) (providing that the definitions apply only to chapter 11.98 or as specifically reference elsewhere in Title 11).



both trustees and the “stakeholder” beneficiaries. These definitions were integrated into several statutes<sup>400</sup> covering issues ranging from transfer of situs to delivery of trust administration for pet trusts. The 2012 Task Force used the definitions for a few select other statutes outside of RCW Chapter 11.98 by specific use of the term but declined to extend the UTC definitions comprehensively into RCW 11.96A or further into RCW Title 11 without additional review and analysis.

#### *F. Use of Email for Notice*

Section 109 of the UTC provides that any required notice must be given “in a manner reasonably suitable under the circumstances and likely to result in receipt.”<sup>401</sup> The section further gives examples of permissible methods of giving notice and includes email. The Task Force wanted to authorize giving of notice by email, but chose instead to use the approach in the Washington Business Corporation Act.<sup>402</sup> RCW 11.96A.110 was revised to allow notice by email only if the recipient had previously consented to notice by email. Such consent can be revoked at any time, and two undeliverable email notices is deemed a revocation of that consent.

#### *G. General Trust Provisions*

Article 4 of the UTC sets forth general trust principles previously found only in common law. Several of the provisions were included in the 2011 Legislation, with the general intent that they were merely codification of existing Washington common law rather than creating new law. Washington case law on trusts is sparse, so much of what we characterize as common law is based on general U.S. common law relating to trusts, as reflected in the Restatement.<sup>403</sup> Exceptions to that general rule, where changes to the common law were made in the statute, are noted below.

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400. The definitions were integrated into RCW 11.96A.050, 11.96A.120, 11.98.005, 11.98.015, 11.98.019, 11.98.039, 11.98.041, 11.98.045, 11.98.051, 11.98.078, 11.106.020, and 11.118.050. For most of these statutes, the integration of the definitions merely updated the verbiage to create consistency and did not create a substantive change.

401. U.T.C. § 109 (2010).

402. See WASH. REV. CODE § 23B.01.410 (2012).

403. See, e.g., *Niemann v. Vaughn Cmty. Church*, 154 Wash. 2d 365, 113 P.3d 463 (2005) (example of court relying on the Restatement of Trusts as a statement of applicable common law of trusts in Washington).

### 1. *Trust Creation*

RCW 11.98.008 is based on UTC section 401 and codifies common law regarding methods of creating a trust. It does not include the UTC provision that a trust may be created by exercise of a power of appointment in favor of a trustee, but that omission does not invalidate Washington trusts created in that manner. Trusts validly created under common law are still valid under Washington law because the statute only supplements common law. The UTC power of appointment language was omitted because the language of a power of appointment governs whether the donee of the power can appoint to a trustee, and the 2003 Task Force did not want the statute to imply otherwise.

The section requires a transfer of property, or identification of specific property when the trustor is also the trustee. Existing statutes allow certain beneficiary designations to constitute “property” sufficient to satisfy this section. RCW 11.12.250, the Washington codification of the Uniform Testamentary Additions to Trusts Act, validates a gift under will to a previously unfunded trust, and such gift under will would be sufficient to constitute the necessary property interest.<sup>404</sup> RCW 11.98.170(1)(b) authorizes unfunded life insurance or retirement asset trusts:

a trust is valid even if the only corpus consists of the right of the trustee to receive as beneficiary insurance or retirement plan proceeds; any such trustee may also receive assets, other than insurance or retirement plan proceeds, by testamentary disposition or otherwise and, unless directed otherwise by the transferor of the assets, shall administer all property of the trust according to the terms of the trust agreement.<sup>405</sup>

RCW 11.98.011, setting forth the requirements for creating a trust, is identical to UTC section 402, except for the specific references to Washington statutes governing pet trusts and noncharitable purpose trusts, as discussed below in Part V.3. The statute requires the trustor to have capacity, which for revocable trusts is the capacity to make a will,<sup>406</sup> and for irrevocable trusts it is the capacity to transfer the property into the trust.<sup>407</sup>

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404. See U.T.C. § 401 cmt..

405. WASH. REV. CODE § 11.98.170(1)(b).

406. See discussion of § 11.103 *infra*, Part VI. K.

407. See U.T.C. § 402 cmt.; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (2003); RESTATEMENT (THIRD) OF TRUSTS § 11 (2003); RESTATEMENT (SECOND) OF TRUSTS §§ 18–22 (1959).

Under the statute, if the same person is the sole trustee and the sole beneficiary, then the trust is not valid. This is a codification of the doctrine of merger, recognized in *Estate of Lonneker v. Lonneker*.<sup>408</sup> Under the doctrine of merger, if one person holds all the managerial and ownership power as trustee, and all beneficial interests as the sole beneficiary, then the person's interest is fee simple.<sup>409</sup> Note that if there are remainder beneficiaries, even if the trust is revocable, the doctrine of merger does not apply because there are other beneficiaries.<sup>410</sup>

The statute requires a definite beneficiary, with some exceptions,<sup>411</sup> which is the traditional common law requirement.<sup>412</sup> Pet trusts, which already existed under Washington statute, and noncharitable purpose trusts, which were added by the 2011 Legislation, are exceptions to the common law rule requiring ascertainable beneficiaries. However, the statute gives an additional, albeit limited, exception to this rule: if a trustee is given the power to choose a beneficiary from an indefinite class of persons, and the trustee exercises the power, then the choice is valid. If the trustee fails to exercise the power within a reasonable time, the property passes to the persons who would have taken the property had the power not been conferred.

RCW 11.98.012 is the comity provision that validates, for Washington purposes, inter vivos trusts that were validly created under another state's laws. It does not apply to testamentary trusts. It provides that an inter vivos trust is valid in Washington if it was validly created under the laws where the trust agreement was executed, or under the laws of the jurisdiction where the trustor lived, where the trustee lived or did business, or where any of the property was located, as that law provided at the time the trust was created (if an irrevocable trust), or at the time the trust became irrevocable (if originally an irrevocable trust). The Washington statute varies from UTC section 403 in distinguishing the applicable law for revocable and irrevocable trusts. Testamentary trusts are not addressed in this section, but generally testamentary trusts will be recognized if valid under the law of the decedent's domicile as of the decedent's death.<sup>413</sup>

RCW 11.98.013 is identical to UTC section 404, and states that a

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408. 45 Wash. App. 222, 724 P.2d 1088 (1986).

409. See RESTATEMENT (THIRD) OF TRUSTS § 69; RESTATEMENT (SECOND) OF TRUSTS § 122.

410. See U.T.C. § 402 cmt.

411. Charitable trusts, pet trusts, and noncharitable purpose trusts are the exceptions.

412. See RESTATEMENT (THIRD) OF TRUSTS §§ 44–46; RESTATEMENT (SECOND) OF TRUSTS §§ 112–122.

413. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 (1971).

trust's purposes must be lawful, not contrary to public policy, and possible to achieve. This is a statement of existing common law. The Restatement (Third) of Trusts gives the following examples of trusts that would not be permissible: performance of the trust would require the trustee to commit a criminal or tortious act, the trustor's purpose in setting up the trust was to defraud creditors, or the consideration for establishing the trust was illegal.<sup>414</sup> A "capricious" purpose, such as a direction to the trustee to throw money into the ocean or burn down a house, is likely to be contrary to public policy.<sup>415</sup>

## 2. *Evidence of Oral Trust*

RCW 11.98.014, modeled after UTC section 407, clarifies that a trust can be oral except as otherwise required by statute; but if oral, the creation of the trust and its terms must be proven by clear, cogent, and convincing evidence. The Washington State Supreme Court has previously recognized that trusts need not be in writing,<sup>416</sup> but the statute adds the clear, cogent, and convincing evidentiary standard to proving oral trusts. The statute of frauds,<sup>417</sup> which has been interpreted to require a trust holding real estate to be in writing,<sup>418</sup> is the primary exception to the allowance of oral trusts.

## 3. *Noncharitable Purpose Trusts*

RCW 11.98.015 creates an exception to the general requirement that a private trust have an ascertainable beneficiary. Under common law, a trust must either have an ascertainable beneficiary or have a charitable purpose,<sup>419</sup> and benevolent purpose trusts that did not reach the level of "charitable purpose" have been invalidated on that basis. For example, in *Shenendoah Valley National Bank v. Taylor*,<sup>420</sup> the testator's will set up a perpetual trust to pay the income to local schoolchildren on the last day of school before Easter and before Christmas, "to be used by such child in the furtherance of his or her obtainment of an education." The court invalidated the trust because, although there was a direction that the

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414. See RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a.

415. See *id.* § 47 cmt. e; II SCOTT & FRATCHER, *supra* note 187, § 124.7.

416. See *Goodman v. Goodman*, 128 Wash. 2d 366, 907 P.2d 290 (1995).

417. WASH. REV. CODE § 19.36.010 (2012).

418. See *Stocker v. Stocker*, 74 Wash. App. 1, 871 P.2d 1095 (1994); *Moe v. Brumfield*, 27 Wash. 2d 714, 179 P.2d 968 (1947).

419. See RESTATEMENT (THIRD) OF TRUSTS §§ 28, 44.

420. 63 S.E.2d 786 (Va. 1951).

children use the funds for educational purposes, the timing of the distributions made that unlikely. The purpose of the so-called “candy trust” was therefore benevolent but not charitable and, as a private trust, violated the rule against perpetuities.

The most famous example of such a trust is George Bernard Shaw’s alphabet trust. He left his estate in trust “to use one-third of the income for thirty years, or until the trust sooner terminates, to support (a) the study of the advantages of a phonetic alphabet and (b) the publication and free distribution of my play, ‘Andrew and the Leopard,’ written in this alphabet.”<sup>421</sup> His heirs challenged the trust because the purpose was not charitable, and the suit was settled, funding the alphabet trust project with a fraction of what Shaw intended.<sup>422</sup> Both of these trusts, and trusts with similar benevolent but noncharitable purposes,<sup>423</sup> can now be established for a period of 150 years under Washington law.<sup>424</sup> The statute provides for a person designated in the trust, or by the court, to enforce the trust, and that person is considered a qualified beneficiary of the trust and entitled to notice under RCW 11.98.<sup>425</sup> The purpose of the trust must be “valid” so a trust could still be challenged on ground that the purpose is contrary to public policy or otherwise invalid.<sup>426</sup>

#### 4. *Cy Pres*

RCW 11.96A.127, based on UTC section 405, codifies but also modifies the doctrine of cy pres. The Washington statute applies to charitable dispositions in wills as well as trusts. The common law doctrine requires finding both that the stated charitable purpose is impossible and impracticable and that the donor had a general charitable intent in order for the court to have power to amend the terms of the charitable gift. The statute eliminates the required finding of general charitable intent and instead presumes that such charitable intent existed. Elimination of the general charitable intent requirement overrules the

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421. *In re Shaw*, 1 All E.R. 745 (Ch. 1957); see RESTATEMENT (THIRD) OF TRUSTS § 47 illus.7.

422. See JESSE DUKEMINIER ET AL., WILLS TRUSTS & ESTATES 759–60 (8th ed. 2009).

423. Another example of a noncharitable trust, which was considered by the Task Force, would be a reward fund set up, offering a reward for information about a crime, that would last for a certain period.

424. The Washington statute differs from the UTC in allowing the trust to last 150 years, our perpetuities period per RCW 11.98.130, rather than twenty-one years.

425. See WASH. REV. CODE ANN. § 11.98.015 (West 2013); see also S.B. 5344, 63d Leg., Reg. Sess. § 16 (Wash. 2013) (requiring notice be given to qualified beneficiaries).

426. See WASH. REV. CODE § 11.98.013 (2012).

holding in *Horton v. Board of Education*,<sup>427</sup> that a gift to a specific charitable institution, without a specified use for the gifted funds, is not eligible for cy pres. In *Horton*, Dexter Horton's will established a trust for his granddaughter with the remainder payable to the Kansas City University. During the granddaughter's life, the University was dissolved and the assets sold to another university. The court held that the University's interest was a contingent remainder, and lapsed because the University was no longer in existence.<sup>428</sup> The successor university argued application of cy pres, but the Washington State Supreme Court agreed with the trial court judge, who stated:

Now, his primary thought at that time was not any institution, was not any charitable affair at all. It was his daughter. But he realized that if there was anything left over, then this particular Methodist college of which he was well aware, which he knew about and which he was interested in, then as to whatever that amount be, maybe nothing, maybe something, maybe something great, whatever it is, "That particular college I want to have it." It has no reference or no connection, in my humble opinion, whatever with efforts to any charitable matter at all. It has strictly to do with a certain designated party, "And I want that party to have it."<sup>429</sup>

Under the current statute, Dexter Horton's charitable intent, in naming a charitable institution, would be presumed. The statute also provides that if the will or trust makes an alternative gift to a private individual or creates a reversion to the grantor if the charitable gift fails, the alternative gift is effective only for twenty-one years after the trust became irrevocable or the testator died, or in the case of a reversion, the grantor is still alive.<sup>430</sup>

#### H. *Reformation of Mistakes*

This section was a major departure from former Washington law, which followed the common law rule that does not allow the correction

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427. 32 Wash. 2d 99, 201 P.2d 163 (1949).

428. This is a questionable holding. The interest was contingent only on the fund being exhausted by the granddaughter's needs and there was no requirement in the document that the university survive to the end of the granddaughter's life estate.

429. *Horton*, 32 Wash. 2d at 106-07, 201 P.2d at 167.

430. WASH. REV. CODE §11.98A.127(2). See generally Ronald Chester, *Cy Pres or Gift Over?: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41 (1989).

of mistakes in wills and restricts modification of irrevocable trusts.<sup>431</sup> The section is based on UTC section 415 but differs in two key respects. First, RCW 11.96A.125 applies to reformation of both trusts and wills.<sup>432</sup> Second, the statute allows reformation both by judicial decision, if a mistake is proven by clear, cogent, and convincing evidence, and by binding nonjudicial agreement.<sup>433</sup> The statute was amended in 2013 to clarify that the parties are free to reform the agreement provided the requirements of RCW 11.96A.220 are met, without findings of clear, cogent, and convincing evidence of the mistake.<sup>434</sup>

### *I. Default and Mandatory Rules*

Section 105 of the UTC states the general rule that the statutory rules are default rules that can be overridden by the trust agreement, with some critical exceptions. This rule was already in the Washington statute in RCW 11.97.010 but was amended to clarify the exceptions. Under the current statute, there are several issues that either cannot be overridden by the trust agreement or are subject to limitations:

- (1) A trustee cannot be relieved of the duty to act in good faith and with honest judgment;
- (2) The duty to keep beneficiaries informed can be limited only as provided in the revised notice provisions of RCW 11.98;<sup>435</sup>
- (3) The definitions of “qualified beneficiaries” and “permissible distributees” cannot be altered;
- (4) Mandatory rules that cannot be waived by the trust agreement including spendthrift protection for a beneficiary’s interest in a trust (other than a self-settled trust) (RCW 6.32.250); and access

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431. See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 cmt. c (2003); Ronald Chester, *Modification and Termination of Trusts in the 21st Century*, 35 REAL PROP. PROB. & TR. J. 697 (2001); Edward C. Halback, Jr., *Uniform Acts, Restatements, and Other Trends in American Trust Law at Century’s End*, 25 ACTEC L.J. 101 (1999).

432. The UTC does not apply to wills generally, and there is a corresponding provision in the Uniform Probate Code allowing reformation of mistakes in wills. See UNIF. PROBATE. CODE § 2-805 (2010).

433. See WASH. REV. CODE § 11.96A.220.

434. The drafters’ comments to Senate Bill 5344 state: “This section is modified to clarify that the evidentiary standard contained in this section only applies to reformations by judicial procedure. It is long standing law in Washington that reformations may be made by agreement under RCW 11.96A.220 without application of the evidentiary standard.” *Comments to 2012 Title 11 Revisions*, WASH. STATE BAR ASS’N, <http://www.wsba.org/Legal-Community/Legislative-Affairs/~media/Files/Legal%20Community/Legislative%20Affairs/2013/Trust%20Act.ashx> (last visited Sept. 26, 2013) (WSBA comments to 2013 bill).

435. See *supra* Part II.D.4 (discussing notice provisions).

- to a beneficiary's interest in a trust for child support and necessities of life creditors (RCW 11.96A.190), and creditors of a beneficiary of a self-settled trust (RCW 19.36.020),
- (5) The limitations on a trustee's exercise of discretion under RCW 11.98.200 through 11.98.240 can only be changed by reference to those statutes and the requirements in the statutes for any deviation from the statutes; and
  - (6) The interpretation and application of exercises of powers of appointment in RCW 11.95.100 through 11.95.150 are mandatory rules that cannot be changed.

### *J. Change of Situs*

The Washington provisions for change of trust situs were similar to the UTC provisions, but were updated in the 2011 and 2013 Legislation to conform to the UTC process because both Task Forces believed that the UTC model was more efficient. Under previous law, the trustee could transfer the situs only if the transfer met several criteria: (1) it would facilitate the economic and convenient administration of the trust; (2) it would not materially impair the interests of the beneficiaries or others interested in the trust; (3) it would not violate the terms of the trust, and (d) it had the consent of all parties.<sup>436</sup> The new standard for transfer is the same but now adds the requirement that transfer be to a jurisdiction where one of the "connection" requirements for situs described above<sup>437</sup> is met with respect to that jurisdiction.<sup>438</sup> The process for judicial transfer of situs remained unchanged, but nonjudicial transfer of situs was amended to continue to allow for parties to enter into a nonjudicial binding agreement, but also to add a nonjudicial process similar to the UTC. Under the current statute, the trustee must send out notice to the qualified beneficiaries with a statement that they have sixty days to object to the proposed transfer.<sup>439</sup> The consent of all beneficiaries no longer must be obtained. The notice to each party must include several pieces of information: (1) the contact information for the trustee; (2) the trust document; (3) a listing of the assets and liabilities of the trust dated within ninety days; (4) name, address and qualifications of new trustee, evidence of new trustee's acceptance, and the name of the court having jurisdiction; (5) a statement of facts supporting the

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436. See WASH. REV. CODE § 11.98.045(2) (2010).

437. See *supra* notes 239–256 and accompanying text.

438. WASH. REV. CODE § 11.98.045(2) (2012).

439. S.B. 5344, 63d Leg., Reg. Sess. § 15(1) (Wash. 2013).



mandatory considerations of RCW 11.98.045(2); (6) notice that each beneficiary has not less than sixty days to object to the transfer; and (7) a form to consent or object to the transfer.<sup>440</sup> If a beneficiary does not object in that time period, the trustee can go forward with the transfer of situs.<sup>441</sup>

#### *K. Venue*

The venue provisions were updated in the 2011 Legislation, because the prior law set venue in the county of the trust's situs, which was defined as the principal place of administration, and those terms were out of date and ambiguous.<sup>442</sup> The new provisions are similar to the venue determinations for probate in that they allow for venue to be proper in multiple counties. Generally, any county with a contact with the trust listed in the situs statute can be selected, and if the trust has none of those contacts with any county, but Washington otherwise has jurisdiction, then venue is in any county.<sup>443</sup> Because of the number of options, the statute now includes a procedure for an interested party to move venue, similar to the procedure in the probate section.<sup>444</sup> A party is always able to request a change of venue, but if a party makes the request within four months of the first notice of a proceeding, then venue must be moved to the county with the strongest connection to the trust, except for good cause shown.<sup>445</sup>

#### *L. New Chapter on Revocable Trusts*

The Task Force adopted the UTC approach of a separate section of rules applicable to revocable living trusts, recognizing their increasing presence as an alternative to will planning. The new chapter, RCW 11.103, codifies and clarifies several issues regarding revocable living trusts, such as how to amend or revoke, and limitations of actions on the validity of a revocable living trust. RCW 11.103.020 is taken from UTC section 601 and clarifies that the capacity required to create or exercise powers with regard to a revocable trust is the same as that required to make a will. This provision is in recognition of the role of revocable

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440. WASH. REV. CODE ANN. § 11.98.051(1) (West 2013).

441. *Id.* § 11.98.051(2).

442. *See supra* Part III, Determination of Trust Situs.

443. WASH. REV. CODE § 11.96A.050(1) (2012).

444. *Id.* § 11.96A.050(4).

445. *Id.*

living trusts as will substitutes and part of the movement to make the laws applicable to wills and to revocable living trusts consistent.<sup>446</sup> There was some concern expressed that this section created the possibility that if a trustor of a revocable trust became incapacitated, the trustor would lose the ability to revoke or amend under this section and therefore the trust would become irrevocable, triggering a taxable gift. That concern is unfounded. The possibility would have existed independent of a statute specifying the *level* of capacity required to amend or revoke (for example, if the trustor were in a coma and clearly unable to amend or revoke under any standard of capacity), and the authors know of no reported decisions in which that argument was raised. Second, even if the trustor were incapacitated, the trust remains revocable by an attorney-in-fact (if in existence and so authorized), or by a guardian.<sup>447</sup> And the legal assumption is that the trustor, if alive, can always “get better.”<sup>448</sup>

RCW 11.103.030 covers revocation and amendment of revocable trusts and is based on section 602 of the UTC. First, the 2003 Task Force chose to retain the common law presumption that a trust was irrevocable unless expressly stated otherwise, rather than adopting the UTC rule that trusts were presumptively revocable. The section contains specific provisions concerning community property. Either spouse may revoke the trust unilaterally as to community property in the trust, but both must join in any amendment.<sup>449</sup> If there is noncommunity property in a trust with multiple trustors, a trustor can revoke or amend with respect to his or her separately contributed property, but the trustee must notify the other trustors of any such changes. The Washington statute includes a statement that “[t]he character of community property or separate property is unaffected by its transfer to and from a revocable trust.”<sup>450</sup> The method of revocation and amendment is now specified in the statute. Substantial compliance with the method of revocation or amendment provided in the trust agreement is sufficient. If there is no method provided in the trust agreement, the trustor can revoke or amend by a “later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the

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446. See John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 28, Jan.–Feb. 2004, at 30.

447. WASH. REV. CODE § 11.92.140.

448. MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures 1975), available at [http://www.youtube.com/watch?v=UTdDN\\_MRe64](http://www.youtube.com/watch?v=UTdDN_MRe64).

449. WASH. REV. CODE § 11.103.030(2)(a).

450. *Id.* § 11.103.030(2)(c).

terms of the trust;” or a “written instrument signed by the trustor evidencing intent to revoke or amend.”<sup>451</sup>

The Washington statute differs from the UTC in several ways. First, it requires a writing to amend or revoke if no other method was specified in the trust agreement;<sup>452</sup> second, it clarifies that the superwill provisions of RCW 11.11 do not apply to the trustor’s ability to amend or revoke with the methods specified in this section. The section further specifies that an attorney in fact can exercise the trustor’s powers to amend or revoke only to the extent authorized by the power of attorney<sup>453</sup> *and* as authorized, or as consistent with the terms of the trust agreement. This wording is slightly different than UTC section 602, and requires both authorization in the power of attorney, and either authorization in the trust agreement or a showing that such exercise by the attorney in fact is consistent with the trust agreement. A guardian may exercise a trustor’s powers to amend or revoke only with court approval under RCW 11.92.140. Finally, the section protects a trustee who acts without knowledge that the trust has been revoked or amended.

RCW 11.103.040 is based on UTC section 603, and clarifies that while a trustor of a revocable trust is alive, the trustee owes duties only to the trustor. The Washington provision varies from the UTC because the UTC states that the sole duty to the trustee lasts as long as the trust is revocable and the trustor has capacity. RCW 11.103.050 now provides a contest period similar to that available for will contests.<sup>454</sup> If a trustee has given notice as required under RCW 11.98.07, once the trustor has died, the beneficiary has four months to contest the validity of the trust. If no such notice is given, the validity of the trust can be contested within twenty-four months of the trustor’s death.<sup>455</sup>

### *M. Accepting and Declining Trusteeship*

The 2003 Task Force did not add UTC section 701, “Accepting or Declining Trusteeship,” because it did not believe it was necessary. However, since several provisions of RCW Chapter 11.98 rely on the timing of the acceptance of the trusteeship, the 2012 Task Force decided

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451. *Id.* § 11.103.030(3)(b).

452. The UTC provision allows amendment or revocation by “any other method manifesting clear and convincing evidence of the settlor’s intent.” U.T.C. § 602(c)(2)(B) (2010).

453. *See* WASH. REV. CODE § 11.94.050.

454. *Id.* § 11.24.010.

455. This time period is consistent with the claims period for creditors when no notice to creditors has been giving. *Id.* § 11.40.010.

it would be a helpful addition for the sake of clarity. The section on accepting trusteeship is identical to the UTC.<sup>456</sup> But to decline trusteeship, the Washington statute requires that the person deliver a written declination to the trustor or the successor trustee or to a qualified beneficiary.<sup>457</sup> By contrast, the UTC does not specify a method of declining trusteeship, and provides that a person who has not accepted the trusteeship within a reasonable time is deemed to have declined.<sup>458</sup> Under the Washington statute, acceptance and declination both require affirmative acts. Both the Washington statute and the UTC provide that a person can act to preserve the property or investigate the property without having to actually accept the trusteeship.<sup>459</sup>

#### *N. Trustee Powers*

RCW 11.98.070 lists the powers held by trustees unless otherwise provided in the trust agreement. The 2003 Task Force compared Washington's existing list of powers with UTC section 816 and selected some enumerated powers from the UTC section to include in the Washington statute. The Task force believed that these added powers were most likely within a trustee's authority under current law but that it would be beneficial to include specific reference to them in the statute. One substantive change was the provision on payments to minors and other incapacitated beneficiaries.<sup>460</sup> The revised section expands the trustee's options for payment and now specifies that if the trustee uses one of the prescribed methods, "the trustee has no further obligations regarding the amounts so paid."<sup>461</sup>

#### *O. Plan of Distribution Upon Termination of Trust*

The 2011 Legislation added RCW 11.98.145, which is taken from UTC section 817. It allows a trustee to propose a plan of distribution of trust assets to beneficiaries upon termination of the trust, and authorizes the trustee to follow that plan as long as no beneficiary objects within thirty days. Note that the notice of the plan, if mailed, must be by certified mail, in contrast to other forms of notice required in RCW Title

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456. S.B. 5344, 63d Leg., Reg. Sess. § 10(1) (Wash. 2013); U.T.C. § 701(a).

457. S.B. 5344 § 10(2).

458. U.T.C. § 701(b).

459. S.B. 5344 § 10(3); U.T.C. § 701(c).

460. WASH. REV. CODE § 11.98.070(16).

461. *Id.* § 11.98.070(16)(b).

11 that can be sent by regular mail.<sup>462</sup>

*P. Nonliability of Third Persons Without Knowledge of Breach*

RCW 11.98.105 was added in the 2011 Legislation, and is based on UTC section 1012. It is a clarification and codification of common law. Under this section, a third person dealing with a trustee in good faith and without knowledge that the trustee is acting improperly is protected from liability. There are two important provisions that give specific clarification. First, the third person acting in good faith does not have a duty to inquire into the trustee's authority. Second, a third party who turns property over to a trustee does not have a duty to ensure that the trustee subsequently applies the property appropriately.<sup>463</sup> Because the section is essentially identical to UTC section 1012, the UTC comments and interpretations from other states with this section should be helpful in defining the scope of the liability protection under this statute. Former section 11.98.090 covered the same subject, without the same level of detail, and was repealed in the 2013 Legislation.<sup>464</sup>

*Q. Exculpatory Clauses*

RCW 11.98.107 was added in the 2011 Legislation and is based on UTC section 1008. It provides that clauses that relieve the trustee from liability for breach of duty are unenforceable if inserted as a result of abuse of the relationship between the trustor and the trustee.<sup>465</sup> It further provides that an exculpatory clause drafted or caused to be drafted by the trustee is presumed invalid unless the trustee proves that the clause is fair, and that it was adequately explained to the trustor.<sup>466</sup> The burden therefore shifts to the trustee to prove an exculpatory clause is enforceable in situations where the trustee caused the term to be included. Drafters of trusts should therefore document fairness and disclosure to the trustor when an exculpatory clause is requested by the trustee. The 2003 Task Force elected not to include the UTC language regarding the unwaivability of good faith, because that requirement is already codified at RCW 11.97.010.

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462. *Id.* § 11.96A.110.

463. *Id.* § 11.98.105(2)–(3).

464. S.B. 5344, 63d Leg., Reg. Sess. § 18 (Wash. 2013).

465. WASH. REV. CODE § 11.98.107(1).

466. *Id.* § 11.98.107(2).

*R. Beneficiary Consent, Release, or Ratification*

RCW 11.98.108 is taken from UTC section 1009 and codifies common law that a beneficiary can waive, release, or ratify a trustee's action that may otherwise be considered a breach of trust, and such waiver, release, or ratification is effective unless the beneficiary's action was either induced by the trustee's improper conduct or the beneficiary was not properly informed.

*S. Certification of Trust*

RCW 11.98.075 is taken from UTC section 1013, and is an important addition to existing law. It authorizes a trustee to respond to a request from a third party, such as a bank, for the trust agreement by delivering instead a certificate with certain pertinent information, but without the dispositive terms of the trust. With this provision, trustees who are asked by third parties for copies of the trust agreement can protect the privacy of the trustor and beneficiaries by giving instead a certificate that gives the third party only the information necessary to do business with the trust. If a third party nevertheless demands a copy of the entire trust agreement in addition to the certification, and that demand is not in good faith, that third party can be held liable for damages, including attorneys' fees incurred to resist such a request.<sup>467</sup> The section protects third parties who rely in good faith on the certificate, and the damages and attorneys' fees provision deters a third party from insisting on the trust agreement in addition to the certification.<sup>468</sup>

*T. Damages for Breach of Trust*

RCW 11.98.085 specifies calculation of damages when a trustee breaches his fiduciary duties, and is identical to UTC section 1002. It codifies the common law that a trustee is liable for the greater of the amount necessary to restore the trust to its value if no breach occurred, and the profit made by the trustee.<sup>469</sup> The section also provides for a method of contribution if there are multiple trustees liable to the beneficiaries.<sup>470</sup>

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<sup>467</sup> *Id.* § 11.98.075(8).

<sup>468</sup> *Id.* § 11.98.075(6)–(8).

<sup>469</sup> RESTATEMENT (THIRD) OF TRUSTS § 100 (2012).

<sup>470</sup> WASH. REV. CODE § 11.98.085(2).

*U. Effective Dates*

Both the 2011 Legislation and the 2013 Legislation state that the provisions apply to trusts in existence at the effective dates of the acts as well as to trusts to be created, and apply to pending as well as future judicial proceedings, unless the court finds that such application would interfere with the proceedings or prejudice the rights of the parties.<sup>471</sup> These sections are based on UTC section 1106. The comments to that UTC section state:

By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen. This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.<sup>472</sup>

However, both the 2011 Legislation and the 2013 Legislation make an exception for the sixty-day notice to beneficiaries requirement.<sup>473</sup>

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471. S.B. 5344, 63d Leg., Reg. Sess. § 28 (Wash. 2013); H.B. 1051, 63d Leg., Reg. Sess. § 40 (Wash. 2011).

472. U.T.C. § 1106 cmt. (2010).

473. *See supra* notes 167–171 and accompanying text.

## APPENDIX A

This proposed revision to RCW 11.96A.120 attempts to address the concerns raised in Part IV.D of this Article.

**RCW 11.96A.120 - Representation**

- (1) Notice to a person who may represent and bind another person under this section has the same effect as if notice were given directly to the other person.
- (2) The consent of a person who may represent and bind another person under this section is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.
- (3) The following limitations on the ability to serve as a representative shall apply:
  - (a) a trustor may not represent and bind a beneficiary under this section with respect to the termination and modification of an irrevocable trust; ~~and~~
  - (b) representation of an incapacitated trustor with respect to his or her powers over a trust shall be subject to the provisions of RCW 11.103.030, and chapters 11.96A, 11.88 and 11.92 RCW; and
  - (c) the representative and the person represented must not have a conflict of interest at any time during the representation with respect to the particular matter that is the subject of the representation.
- (4) ~~To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to the particular question or dispute~~ The following fiduciary representation is permissible:
  - (a) a guardian may represent and bind the estate that the guardian controls, subject to chapters 11.96A, 11.88 and 11.92 RCW;
  - (b) a guardian of the person may represent and bind the incapacitated person if a guardian of the incapacitated person's estate has not been appointed;
  - (c) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
  - (d) a trustee may represent and bind the beneficiaries of the trust; and
  - (e) a personal representative of a decedent's estate may represent and bind persons interested in the estate.
- (5) A parent may represent and bind the parent's minor or unborn child



or children if a guardian for the child or children has not been appointed.

- (6) 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 another having a substantially identical interest with regard to the ~~particular question or dispute~~ matter that is the subject of the representation; but only to the extent there is no conflict of interest between the representative and the person represented with regard to the particular question or dispute.
- (7) Where an interest has been given to a class of persons, the living members of the class as of the date that the representation is to be determined, may ~~virtually represent and bind~~ all other members of the class as of that date, but only to the extent that there is no conflict of interest between the representative and the person(s) represented with regard to the particular question or dispute.
- (8) Representation of successive interests is permitted as follows:
- (a) Where an interest has been given to a living person or to a class of persons and a substantially identical interest is to pass to another person or class of persons, or both, upon the happening of a future event, the living person, or the living members of the class of persons, who hold the interest may represent and bind all of the persons and classes of persons who might take on the happening of all subsequent future events.
- (b) Where an interest will be given to a living person or to a class of persons upon the happening of a future event and a substantially identical interest would pass to another person or class of persons, or both, upon the happening of one or more subsequent future events, the living person, or the living members of the class of persons, who will hold the interest on the happening of an earlier event may represent and bind all of the persons and classes of persons who might take on the happening of all subsequent future events.

~~Where an interest 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 heirs, issue, or other kindred of that living person or the distributees of the estate of that living person upon the happening of a future event, that living person may virtually represent the surviving spouse or surviving domestic partner, heirs, issue, or other kindred of the person, and the distributees of the estate of the person, but only to the extent there is no conflict of interest between the~~

~~representative and the person(s) represented with regard to the particular question or dispute.~~

- ~~(8) Except as otherwise provided in subsection (7), where an interest 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, the living person or persons who would take the interest upon the happening of the first event may virtually represent the persons and classes of persons who might take on the happening of the additional future event, but only to the extent there is no conflict of interest between the representative and the person(s) represented with regard to the particular question or dispute.~~
- ~~(9) To the extent there is no conflict of interest between the holder of the power of appointment and the persons represented with respect to the particular question or dispute,~~
- ~~(c) The holder of a lifetime or testamentary power of appointment may virtually represent and bind persons who are permissible appointees or takers in default (but only to the extent that they the takers in default are permissible appointees in the case of a limited power of appointment) under the power, and who are not permissible distributees.~~
- ~~(9) (10) The Attorney General may virtually represent and bind a charitable organization if:~~
- ~~(a) the charitable organization is not a qualified beneficiary specified in the trust instrument or acting as Trustee; or~~
- ~~(b) the charitable organization is a qualified beneficiary, but is not a permissible distributee, and its beneficial interest in the trust is subject to change by the trustor or by a person designated by the trustor.~~
- ~~(10) (11) An action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise represented under this section.~~
- ~~(11) (12) This section is intended to adopt and expand on 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.~~