

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2760**

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Subject: Linda Kotis & Modification Mania - Avoid Trust Code Trip-Ups and Draft Documents to Facilitate Change

“Grantor trusts. Non-grantor trusts. Revocable trusts that became irrevocable following the settlor’s death. Crummey trusts. Dynasty trusts with living settlors. Trusts with deceased settlors. These are among the types of trusts involved in the dozens of trust modifications on which we have advised our clients over the past several years. As the statutory mechanisms for modifying trusts grow in number and variety, it is reasonable for the estate planner to expect clients to modify their irrevocable trusts at a future date. Anticipating change is better than being surprised by it. Therefore, learn how to avoid the pitfalls present in relying solely on the statutes and consider drafting new trusts so as to facilitate later changes.”

Linda Kotis provides members with commentary on modification of irrevocable trusts and some “Pro Tips” for (i) avoiding the pitfalls present under state trust codes and (ii) drafting new trusts to facilitate later changes.

Linda Kotis is Of Counsel in the Washington, DC office of **Ivins, Phillips & Barker**, a firm ranked by Chambers in its 2019 High-Net Worth guide. She is a member of the District of Columbia, California, Indiana, and Maryland Bars. Linda advises clients on forming and revising their estate plans and analyzes estate, income, generation-skipping transfer, and gift taxation matters for high net worth individuals and families. Linda’s significant experience includes analysis of complex state trust administration and non-tax issues, the administration of high net worth estates, formation of private foundations, marital agreements, complex guardianships, post-mortem planning, probate matters and court pleadings regarding fiduciary administration issues. For **LISI**, Linda has written [Reset of the District of Columbia’s Estate Tax Exemption](#) with co-authors Andrea Dykes and Carolyn Rogers of Howard Insurance (January 9, 2019), [Minding the Gap: The Mismatch Between Maryland’s 2019 Estate Tax](#)

[Exemption and the New Federal Estate Tax Exemption](#) (June 25, 2018), and [Reform School: Lessons on Rescuing an Undesirable Tax Plan after Death](#) (April 27, 2017). She is the author of *Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*, Probate & Property magazine (March/April 2017), and other articles in *Washington Lawyer*, *Bloomberg BNA Daily Tax Report*, and *Wealth Strategies Journal*. Linda's most recent presentations on estate planning were *Lemons to Lemonade: Making Use of the Delaware Tax Trap* (November 13, 2018) with Kasey A. Place of Ivins, Phillips & Barker at the DC Bar Communities, Estates, Trusts, and Probate Lunch Series, and as a panelist with Robin Solomon of Ivins, Phillips & Barker at the *Women, Influence & Power in Law* conference (October 4, 2018). Past presentations include meetings of the American Bar Association and the District of Columbia Bar, as well as law firm briefings. Linda is an active member of the Estate Planning Council of Montgomery County, Maryland.

Linda would like to thank her colleagues, **H. Carter Hood** and **Kasey A. Place**, for their suggestions on the subject matter and comments on this article.

Here is her commentary:

EXECUTIVE SUMMARY:

Grantor trusts. Non-grantor trusts. Revocable trusts that became irrevocable following the settlor's death. Crummey trusts. Dynasty trusts with living settlors. Trusts with deceased settlors. These are among the types of trusts involved in the dozens of trust modifications on which we have advised our clients over the past several years. While some of these include trusts written in the distant and recent past for our own clients, other projects came to us from families changing counsel. All but one of the modifications have been non-judicial. Reasons for amendments have included:

- Updating and standardizing administrative provisions across 22 different trusts for multiple generations of the same family;
- Adding general powers of appointment to Crummey trusts to create a more favorable tax result;

- Clarifying that a Trustee's power to guarantee loans includes power to provide indemnification;
- Changing the situs and governing law of a District of Columbia trust to Delaware and making it a directed trust;
- Decanting trusts to remove a contingent general power of appointment because of the settlor's concern over a beneficiary's potential choice of appointees; and
- Moving trusts to another jurisdiction to take advantage of the new jurisdiction's trust code provisions allowing a nonjudicial termination.

Mechanisms for the changes have included: (i) statutory modifications using 12 Del. C. § 3342(a) which allows a trust agreement to be modified during the settlor's lifetime with the consent or non-objection of the settlor, Trustees, and beneficiaries; (ii) statutory mergers using 12 Del. C. § 3325(29) which allows a Trustee to merge an irrevocable trust following the settlor's death into an existing trust or a new trust with the consent or non-objection of the Trustees and beneficiaries; (iii) relying upon a trust agreement provision allowing a Trustee to modify the agreement for tax reasons and consistent with the settlor's intent, when beneficial interests are not being changed; and (iv) decanting based upon a state's new decanting statute.

The statutory choices for modifying trusts are growing in number and variety, with jurisdictions adopting the Uniform Trust Code (UTC) and the Uniform Trust Decanting Act (UTDA) and adding Nonjudicial Settlement Agreement (NJSA) provisions to their trust codes. It is reasonable for the estate planner to anticipate that clients will wish to modify trusts benefitting a family member at a future date.

COMMENT:

Mindy and her fellow physicians and office mates (Danny, Jeremy, Peter, Morgan, Tamra, and Betsy) have long been involved in each other's personal lives, from romantic entanglements to housing choices to parental conflicts. As it turns out, they also have a history of serving as Trustees, settlors, beneficiaries and other fiduciaries for various trusts created for their benefit.

Based on their trusts, here are some “Pro Tips” to (i) avoid the pitfalls present in relying solely on statutory modification rules and (ii) draft new trust agreements so as to facilitate later changes.

1. **Issue:** A beneficiary’s power to remove and replace Trustees may preclude a Trustee from exercising his or her power to decant the trust.

Scenario: While Jeremy’s family was living in Richmond, Virginia, his father created a Virginia irrevocable trust (i) to augment Jeremy’s meager income as an OB-GYN resident at UVA medical school and (ii) because he doubted his son’s ability to achieve financial independence once he graduated. Now that Jeremy has proven his father wrong by joining a successful New York practice, Jeremy would like to have the trust decanted so that the trust provision granting him a limited power of appointment could be expanded to include charities as well as Jeremy’s descendants.¹ Morgan, a nurse practitioner in the practice, now serves as Trustee and is willing to decant the trust. Jeremy has the power to remove and replace Morgan as Trustee and the trust is silent on the qualifications of the successor Trustee. While both the Uniform Trust Decanting Act² and the Virginia Trust Decanting Act require a Trustee to be an “authorized fiduciary,” the definition of such a fiduciary differs under the two acts.³ Under Virginia law, the Trustee of the “first” trust (*i.e.*, the trust that is being decanted) is not an authorized fiduciary when a current beneficiary may remove and replace the Trustee and designate a related or subordinate party⁴ with respect to such current beneficiary as successor Trustee. Because the trust does not prohibit Jeremy from choosing a related or subordinate party as a Trustee, Jeremy would not be limited in his selection of a successor to Morgan. Therefore, Jeremy’s Trustee removal and replacement power causes Morgan to fail to qualify as an authorized fiduciary, and Morgan cannot decant the trust.

Solution: When the parties are working with an existing trust, such as in this scenario, determine whether the trust agreement or the state trust code allows the beneficiary to release his removal power. Another solution may be the authority under the state trust code to change the trust situs and governing law. The Trustee could exercise this power to move the trust to a jurisdiction with a decanting statute

that does not define authorized fiduciary in reference to the existence of a Trustee removal and replacement power.

When drafting a new trust, require the beneficiary with the Trustee removal power to appoint a person or organization who is not a related or subordinate party as successor Trustee. (This is recommended regardless of whether a decanting is anticipated, because the beneficiary's removal power may otherwise cause the beneficiary to be treated as holding a general power of appointment over the trust.)⁵ Authorize the beneficiary to release his or her Trustee removal and replacement power. Alternatively, build in decanting powers in the trust agreement, rather than relying on state statutes. This could range from (i) a simple provision allowing an independent Trustee to distribute income and principal from a beneficiary's trust to another trust for that beneficiary on any terms the Trustee deems appropriate, to (ii) a complex article mirroring the structure of a decanting statute with requirements tailored to the beneficial interests of the existing trust.

2. **Issue:** Naming a specific charity as a contingent remainder beneficiary may lead to unwanted involvement of third parties in a trust modification.

Scenario: Peter was so relieved that Lauren chose to marry him instead of his physician partner Jeremy that he jumped at the chance to move his family from New York to open the practice's new satellite office in Raleigh, North Carolina. Peter has created a Spousal Lifetime Access Trust (SLAT) to benefit Lauren, her son Henry, and their new triplets. Peter named Mindy, a fellow OB-GYN and his closest friend in the practice, as Trustee of the trust. Peter now would like to modify the Descendants' Separate Trusts provisions under the SLAT to change the age at which each child may serve as a Co-Trustee of his or her own trust. The trust is governed by North Carolina law, which allows an irrevocable trust to be amended with the consent of the settlor and all beneficiaries.⁶ Duke University Medical School is named as a "Taker of Last Resort" in the SLAT. The likelihood of Peter dying with no descendants and therefore causing Duke University to benefit from the trust is remote. Nonetheless, the medical school is a contingent remainder beneficiary⁷ whose consent to the modification must be obtained. Peter is reluctant to have Duke University involved in the process. He

doesn't wish to inform the medical school that it holds a remote remainder interest, and he fears the medical school's involvement will delay the modification process.⁸

Solution: When the parties are working with an existing trust, such as in this scenario, they will have to decide whether to abandon the plan to amend the trust or proceed with the involvement of the contingent remainder beneficiary.

When drafting a new trust, accomplish the settlor's charitable intent by stating in the Takers of Last Resort provision that a Trustee has discretion to choose one or more charities, rather than naming specific charities which would take in the event that all other named beneficiaries are deceased. The Trustee could be required to take into consideration the settlor's lifetime giving patterns and wishes as known to the Trustee. The settlor could put those wishes in a letter to the Trustee. There would be no identifiable charitable organization that would benefit if the settlor died without living descendants, and therefore, the consent of the contingent remainder beneficiaries would not be necessary for the modification.

Note that the state's attorney general must be notified of certain proceedings involving modifications to a charitable trust in order to protect the interests of charitable beneficiaries. This is because charitable beneficiaries of a charitable trust and the state's attorney general have the rights of a qualified beneficiary under the trust code. A provision in an otherwise "noncharitable" trust naming a charity as a contingent remainder beneficiary or allowing a Trustee to select a charity as a remainder beneficiary if all other interests to individuals fail, however, does not cause a trust to be considered a charitable trust.⁹ Therefore, neither the attorney general nor the charity named as contingent remainder would be considered a qualified beneficiary, and the attorney general would not have to be given notice of the modification described in this scenario.

- 3. Issue:** A Trustee may not change certain "administrative" provisions when decanting a trust without the consent of third parties and beneficiaries.

Scenario: Tamra was hired as a nurse in the medical practice to replace Morgan, who was fired by Danny. Tamra is the beneficiary of

a trust created by her aunt in Colorado years ago. Betsy, a receptionist employed by the medical practice, knew Tamra and her family from their college days and therefore was named as Trustee of the trust. Tamra's long-term boyfriend, Ray Ron, was named as Trust Protector and given the power to remove and replace Trustees. Shortly after Mindy persuaded Danny to rehire Morgan, Tamra ditched Ray Ron and started seeing Morgan. While Ray Ron is now out of Tamra's personal life, she is uncomfortable with his continuing role in her financial matters. Tamra has asked about decanting the trust to a new trust agreement that gives the removal power to Morgan instead. The Colorado Uniform Decanting Act limits Betsy's authority as Trustee to change a Trustee removal provision in the new trust, requiring one of the following: (i) Ray Ron must consent to a modification that affects only him; (ii) Ray Ron and the qualified beneficiaries of the second trust must consent to modifying the removal power, and the change must grant a substantially similar power to another person; or (iii) a court must approve modifying the removal power, and the change must grant a substantially similar power to another person.¹⁰ Ray Ron is unlikely to cooperate with this change. Morgan is leery of the trust being involved in a court proceeding because of his status as a former inmate at Otisville Correctional Facility.

Solution: When the parties are working with an existing trust, such as in this scenario, the Trustee typically has the authority under the state trust code to change the trust situs and governing law. The Trustee may exercise this power to move the trust to a jurisdiction with more favorable laws regarding the modification of a Trustee removal power in a decanted trust. For example, the Washington UTDA allows the removal power to be changed in a decanting when all qualified beneficiaries of the second trust consent to the modification.¹¹ The person possessing the removal power would not have to be involved with the decanting of the trust administered in Washington state and governed by its laws.

When drafting a new trust, see the discussion in Example 1 about including decanting powers in a trust instrument. Note that if a comprehensive decanting article is added and the Trustee is allowed to change removal and replacement powers, the provision should

address the designation of a person holding those powers who is not a related or subordinate party.¹²

4. **Issue:** Trustees involved with a trust modification will want to seek releases from current beneficiaries and remainder beneficiaries, and myriad signatures may be needed.

Scenario: Continuing with the trust discussed in Example 3, suppose instead (i) the trust for Tamra is governed by Delaware law, (ii) Tamra's uncle who lives in Delaware is Trustee, (iii) Ray Ron has decided to cooperate by resigning as Trust Protector, and (iv) pursuant to the trust agreement Mindy is now successor Trust Protector. Mindy is concerned she is too indecisive to fulfill her duties as Trust Protector. She has told Tamra and her aunt and uncle the trust should be modified to add Danny as a Co-Trust Protector and make other changes affecting the duties of a Trust Protector. Delaware law allows a trust agreement to be modified during the settlor's lifetime with the non-objection of the settlor, Trustees, and beneficiaries.¹³ The parties will enter into a modification and release agreement (essentially an NJSA) to accomplish the modification and release the fiduciaries for actions through the date of the modification. Tamra's uncle named her cousin Sheena and 15 of Tamra's other cousins as presumptive remainder beneficiaries of this trust. While Sheena lives in New York, the other beneficiaries live in 15 different states. All beneficiaries are under age 30, and six of the 16 remainder beneficiaries are minors. Delaware's virtual representation statute provides that a minor who is not otherwise represented may for all purposes be represented and bound by another who has a substantially identical interest with respect to the particular question involving a trust when there is no material conflict of interest between the representative and the person being represented.¹⁴ Tamra and her aunt and uncle are worried that having to obtain so many signatures may delay the modification. They also are concerned that this process permits disclosures to remainder beneficiaries about the trust that they otherwise wish to avoid.

Solution: When the parties are working with an existing trust, such as in this scenario, the required beneficiary signatures to the modification agreement could be limited to 10 signatures. The 10 adult remainder beneficiaries may represent themselves and any one of them may also represent all six minor cousins or siblings of theirs.

This is because such minor remainder beneficiary is similarly situated to the adult remainder beneficiary and the adult beneficiary has no conflict with the minor with respect to the interests in the trust.

When drafting a new trust, dealing with myriad signatures and undesirable disclosures may be avoided in future situations. The new trust agreement could create a set of “Notice Recipients” to receive notices or sign documents on behalf of a beneficiary, including both adult and minor beneficiaries. This is permitted under Delaware law in conjunction with the appointment of a “designated representative.”¹⁵ For example, the provision could state that a Notice Recipient may be (i) any current income and principal beneficiary who has reached a certain age as long as such person is not under a disability, (ii) the Trustee, (iii) fiduciaries such as the Trust Protector, Investment Advisor, and Distribution Advisor, and (iv) parties named in the trust agreement to receive notice and take action on behalf of the beneficiary. While commentators have discussed what constitutes a reasonable length of time under Delaware law to waive a Trustee’s duty to inform and report to beneficiaries,¹⁶ there appears to be no limit on a beneficiary’s age for whom a designated representative would be appointed.

5. **Issue:** Naming both parents as Trustees of a Crummey trust may reduce virtual representation options necessary for trust modifications.

Scenario: Annette moved from Staten Island to the District of Columbia after winning a large settlement from her former hotel employer. Annette is elated that her son Danny and his wife Mindy have taken time away from their busy medical practice to start a family. Therefore, she decided to show her gratitude by creating a Crummey trust under DC law for her first grandchild, Inigo,¹⁷ and naming Danny and Mindy as Trustees of the trust. The trust agreement authorizes the Trustees to act unanimously to modify the trust for tax reasons, when the change reflects the settlor’s intention in creating the trust. The Trustees now want to modify the trust to give Inigo a general power of appointment to appoint assets equal to the value of contributions made to the trust on or after the date of the trust amendment. This will allow Annette’s additional gifts to qualify for the generation-skipping transfer (GST) tax annual exclusion because of the principal being includable in Inigo’s estate, enabling

Annette to preserve her GST tax exemption for use on larger gifts. The parties will enter into an NJSA to acknowledge the modification. Someone must represent Inigo's interests in the NJSA because the trust is being changed while Inigo is still a minor. A parent or Trustee may virtually represent a beneficiary when there is no conflict of interest with respect to the trust transaction, or a grandparent or other ancestor when a parent cannot otherwise represent the beneficiary.¹⁸ In this case, since both Danny and Mindy would be acting unanimously as Trustees to amend the trust, they have a conflict with representing their daughter.¹⁹ The modification benefits Annette as the donor of GST annual exclusion gifts and thus she also has a conflict. Therefore, none of them may represent the minor and no other virtual representation provision applies. In order to accomplish the modification and represent their young daughter's interests, Mindy or Danny must resign as Trustee.

Solution: When the parties are working with an existing trust, such as in this scenario, as long as appointment of a Co-Trustee is permitted at any time, the parent who resigns as Trustee could be reappointed as Co-Trustee once the modification is complete.

When drafting a new trust, consider naming only one parent as Trustee of the trust. Allow any Trustee to resign at any time. Give the sole Trustee power to appoint a Co-Trustee. See also the discussion in Example 4 offering other methods for handling notice and representation issues in a newly drafted trust.

Conclusion

As Mindy is fond of saying, "who I have been is not who I am going to be." Likewise, a trust agreement as executed may not necessarily remain in its original form. Building in flexibility when drafting new trust agreements preserves a client's options for future modifications due to altered family circumstances, tax law changes, and refinement of a settlor's intent. Understanding the limitations of statutory modification rules will help prevent those requirements from derailing the modification process and may lead to alternative methods for effectuating the proposed changes to a trust agreement.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Linda Kotis

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CITATIONS:

¹ Va. Code § 64.2-779.8(D)(3) allows a Trustee to create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary. A power of appointment described in Va. Code § 64.2-779.8(D)(3) may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust. See Va. Code § 64.2-779.8(E).

² Under UTDA Section 2(3), “Authorized fiduciary” means:

- (A) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;
- (B) a special fiduciary appointed under Section 9; or
- (C) a special-needs fiduciary under Section 13.

Comment to UTDA Section 2 discusses the definition of an authorized fiduciary as follows:

The definition excludes a settlor acting as a trustee. If a settlor is a trustee of an irrevocable trust, gift and estate tax problems could result if the settlor had a decanting power. The definition does not exclude a beneficiary who is acting as a trustee (an “interested trustee”) because the act only permits a trustee with expanded distributive discretion to decant in a manner that would change beneficial interests. Typically trusts will not give an interested trustee unascertainable discretion over discretionary distributions because such discretion would create gift and estate tax issues. In the unusual event that a trust does give an interested trustee unascertainable discretion, the trustee will incur the tax effects of holding a general power of appointment whether or not the trustee also has a decanting power.

³ Unlike the Uniform Trust Decanting Act which has a definition section separate from the one found in the Uniform Trust Code, the Virginia Decanting Act does not have its own definition section. Therefore, definitions under Article 1 of the Virginia Trust Code apply to the Virginia Decanting Act. The applicable definition of “authorized fiduciary” for purposes of decanting in Virginia is found in Va. Code § 64.2-701 and states as follows:

“*Authorized fiduciary*” means (i) a trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the income or principal of the first trust to one or more current beneficiaries and that is not (a) a current beneficiary of the first trust or a beneficiary to which the net income or principal of the first trust would be distributed if the first trust were terminated, (b) a trustee of the first trust that may be removed and replaced by a current beneficiary who has the power to remove the existing trustee of the first trust and designate as successor trustee a person that may be a related or subordinate party, as defined in 26 U.S.C. Section 672(c), with respect to such current beneficiary, or (c) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the first trust; (ii) a special fiduciary appointed under Section 64.2-779.6; or (iii) a special-needs fiduciary under Section 64.2-779.10.

In *Annual Survey of Virginia Law: Article: The Virginia Uniform Trust Code*, 53 U. Rich. L. Rev. 179, 183-184 (2018), J. William Gray, Jr. and Katherine E. Ramsey explain the background of Virginia's limitation on the decanting power as follows:

Before Virginia adopted the Uniform Trust Decanting Act ("UTDA") in 2017, a decanting power could be exercised only by a disinterested trustee, *i.e.*, a trustee who was not a current beneficiary or a potential distributee if the trust were then terminated, who could not be replaced by an interested beneficiary and whose legal obligation to support a beneficiary could not be satisfied from the trust. Limiting the decanting power to a disinterested trustee avoided the possibility that the trustee would be considered to hold a general power of appointment over the trust assets for federal transfer tax purposes, which would cause the value of those assets to be included in the trustee's gross estate. However, when the Virginia UTDA was enacted, it prohibited only a trustee who was also the trust settlor from participating in any decanting decision.

To avoid potential problems from the change in the definition of "authorized fiduciary," the 2018 General Assembly amended it to exclude once again those trustees who are current trust beneficiaries or potential recipients of trust income or principal on dissolution, those who could be removed by an interested beneficiary, and those who could satisfy their legal obligations to support a beneficiary from the trust. It also authorized the court to appoint a special fiduciary with authority to exercise the decanting power if there are no disinterested trustees or if any trustee so requests.

In footnote 28 of their article, J. William Gray, Jr. and Katherine E. Ramsey explain the reasoning behind the lack of a similar limitation in the Uniform Trust Decanting Act on the identity of the Trustee:

The National Conference of Commissioners on Uniform State Laws reasoned that a broader prohibition was not necessary because trust settlors were not likely to give other types of interested trustees the expanded distributive discretion necessary to conduct a decanting that affected beneficial interests, and if such discretion were given, it would be

sufficient on its own to cause the trust assets to be included in the trustees' gross estates whether or not they also held a decanting power. See Unif. Tr. Decanting Act § 2 cmt. (Unif. Law Comm'n 2015).

⁴ As defined in 26 U.S.C. § 672(c).

⁵ Private Letter Ruling 201436003.

⁶ See N.C. Gen. Stat. § 36C-4-411(a).

⁷ N.C. Gen. Stat. § 36C-1-103(3) defines Beneficiary as a person who:

- a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer, but excluding a permissible appointee of a power of appointment; or
- b. In a capacity other than that of Trustee, holds a power of appointment over trust property.

Comment to UTC Section 103, from which the North Carolina trust code section is derived, explains:

The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust.

⁸ Alternatively, it may be possible to use North Carolina's NJSA provisions to make a change that affects the age of a beneficiary eligible to serve as a Co-Trustee. See N.C. Gen. Stat. § 36C-1-111(b)(3) which states:

(b) Interested persons may enter into a binding nonjudicial settlement agreement with respect to any of the following matters involving a trust:

.....

(3) The resignation or appointment of a Trustee and the determination of a Trustee's compensation;

Commentary to the North Carolina statute taken from UTC Comments indicate a lack of clarity on the identity of parties whose approval would be required for the NJSA.

The fact that the Trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. . . . Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the “interested persons” whose consent is required to obtain a binding settlement.

Therefore, out of an abundance of caution, if Peter used the NJSA process to modify the Trustee requirements, Duke University Medical School should at least be given notice of the NJSA. For a review of the NJSA statutes in various jurisdictions, see Linda Kotis, *Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*, Probate & Property magazine (March/April 2017).

⁹ See N.C. Gen. Stat. § 36C-1-103(4), defining a charitable trust as one created for a charitable purpose described in N.C. Gen. Stat. § 36C-4-405(a). Commentary to N.C. Gen. Stat. § 36C-1-110, taken from the Comment to UTC Section 110 about qualified beneficiaries, states as follows:

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the state’s attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust, [sic] Under subsection (b), charitable organizations expressly designated in the terms of the trust to receive distributions and who would qualify as a qualified beneficiary were the trust noncharitable, are granted the rights of qualified beneficiaries under the Code. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee’s discretion but that are not named in the trust’s terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding remote remainder interests.

¹⁰ C.R.S. 15-16-918.

¹¹ Rev. Code Wash. (ARCW) § 11.107.070 (4).

¹² See Comment to UTDA Section 18.

¹³ 12 Del. C. § 3342(a).

¹⁴ 12 Del. C. § 3547(a).

¹⁵ 12 Del. C. § 3339 states in pertinent part as follows:

(a) For purposes of this title, the term “designated representative” means a person who is authorized to act as a designated representative in the manner described in at least 1 of the following paragraphs of this subsection (a) and who delivers to the Trustee such person’s written acceptance of the office of designated representative. A person who is authorized to act as a designated representative in the manner described in this subsection:

(1) Is expressly appointed under the terms of a governing instrument as a designated representative or by reference to this section;

(2) Is authorized or directed under the terms of a governing instrument to represent or bind 1 or more beneficiaries in connection with a judicial proceeding or nonjudicial matter, as those terms are defined in § 3303(e) of this title;

(3) Is a person appointed by 1 or more persons who are expressly authorized under a governing instrument to appoint a person who is described in paragraph (a)(1) or (2) of this section;

(4) Is a person appointed by a beneficiary to act as a designated representative of such beneficiary; and/or

(5) Is a person appointed by the trustor to act as designated representative for 1 or more beneficiaries.

(b) A designated representative shall be presumed to be a fiduciary.

¹⁶ The 11th Annual Delaware Trust Conference raises the question of what is a reasonable age limitation under 12 Del. C. § 3303(c) to limit the reporting of information to beneficiaries. In “Silence Is Golden” - The Best Way to Setup A Quiet Trust Roadmap to Navigating the Issues and Pre-

Mortem Validation,” 11th Annual Delaware Trust Conference, pages 1, 3, October 25 – 26, 2016, Jocelyn Margolin Borowsky, Esq. William H. Lunger, Esq., and Gregory J. Weinig, Esq. write:

I. Silent Trusts – General Background.

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B. Silent Trusts in Delaware.

Unfortunately, the default law of notice can lead to possible negative effects for young (or otherwise susceptible) beneficiaries. What happens when an eighteen (18) year old beneficiary learns that he or she has a large trust set aside for his or her primary benefit? As a result, under Delaware law the settlor of a trust may waive the duty to inform and report, for a period of time, by the terms of the trust agreement. 12 *Del. C.* Section 3303(a). Section 3303 was amended in 2015 to provide a set of guidelines for determining the period of time during which the duty to inform and report is waived. The guidelines provide that the period of time may be related to [i] the age of a beneficiary, [ii] the lifetime of each settlor and/or spouse of a settlor, [iii] a term of years or specific date, or [iv] a specific event that is certain to occur. 12 *Del. C.* Section 3303(c). **These guidelines are not exclusive or mandatory, but are intended to be illustrative of the types of periods of time that could be enforceable.** [emphasis added].

.....

II. Common Questions Regarding Silent Trusts.

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C. Questions About Enforceability/Liability.

(3) Are the various safe harbors set forth in Section 3303(c) still subject to a reasonableness standard? For example, Section 3303(c)(2) allows notice to beneficiaries to be restricted for a period of time related to the lifetime of the settlor. **If a settlor lives until 100 years old, does this mean**

the notice to beneficiaries can effectively be restricted until such beneficiaries are 70-80 years old? Would a court enforce such a restriction? [emphasis added]

¹⁷ Named for Mindy's favorite character in *The Princess Bride*, Inigo Montoya.

¹⁸ D.C. Code § 19-1303.03.

¹⁹ As Comment to UTC Section 303, from which D.C. Code § 19-1303.03 is derived, explains: "A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the Trustee or holds an adverse beneficial interest."