Washington Prefatory Note

The Uniform Trust Decanting Act was adopted by the Uniform Law Commission at its annual conference on July 10, 2015.

The Prefatory Note by the National Conference of Commissioners on Uniform State Laws (NCCUSL) is worthwhile in explaining the need for a decanting statute and for uniformity.

The Washington Decanting Trust Statute models the Uniform Act. However, the Washington Decanting Statute shortens 30 sections of the Uniform Trust Decanting Act to 8 sections in the Washington Decanting Statute. Many sections of the Uniform Act were combined in various sections of the Washington Statute. The Washington Trust Decanting Statute only applies to trusts and trustees; it does not apply to other fiduciaries.

Six sections of the Uniform Act were omitted entirely, being: Section 8, Representation; Section 9, Court Involvement; Section 10, Formalities; Section 23, Trust for Care of Animal; Section 28, Uniformity of Application and Construction; and Section 29, Relation to Electronic Signatures in Global and National Commerce Act.

The Washington comments that differ from the Uniform Act comments are highlighted at the beginning of each Washington section. The comments pertaining to the Uniform Act sections that are included are set out in full following the Washington comments.

Following is a table showing where the eight sections of the Washington Decanting Statute can be found in the Uniform Trust Decanting Act. After the Table, the Prefatory Note to the Uniform Act is set out below.

WASHINGTON TRUST DECANTING STATUTE, SOURCE IN UNIFORM TRUST DECANTING ACT	
Washington Statute	**UTDA**
Section 1(a)	Section 2(2)
Section 1(b)	Section 2(5)
Section 1(c)	Section 2(10)
Section 1(d)	Section 2(11)
Section 1(e)	Section 2(12)
Section 1(f)	Section 12(a)
Section 1(g)	Nothing comparable. See RCW 11.98.002(2)
Section 1(h)	Section 2(21)
Section 1(i)	Section 2(23)
Section 2	Section 11
Section 3	Section 12
Section 4(a), (b), (c), and (d)	Section 4(a), see Section 7; Section 4(b), see RCW 11.96A.220; Section 4(c), see Section 9.
Section 4 (e) and (f)	Section 7(d)
Section 4(g)	Section 7(e)
Section 4(h)	Section 7(f) and (h)
Section 5(a)	Section 6
Section 5(b)	Section 27
Section 5(c)	Section 25
Section 5(d)	Section 26
Section 5(e)	Section 24
Section 6	Section 13
Section 7(a)	Section 15(a) and (b)
Section 7(b)	Section 16
Section 7(c)	Section 17
Section 7(d)	Section 18
Section 7(e)	Section 20
Section 7(f)	Section 14(b), (c) and (d)
Section 7(g)	Section 19
Section 7(h)	Section 15(c)
Section 8(a)	Nothing comparable. For example, see Chapter 11.118 RCW and UTDA Section 23.
Section 8(b)	Section 3(d) and (e)
Section 8(c)	Section 3(b)
Section 8(d)	Section 4(b)
Section 8(e)	Section 5
Section 8(f)	Section 21
Section 8(g)	Section 22(a)
Section 8(h)	Section 22(b)

Section 8(i)	Section 30

Uniform Act Prefatory Note

The Uniform Trust Decanting Act is promulgated in the midst of a rising tide of state decanting statutes. These statutes represent one of several recent innovations in trust law that seek to make trusts more flexible so that the settlor's material purposes can best be carried out under current circumstances. A decanting statute provides flexibility by statutorily expanding discretion already granted to the trustee to permit the trustee to modify the trust either directly or by distributing its assets to another trust. While some trusts expressly grant the trustee or another person a power to modify or decant the trust, a statutory provision can better describe the power granted, impose limits on the power to protect the beneficiaries and the settlor's intent, protect against inadvertent tax consequences, provide procedural rules for exercising the power and provide for appropriate remedies. While decanting may be permitted in some situations under common law in some states, in many states it is unclear whether common law decanting is permitted, and if it is, the circumstances in which it is permitted and the parameters within which it may be exercised.

Need for Uniformity. Trusts may be governed by the laws of different states for purposes of validity, meaning and effect, and administration. The place of administration of a trust may move from state to state. It often may be difficult to determine the state in which a trust is administered if a trust has co-trustees domiciled in different states or has a corporate trustee that performs different trust functions in different states. As a result it may sometimes be unclear whether a particular state's decanting statute applies to a trust and sometimes more than one state's decanting statute may apply to a trust. A uniform statute can eliminate conflicts between different state statutes. It can also protect a trustee who decants under one state's statute when more than one state's statute might apply and protect a trustee who reasonably relies on a prior decanting.

Currently there is limited guidance on the income, gift, and generation-skipping transfer ("GST") tax implications of decanting. A uniform statute also may provide common ground for the promulgation of tax guidance.

What Trusts May Be Decanted. Generally, the Uniform Trust Decanting Act permits decanting of an irrevocable, express trust in which the terms of the trust grant the trustee or another fiduciary the discretionary power to make principal distributions. See Section 3 and Section 2(3) (defining "authorized fiduciary"). The act does not apply to revocable trusts unless they are revocable by the settlor only with the consent of the trustee or an adverse party. Section 3(a). The act does not apply to wholly charitable trusts. Section 3(b). With one exception, if no fiduciary has discretion to distribute principal, the act does not apply unless the court appoints a special fiduciary and authorizes the special fiduciary to exercise the decanting power. See Section 9(1)(2). The exception is that a fiduciary who is responsible for making trust distributions may decant a trust to create a special-needs trust even if the fiduciary does not have

discretion over principal if the decanting will further the purposes of the first trust.

Who May Decant. As discussed below, the decanting power is a fiduciary power, and thus must be entrusted to one of the fiduciaries of the first trust. The act entrusts the "authorized fiduciary" with the decanting power. The "authorized fiduciary" generally is the fiduciary who has discretion to distribute principal, although a more expansive definition is needed in the case of a special-needs trust. Generally, the authorized fiduciary will be the trustee. Where there is a divided trusteeship that gives the power to make or direct principal distributions to another fiduciary, such as a distribution director, such other fiduciary will be the authorized fiduciary.

Discretion Over Principal. Except in the case of special-needs trusts, the decanting power is granted only to an authorized fiduciary who by definition must have the discretion to distribute principal. The extent of the decanting authority depends upon the extent of the discretion granted to the trustee to distribute principal. When the authorized fiduciary has "limited distribution discretion" that is constrained by an ascertainable or reasonably definite standard, the interests of each beneficiary in the second trust must be substantially similar to such beneficiary's interests in the first trust. Thus when the authorized fiduciary has limited distributive discretion, an exercise of the decanting power generally can modify administrative, but not dispositive, trust provisions. When the authorized fiduciary has "expanded distributive discretion," the authorized fiduciary may exercise the decanting power to modify beneficial interests, subject to restrictions to protect interests that are current, noncontingent rights or vested remainder interests, to protect qualification for tax benefits and to protect charitable interests.

Sometimes a trust may have two or more authorized fiduciaries, some of whom have limited distributive discretion and some of whom have expanded distributive discretion. The authorized fiduciaries with limited distributive discretion may exercise the decanting power under Section 12 and the authorized fiduciaries with expanded distributive discretion may exercise the decanting power under Section 11.

Fiduciary Power. The Uniform Trust Decanting Act does not impose any duty on the authorized fiduciary to exercise the decanting power, but if the authorized fiduciary does exercise that power, the power must be exercised in accordance with the fiduciary duties of the authorized fiduciary. See Section 4. A fiduciary must administer a trust in good faith, in accordance with its terms (subject to the decanting power) and purposes, and in the interests of the beneficiaries. An exercise of decanting power must be in accordance with the purposes of the first trust. The purpose of decanting is not to disregard the settlor's intent but to modify the trust to better effectuate the settlor's broader purposes or the settlor's probable intent if the settlor had anticipated the circumstances at the time of decanting.

As a fiduciary power, the decanting power may be exercised without consent or approval of the beneficiaries or the court, except in the case of a few specific modifications that may benefit the fiduciary personally. Nonetheless, qualified beneficiaries are entitled to notice and may petition the court if they believe the authorized fiduciary has breached its fiduciary duty. Further, the authorized fiduciary, another fiduciary, a beneficiary, the settlor or, in the case of a trust with a charitable interest, the Attorney General or other official who may enforce the

charitable interest, may petition the court for instructions, appointment of a special fiduciary who may exercise the decanting power, approval of an exercise of decanting power, a determination that the authorized fiduciary breached its fiduciary duties, a determination that the savings provisions in Section 22 apply or a determination that the attempted decanting is invalid.

Decanting Procedure. Initially, the power to decant was often considered a derivative of the power to make a discretionary distribution to a beneficiary. Under this construct the decanting power was exercised by making a distribution from one trust to another, and a second trust, separate and distinct from the first trust, was required.

The Uniform Trust Decanting Act views the decanting power as a power to modify the first trust, either by changing the terms of the first trust or by distributing property from the first trust to a second trust. While the act generally modulates the extent of the authorized fiduciary's power to decant according to the degree of discretion granted to the authorized fiduciary over principal, the power to decant is distinct from the power to distribute.

Thus the authorized fiduciary may exercise the decanting power by modifying the first trust, in which case the "second trust" is merely the modified first trust. The decanting instrument can, when appropriate, merely identify the specific provisions in the first trust that are to be modified and set forth the modified provisions, much like an amendment to a revocable trust. If the decanting power is exercised by modifying the terms of the first trust, the trustee could either treat the second trust as a new trust or treat the second trust as a continuation of the first trust. If the second trust is treated as a continuation of the first trust, there should be no need to transfer or retitle the trust property. Further, subject to future tax guidance, if the second trust is a continuation of the first trust, there may be no need to treat the first trust as having terminated for income tax purposes and no need to obtain a new tax identification number.

Washington Statute	UTDA
Section 1	Section 2(2)

Washington Comment

The definitions contained in the Washington Trust Decanting Statute are taken from the definitions in Section 2 of the Uniform Trust Decanting Act.

The definitions in Section 2 of the Uniform Trust Decanting Act that are omitted from the definitions in Section 1 of the Washington Trust Decanting Statute are:

(1) "Appointive Property";
(3) "Authorized Fiduciary"; (Washington Statute uses 'Trustee')
(4) "Beneficiary"; (Washington Statute uses 'Qualified Beneficiary')
(6) "Charitable Organization"; (For 6 and 7, Washington Statute uses 'Charitable Interest')
(7) "Charitable Purpose";
(8) "Court";
(9) "Current Beneficiary";
(11) "Expanded Distributive Discretion"; (In its place, Washington Statute uses 'Expanded Discretion' and 'Limited Discretion" instead of Limited Distributive Discretion);
(13) "First – Trust Instrument";
(14) "General Power of Appointment";
(15) "Jurisdiction";
(16) "Person";
(17) "Power of Appointment";
(18) "Power Holder";
(19) "Presently Exercisable Power of Appointment";
(22) "Record";
(24) "Second-Trust Instrument";
(25) "Settlor";
(26) "Sign";
(27) "State";
(28) "Terms of the Trust";
(29) "Trust Instrument."

Uniform Act Comment

Ascertainable Standard. The definition of "ascertainable standard" is similar to the definition found in Section 103(2) of the Uniform Trust Code, but also includes the regulations to the cited sections of the Internal Revenue Code.

A power that is limited to health, education, support or maintenance is limited to an ascertainable standard. Treas. Reg. § 25.2514-1(c)(2). Other powers limited to an ascertainable standard include "support in reasonable comfort," "maintenance in health and reasonable comfort," "support in the beneficiary's accustomed manner of living," "education, including college and professional education" and "medical, dental, hospital and nursing expenses and expenses of invalidism." A power to make distributions for comfort, welfare, happiness or best interests is not limited to an ascertainable standard. In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust other income or resources before the power can be exercised.

The entire context of the document should be considered in determining whether the standard is ascertainable. For example, if the trust instrument provides that the determination of the trustee is conclusive with respect to the exercise of the standard, the power is not ascertainable.

A power to make distributions "as the trustee deems advisable" or in the trustee's "sole and absolute discretion" without further limitation is not subject to an ascertainable standard.

The term is also construed by case law regarding Internal Revenue Code Sections 2036 and 2038.

Charitable Interest. The term "charitable interest" includes an interest held by a charitable organization that makes the charitable organization a qualified beneficiary. Section 2(5). See Section 2(4)(C) defining the term "beneficiary" to include an identified charitable organization that may or will receive distributions under the terms of a trust. See Section 2(20) defining a qualified beneficiary.

For example, a trust might provide for a certain amount to be distributed annually to Gentoos Need You, a charitable organization, and permit the trustee to make discretionary distributions of principal to the settlor's descendants. Upon the death of the settlor's last surviving child, $100,000 is to be paid to Gentoos Need You and the remainder to trusts for the settlor's grandchildren. The annuity interest and the remainder interest held by Gentoos Need You are both charitable interests because they are held by an identified charitable organization and make the organization a qualified beneficiary.

The term "charitable interest" also includes an interest that can benefit only charitable organizations and that, if held by an identified charitable organization, would make the charitable organization a qualified beneficiary. Section 2(5)(B). For example, if the trustee is to distribute $50,000 from the trust each year for ten years to one or more charitable organizations selected by the trustee that protect Antarctica and its wildlife, the trustee also has discretion to distribute income and principal to individual beneficiaries, and at the end of ten years the trustee is to distribute the remainder to the settlor's descendants, the $50,000 annuity is a charitable interest because it may be distributed only to charitable organizations.

As another example, if the trustee may make discretionary principal distributions to the settlor's spouse, and upon the spouse's death is to distribute one-half of the principal to charitable organizations that protect the Arctic and its wildlife, and the other one-half to the settlor's descendants, there is a charitable interest in one-half of the remainder.

The term "charitable interest" also includes an interest devoted solely to charitable purposes, even if the charitable purposes may be carried out directly by the trust rather than through distributions to charitable organizations. Section 2(5)(C). The act, however, does not apply to a wholly charitable trust. See Section 3(b).

The term does not include contingent, successor charitable interests that are not equivalent to the interests held by qualified beneficiaries. For example, if a trust permits distributions to Child A, and upon Child A's death the trust distributes to Child A's descendants, or if none, to the settlor's descendants, or if none, to the Manatee Preservation Fund, a charitable organization, and Child A or the settlor has one or more descendants living, the interest of the Manatee Preservation Fund does not make it a qualified beneficiary and therefore its interest is not a charitable interest.

Decanting Power or The Decanting Power. The term "decanting power" or "the decanting power" means the power granted in this act to the authorized fiduciary (see Section 2(3)) to distribute all or part of the property of the first trust to a second trust or, alternatively, to modify the terms of the first trust to create the second trust. The term does not include any similar power that may be granted under the terms of the trust instrument or pursuant to common law.

If the terms of the first trust are modified, it is not necessary to treat the second trust as a newly created, separate trust, thus avoiding the need to transfer title of the property of the first trust to the second trust. If all of the property of the first trust is distributed pursuant to an exercise of the decanting power to a separate second trust, then the first trust would terminate. The termination of the first trust may impose certain duties on the trustee such as providing reports to the beneficiaries and filing final income tax returns.

Expanded Discretion. "Expanded distributive discretion" is any discretion that is not limited to an ascertainable standard (see Section 2(2)) as used in Internal Revenue Code Section 2514(c)(1) or to a reasonably definite standard (see Section 2(21)) as used in Internal Revenue Code Section 674(b)(5)(A). The tax terms are used here, one from gift tax rules and one from income tax rules, because the definitions of these tax terms are generally clearer than the definitions of nontax terms sometimes used to describe different types of trustee discretion.

First Trust. The terms "first trust" and "second trust" (Section 2(23)) are relative to the particular exercise of the decanting power. Thus when the decanting power is exercised over Trust A to make a distribution to Trust B, Trust A is the first trust and Trust B is the second trust with respect to such exercise of the decanting power. If the decanting power is later exercised

over Trust B to make a distribution to Trust C, then Trust B would be the first trust and Trust C the second trust with respect to such exercise of the decanting power.

Limited Discretion. "Limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard. Section 12(a). "Ascertainable standard" is defined in Section 2(2). "Reasonably definite standard" is defined in Section 2(21). "Limited distributive discretion" and "expanded distributive discretion" (see Section 2(11)) are mutually exclusive terms. An authorized fiduciary who has expanded distributive discretion over principal may decant under Section 11. An authorized fiduciary who has limited distributive discretion over principal may decant under Section 12. An authorized fiduciary who has no distributive discretion over principal, even if the authorized fiduciary has distributive discretion over income, may not decant under the act except as provided in Section 13.

Qualified Beneficiary. The definition of "qualified beneficiary" is substantially the same as the definition in Section 103(13) of the Uniform Trust Code. Note, however, that the expanded definition of "beneficiary" in Section 2(4) includes charitable organizations identified to receive distributions in charitable trusts. Such charitable organizations would be entitled to notice of an exercise of the decanting power under Section 7.

The qualified beneficiaries consist of the current beneficiaries (see Section 2(9)) and the presumptive remainder beneficiaries (see Section 11(a)(2)).

The holder of a presently exercisable general power of appointment is a qualified beneficiary. A person who would have a presently exercisable general power of appointment if the trust terminated on that date or if the interests of the current beneficiaries terminated on that date without causing the trust to terminate is also a qualified beneficiary. The term does not include the holder of a testamentary general power of appointment or the holder of a nongeneral limited power of appointment. Nor does the term include the objects of an unexercised inter vivos power of appointment.

When a trust has distributees or permissible distributees of trust income or principal who are in more than one generation of the descendants of a person and the trust continues after the deaths of the members of the most senior generation who are included among such distributees, Section 2(20)(B) should be construed to include the distributees or permissible distributees after the interests of the most senior generation of such distributees terminate and subparagraph (C) would not ordinarily be applicable if there are any current beneficiaries who are not members of the most senior generation. Assume a trust permits discretionary distributions to any of A's descendants, and only terminates if A has no living descendants, in which case it is distributed to B, and A's now living descendants are Child 1, Child 2, Grandchild 1A and Grandchild 1B. The presumptive remainder beneficiaries are Grandchild 1A and Grandchild 1B pursuant to Section 2(20)(B), and Section 2(20)(C) should not apply to cause B to be a presumptive remainder beneficiary. On the other hand, if A's then living descendants were limited to Child 1 and Child

2, then B would be the presumptive remainder beneficiary under Section 2(20)(C), because there is no presumptive remainder beneficiary under Section 2(20)(B).

Reasonably Definite Standard. "Reasonably definite standard" is defined in Treasury Regulations Section 1.674(b)-1(b)(5). "Reasonably definite standard" includes an ascertainable standard but may also include standards that would not be considered ascertainable standards. A power to distribute principal for the education, support, maintenance, or health of the beneficiary; for the beneficiary's reasonable support and comfort; or to enable the beneficiary to maintain the beneficiary's accustomed standard of living; or to meet an emergency; would be a reasonably definite standard. A power to distribute principal for the pleasure, desire, or happiness of a beneficiary is not a reasonably definite standard. A power to make distributions "as the trustee deems advisable" or in the trustee's "sole and absolute discretion" without further limitation is not a reasonably definite standard. A reasonably definite standard need not require consideration of the needs and circumstances of the beneficiary.

The entire context of a provision of a trust instrument granting a power should be considered in determining whether there is a reasonably definite standard. For example, if a trust instrument provides that the determination of the trustee shall be conclusive with respect to the exercise or nonexercise of a power, the power is not limited by a reasonably definite standard. The fact, however, that the governing instrument is phrased in discretionary terms is not in itself an indication that no reasonably definite standard exists.

Internal Revenue Code Section 674(d) uses the term "reasonably definite external standard." The term "reasonably definite external standard" appears to have the same meaning as "reasonably definite standard." See Treas. Reg. § 1.674(d)-1.

The term is also construed by case law regarding Internal Revenue Code Sections 2036 and 2038.

Second Trust. The definition of "second trust" includes (1) an irrevocable trust already in existence, whether created by the settlor of the first trust or a different settlor, (2) a "restatement" of the first trust which could be executed by the authorized fiduciary or another person as the nominal grantor, (3) the first trust as modified to create the second trust, or (4) a new trust executed by the authorized fiduciary or another person as the nominal settlor for the purpose of decanting. A decanting that is implemented by "restating" or modifying the first trust presumably would not require the issuance of a new tax identification number or the retitling of property or a final income tax return for the trust. A decanting that distributes the property of the first trust to another trust presumably would require that the property be retitled. Further, if the first trust was terminated by reason of the decanting, a final income tax return for the first trust would be required.

Washington Statute
Section 2

UTDA
Section 11

Washington Comment

Section 2 is based on Section 11 of the Uniform Trust Decanting Act. The terms "noncontingent right" and "expanded distributive discretion" were omitted as they were not included in early drafts of the Uniform Act. The Section 11 comment is set out below. Both Sections 2 and 3 reference discretionary power related to principal only. This is because, except in accordance with Section 6, the decanting power cannot be exercised when the trustee's discretionary distribution power is limited to income. This follows the Uniform Trust Decanting Act.

Uniform Act Comment

Noncontingent Right. The term "noncontingent right" describes interests that are certain to occur. A right is not noncontingent if it is subject to the occurrence of a specified event that is not certain to occur. For example, if A's children who survive A are to receive trust assets upon A's death, the rights of A's children are not noncontingent, because each must survive A to take and they may not survive A. The rights of A's children are not noncontingent regardless of whether the requirement of survival is expressed as a condition precedent or a condition subsequent. Thus the result is the same if the gift upon A's death is to A's children in equal shares, but if any child predeceases A such child's share shall be distributed to such child's descendants in shares per stirpes.

A right also is not a noncontingent right if it is subject to the exercise of discretion. Thus if a trustee has discretion to make distributions to A and A's descendants for their support and health care, the interests of A and A's descendants are not noncontingent. The result is the same even if the trust directs the trustee to make distributions to A and A's descendants for their support and health care because the timing and amount of the distributions are subject to the trustee's discretion.

A right also is not noncontingent if a person has discretion to distribute the property subject to the interest to any person other than the beneficiary or the beneficiary's estate. Thus if a trust provides that all income shall be distributed annually to A, but gives the trustee discretion to distribute principal to B for B's support and medical care, A's right is not noncontingent.

A current mandatory right to receive income, an annuity or a unitrust payment where the trustee has no discretion to make distributions to others is a noncontingent right.

Presumptive Remainder Beneficiary. "Presumptive remainder beneficiary" means a qualified beneficiary (see Section 2(20)) other than a current beneficiary (see Section 2(9)). The presumptive remainder beneficiaries might be termed the first-line remainder beneficiaries. These are the beneficiaries who would become eligible to receive distributions were the event

triggering the termination of a current beneficiary's interest or of the trust itself to occur on the date in question. Such a terminating event will often be the death or deaths of the current beneficiaries. A person who would have a presently exercisable general power of appointment if the trust terminated on that date or if the interests of the current beneficiaries terminated on that date without causing the trust to terminate is a presumptive remainder beneficiary.

Presumptive remainder beneficiaries can include takers in default of the exercise of a power of appointment. The term may sometimes include the persons entitled to receive the trust property pursuant to the irrevocable exercise of an inter vivos power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

Successor Beneficiary. The term "successor beneficiary" means a beneficiary who has a future beneficial interest in a trust, vested or contingent, including a person who may become a beneficiary in the future by reason of inclusion in a class, other than a beneficiary who is a qualified beneficiary. Thus it includes beneficiaries who might be termed "second line" or more remote remainder beneficiaries. It also includes unborn or unascertained beneficiaries who are beneficiaries by reason of being members of a class. It does not include, however, a person who is merely a holder of a power of appointment but not otherwise a beneficiary.

Vested Interest. "Vested interest" includes a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power. Section 11(a)(4)(A). For example, if the trustee is required to distribute the trust principal to A when A attains age 30 if A is then living, and A has attained age 30 but the trustee has not yet made the distribution, A's right to receive the trust principal is a right to a mandatory distribution that is a noncontingent right. If A is age 29, however, A's right is not a noncontingent right because A must survive to age 30.

The right to a mandatory distribution does not include a right to a distribution pursuant to a standard or a right to a distribution in the discretion of a fiduciary. Thus a right to receive distributions for "support and health care," or for "best interests" would not be a mandatory distribution right for purposes of Section 11.

"Vested interest" also includes a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount or a percentage of value of some or all of the trust properties. Section 11(a)(4)(B). Thus if A is currently entitled to all trust income payable annually, and the trustee has no discretion to not pay the income to A and no discretion to distribute principal to anyone other than A, A's right to income is a vested interest. A's right to income is a vested interest even if the trustee has discretion to distribute principal to A. The result is the same if instead of an income right, A has the right to receive a specified dollar amount or a percentage of value of trust assets. A's right is a vested interest even if the right will cease upon some future event, such as A's death or a particular date, so long as the future event is not an exercise of fiduciary discretion. A specified dollar amount includes

a dollar amount that is dependent upon factors other than fiduciary discretion or specific events not certain to occur, such as the inflation rate. A "vested interest" includes a current right to a unitrust distribution based on the value of certain or all trust assets.

A fiduciary's power to make equitable adjustments to income or principal, whether granted under the trust instrument or state law, does not make an income interest not mandatory or not noncontingent. A fiduciary's power to exclude certain assets in determining a unitrust distribution to attain an equitable result, whether granted under the trust instrument or state law, does not make a unitrust interest not mandatory or not noncontingent. For example, a beneficiary's current right to receive an annual distribution equal to 4% of the value of the trust principal is a vested interest even if the fiduciary has a right to exclude from the value of trust principal non-income producing assets.

Even if all conditions to such right have been met, the decanting may eliminate current mandatory rights to income, annuity or unitrust distributions that have come into effect with respect to a beneficiary if the authorized fiduciary has discretion to make principal distributions to another beneficiary. For example, if the first trust provides for mandatory income distributions to A, but permits the authorized fiduciary to make discretionary principal distributions to A, B or C for their best interests, the decanting may eliminate A's mandatory income interest. In such case the first trust indirectly gave the authorized fiduciary the ability to reduce or eliminate A's income interest by making discretionary principal distributions to B or C.

A right to receive mandatory payments less frequently than annually is not a vested interest. For example, a right to receive 5% of the trust value every fifth year is not a vested interest, except with respect to any amounts currently payable. As another example, a right to receive distributions of one-third of the trust principal at ages 30, 35 and 40 is not a vested interest if the beneficiary has not attained age 30. If the beneficiary is age 30 but the trustee has not yet distributed the one-third payable at age 30, the beneficiary's right to that one-third is a vested interest, but the beneficiary's right to receive distributions at ages 35 and 40 is not a vested interest.

"Vested interest" also includes a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust property. Section 11(a)(4)(C). Thus, for example, it makes no difference whether the trustee is required to distribute income annually or whether the beneficiary may withdraw income annually. As another example, if B has a current right to withdraw annually the greater of $5,000 or 5% of the trust value each year, B's right is a vested interest. If B's right to withdraw did not begin until B attained age 25 and B has not attained age 25, B's right would not be a vested interest.

"Vested interest" also includes a presently exercisable general power of appointment. A power of appointment is presently exercisable if it is exercisable at the time in question. Typically, a presently exercisable power of appointment is exercisable at the time in question

during the powerholder's life and also at the powerholder's death, e.g., by the powerholder's will. Thus, a power of appointment that is exercisable "by deed or will" is a presently exercisable power.

A power to withdraw from a trust is a power of appointment. See Restatement Third of Trusts § 56 comment b. Thus if a beneficiary has already attained an age at which the beneficiary can withdraw all or a portion of the trust, the second trust may not modify or eliminate that right of withdrawal. If a Crummey withdrawal power is still in effect with respect to a prior contribution to the trust, the second trust cannot modify or eliminate the Crummey withdrawal right.

For example, if the trustee may make discretionary distributions to C and C's descendants, C has a right to withdraw one-half of trust principal after attaining age 28, and C has attained age 28, C's right is a vested interest under Section 11(a)(4)(D) even if the trustee has power to distribute trust principal to anyone other than C.

"Vested interest" also includes a right to receive an ascertainable part of the trust property on the trust's termination which is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur. Thus if the trustee is to distribute income to F, and upon F's death is to distribute the principal to G or G's estate, G's interest is a vested interest. G would not have a vested interest if the trustee had discretion to distribute principal to F or if G was required to survive F to take the remainder interest. Thus the right of a person to receive the trust property upon the termination of such trust if such person is then living would not be a vested interest. Any interest with a condition is not a vested interest, regardless of whether the condition is a condition precedent or condition subsequent. For example, A does not have a vested interest if upon termination the trust property passes to A or A's estate, provided that A is then married or was married at the time of A's prior death.

Expanded Distributive Discretion Decanting. Under Section 11 an authorized fiduciary who has expanded distributive discretion to distribute all or part of the principal of a trust to one or more of the current beneficiaries may exercise the decanting power over the principal subject to such expanded distributive discretion.

"Expanded distributive discretion" is defined in Section 2(11). When a trustee is granted expanded distributive discretion, that is an indication that the settlor intended to rely on the trustee's judgment and discretion in making distributions. The settlor's faith in the trustee's judgment supports the assumption that the settlor would trust the trustee's judgment in making modifications to the trust instrument in light of changed circumstances including the beneficiary's circumstances and changes in tax and other laws.

The decanting power, like most discretionary distribution powers, can be exercised over all or part of the first trust. If it is exercised over only part of the first trust, the second trust would need to be a separate trust and could not be a continuation of the first trust. If the decanting power is exercised to distribute property of the first trust to more than one second

trusts, then the second trusts (or at least all but one of the second trusts) would need to be separate trusts and could not be a continuation of the first trust.

If the authorized fiduciary has expanded discretion over only part of the first trust, the authorized fiduciary may exercise the decanting power under this section only over such part. See Section 11(f). With respect to the remainder of the trust, the authorized fiduciary may have the ability to decant under Section 12 or Section 13.

The second trust may contain any terms permissible for a trust subject only to the restrictions found in the act. Thus subject to subsections (c) and (f) of Section 11 and the other restrictions in Sections 14 through 20 and subject to the fiduciary duty in Section 4(a), the second trust may (1) eliminate (but not add) one or more current beneficiaries; (2) make a current beneficiary a presumptive remainder beneficiary or a successor beneficiary; (3) eliminate (but not add) one or more presumptive remainder and successor beneficiaries; (4) make a presumptive remainder beneficiary a successor beneficiary, or vice versa; (5) alter or eliminate rights that are not vested interests; (6) change the standard for distributions; (7) add or eliminate a spendthrift provision; (8) extend the duration of a trust (subject to Section 20); (9) change the jurisdiction of the trust and the law governing the administration of the trust (subject to Section 14(e)); (10) eliminate, modify or add powers of appointment; (11) change the trustee or trustee succession provisions; (12) change the powers of the trustee; (13) change administrative provisions of the trust; (14) add investment advisors, trust protectors or other fiduciaries; (15) divide a trust into more than one trust; and (16) consolidate trusts. The foregoing list merely provides examples and is not exhaustive.

The second trust, however, cannot make a remainder beneficiary a current beneficiary. This prohibition on accelerating a remainder interest is included to avoid any argument under Internal Revenue Code Section 674 that the mere existence of a power to make a remainder beneficiary a current beneficiary causes the trust to be a grantor trust, whether or not the decanting power is ever exercised in such manner.

Section 11(c)(3) prohibits the second trust from reducing or eliminating a vested interest. A vested interest is not reduced, however, just because other changes made as a result of a decanting may have incidental effects on the interest. For example, a modification of the fiduciary's investment powers or the manner of determining the fiduciary's compensation may have incidental effects on a beneficiary's interest, but such modifications do not reduce a vested interest.

The restrictions in Section 11(c)(3) do not apply to a decanting under Section 13. Section 13(c)(2).

Subsections (d) and (e) permit the second trust to retain or omit a power of appointment included in the first trust, or to create powers of appointment in one or more current beneficiaries of the first trust. For example, if the first trust permits the authorized fiduciary to make discretionary distributions of income or principal to the settlor's child A, and upon A's death the

remainder is allocated for the settlor's descendants per stirpes, to be held in further trust for each such descendant, the second trust could grant A a lifetime and/or testamentary power, general or nongeneral. The second trust could grant A a lifetime power to appoint to A's descendants, spouse and charitable organizations and a testamentary power to appoint to A's estate or to the creditors of A's estate. The second trust also could provide that each descendant of the settlor for whom a trust is established at A's death will have an inter vivos or a testamentary, general or limited, power of appointment. The second trust could even give A's now living children, D and E, powers of appointment that they may exercise in their Wills, but that will only take effect upon A's death or, if later, their deaths.

Subsection (e) makes clear that persons who are not otherwise beneficiaries of the first trust may be permissible appointees of a power of appointment granted to a current beneficiary.

Sometimes state law may provide more than one method for making the same modification to a trust. For example, a combination of trusts or a division of a trust that would be permitted under Section 417 of the Uniform Trust Code may also be accomplished under this act through decanting. When a desired modification could be accomplished by decanting or by another method, the trustee may select either method.

Washington Statute	UTDA
Section 3	Section 12

Washington Comment

Section 3 is based on Section 12 of the Uniform Trust Decanting Act. A minor change was made to the language of Section 3(b)(1) where "applied" in the Uniform Act was changed to "made" so that the language would be more consistent with other language in the Uniform Act. While the Washington Statute does not specifically refer to "substantially similar beneficial interests," it does use the "substantially similar" interest concept in several provisions including Section 3(a), Section 3(b) and Section 6(c)(3). The Section 12 comment is set out below. Both Sections 2 and 3 reference discretionary power related to principal only. This is because, except in accordance with Section 6, the decanting power cannot be exercised when the trustee's discretionary distribution power is limited to income. This follows the Uniform Trust Decanting Act.

Uniform Act Comment

Substantially Similar Beneficial Interests. When the authorized fiduciary has limited distributive discretion over principal, the authorized fiduciary may exercise the decanting power to effect modifications in administrative provisions, including trustee succession provisions, but may not materially change the dispositive provisions of the trust. This section requires the beneficial provisions of the second trust to be substantially the same as in the first trust, because the settlor did not choose to give the authorized fiduciary expanded discretion. Thus, for example, if a trust provides for principal distributions subject to an ascertainable standard to the settlor's child, and upon the child's death the remainder is to be distributed to Charitable Organization A, the decanting power cannot be exercised in a manner that substantially changes the interests of the child or of Charitable Organization A. Nonetheless, the settlor did entrust the authorized fiduciary with some discretion over principal distributions indicating some confidence in the trustee's judgment, justifying a limited decanting power in these situations.

"Substantially similar" means that there is no material change in a beneficiary's beneficial interests except as provided in subsection (d). A distribution standard that was more restrictive or more expansive would not be substantially similar. Thus if the first trust permitted distributions for support, health care and education, the beneficial interests would not be substantially similar if the second trust permitted distributions only for support and health care. If the first trust, however, permitted distributions for education without elaboration with respect to what was included within the term, the second trust might define education to include college, graduate school and vocational schools if otherwise consistent with applicable law.

If the first trust requires that a trust be distributed at age 35, a second trust that permits the beneficiary to withdraw any part or all of the trust at any time after age 35 would be substantially similar. A second trust that delayed the distribution to age 40 would not be substantially similar.

Changes to a fiduciary's administrative powers or investment powers, changes in a fiduciary, or changes in jurisdiction or the state law governing the administration of the trust, are not material changes in a beneficiary's beneficial interests, even though such changes may have incidental effects on the beneficial interests. For example, changing the trustee from one person to another could impact how the trustee exercises discretionary distribution authority, but is not a material change because the trustee's discretion is subject to the same standard and the trustee is subject to fiduciary duties.

Section 12(d), which permits distributions to be made for the benefit of the beneficiary instead of directly to such beneficiary, in part reflects existing law and in part expands existing law. Section 816(21) of the Uniform Trust Code permits a trustee to pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated by paying it directly to the beneficiary, applying it for the beneficiary's benefit, paying it to certain other persons on behalf of such beneficiary, or managing it as a separate fund on the beneficiary's behalf subject to the beneficiary's continuing right to withdraw the distribution. Section 12(d)(1) permits an amount distributable to a beneficiary to be applied for the beneficiary's benefit, but does not require that the beneficiary be under a legal disability or incapacitated. Section 12(d)(2) permits an amount distributable to a beneficiary who is under a legal disability or whom the trustee reasonably believes is incapacitated to be paid as permitted under the state's trust code. Under the Uniform Trust Code, as noted above, the trustee may pay such amount to certain other persons such as a conservator or guardian on behalf of the beneficiary. Section 12(d)(3) recognizes that the first-trust instrument may contain certain provisions authorizing the trustee to pay amounts distributable to beneficiaries to certain persons on their behalf or in certain ways. If the second-trust instrument also contains the same provisions, they are another permissible way to make distributions to a beneficiary because they were authorized by the settlor.

For example, if a trust requires that all income be distributed to A and permits the trustee to distribute principal to A for A's support, the trustee may decant the trust to require that all trust income be held in an accumulated income fund under the trust agreement, which permits A to withdraw the accumulated income fund at any time and permits the trustee to use the accumulated income fund to directly pay A's expenses. This might be helpful, for example, if A was incapacitated, incarcerated or uninterested in managing the funds herself or himself.

Section 12 is intended to permit a severance of a trust if the beneficial interests in the second trust, in the aggregate, are substantially similar to the beneficial interests in the first trust. For this purpose, an equal vertical division of a trust in which multiple beneficiaries have equal discretionary interests would usually be considered to be substantially similar. For example, if a testamentary trust created by A provides for discretionary distributions of income and principal to A's children for support, education and health care and A has three living children (B, C and D), the authorized fiduciary may exercise the decanting power under Section 12 to sever the trust into three equal trusts, one for each of B, C and D. The beneficial interest of each child in the second trusts is different because before the severance each child could conceivably receive

discretionary distributions of more than one-third of the first trust and after the severance each child may only receive distributions from such child's second trust (one-third of the first trust). A child's interest would usually be considered substantially similar, however, because the loss of the possibility of receiving distributions of more than one-third of the first trust is offset by the fact that after the severance the other children may not receive discretionary distributions from such child's second trust. A child's interest after severance might not be considered substantially similar, however, if the first-trust instrument made clear that B's health care needs should be given priority and it seemed likely that B's health care needs would exceed one-third of the principal of the first trust.

Washington Statute	UTDA
Section 4(a), (b), ,(c), and (d)	Sections 7 and 9

Washington Comment

Section 4(a) of the Washington Trust Decanting Statute is based on Section 7 of the Uniform Trust Decanting Act, under which a trustee may exercise the decanting power if (1) the trustee determines that decanting will be consistent with the first trust purposes and the trustee's fiduciary duties and (2) the trustee gives written notice of the intention to exercise not less than 60 days prior to the effective date of the exercise, to each qualified beneficiary, each person that has a presently exercisable power of attorney over a part of the first trust and each person that currently has the right to remove or replace the trustee. Section 4(a) is similar to RCW 11.4A.040(b), under which a trustee may convert a trust into a unitrust if the trustee determines that conversion will enable the trustee to better carry out the purposes of the trust and if the trustee gives written notice of the intention to convert to the qualified beneficiaries not less than 60 days before the effective date of conversion. Note that the latter notice procedure has been in effect since January 1, 2003.

In the alternative, section 4(b) allows the trustee, the trust's qualified beneficiaries and all other "parties" for purposes of Chapter 11.96A RCW (that is, as defined by RCW 11.96A.030(5)) to agree to the exercise of the decanting power through a binding agreement executed under Chapter 11.96A RCW (in particular, RCW 11.96A.220).

Section 4(c) of the Washington Trust Decanting Statute, while generally based on Chapter 11.96A RCW, is specifically based on Section 9 of the Uniform Trust Decanting Act, authorizing the trustee of the first trust, a qualified beneficiary, a holder of a such a presently exercisable power of appointment or a person having such a right to remove or replace the trustee to petition the court regarding exercise of the decanting power (that is, to petition the Superior Court for instructions to the trustee regarding whether a proposed exercise is permitted by the statute and consistent with the trustee's fiduciary duties or whether the proposed exercise would not comply with the statute or be an abuse of the trustee's discretion). Section 4(d) authorizes just the trustee of the first trust to petition the court if the decanting increases the trustee's compensation or modifies a provision granting a person the right to remove or replace the trustee.

Section 4(d) of the Washington Trust Decanting Statute provides a method for petitioning the court when changes related to trustee compensation or modification of a provision involving removal or replacement of the trustee is involved.

Uniform Act Comment

Section 7 comments: Generally a trustee is not required to provide notice to beneficiaries prior to exercising a discretionary power. This section is not intended to change the law in this regard except with respect to exercises of the decanting power. Because qualified beneficiaries

are entitled to know the terms of the trust, they should receive notice of any change in the terms of the trust. Requiring prior notice seems reasonable, in light of the significant trust modifications that can be made by decanting, and practical, in that it helps determine if any settlor, fiduciary or beneficiary has an objection to or may challenge the decanting. Any person entitled to notice under subsection 7(c) may petition the court under Section 9 for a determination of whether the proposed or attempted exercise of the decanting power is an abuse of discretion or does not otherwise comply with the act.

If a qualified beneficiary is a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation principles of applicable state law may be employed. Under state law, an emancipated minor presumably may represent himself or herself.

Notice must be given to (a) each settlor of the first trust (see Section 2(25)); (b) all qualified beneficiaries (see Section 2(20)); (c) each holder of a presently exercisable power of appointment, whether or not such holder is a qualified beneficiary; (d) any person who may remove or replace the authorized fiduciary; (e) all other fiduciaries of the first trust; (f) all fiduciaries of the second trust or trusts; and (g) the Attorney General (or other official with enforcement authority over charitable interests) if there is a determinable charitable interest (see Section 14(a)(1)). If the authorized fiduciary is comprised of more than one fiduciary, notice should be given to any person who may remove or replace any of such fiduciaries. The term "replace" refers to the power to both remove and designate a successor for the authorized fiduciary, and does not refer to the power merely to designate a successor when a vacancy occurs.

Other notice provisions under state law may also apply to a decanting. Under Section 813(a) of the Uniform Trust Code, a trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. An exercise of the decanting power is a material fact. If the second trust is newly created for purposes of decanting, state law may require notice of the creation of the trust to certain beneficiaries. For example, Section 813 of the Uniform Trust Code requires a trustee, within 60 days after accepting a trusteeship, to notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number. In addition, if the exercise of the decanting power results in a distribution of property, the distribution would be considered a disbursement that should be reported on the accounting of the first trust. If the exercise of the decanting power results in the termination of the first trust, state law or the trust instrument may require a final accounting.

Subsection (c)(7) entitles the Attorney General to notice of an exercise of the decanting power with respect to a trust containing a determinable charitable interest. See Section 14(a)(1).

* * *

Subsection (e) describes the items that must be included in the notice. Subparagraph (1) requires that the notice specify the manner in which the authorized fiduciary intends to exercise

the decanting power. Depending upon the circumstances, the authorized fiduciary might describe the modifications being made, provide a comparison of the first trust and the second trust or, where the second trust is extensively different than the first trust, refer the notice recipient to the trust instruments. As a best practice, it is desirable to tell each notice recipient in which capacity he or she is receiving the notice. For example, a notice might state: "You are receiving this notice because you are the settlor of Trust XYZ" or "You are receiving this notice because you are a qualified beneficiary of Trust XYZ." In the case of notice to an Attorney General, it is a best practice to indicate where in the instruments the determinable charitable interest may be found and whether the second trust will be administered under the law of a different state (see Section 14(e)).

Although under Section 7(h) an exercise of the decanting power will not be ineffective because of the failure to provide the required notice to one or more persons, provided that the authorized fiduciary acted with reasonable care, the act does not override the court's ability to address breaches of fiduciary duty and to fashion appropriate remedies.

Section 9 comments: Decanting by definition is an exercise of fiduciary discretion and is not an alternative basis for a court modification of the trust.

The decanting power, however, is a very broad discretionary power. Therefore, Section 9 provides that the authorized fiduciary, any person who would be entitled to notice of the exercise of the decanting power, any beneficiary or the Attorney General or other official who has enforcement authority over a charitable interest in the first trust, may petition the court for certain purposes with respect to a prior decanting or a proposed decanting. The persons who receive notice under Section 7 and who could petition the court include the settlor, the holder of a presently exercisable power of appointment over the first trust, each person who has a right to remove or replace the authorized fiduciary and each fiduciary of the first and second trusts.

A successor beneficiary, even though such beneficiary is not entitled to notice under Section 7, could petition the court under Section 9. Even though the Attorney General is entitled to notice under Section 7 only if there is a *determinable* charitable interest, the Attorney General may petition the court under Section 9 with respect to any charitable interest.

Any such person may request instructions with respect to whether a proposed decanting complies with the act and is consistent with the fiduciary duties of the authorized fiduciary. Section 9(a)(1). The authorized fiduciary need not have provided notice of a proposed decanting or even be the person proposing the decanting in order for the court to provide instructions. Such an instruction, however, would not create in the authorized fiduciary a duty to decant.

While generally the authorized fiduciary should decide whether or not to exercise the decanting power, and may seek instructions from the court when in doubt as to whether the proposed exercise is permitted and consistent with the authorized fiduciary's fiduciary duties, there may be times when the exercise of the decanting power is appropriate but the authorized fiduciary cannot or should not be the person to exercise the power. Under such circumstances the court may appoint a special fiduciary to determine if the decanting power should be exercised

and, if so, to exercise the power. Section 9(a)(2). The terms of the appointment may limit the special fiduciary's power to determine whether a proposed exercise is appropriate or may grant the special fiduciary broader power to determine the scope of a decanting. The term of appointment may also limit the period of time during which the special fiduciary may act. For example, assume a trust permits discretionary principal distributions to the settlor's descendants subject to an ascertainable standard if a beneficiary is acting as trustee and subject to expanded discretion if a disinterested person is acting as trustee. If a beneficiary is acting as trustee and believes that an exercise of the decanting power under Section 11 may be appropriate, the trustee could request that the court appoint a disinterested person as special fiduciary to determine whether the decanting power should be exercised and, if so, to exercise the power. As another example, if the authorized fiduciary is a beneficiary of the first trust and it is appropriate to create a special-needs trust for another beneficiary, but the decanting might incidentally increase the authorized fiduciary's interest in the trust, it may be advisable for the authorized fiduciary to request under subsection (a)(2) the appointment of a special fiduciary to decide whether to exercise the decanting power.

The special fiduciary essentially temporarily steps into the office of the trustee or other fiduciary who has the power to make trust distributions (the "distribution fiduciary"). If the special fiduciary, if acting as the distribution fiduciary, would have expanded distributive discretion, the court may authorize the special fiduciary to exercise the decanting power under Section 11. If the special fiduciary, if acting as the distribution fiduciary, would have limited distributive discretion, the court may authorize the special fiduciary to exercise the decanting power under Section 12. If the distribution fiduciary has no discretion to distribute principal, then the special fiduciary could not exercise the decanting power under Section 11 or 12, but could exercise the decanting power under Section 13.

For example, assume A is acting as trustee of a trust that is required to distribute income to A and upon A's death distributes to A's descendants. A special fiduciary cannot exercise the decanting power under Section 11 or Section 12 because the special fiduciary, if acting as trustee, has no distributive discretion over principal.

Now assume that the trust also provides that if a person who is not a beneficiary is acting as trustee, such trustee may make discretionary distributions of principal to A for A's health care. A special fiduciary who is not a beneficiary could be appointed and granted the authority to exercise the decanting power under Section 12.

Alternatively, assume that the trust provides that if a person who is not a beneficiary is acting as trustee, such trustee may make discretionary distributions of principal to A for A's best interests. A special fiduciary who is not a beneficiary could be appointed and granted the authority to exercise the decanting power under Section 11.

Any person described in Section 9(a) may request that the court approve an exercise of the decanting power. Such approval should be granted if the decanting complies with this act and is not an abuse of the trustee's discretion.

A petition to the court may also request that the court determine whether an attempted decanting is ineffective because it did not comply with the act. The court may also determine whether the remedial provisions of Section 22 apply to an attempted decanting and how such remedial provisions modify the second-trust instrument. If a trust has been administered after an attempted decanting under the assumed terms of the second-trust instrument, but after applying Section 22 should have been administered on different terms, the court may also instruct the fiduciary on the corrective action that should be taken.

For example, if an attempted decanting eliminated a noncontingent right to mandatory income distributions, and several years after the attempted decanting the income beneficiary of the first trust petitioned the court to apply Section 22 to the attempted decanting, the court might declare that the second trust must grant the income beneficiary such beneficiary's mandatory income interest and might order a makeup distribution to the income beneficiary for the period the income was not paid.

In addition, certain changes in a decanting require either approval by certain persons or court approval. Under Section 16, certain increases in the compensation of the authorized fiduciary require either the consent of all qualified beneficiaries or court approval. Under Section 18, modification of a power to remove or replace an authorized fiduciary requires the consent of the person holding such power (and, in some cases, consent of the qualified beneficiaries) or court approval.

The court may, but need not, take any of the actions described in Section 9.

Washington Statute	**UTDA**
Section 4 (e) – (h)	Section 7(d), (e), (f), (h)

Washington Comment

Sections 4(e)-(h) of the Washington Decanting Trust Statute incorporate concepts from Section 7(d), (e), (f), and (h) of the Uniform Trust Decanting Act. Regarding the second sentence of Section 4(e) of the Washington statute, note that appointment of a guardian ad litem under RCW 11.96A.160 is required if, because all qualified beneficiaries are minors and none has a representative, there otherwise would be no qualified beneficiary to receive notice under Section 4. The comments on those subsections of Section 7 are set out below.

Uniform Act Comment

Subsection (d) provides that notice need not be given to a person who is not known to the fiduciary or who is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence. An analogous term, "reasonable care," is used in Section 1007 of the Uniform Trust Code. Section 1007 provides that a trustee who has exercised reasonable care to ascertain the

happening of an event that affects the administration of a trust is not liable for a loss resulting from the trustee's lack of knowledge.

Although the act does not limit the amount of time that may pass between the giving of notice and the exercise of the decanting power, if the exercise of the power does not occur within a reasonable period of time from the proposed effective date set forth in the notice, a new notice should be given with a new notice period. Further, the authorized fiduciary's duties to keep beneficiaries and interested persons informed about the trust may require the authorized fiduciary to inform such persons if the decanting is not completed as proposed or when the decanting has been completed.

If after notice is given and before the decanting power is exercised, relevant facts change in a manner that entitles an additional person to receive notice, unless such additional person can be represented by another person who has already received notice, notice should be provided to such additional person. A new notice period should begin to run, unless such additional person waives the notice period.

Subsection (e) describes the items that must be included in the notice. Subparagraph (1) requires that the notice specify the manner in which the authorized fiduciary intends to exercise the decanting power. Depending upon the circumstances, the authorized fiduciary might describe the modifications being made, provide a comparison of the first trust and the second trust or, where the second trust is extensively different than the first trust, refer the notice recipient to the trust instruments. As a best practice, it is desirable to tell each notice recipient in which capacity he or she is receiving the notice. For example, a notice might state: "You are receiving this notice because you are the settlor of Trust XYZ" or "You are receiving this notice because you are a qualified beneficiary of Trust XYZ." In the case of notice to an Attorney General, it is a best practice to indicate where in the instruments the determinable charitable interest may be found and whether the second trust will be administered under the law of a different state (see Section 14(e)).

Although under Section 7(h) an exercise of the decanting power will not be ineffective because of the failure to provide the required notice to one or more persons, provided that the authorized fiduciary acted with reasonable care, the act does not override the court's ability to address breaches of fiduciary duty and to fashion appropriate remedies.

Washington Statute	UTDA
Section 5(a)	Section 6

Washington Comment

Section 5(a) is based on Section 6 of the Uniform Trust Decanting Act. The Section 6 comment is set out below.

Uniform Act Comment

A trustee should be able to administer a trust with some dispatch and without concern that reliance on a prior decanting is misplaced. This section allows a trustee, other fiduciary or other person to reasonably rely on the validity of a prior decanting, whether that decanting was performed under the act or under other law of the state or another jurisdiction. Thus this section relieves a trustee or other fiduciary from any duty it might otherwise have to determine definitively the validity of a prior decanting.

The person's reliance on the validity of a prior decanting must be reasonable. Thus a fiduciary must still review the facts of the prior decanting, whether it appears to be in compliance with the statute or other law under which the decanting was performed, and whether the law under which the decanting was performed appears to be applicable to the trust. If the second trust contains provisions that clearly are prohibited by the applicable decanting law, or fails to contain provisions that are clearly required by the applicable decanting law, reliance would not be reasonable.

When trusts have changed jurisdictions, it may be difficult to determine what law governs the administration of the trust. When trusts have multiple trustees, or a trustee conducts different trust functions in different places, it may be difficult to determine where the trust is administered. Thus it may be difficult in some cases to confirm with certainty which state decanting law applied to a prior attempted decanting. In some instances more than one state's decanting law may appear to apply, creating further uncertainty if the prior attempted decanting did not comply with all of the potentially applicable statutes. Section 6 protects a trustee or other person who makes a reasonable determination about which state decanting law applied to a prior decanting.

Ordinarily, a trustee or other person relying on a prior decanting need not independently verify compliance with every procedural rule of the decanting law. For example, ordinarily, the person relying on the prior decanting need not verify that every person required by the statute to receive notice in fact received notice. If such person knew, however, that the decanting law required notice and that no notice was given, reliance would not be reasonable.

This section does not validate any or all attempted decantings. Even if a trustee or other person may reasonably rely on a prior decanting, an interested person may still have the ability to challenge the decanting as invalid.

There may be times when the trustee or other person has sufficient questions about a prior attempted decanting that additional action is required to determine whether the prior attempted decanting was valid, in whole or in part, and to clarify the operating terms of the trust. In some cases the authorized fiduciary might use a new, properly implemented decanting to clarify the terms of the trust prospectively. In other cases a nonjudicial settlement agreement between the trustee and interested parties might be used to conform the effective terms of the trust. In some cases the trustee or other person might petition the court to determine the effective terms of the trust.

Washington Statute	**UTDA**
Section 5(b)	Section 27

Washington Comment

Section 5(b) is based on Section 27 of the Uniform Trust Decanting Act. The Section 27 comment is set out below.

Uniform Act Comment

It would be inequitable to permit a second trust to evade liabilities incurred by the trustee of the first trust to the extent the creditor would have been entitled to satisfaction out of the trust property. Section 27 provides that a debt, liability or other obligation of the first trust against property of a first trust is enforceable to the same extent against such property when held by the second trust. Section 27 may apply to contractual claims, obligations arising from ownership or control of trust property and to torts committed in the course of administering a trust. Cf. Uniform Trust Code § 1010(c).

The Restatement Second of Trusts provides various situations in which a person to whom the trustee has incurred a liability in the course of the administration of a trust can by a proceeding in equity reach trust property and apply it to the satisfaction of such person's claim. See Restatement Second of Trusts § 267. Section 268 of the Restatement Second of Trusts provides that the creditor can reach trust property to the extent the creditor cannot obtain satisfaction of the claim out of the trustee's individual property to the extent the trustee is entitled to exoneration out of the trust estate. Section 269 of the Restatement Second of Trusts provides that a creditor who cannot obtain satisfaction out of the trustee's individual property can by a proceeding in equity reach trust property to the extent the trust estate has benefitted. Section 270 of the Restatement Second of Trusts permits the creditor to reach trust property if by the terms of the trust the settlor manifested an intention to confer such a power on the creditor. Section 271 of the Restatement Second of Trusts permits a creditor to reach trust property on a contractual claim if the contract provides that the trustee shall not be personally liable upon the contract and the contract was properly made by the trustee in the administration of the trust. Section 271A of the Restatement Second of Trusts permits a creditor to obtain satisfaction out of the trust estate if it is equitable to permit him to do so.

For example, assume Chicago Bank makes a loan to the trustee of First Trust, secured by First Trust's holdings of Fuchsia Corp. stock. The loan provides that trustee is not personally liable. The trustee decants First Trust and distributes all of its assets to Second Trust. Chicago Bank may enforce the loan against the property of Second Trust, including the Fuchsia Corp. stock, to the same extent it could have enforced the loan against the property of First Trust. If Second Trust also owns property not attributed to the decanting, Section 27 does not expose such property to Chicago Bank's claim.

Assume instead that the trustee of First Trust decanted and distributed all of the Fuchsia Corp. stock to Second Trust, and distributed all of the other assets of First Trust to Third Trust. Chicago Bank may enforce the loan against the Fuchsia Corp. stock held by Second Trust to the same extent it could have enforced the loan against the Fuchsia Corp. stock when it was held by First Trust. If prior to the decanting Chicago Bank could have enforced the loan against the property of First Trust other than the Fuchsia Corp. stock to the extent the value of the Fuchsia Corp. stock was insufficient to satisfy the loan, after the decanting Chicago Bank may enforce the loan, to the extent the Fuchsia Corp. stock is insufficient to satisfy the loan, against the other property of Second Trust and Third Trust to the extent it was attributable to the property of First Trust.

Section 27 only applies to a debt, liability or other obligation that is in existence and enforceable against the property of the first trust at the time of the decanting.

Section 27 is not intended to impede an authorized fiduciary from exercising the decanting power in a manner that may protect the property of the second trust from debts, liabilities or obligations of the settlor or a beneficiary to a greater extent than the property of the first trust would have been protected from such debts, liabilities or obligations. For example, a decanting may add a spendthrift provision to a trust. As another example, a decanting under Section 11 could postpone or eliminate a prospective withdrawal right of a beneficiary or eliminate a general power of appointment that is not presently exercisable.

Washington Statute	**UTDA**
Section 5(c)	Section 25

Washington Comment

Section 5(c) is based on Section 25 of the Uniform Trust Decanting Act. The intent of the trustee has not historically been a consideration when interpreting settlor intent in Washington State. As discussed in the Uniform Act comment to Section 25, the intent of the trustee may be the most relevant when a trust has been decanted and the terms of the second trust must be considered. The Section 25 comment is set out below.

Uniform Act Comment

"Settlor" is defined in Section 2(25) as the person who creates or contributes property of the trust, except as provided in Section 25. The comments to Section 102 and Section 103 of the Uniform Trust Code generally consider the person who funded a trust as the settlor and would not treat as the settlor a nominal grantor, meaning a person who signs the trust instrument to create the trust but who does not contribute the property to the trust (except perhaps for nominal funding).

When a new trust instrument is created for purposes of serving as the second trust for a decanting, the second-trust instrument may be signed by the trustee of the first trust, a beneficiary, the settlor of the first trust, an attorney for the settlor, the trustee or a beneficiary of the first trust, or some other person. Under these circumstances, the creator of the second trust generally will not be the settlor of the second trust unless such person funded the first trust or is the authorized fiduciary exercising the decanting power.

For most purposes, when a trust is decanted the settlor of the first trust should be considered the settlor of the second trust to the extent of the decanting. If the second trust is a pre-existing trust funded by a different settlor, then the original settlor of the second trust would continue to be considered the settlor over the portion of the trust property attributable to that person's contribution and the original settlor of the first trust would be considered the settlor of the portion of the second trust property attributable to the decanting. This general rule of Section 25(a) would apply, for example, for purposes of determining who holds the rights granted to the settlor or who must consent when the settlor's consent is required for an action and for tax purposes. For example, under the Uniform Trust Code this rule would apply for purposes of Section 113 (Insurable Interest), Section 301(d) (limiting the ability of a settlor to represent a beneficiary), Section 405(a) (enforcement of a charitable trust), Section 411 (modification of a trust with the settlor's intent), Section 505 (Creditor's Claims), Section 706(a) (request to remove a trustee), and Section 814 (limiting certain discretionary powers).

For purposes of determining the settlor's intent or purpose in creating a trust, or whether the settlor did not anticipate certain circumstances, it may sometimes be appropriate to consider the intent of the original settlor of the second trust. For example, if a decanting distribution is made to a pre-existing trust with property of its own, the intent of the original settlor of the second trust may be more relevant in construing, modifying or reforming the second-trust instrument after the decanting distribution. In such a case, the decanting distribution adopts the language of the second-trust instrument, which is most appropriately construed with respect to the intent of the creator of such trust. When a decanting distribution is made to a second trust created by the authorized fiduciary for the purposes of decanting, or when the decanting is a modification of the first trust, the intent of the authorized fiduciary may be most relevant in later construing the terms of the second trust, or at least the terms modified by the decanting. The intent of the settlor of the first trust may still be relevant, however, because the decanting would have been made to better carry out the purposes of the first trust. Further, to the extent the

second trust does not modify the terms of the first trust, the intent of the settlor of the first trust would be relevant in construing such terms.

Section 25(b) would apply, under the Uniform Trust Code, with respect to Section 412 (Modification or Termination Because of Unanticipated Circumstances), Section 415 (Reformation to Correct Mistakes) and Section 416 (Modification to Achieve Settlor's Tax Objectives). For example, under Section 412 of the Uniform Trust Code, a court may make certain trust modifications if because of "circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust." The modification, to the extent practicable, is to be made in "accordance with the settlor's probable intention." Thus where the authorized fiduciary of the first trust, or some other person, has created the second trust, the intent of the maker of the second trust may be relevant in determining, with respect to the second trust, what circumstances were not anticipated by the settlor and what would be the settlor's probable intent.

Section 25(b) may also apply in other contexts for determining the purposes and material purposes of the trust. The material purposes of the trust may, for example, be relevant in determining whether a nonjudicial settlement agreement is valid. Settlor intent is relevant in determining a trust's purposes and material purposes.

Washington Statute	**UTDA**
Section 5(d)	Section 26

Washington Comment

Section 5(d) is based on Section 26 of the Uniform Trust Decanting Act. The Section 26 comment is set out below.

Uniform Act Comment

If the decanting power is exercised by modifying the terms of the first trust, the trustee could either treat the second trust created by such modification as a new trust, in which case the property of the first trust would need to be transferred to the second trust, or alternatively treat the second trust as a continuation of the first trust, in which case the property of the first trust would not need to be retitled. When the second trust is a continuation of the first trust, any property owned by the first trust is still owned by the trust after the decanting, even if the authorized fiduciary is not aware of such property at the time of the decanting.

When the decanting power is exercised by distributing property of the first trust to a separate second trust, regardless of whether the terms of such second trust are set forth in an entirely separate trust instrument or a modification of the first-trust instrument, the property of the first trust needs to be transferred to the second trust(s). Inevitably, there will be cases where the trustee fails to transfer all of the property to the second trust. The trustee can protect against this possibility by, in the exercise of the decanting power, making a global assignment of all trust

property to the second trust. When the property of the first trust is being divided among more than one second trusts or not all of the property of the first trust is being decanted, it is more complicated, but still possible, to specify in the exercise of the decanting power how later-discovered property should be allocated.

Section 26(c) explicitly permits an authorized fiduciary to provide, in an exercise of the decanting power or by the terms of a second trust, for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the decanting power. For example, if an authorized fiduciary exercises the decanting power over a trust to create a special-needs trust for the settlor's child J and to create a separate trust for the settlor's other children, the exercise of the decanting power might state that the trust for J will be funded with marketable securities and cash with a value of $1,000,000 and that all other property, including later-discovered property, will be distributed to and owned by the trust for the other children. Assume the trust for J is then funded with $1,000,000 of marketable securities and all other property then known to the trustee is assigned to the trust for the other children. If subsequently other trust assets are discovered, it would be clear that they belong to the trust for the other children and not the trust for J.

The trustee in transferring title to the first trust's property pursuant to a decanting may also take the precaution of executing a global assignment of all property not otherwise expressly transferred to the appropriate second trusts.

Section 26(a) and (b) specify default rules when later-discovered property and property paid to or acquired by the first trust after the exercise of the decanting power is not expressly allocated to a particular trust by the exercise, by the second-trust instrument or by an assignment.

Subsection (a) provides that if the decanting intended to distribute all of the principal of the first trust to one or more second trusts, then the property is part of the second trust or trusts. When there is more than one second trusts, the exercise of the decanting power might specify their respective interests in the property of the first trust or if it does not, the second trusts may need to reach agreement about their respective ownership interests.

Subsection (b) provides that if the decanting was not intended to distribute all of the principal of the first trust to one or more second trusts, such property remains part of the first trust.

Washington Statute	**UTDA**
Section 5(e)	Section 24

Washington Comment

Consistent with Section 5(c), Section 5(e) makes clear that any reference in Title 11 of the Revised Code of Washington to a trust instrument or to the terms of a trust is a reference to

the second trust, the second trust instrument and the terms of the second trust. This language is similar in scope to that of RCW 11.98.009, which causes Chapter 11.98 RCW to apply to all express trusts, including the types of express trust specifically described in RCW 11.98.009.

Uniform Act Comment

No comments listed.

Washington Statute	**UTDA**
Section 5(f), (g) and (h)	None

Washington Comment

The source for Section 5(f), 5(g) and 5(h) is RCW 23B.09.050(2), a provision of Washington's business entity conversion statute enacted in Senate Bill 5999, 2014 Session Laws, Chapter 83, § 13. The following comment appeared in the House Bill Report on Senate Bill 5999:

A converted organization or entity is for all purposes the same entity that existed before the conversion, with the same rights, privileges, immunities, powers, and purposes of the converting organization. Title to all property remains vested in the converted organization or entity. All debts, liabilities, and obligations of the converting organization or entity continue as obligations of the converted organization, and any pending action by or against the converting organization may continue as if the conversion had not occurred.

Uniform Act Comment

No comments listed.

Washington Statute	UTDA
Section 6	Section 13

Washington Comment

The definitions that are included in Section 6 of the Washington Trust Decanting Statute are the same as found in Section 13 of the Uniform Trust Decanting Act.

Unlike the Uniform Trust Decanting Act, the Washington Act provides that a trustee may exercise the Section 6 decanting power over income and principal under both Section 2, Expanded Discretion and under Section 3, Limited Discretion.

Uniform Act Comment

Section 13 permits an authorized fiduciary to exercise the decanting power over a trust that has a beneficiary with a disability to create a special-needs trust that governmental benefits programs may not consider a "resource" for purposes of the eligibility of the beneficiary with a disability for those benefits. Many governmental benefit programs restrict eligibility for those programs to only persons of limited resources. These resources may include any assets from which the beneficiary with a disability has the right to compel a distribution or a withdrawal. Special-needs trusts are drafted so as to limit the distribution rights of the beneficiary with a disability and thus better permit the beneficiary with a disability to qualify for governmental benefits. Under Section 13 the authorized fiduciary may modify the dispositive provisions for the beneficiary with a disability even if the authorized fiduciary has no discretion to make distributions or only discretion over income.

Beneficiary with a Disability. "Beneficiary with a disability" means a beneficiary who the special-needs fiduciary believes may qualify for governmental benefits based on disability. Section 13(a)(1). The beneficiary need not be adjudicated incompetent or totally incapacitated. The beneficiary need not be currently receiving governmental benefits based on disability. Nor need it be certain that the beneficiary would qualify for such benefits but for the terms of the first trust. The special-needs fiduciary need only have a reasonable belief that the decanting may permit the beneficiary to qualify for such benefits. The governmental benefits must be ones, however, that are based on disability and not merely on financial need. Thus a decanting intended to permit a beneficiary with no disability to qualify for a needs-based college scholarship is not permitted under Section 13.

Governmental Benefits. "Governmental benefits" means financial aid or services from a state, federal or other public agency. Section 13(a)(2). It does not include benefits from a private entity.

Special-Needs Fiduciary. Because the term "authorized fiduciary" is limited to a fiduciary who has the power to make discretionary distributions of principal and Section 13 is intended to permit a fiduciary to decant even if the fiduciary does not have discretion over

principal, Section 13 uses the separate term "special-needs fiduciary" to identify the fiduciary who has the power to decant. If there is no fiduciary who has discretion over principal, the special-needs fiduciary is the fiduciary with discretion over income, or if none, the fiduciary who is directed to make distributions. Section 13(a)(3).

Special-Needs Trust. "Special-needs trust" means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits based on disability. Section 13(a)(4).

Furtherance of Purposes of Trust. The exercise of the decanting power must be in furtherance of the purposes of the first trust. Section 13(b)(2). Thus the decanting must effectuate better the settlor's broader purposes. In most cases, if the first trust did not anticipate the beneficiary's disability and the settlor's broader purpose was to provide for the beneficiary's support, a decanting that would permit the beneficiary with a disability to qualify for governmental benefits while still being eligible to receive discretionary distributions from the trust would further the purposes of the trust.

For example, assume the first trust was created and funded by A, requires all income to be distributed to the beneficiary after age 21, permits the trustee to distribute principal to the beneficiary pursuant to an ascertainable standard for the beneficiary's support, permits the beneficiary to withdraw the trust principal at age 30, grants the beneficiary a testamentary general power of appointment, and upon the beneficiary's death distributes any unappointed property per stirpes to A's descendants then living. If the beneficiary is age 25 and is disabled, the authorized fiduciary may exercise the decanting power to distribute the principal of the first trust to a trust that provides only for distributions to the beneficiary in the trustee's absolute discretion and upon the beneficiary's death distributes the remaining trust assets per stirpes to A's descendants then living. The exercise of the decanting power may eliminate the beneficiary's right to income, the beneficiary's prospective right to withdraw the trust at age 30 and the beneficiary's power of appointment. The second trust may not, however, change the remainder beneficiaries. Section 13(c)(3).

The result is the same if the beneficiary is age 31 and thus has a right to withdraw the trust assets, because Section 13(c)(2) provides that Section 11(c)(3) does not apply to the interest of the beneficiary with a disability.

If in the above example the trustee had no discretion to distribute principal, but was either required to distribute income or had discretion to distribute income for A's support, the authorized fiduciary could still decant to a special-needs trust. The trustee would be considered the special-needs fiduciary under Section 13(a)(3).

The decanting, however, must further the purposes of the first trust. Section 13(b)(2). For example, if a trust was created solely for the purpose of funding college education for the settlor's grandchildren, the authorized fiduciary may not decant to pay for the support of a grandchild who is a beneficiary with a disability. Conceivably, however, a trust for the

education at all levels of the settlor's grandchildren might be decanted to a trust that permits distributions to a grandchild who is a beneficiary with a disability for such grandchild's occupational therapy and vocational training.

Pooled or Payback Trust. The second trust may be a pooled trust or a payback trust. Section 13(c)(1). For example, assume a trust was funded by the beneficiary, directly or indirectly, and provides for distributions of income to the beneficiary until age 30 and then provides for the remainder of the trust to be distributed to the beneficiary. The beneficiary is age 28. The authorized fiduciary may exercise the decanting power, and the second trust may be a "pooled trust" or a payback trust. Section 13(c)(1). The act does not require that the second trust be a "pooled trust" or a payback trust, but other state law may impose such a requirement.

Other Beneficial Interests Must Be Substantially Similar. Subsection (c)(3) generally requires that any beneficial interests of beneficiaries other than the beneficiary with a disability be substantially similar to their interests in the first trust except to the extent they are affected by changes to the interest of the beneficiary with a disability. The beneficiary's disability justifies permitting a modification of the interest of the beneficiary with a disability even when the trustee has limited or no discretion, but does not justify otherwise changing the interests of other beneficiaries. The modifications to the interest of the beneficiary with a disability, however, might affect the amount or timing of the other beneficiaries' interests.

Thus if the first trust has more than one current beneficiary, one of whom is a beneficiary with a disability, the special-needs fiduciary may decant under Section 11 as if the special-needs fiduciary had expanded discretion to distribute principal to the beneficiary with a disability, but may not alter the interests of the other beneficiaries except to the extent they are affected by the changes to the interest of the beneficiary with a disability. For example, assume the first trust was created and funded by A, continues for the rule against perpetuities period, requires that income be distributed per stirpes to A's descendants, and permits discretionary distributions of principal to A's descendants pursuant to an ascertainable standard. The exercise of the decanting power might, for example, distribute part of the principal of the first trust to a special-needs trust solely for the benefit of the beneficiary with a disability (the "Special-Needs Trust") and distribute the remaining principal to a trust solely for the benefit of the nondisabled beneficiaries (the "Non-Special-Needs Trust"), the terms of which are otherwise identical to the terms of the first trust. The Special-Needs Trust might give the trustee absolute discretion to make distributions to the beneficiary with a disability. Upon the death of the beneficiary with a disability, however, the remaining assets of the Special-Needs Trust must be distributed to the Non-Special-Needs Trust, because the decanting cannot change the interests of the non-disabled beneficiaries, except to the extent they are affected by the changes to the interest of the beneficiary with a disability. The non-disabled beneficiaries' remainder interests may be affected, for example, because the trustee of the Special-Needs Trust may make distributions to the beneficiary with a disability in the trustee's absolute discretion and is not limited by an ascertainable standard. The Non-Special-Needs Trust must have the same terms as the first trust, except that it may modify or eliminate the interest of the beneficiary with a disability. So, for

example, the Non-Special-Needs Trust might provide that no distributions would be made to the beneficiary with a disability unless the Special-Needs Trust was exhausted.

Washington Statute	**UTDA**
Section 7(a)	Section 15

Washington Comment

Section 7(a) is consistent with RCW 11.97.010, which would cause any prohibition or restriction on decanting in the first trust instrument to control. Section 7(a) is based on Section 15 of the Uniform Trust Decanting Act. The Section 15 comment is set out below.

Uniform Act Comment

A trust instrument may expressly preclude the exercise of a decanting power under the act or any similar state statute with respect to the entire trust or with respect to one or more provisions of the trust. See Section 15(a). The exercise of a decanting power, however, is not prohibited by a statement that the trust is irrevocable or unamendable, or by a spendthrift provision. See Section 15(c). In order to preclude the exercise of the decanting power, the first-trust instrument must expressly refer to the act or to a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust. For example, assume a first-trust instrument states: "There shall always be a trustee who is an attorney or accountant." That sentence alone would not prohibit the exercise of the decanting power to eliminate that requirement. If the first-trust instrument, however, also stated that "this provision may not be modified by the exercise of any decanting power," then the exercise of the decanting power to modify that provision would be prohibited by Section 15(a).

Any restriction in the first-trust instrument that expressly applies to decanting is honored. Thus, for example, a restriction in the first-trust instrument that requires court approval of any decanting that accelerates the distribution of trust assets would be enforced. As another example, a restriction requiring approval of any decanting by a particular third party would also be enforced.

An irrevocable trust may provide in the trust instrument a mechanism for modifying the trust, for example, by granting a trust protector the power to modify the trust. The fact that a trust instrument provides such a mechanism for modification does not preclude the application of this act. Any requirements or restrictions contained in the trust instrument for such modification mechanism do not apply to an exercise of a decanting power under this act unless such requirements or restrictions expressly apply to an exercise of a decanting power under this act or a similar state statute.

If the first-trust instrument contains a restriction on decanting, the provision must be included in the second-trust instrument. Section 15(e). This provision is intended to prevent

serial decanting in which the first decanting removes the restriction on changing a particular provision in the first-trust instrument, and the second decanting then changes such provision.

Washington Statute	**UTDA**
Section 7(b)	Section 16

Washington Comment

Section 7(b) is based on Section 16 of the Uniform Trust Decanting Act. The Section 16 comment is set out below.

Uniform Act Comment

An exercise of the decanting power generally is an action taken by the authorized fiduciary that does not require beneficiary consent or court approval. The purpose of requiring beneficiary consent or court approval to a change in the compensation of the authorized fiduciary is to place a check on an authorized fiduciary increasing its own compensation by decanting. In this context it does not seem necessary to require the consent of all beneficiaries. Obtaining the consent of qualified beneficiaries, who would generally be immediately impacted by a change in compensation, should be sufficient.

If the first-trust instrument specifies the authorized fiduciary's compensation, the decanting may not increase the fiduciary's compensation without either the consent of all qualified beneficiaries of the second trust or court approval. Section 16(a). This subsection applies whether the increase in compensation would result from omitting the provision in the trust instrument specifying compensation, modifying such provision or replacing such provision with a different provision. If it is unclear whether a change in method of calculating compensation would result in an increase, either court approval or consent of all qualified beneficiaries should be obtained.

If the first-trust instrument does not specify the authorized fiduciary's compensation, the decanting may not increase the compensation above the compensation permitted in the trust code of the enacting state without either the consent of all qualified beneficiaries or court approval. Section 16(b).

Section 16 expressly does not prohibit an increase in compensation arising incidentally because of other changes made by the exercise of the decanting power. For example, any increase in the compensation of the authorized fiduciary because the second trust may last longer than the first trust is incidental. Also incidental are any increases in compensation that may arise because the second trust may have a greater value in the future than the first trust would have had, for example, because property is retained in the trust longer or smaller distributions are made. Other incidental increases in the compensation of the authorized fiduciary may occur because of changes in investments, changes in the law governing the administration of the trust,

changes in the identity of the authorized fiduciary, or changes in the duties of the authorized fiduciary.

In many cases the consideration of a proposed decanting or the implementation of a decanting is fairly seen as an exercise of a discretionary fiduciary power that does not warrant any additional compensation for the authorized fiduciary. In some cases, however, the authorized fiduciary may be required to spend an extraordinary amount of time in evaluating a potential exercise of the decanting power, particularly when an exercise of the power is suggested by a beneficiary, or in exercising the decanting power. In such cases, and regardless of whether the authorized fiduciary ultimately exercises the decanting power, the authorized fiduciary may be entitled to additional compensation under the trust instrument or under state law. See Section 708 of the Uniform Trust Code. In the absence of explicit authority on the appropriate amount of any such compensation, such compensation should be reasonable considering the relevant factors, including the time devoted to the decanting and the degree of difficulty. See Restatement Third of Trusts Section 38 comment c. The authorized fiduciary may also be entitled to have reasonable expenses related to evaluating a potential exercise of the decanting power or in exercising the decanting power paid from the first trust. See Section 709 of the Uniform Trust Code.

Washington Statute	**UTDA**
Section 7(c)	Section 17

Washington Comment

Section 7(c) is the same as the Uniform Trust Decanting Act Section 17, Relief from Liability and Indemnification, except that Section 7(c)(3) specifically mentions directed trusts. In addition, the ability to relieve a trustee from liability for breach of trust in a second trust instrument is limited under RCW 11.98.107. The Section 17 comment is set out below.

Uniform Act Comment

An authorized fiduciary should not be permitted to decant in order to insert in the second-trust instrument a provision directly exculpating the authorized fiduciary or indemnifying the authorized fiduciary except to the extent such provision was contained in the first-trust instrument or applicable law would have provided such exculpation or indemnification. Nonetheless, decanting may appropriately reduce the authorized fiduciary's liability indirectly. For example, if the second trust is subject to the law of a different state, the law governing the second trust may provide additional protection to the authorized fiduciary.

The terms of the second trust may reduce an authorized fiduciary's liability indirectly, for example, by modifying the rules for approving accounts or expressly permitting the retention of certain property. While such provisions may not violate Section 16, they could under certain circumstances violate the authorized fiduciary's general fiduciary duties. For example, while it

may be appropriate in the second trust to expressly permit the retention of a residence used by a current beneficiary of the trust, it may not be appropriate to permit the retention of all of the current trust property without any liability.

Subsection (b) recognizes that the trustee of the first trust may be unwilling to distribute the assets of the first trust to the second trust unless the trustee is indemnified for any liability or claim that may become payable from the first trust after its assets are distributed. Subsection (b) is consistent with Section 27, which provides that decanting does not relieve the trust property from any liability that otherwise attaches to the trust property. The indemnification described in subsection (b) may be contained in the second-trust instrument or may be contained in the record exercising the decanting power.

An authorized fiduciary can decant to a trust that divides the trustee responsibilities (i.e., jobs) among various parties, but cannot eliminate the fiduciary duties that accompany those jobs. To the extent that the second trust assigns a fiduciary responsibility and the fiduciary duty that accompanies such responsibility to a particular fiduciary, the other fiduciaries may be relieved from liability for the actions of that particular fiduciary. For example, an investment advisor can be appointed and the authorized fiduciary can be relieved of fiduciary liability for the investment decisions to the extent permitted by the law of the enacting state so long as the investment advisor is acting in a fiduciary capacity and has fiduciary liability for the investment decisions. Section 17(c), (d).

Washington Statute	**UTDA**
Section 7(d)	Section 18

Washington Comment

Section 7(d) is based on Section 18 of the Uniform Trust Decanting Act. The Section 18 comment is set out below.

Uniform Act Comment

Section 18 authorizes a modification of a trustee removal provision only with either court approval or the consent of the person currently holding the right to remove or replace the trustee. The power to remove a fiduciary is a power to remove the fiduciary without the fiduciary's consent regardless of whether the remover has the power to designate the successor fiduciary. The power to replace a fiduciary is the power to remove the fiduciary and to designate the successor for the fiduciary without the consent of the fiduciary.

Unless the qualified beneficiaries also consent to such change, the person currently holding the right to remove the authorized fiduciary may only consent to the modification of the right with respect to himself or herself and cannot consent to the modification of such right with respect to any successor remover. Section 18(1). For example, if a trust provides that the

authorized fiduciary may be removed by X (the "current remover"), so long as X is living and not incapacitated, and after X is deceased or incapacitated, by Y, X may consent to a modification that would permit the authorized fiduciary to be removed only by the joint agreement of X and Z and only with 90 days' prior notice, but such modification would not affect Y's power of removal after X is deceased or incapacitated unless Y also consents to the modification or unless the qualified beneficiaries consent to such change.

Alternatively, the removal power may be modified by the current remover and the qualified beneficiaries if the modification grants a substantially similar removal right to another person. Section 18(2). In the previous example, X (the current remover) and the qualified beneficiaries could consent to a modification that would permit the authorized fiduciary to be removed by Z, or if Z were not willing and able to act, by W. Y, the successor remover named in the first-trust instrument, would not need to consent to such modification if X and the qualified beneficiaries consent to it.

Alternatively, the power to remove or replace the authorized fiduciary may be modified if the court approves the modification and the modification grants a substantially similar power to another person. Section 18(3).

In the case of a modification with the consent of the qualified beneficiaries or with court approval, the modification must grant a substantially similar power to another person. A power to remove a fiduciary only for cause would not be substantially similar to a power to remove a fiduciary for any reason. A power to remove a fiduciary only after the fiduciary has attained age 75 or served for ten years is not substantially similar to a power to remove the fiduciary at any time. A power to replace a fiduciary is not substantially similar unless it contains substantially the same restrictions on who may serve as the replacement fiduciary. For example, a power to remove a fiduciary and replace the fiduciary with any person would not be substantially similar to a power to remove the fiduciary and replace the fiduciary with a person who is not related or subordinate to the settlor.

In exercising the decanting power to designate a different person to remove and replace the trustee, the authorized trustee should be alert to the tax consequences if the person so designated is not independent for tax purposes.

Washington Statute	**UTDA**
Section 7(e)	Section 20

Washington Comment

Section 7(e) is based on Section 20 of the Uniform Trust Decanting Act. Section 7(e) would cause, if the first trust is governed by Washington law, the second trust to be subject to Washington's perpetuity statute, RCW 11.98.130 through 11.98.160, which establishes a 150-year period in gross as the maximum duration of the trust. If the first trust is governed by the law of another state, the perpetuity statute or other similar law of the other state would govern.

The comment of Section 20 of the Uniform Trust Decanting Act addresses several perpetuity statutes. The Section 20 comment is set out below.

Uniform Act Comment

To implement the public policy of the state law applicable to the first trust, subsection (b) requires that any maximum perpetuity, accumulation, or suspension-of-the-power-of-alienation period (collectively referred to as a "perpetuities rule") applicable to the first trust apply to the second trust to the extent its assets are attributed to the first trust. This rule is also supported by pragmatic considerations. An exercise of a decanting power could inadvertently violate a perpetuities rule applicable to the first trust if the second trust does not comply with the same perpetuities rule. Even in states that have abolished the maximum perpetuity rule, the state may still impose another perpetuities rule (e.g., a suspension-of-the-power-of-alienation rule), the first trust may still be subject to a rule against perpetuities under prior law or the first trust may be subject to a rule against perpetuities under the law of a different state. Further, if a trust is grandfathered from generation-skipping transfer ("GST") tax or has an inclusion ratio less than one, decanting to a trust that does not comply with the same rule against perpetuities period (or a federal rule against perpetuities period) may have adverse GST consequences.

Thus if the first trust was created in a state with a traditional rule against perpetuities, the authorized fiduciary may not exercise the decanting power to change the governing law to a state with no rule against perpetuities and to eliminate the rule against perpetuities applicable to the first trust.

Where the maximum term of the first trust is measured by reference to lives in being on the date the first trust became irrevocable, Section 20 does not preclude the second trust from using an expanded class of measuring lives so long as the expanded class were in being on the date the first trust became irrevocable. For example, assume the first trust is subject to State A's trust duration rule, which is a traditional rule against perpetuities that requires that an interest in a trust vest within twenty-one years of the last to die of lives in being when the trust became irrevocable. The first trust contains a perpetuities savings clause that requires the trust to terminate twenty-one years after the death of the survivor of the settlor's descendants living when the first trust was created. The second trust may replace the perpetuities savings clause with a provision that requires the trust to terminate twenty-one years after the death of the survivor of the descendants of any grandparent of the settlor who were living when the first trust was created.

As another example, assume the first trust is subject to State A's trust duration rule, which is a traditional rule against perpetuities, but which permits a trust to opt out of the rule against perpetuities. The first trust does not opt out of the rule against perpetuities. The second trust may opt out of the rule against perpetuities if the first trust could have done so.

If the first trust and the state law applicable to the first trust permitted the springing of the "Delaware Tax Trap" of Code Section 2041(a)(3), the second trust may also permit the springing of the Delaware Tax Trap.

The second trust may terminate earlier than the trust duration rule applicable to the first trust would require. Assume Trust A and Trust B are both subject to State Z's trust duration rule, which is a traditional rule against perpetuities. Both trusts were created by the same settlor and contain a perpetuities savings clause that requires the termination of the trust twenty-one years after the death of the survivor of the settlor's descendants living on the date the trust was created. Trust A was created on June 6, 1966. Trust B was created May 5, 1955. Trust A may be decanted into Trust B because Trust B will terminate prior to the rule against perpetuities applicable to Trust A. Trust B may be decanted into Trust A if Trust A is modified to provide, or the decanting instrument provides, that the portion of Trust A attributable to the addition of the assets of Trust B must vest within the rule against perpetuities period applicable to Trust B. The trustee could segregate the assets Trust A receives from the decanting of Trust B. Alternatively, the trustee could determine the fractional share of the total assets attributable to Trust B, based upon values at the time of decanting, and such fractional share of Trust A will be subject to the rule against perpetuities period applicable to Trust B.

If the authorized fiduciary attempts to decant Trust B into Trust A without providing either in Trust A or the decanting instrument that the portion of the trust attributable to Trust B must vest within the rule against perpetuities period applicable to Trust B, the decanting may still be valid. First, the statutes of State Z may contain a rule against perpetuities savings clause that will cause the trust to vest or terminate within the applicable rule against perpetuities period. Second, if there is no statutory savings clause, Section 22 of this act may apply to read into Trust A an appropriate savings clause with respect to the portion of the trust attributable to Trust B.

Section 20 does not address whether, if the decanting changes the place of administration for the trust or the law governing the trust, and the new jurisdiction has a more restrictive trust duration rule, the new jurisdiction may impose its maximum perpetuity, accumulation or suspension-of-the-power-of-alienation period on the second trust. The new jurisdiction may do so if the rule of the first jurisdiction is contrary to a strong public policy of the new jurisdiction. Thus if the first jurisdiction has no rule against perpetuities, and the second jurisdiction has a traditional rule against perpetuities, the second jurisdiction may but need not determine that its rule expresses a strong public policy against perpetual trusts.

Subsection (a) provides that, except as provided by subsection (b), the second trust may have a term that is the same as or different from the term of the first trust. Thus the term of the second trust may be longer than or shorter than the term of the first trust.

Washington Statute	UTDA
Section 7(f)	Section 14(b), (c) and (d)

Washington Comment

Section 7(f) is based on Sections 14(b), (c) and (d) of the Uniform Trust Decanting Act. Under Washington law, the Washington State Attorney General has the authority to participate in proceedings relating to charitable trusts and trusts involving charitable interests under Chapter 11.110 RCW. Section 7(f) confirms this authority extends to proceedings related to trust decanting. The Washington Trust Decanting Statute does not apply to trusts held solely for charitable purposes, as provided under Section 8(c). The Section 14 comment is set out below.

Uniform Act Comment

The Uniform Trust Decanting Act does not permit the decanting of a trust held solely for charitable purposes (a "wholly charitable trust"). See Section 3(b). While a split interest trust such as a charitable remainder trust or a charitable lead trust is not a wholly charitable trust, in almost all cases the trustee of such a trust would not have discretion to distribute principal to a current beneficiary and therefore there would be no authorized fiduciary (see Section 2(3)) who would have authority to exercise the decanting power under Section 11 or Section 12.

Other trusts that could be decanted under Sections 11, 12 or 13, however, may contain charitable interests. Section 14 imposes special protections for charitable interests. When a charitable interest is a "determinable charitable interest," Section 14 gives the Attorney General (or other official with enforcement authority over charitable interests) the rights of a qualified beneficiary and restricts the ability to decant to change the law governing the trust's administration. Generally, a determinable charitable interest is a charitable interest not subject to fiduciary discretion or any significant contingencies.

Determinable Charitable Interest. An interest must meet three requirements to be a determinable charitable interest. Section 14(a)(1). First, the interest must be a charitable interest. See Section 2(5). Determinable charitable interests are a subset of charitable interests. Thus a remote contingent interest cannot be a determinable charitable interest.

Second, a determinable interest must be a right to a mandatory distribution. A mandatory distribution is a right that is not subject to the exercise of discretion. The mandatory distribution may be a right to income, principal or both. A mandatory distribution may be a right to a current distribution, for example, where a charitable organization is entitled to a certain portion of trust principal on a date that has already occurred and the distribution has not yet been made. A mandatory distribution also includes a right to periodic distributions of income, a specific dollar amount or a percentage of value of some or all of the trust property. A mandatory distribution also includes a right to receive an ascertainable part of the trust property currently or on the occurrence of a specified event or after the passage of a specified time.

This requirement would be met, for example, if a trust required the trustee to distribute to charitable organizations or for charitable purposes one-half of the trust's net income annually or, alternatively, one percent of the value of the trust's assets annually. It would also be met if the trustee was required to distribute ten percent of the trust principal to charitable organizations or for charitable purposes ten years after the settlor's death or alternatively upon the death of the settlor's surviving spouse. This requirement would not be met if the charitable distribution was subject to the trustee's discretion.

A mandatory distribution would also include a right of withdrawal held by a charitable organization.

The third and final requirement for a determinable charitable interest is that the charitable interest either must be unconditional or must in all events be held for charitable purposes. Unconditional generally means not subject to the occurrence of a specified event that may not occur. For example, assume the trustee is to distribute $100,000 annually to the Ornithology Institute, a charitable organization, but only if it uses the funds to search for the ivory billed woodpecker, and if it does not so use the funds, to Resurrect Extinct Species, a charitable organization, but only if it uses the funds to recreate the ivory billed woodpecker from genetic material, and if it does not so use the funds, to Woods for Woodpeckers, a charitable organization. The individual interests of Ornithology Institute, Resurrect Extinct Species, and Woods for Woodpeckers are each conditional. The charitable interest to receive $100,000 annually, in the aggregate, meets the third requirement because in all events it will be held for charitable purposes for one of the three charitable organizations.

A charitable interest is conditional (i.e., not an unconditional interest) if the trustee has discretion to make or not make the distribution. For example, if the trustee has discretion to make distributions of income to Manors for Meerkats, a charitable organization, the charitable interest is not unconditional. The charitable interest would not be a determinable charitable interest unless it would in all events be held for charitable purposes. For example, if the trustee was required to distribute all income annually to Manors for Meerkats or to such other charitable organization as the trustee selected for the benefit of wildlife of the Kalahari Desert, the charitable interest is determinable even though the interest of Manors for Meerkats is not unconditional.

A charitable interest, however, would not be conditional merely because the trustee's exercise of discretion in favor of other beneficiaries could affect the charitable interest. For example, if the trustee is required to distribute $200,000 annually to Lonely George Research Fund and has discretion to distribute principal to the settlor's children, the charitable interest is unconditional because so long as there are sufficient funds in the trust the charitable distribution must be made. As another example, assume the trustee had discretion to distribute income and principal to the settlor's children, and upon the death of the surviving child the remainder was to be distributed to Gone with the Wolves, a charitable organization. The interest of Gone with the Wolves is a determinable charitable interest, even though it may be reduced, or even eliminated, by the trustee's exercise of discretion in favor of the settlor's children.

An interest held by a charitable organization is not conditional merely because it is subject to the requirement that the organization be in existence at the time the distribution is to be made. Further, an interest held by a charitable organization is not conditional merely because the organization must qualify as a charitable organization under a particular provision of the Internal Revenue Code, if the organization so qualifies on the date of determination.

For example, assume a trust provides for distributions for the education of the settlor's children and upon the youngest living child attaining age 28 distributes to Whale Whisperers, if it is then in existence and contributions to it qualify for a federal income tax charitable deduction. The interest of Whale Whisperers is unconditional if at the time of the determination Whale Whisperers is in existence and contributions to it qualify for the federal income tax deduction.

Attorney General Rights. Subsection (b) provides that if the first trust contains a determinable charitable interest, the Attorney General (or other official with enforcement authority over charitable interests) may represent the interest and has all the rights of a qualified beneficiary. The Attorney General is entitled to notice under Section 7(c)(7). The Attorney General may petition the court under Section 9, consent to a change in the compensation of an authorized fiduciary under Section 16 or consent to a change in the identity of the person who may remove or replace the authorized fiduciary under Section 18.

If the decanting changes the jurisdiction of a trust containing a determinable charitable interest, the Attorney General may block the decanting by objecting, even without petitioning the court, unless the court approves the decanting. Section 14(e).

If the determinable charitable interest is held by an identified charitable organization, the organization is a qualified beneficiary, has the rights of a qualified beneficiary and may represent and bind itself. In such a case, either the Attorney General or the organization could consent to a change in the compensation of an authorized fiduciary under Section 16 or consent to a change in the identity of the person who may remove or replace the authorized fiduciary under Section 18. If one of the Attorney General or the organization consented, but the other affirmatively objected, the other could petition the court under Section 9 for a determination.

Preservation of Charitable Interests. Although Section 14(b) gives the Attorney General the rights of a qualified beneficiary only when a charitable interest is determinable, Section 14(c) applies to all charitable interests whether or not determinable. If the first trust contains a charitable interest, whether or not determinable, the second trust may not diminish such interest. Section 14(c)(1). If the interest is held by an identified charitable organization, the second trust may not change the organization. Section 14(c)(2). If the first-trust instrument sets forth a particular charitable purpose, the second trust may not change the charitable purpose. Section 14(c)(3). If the first trust imposes certain conditions or restrictions on the charitable gift, the second trust cannot change the conditions or restrictions. Section 14(c)(4).

If a charitable trust indicates a particular charitable purpose, the exercise of the decanting power may not change the charitable purpose. Section 14(c)(3). Thus if the first trust provides that upon A's death the remainder will be paid to Companion Animals for the benefit and protection of dogs, the second trust may not change the purpose of the charitable gift to the benefit of cats. As another example, if the first trust provides that upon A's death the remainder will be distributed to such charities as the trustee selects for the purpose of preserving habitat for blue footed boobies, the second trust cannot change the charitable purpose to the protection of polar bears.

If an authorized fiduciary has limited discretion to distribute principal and exercises the decanting power under Section 12, Section 12(c) requires that the second trusts must grant each beneficiary of the first trust, including charitable organizations, beneficial interests that are substantially similar to such beneficiary's interests in the first trust. If the first trust contains a charitable interest that is not held by an identified charitable organization, Section 12(c) does not apply but Section 14(c) requires that the second trust may not diminish the charitable interest and that any stated charitable purpose must remain the same.

For example, assume a trust permits discretionary income and principal distributions to the settlor's children for their support and health care, requires that the trustee distribute $25,000 each year to one or more charitable organizations selected by the trustee for the purpose of caring for stray, neglected and abused large dogs, gives the trustee discretion to make additional distributions to charitable organizations for the same purpose, and upon the death of the settlor's last surviving child the principal is to be distributed to charitable organizations selected by the trustee for the same purpose. The trustee has limited discretion to distribute principal and therefore may decant under Section 12, but not Section 11. The exercise of the decanting power may change administrative provisions and trustee provisions, but may not alter the beneficial interests of the children. Because the charitable interests are not held by an identified charitable organization, they are not subject to Section 12(c). Section 14(c), however, requires that the second trust not diminish the charitable interests to the $25,000 annual distributions, to receive discretionary distributions and to the remainder interest. In addition, Section 14(c) requires that the charitable purpose remain the same. Thus the second trust could not change the charitable purpose to supporting dog parks for small dogs.

If the trust was as described above except that the trustee had discretion to make distributions to the children for their best interests, the trustee could exercise the decanting power under Section 11. Thus the trustee could eliminate or reduce the interest of one or more of the settlor's children. The decanting could not, however, diminish the charitable interests because Section 14(c) requires that the charitable interest not be diminished. The trustee could not, for example, grant a power of appointment to a child because such a power would diminish the charitable interests.

If a trust gave the trustee expanded discretion to make distributions to the settlor's children for best interests, and upon the death of the surviving child provided for the remaining assets to be distributed to Howl at the Moon, a charitable organization for the peaceful co-

existence of wolves and humans, the authorized fiduciary could not exercise the decanting power to provide that each child would receive an equal share of the trust assets when the youngest child attained age 25, because that would diminish the charitable interest. The authorized fiduciary also could not exercise the decanting power to change the charitable remainder beneficiary from Howl at the Moon to another charitable organization. By contrast, the authorized fiduciary could exercise the decanting power to provide that when the youngest child attained age 25 the trust would be distributed to Howl at the Moon, because that would enhance the charitable interest.

Subsection (c)(4) prohibits altering any condition or restriction related to the charitable interest. For example, if the first trust requires that the trustee consult with certain persons before making distributions or provide reports to certain persons, or gives enforcement rights to certain persons to ensure the charitable purpose is fulfilled, the second trust may not change such provisions.

Some state Attorneys General (or other officials charged with protecting charitable interests) may be concerned that trusts with charitable interests will be moved out of their jurisdiction by decanting. Section 14(e) addresses this concern by requiring that the second trust be administered under the law of the enacting state unless the court approved the decanting or the Attorney General either approved the decanting or, after receiving notice, failed to object within the notice period.

Subsection (f) makes clear that the Uniform Trust Decanting Act does not limit the powers and duties of the Attorney General under other law of the state, whether statutory or common law. For example, other law of the state may give the Attorney General the right to sue for breach of fiduciary duties with respect to charitable interests.

Washington Statute	UTDA
Section 7(g)	Section 19

Washington Comment

Section 7(g) is based on Section 19 of the Uniform Trust Decanting Act and includes all significant provisions of Section 19, albeit in a shortened form. Subsection 7(g)(9) defines a new term, "tax benefit", which is used in the prefatory language for Section 9(g): If a first trust qualifies for a tax benefit, the second trust must not include or omit a term which would change the tax benefit.

Sections 7(g)(1) through 7(g)(6) list the following tax benefits, all of which also are described in Uniform Trust Decanting Act Section 19: the marital deduction for gift, estate or inheritance tax purposes (Section 7(g)(1)); the charitable deduction for income, gift, estate or inheritance tax purposes (Section 7(g)(2)); the federal gift tax annual exclusion (including the annual exclusion available under Internal Revenue Code Section 2503(c)) (Section 7(g)(3)); trust qualification as a Subchapter S corporation shareholder (Section 7(g)(4); exempt status under the federal generation-skipping transfer tax (Section 7(g)(5)); and minimum distribution requirements that apply to qualified retirement plans and individual retirement accounts (Section 7(g)(6)).

Section 7(g)(7) directs that, if the first trust is a grantor trust for federal income tax purposes, the second trust must remain a grantor trust and, if the settlor did not intend that the first trust be a grantor trust, the second trust must not include provisions which would cause it to be a grantor trust. Subsection 7(g)(8) incorporates the procedure of Uniform Trust Decanting Act Section 19 for a settlor objecting in writing to decanting which would cause a first trust not intended to be a grantor trust to become a grantor trust or a first trust intended to be a grantor trust to cease to be a grantor trust. The Section 19 comment is set out below.

Uniform Act Comment

Certain tax benefits granted under the Internal Revenue Code (the "Code") or state law are dependent upon a trust containing specific provisions. For example, a qualified terminable interest property ("QTIP") marital trust or general power of appointment marital trust requires that the surviving spouse be entitled for life to all income, and a general power of appointment marital trust also requires that the surviving spouse have a general power of appointment exercisable alone and in all events. If a trustee had the power to decant the trust in a manner that deprived the surviving spouse of the requisite income interest, or in the case of a general power of appointment marital trust, the requisite general power of appointment, then arguably the trust would not qualify for the marital deduction from the inception of the trust. Similarly, it is important to ensure that charitable lead trusts and charitable remainder trusts cannot be modified in a way that arguably would prevent them from qualifying for the charitable deduction or that would reduce the amount of that deduction at their inception.

Grantor Trust. For purposes of this section, a grantor trust means a trust as to which a settlor of the first trust is considered the owner for income tax purposes under the Internal Revenue Code. Section 19(a)(1). The term does not include a trust over which someone other than the settlor (e.g., a beneficiary) is treated as the owner under Code section 678. A "nongrantor trust" is a trust that is not a grantor trust. Section 19(a)(3).

Marital Deduction. Subsection (b)(1) protects the marital deduction. For example, for property to qualify as qualified terminable interest property, the surviving spouse must have a qualifying income interest for life and a QTIP election must be made. Code § 2056(b)(7)(B)(i). The surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all the income from the property payable annually or at more frequent intervals and no person has a power to appoint any part of the property to any person other than the surviving spouse. Code § 2056(b)(7)(B)(ii). If the first trust is a trust with respect to which a QTIP election was made, subsection (b)(1) prohibits decanting the property to a trust that does not give the surviving spouse a qualifying income interest for life. For example, if the trustee had expanded discretion to distribute principal to the surviving spouse, the trustee could not decant to give the surviving spouse a lifetime power of appointment in favor of descendants. In addition, both Section 11(c)(3) and Section 19(b)(1) would prohibit the trustee from decanting in a manner that would alter the surviving spouse's income interest.

As another example, assume the first trust qualified for the marital deduction under Code Section 2056(b)(5) because the surviving spouse is entitled for life to all the income, the surviving spouse has a testamentary power of appointment in favor of her estate, and no person has any power to appoint other than to the surviving spouse, and the trustee also has a power to make discretionary distributions to the surviving spouse subject to expanded discretion. Subsection (b)(1) prohibits decanting to a second trust that does not give the surviving spouse a right to all income or that gives any person a power to appoint to anyone other than the surviving spouse. Subsection (b)(1) also requires that the second trust qualify for the marital deduction under the same section of the Code, Section 2056(b)(5). It is not sufficient that the second trust qualify for the marital deduction under another section of the Code. Although Code Section 2056(b)(5) requires that the trust give the surviving spouse a power to appoint to either herself or her estate, the second trust could give the surviving spouse a lifetime power to appoint to herself instead of a testamentary power in favor of her estate, or could expand her testamentary power to include persons other than her estate as potential appointees, because the second trust would still qualify for the marital deduction under Code Section 2056(b)(5). If the first trust, however, gave the surviving spouse a lifetime general power of appointment, the authorized fiduciary could not decant in a manner that eliminated such power of appointment. Section 11(c)(3).

Charitable Deduction. Section 19(b)(2) protects the charitable deduction. The act does not apply to wholly charitable trusts. Section 3(b). While a split interest trust such as a charitable remainder trust or charitable lead trust would not be a wholly charitable trust, in almost all cases the trustee of such a trust would not have discretion to distribute principal to a current beneficiary and therefore there would not be an authorized fiduciary (see Section 2(3))

who would have authority to exercise the decanting power under Section 11 or Section 12. In the rare case in which a split interest charitable trust could be decanted, Section 19(b)(2) requires that the second trust qualify for the charitable deduction under the same provision of the Internal Revenue Code or state law.

Subject to the provisions of Section 14, Section 19(b)(2) does not prohibit the modification or omission of a future gift to a charitable organization even if such gift, if made, would result in a future charitable deduction.

Gift Tax Annual Exclusion. Code Section 2503(b) grants a gift tax annual exclusion for gifts of a "present interest." Present interests are often created in trusts by granting the beneficiary a Crummey right of withdrawal over contributions to the trust. If a trustee could decant in a manner that prematurely terminated a beneficiary's existing Crummey right of withdrawal over a prior contribution to the trust, then arguably the contribution would not qualify for the gift tax annual exclusion. The restriction in Section 11(c)(3) prohibiting the modification or elimination of a presently exercisable power of appointment also protects the annual exclusion for a prior gift to a Crummey trust.

Code Section 2503(c) provides another method for qualifying gifts to a trust for the gift tax annual exclusion. Code Section 2503(c) permits a gift tax annual exclusion for a gift to a trust for an individual under age 21 provided that the property and its income may be expended for the benefit of the donee before attaining age 21, to the extent not so expended passes to the donee upon attaining age 21, and, in the event of the donee's death, is payable to the estate of the donee or pursuant to a general power of appointment.

Assume, for example that the first trust permitted distributions of income and principal subject to expanded discretion to A, provided that the trust property should be distributed to A at age 21 and directed that the trust be distributed to A's estate if A died prior to age 21. A is age 19. The authorized fiduciary could decant to a second trust that, instead of distributing the property to A at age 21, provided A a right to withdraw the trust property for 60 days and that, instead of distributing the property to A's estate, gave A a general testamentary power of appointment. Such a decanting is permitted because the second trust would still qualify under Code Section 2503(c). The authorized fiduciary could not decant to a trust that did not permit A to withdraw the assets until age 30 or that neither gave A a testamentary general power of appointment nor directed distribution of the property to A's estate.

S Corporation Stock. Under Code Section 1361, only certain types of trusts are permitted to own S corporation stock. If the first trust owns S corporation stock, the second trust must also qualify to own S corporation stock under Code Section 1361(c)(2). If the first trust qualifies because it is an electing small business trust (an "ESBT"), the second trust may either be an ESBT or qualify to hold S corporation stock because it is a grantor trust or a qualified subchapter S trust (a "QSST"). Similarly, if the first trust owns S corporation stock and is a grantor trust, the second trust may qualify to hold S corporation stock by being a grantor trust, an ESBT or a QSST.

Subsection (b)(4) imposes a more stringent rule if the first trust is a QSST. In order for a trust to qualify as a QSST, (a) the terms of the trust must require that during the life of the current income beneficiary there shall be only one income beneficiary and (b) all of the income must be distributed to such beneficiary. Code § 1361(d)(3). Thus it may be important that a trust intended to qualify as a QSST not be permitted to be decanted into a trust that would not qualify as a QSST. If the first trust owns S corporation stock and qualifies as an S corporation shareholder because it is a QSST, subsection (b)(4) requires that the second trust also be a QSST. If the first trust is a QSST, it is not sufficient that the second trust qualify to hold S corporation stock under another provision of the Code. If the authorized fiduciary had the power to modify a trust intended to qualify as a QSST to a trust that did not so qualify, the trust would not be a QSST from its inception.

GST "Annual Exclusion" Gifts. Code Section 2642(c) grants a zero inclusion ratio, essentially a "GST annual exclusion," to gifts that qualify for the gift tax annual exclusion but imposes two additional requirements for gifts to trusts. First, the trust must be only for a single individual and second, if the individual dies before the termination of the trust, the property of the trust must be included in the gross estate of such individual. Thus while gifts to trusts for multiple beneficiaries could qualify for the gift tax annual exclusion through the use of Crummey withdrawal rights, such gifts generally would not qualify for the GST annual exclusion. The Code Section 2642(c) restriction requiring a trust be for a single individual for such individual's life could be violated through decanting if the decanting permitted a remainder beneficiary to receive distributions prior to the individual's death. Section 19(b)(5) prohibits such a modification. The requirement that the trust be included in the gross estate of the individual could perhaps be violated by decanting to a trust that was not includible in the beneficiary's gross estate. Section 19(b)(5) prohibits such a decanting.

Qualified Benefits. Complicated rules determine when the life expectancy of a trust beneficiary can be considered in determining the required minimum distribution rules when a trust is the beneficiary of a qualified retirement plan or IRA. These rules are found in Code Section 401(a)(9) and the corresponding regulations, and in other Code sections that refer to Section 401(a)(9). For example, with IRAs, Code Section 408(a)(6) states: "Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained."

Under the rules in Code Section 401(a)(9), only trusts with certain provisions and restrictions permit the life expectancy of the beneficiary to be used to determine required minimum distributions. If a trustee could decant to a trust that would not meet these requirements, then arguably the old trust would not qualify from the inception to use the life expectancy of the beneficiary.

Subsection (b)(6) applies not only to any trust that is currently the beneficiary of an individual retirement account ("IRA") or qualified benefit, but also to any successor trust. The

need to apply subsection (b)(6) to successor trusts is demonstrated by the following example. Assume Trust A is the beneficiary of Parent's $100,000 IRA. Child is the current beneficiary of Trust A and upon Child's death the assets of Trust A will be distributed to Trusts X and Y for Child's children. Trust A is not a "conduit trust," but qualified to take IRA distributions over Child's life expectancy because Trust A, and Trusts X and Y, have only individuals as beneficiaries and all future beneficiaries must be younger than Child. If Trusts X and Y permitted the exercise of a decanting power in any way that could result in the addition of charities or individuals older than Child as beneficiaries or permissible appointees, Trust A would not have qualified to take IRA distributions over Child C's life expectancy. Therefore, the restrictions on decanting must apply to Trusts X and Y, as well as to Trust A. Trusts X and Y are indirect beneficiaries of the qualified benefit property.

If an attempted decanting violates subsection (b)(6), the qualified benefit property is deemed to be held as a separate share as of the date of the exercise of the decanting power. Holding the qualified benefit property as a separate share permits the remedial rules of Section 22 to apply only with respect to the qualified benefit property and its proceeds.

Foreign Grantor Trusts. Generally, the grantor trust rules apply only to a "grantor" who is a citizen or resident of the United States or a domestic corporation. An exception to this rule applies if (a) the foreign grantor has the power to revest title to the trust property in the grantor and such power is exercisable (1) solely by the grantor without the approval or consent of any other person or (2) with the consent of a related or subordinate party who is subservient to the grantor, or (b) distributions may be made only to the grantor and the grantor's spouse during the life of the grantor. If a foreign trust qualifies as a grantor trust because of Code Section 672(f)(2)(A), subsection (b)(7) provides that the decanting power cannot be exercised to a second trust that does not meet the requirements of Code Section 672(f)(2)(A).

Catch-all. Subsection (b)(8) is a catch-all provision intended to preserve any tax benefits not specifically listed in Section 19 for which the first trust qualified if the first-trust instrument expressly indicates an intent to qualify for the tax benefit or is clearly designed to qualify for the tax benefit. Note that subsection (b)(8) does not address any tax benefits for which the trust may qualify in the future. For example, assume that the first trust was a credit shelter trust that was not subject to federal estate tax at the death of the first to die of a married couple because of the decedent's federal exclusion. Assume that an independent person may make discretionary distributions to the surviving spouse and descendants pursuant to expanded discretion. Also assume that the credit shelter trust was designed so that it would not be included in the surviving spouse's estate. The authorized fiduciary could decant and the second trust could grant the surviving spouse a general power of appointment that would cause inclusion in the surviving spouse's estate. Although the credit shelter trust was designed to be excluded from the surviving spouse's estate, such tax benefit is one that would occur, if at all, in the future at the surviving spouse's death; it is not a tax benefit claimed in the past. Therefore subsection (b)(8) does not prohibit such a modification. If the settlor's purposes include saving taxes, and causing inclusion in the spouse's estate may save more taxes by causing a basis adjustment at the surviving

spouse's death even though the trust assets would then be included in the surviving spouse's estate, then such a decanting may be appropriate and is not prohibited by subsection (b)(8).

Grantor Trusts. Subsection (b)(9) expressly permits an exercise of the decanting power to change the income tax status of the trust from a grantor trust to a nongrantor trust or vice versa. Although, absent subsection (b)(9), grantor trust status generally might be viewed as a tax benefit of the first trust, grantor trust status is treated differently under the act because the grantor does not necessarily intend that the grantor trust status be maintained until the grantor's death and because other desirable modifications of the trust may result in a loss of grantor trust status.

An exercise of the decanting power may cause a nongrantor trust to become a grantor trust either as a primary purpose of the exercise of the decanting power or as an incidental consequence of other changes made by the decanting. Subsection (b)(9)(B). It would be fundamentally unfair, however, to permit a decanting to impose on the settlor liability for the second trust's income taxes if the settlor objected to such liability. Therefore subsection (b)(10)(B) permits the settlor to block the decanting by objection during the notice period unless the settlor has the power to cause the second trust to cease to be a grantor trust. The settlor receives prior notice of the exercise of the decanting power under Section 7(c)(1).

Where the first trust is a grantor trust, often the settlor or another person has the power to cause the trust to cease to be a grantor trust. This power permits the settlor or someone acting on the settlor's behalf to relieve the settlor of the income tax liability for the trust. If the second trust is a grantor trust and does not contain the same provisions permitting the grantor trust treatment to be "turned off," the settlor may block the proposed decanting by objecting during the notice period. Subsection (b)(10)(A).

If a portion of a trust is a grantor trust and the remaining portion is a nongrantor trust, subsection (b)(10) applies to the portion that is a grantor trust.

Washington Statute	**UTDA**
Section 7(h)	Section 15(c)

Washington Comment

Section 7(h) of the Washington Trust Decanting Statute is the same as Section 15(c) of the Uniform Trust Decanting Act. The Section 15 comment is set out below.

Uniform Act Comment

A trust instrument may expressly preclude the exercise of a decanting power under the act or any similar state statute with respect to the entire trust or with respect to one or more provisions of the trust. See Section 15(a). The exercise of a decanting power, however, is not prohibited by a statement that the trust is irrevocable or unamendable, or by a spendthrift

provision. See Section 15(c). In order to preclude the exercise of the decanting power, the first-trust instrument must expressly refer to the act or to a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust. For example, assume a first-trust instrument states: "There shall always be a trustee who is an attorney or accountant." That sentence alone would not prohibit the exercise of the decanting power to eliminate that requirement. If the first-trust instrument, however, also stated that "this provision may not be modified by the exercise of any decanting power," then the exercise of the decanting power to modify that provision would be prohibited by Section 15(a).

Any restriction in the first-trust instrument that expressly applies to decanting is honored. Thus, for example, a restriction in the first-trust instrument that requires court approval of any decanting that accelerates the distribution of trust assets would be enforced. As another example, a restriction requiring approval of any decanting by a particular third party would also be enforced.

An irrevocable trust may provide in the trust instrument a mechanism for modifying the trust, for example, by granting a trust protector the power to modify the trust. The fact that a trust instrument provides such a mechanism for modification does not preclude the application of this act. Any requirements or restrictions contained in the trust instrument for such modification mechanism do not apply to an exercise of a decanting power under this act unless such requirements or restrictions expressly apply to an exercise of a decanting power under this act or a similar state statute.

If the first-trust instrument contains a restriction on decanting, the provision must be included in the second-trust instrument. Section 15(e). This provision is intended to prevent serial decanting in which the first decanting removes the restriction on changing a particular provision in the first-trust instrument, and the second decanting then changes such provision.

Washington Statute	UTDA
Section 8(a)	Not applicable

Washington Comment

Section 8(a) of the Washington Trust Decanting Statute makes clear that it applies to all express trusts that are described in RCW 11.98.009, except for revocable trusts during such time as the grantor has the power to revoke, amend, or modify the trust. Compare with Section 3(a) of the Uniform Trust Decanting Act. Title 11 addresses revocable trusts in a number of places. *See* RCW 11.103.030.

Uniform Act Comment

Not applicable.

Washington Statute	UTDA
Section 8(b)	Section 3(d) and (e)

Washington Comment

Section 8(b) is based on Sections 3(d) and (e) of the Uniform Trust Decanting Act. The relevant portions of the Section 3 of the Uniform Trust Decanting Act comment are set out below. Under Washington law, trust decanting is not the exclusive way to modify a trust and other procedures are available, including use of a binding agreement under Chapter 11.96A RCW.

Uniform Act Comment

The Uniform Trust Decanting Act is not the exclusive way to decant a trust and is not the exclusive way to modify a trust. The terms of the trust instrument may grant a fiduciary or other person the power to modify the trust. This act does not supplant any authority granted under such a trust provision. Any such authority granted under the trust instrument does not affect the application of this act unless the trust instrument imposes an express restriction on the exercise of the decanting power under this act or other state statute authorizing a fiduciary to decant. See Section 15(b).

A decanting statute of another state may apply to a trust and, even if this act could also apply to the trust, this act does not supplant the right of a trustee to decant under the statute of such other state. Thus in some situations a fiduciary may have the option of decanting under this act or the decanting statute of another state.

Common law in some states may permit a trustee to decant. This act does not supplant any right to decant under common law. Thus in some cases a fiduciary may have the option of decanting under this act or under common law.

Section 111 of the Uniform Trust Code and statutes in many states permit certain matters regarding a trust to be resolved by a nonjudicial settlement agreement among the interested persons. Those statutes generally permit certain beneficiaries of a trust to approve an exercise of a power by a trustee and thus would permit certain beneficiaries to approve an exercise of the decanting power. In some cases the modification made by an exercise of the decanting power could also have been made by a virtual representation agreement, and in those cases an exercise of the decanting power sometimes might be combined with a nonjudicial settlement agreement. Generally, the nonjudicial settlement agreement would prevent any subsequent challenges to the decanting. The tax consequences of having the beneficiaries consent to the nonjudicial settlement agreement should be considered.

Washington Statute	**UTDA**
Section 8(c)	Section 3(b)

Washington Comment

Section 8(c) is based on Section 3(b) of the Uniform Trust Decanting Act. The relevant portion of Section 3 comment is set out below.

Uniform Act Comment

The act does not permit decanting a trust held solely for charitable purposes (a "wholly charitable trust"). Section 3(b). A private foundation structured as a trust would be a wholly charitable trust that could not be decanted pursuant to the act.

A wholly charitable trust is subject to different public policy concerns than a private trust. Private trusts have identifiable beneficiaries who may enforce their interests in the trust. Charitable trusts have as beneficiaries the community as a whole or charitable organizations, and enforcement may be left to the state's Attorney General or another official. Further, charitable trusts often have particular charitable purposes, and conditions or restrictions on the use of the trust assets. Settlors of wholly charitable trusts often have particularly strong interests in seeing that these purposes, conditions and restrictions are not changed. Special legal doctrines, such as *cy pres*, are available when it becomes unlawful, impossible, or impracticable to carry out the purposes of a wholly charitable trust.

If an irrevocable trust that has noncharitable beneficiaries will in the future be used to fund a wholly charitable trust, the decanting power may be exercised over the irrevocable trust, subject to Section 14, but the decanting may not change the terms of the wholly charitable trust.

To the extent a conservation easement or other restricted gift is considered to be an express trust, such an interest would be a wholly charitable trust that could not be decanted pursuant to the act.

While a split interest trust such as a charitable remainder trust or charitable lead trust would not be a wholly charitable trust, in almost all cases the trustee of such a trust would not have discretion to distribute principal to a current beneficiary and therefore there would not be an authorized fiduciary (see Section 2(3)) who would have authority to exercise the decanting power under Section 11 or Section 12.

If an authorized fiduciary has discretion to distribute principal of a trust that is not a wholly charitable trust but that contains a charitable interest (see Section 2(5)), the charitable interest may not be diminished, the charitable purpose set forth in the first trust may not be changed and any conditions or restrictions on the charitable interest may not be changed. See subsection 14(c).

Washington Statute	**UTDA**
Section 8(d)	Section 4(b)

Washington Comment

Section 8(d) of the Washington Trust Decanting Statute is based on Section 4(b), Fiduciary Duty of the Uniform Trust Decanting Act. The relevant portion of the Section 4 comments is set out below.

Uniform Act Comment

The Uniform Trust Decanting Act does not impose a duty on the authorized fiduciary to decant. To impose a duty on the authorized fiduciary to consider whether any possible decanting could improve the administration of the trust or further the trust purposes would create unfair risks and burdens for fiduciaries and also might, in some situations, present impartiality issues. A trustee cannot possibly consider all the possible ways in which a trust could be improved by decanting. While this act does not create a presumption in favor of the terms of the first trust, an authorized fiduciary generally should not be penalized for not modifying the terms of the trust.

There may be, however, circumstances in which the authorized fiduciary or trustee has a duty under general trust law to seek a deviation from the terms of the trust even if the authorized fiduciary or trustee does not have a duty to exercise a decanting power. Subsection 66(2) of the Restatement Third of Trusts provides:

> (2) If a trustee knows or should know of circumstances that justify judicial action under Subsection (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.

While subsection 66(2) is literally limited to deviations involving administrative provisions, Comment e to subsection 66(2) extends the trustee's duty to distribution provisions when the trustee is actually aware that a purpose of the settlor would be jeopardized by adhering to the existing provision regarding distributions.

The Reporter's Note to Comment e to subsection 66(2) of the Restatement Third of Trusts notes that the situations that might result in a duty to seek a deviation if the trustee has actual knowledge of the circumstances include extraordinary needs of the life beneficiary or irresponsibility of a potential distributee. See Illustration 2 in the Comments on subsection 66(1) of the Restatement Third of Trusts and the last paragraph of the Reporter's Note to Comment b to Section 66 of the Restatement Third of Trusts. In the Reporter's Notes to Comment b of Section 66 of the Restatement Third of Trusts, the Reporter notes that there may be a duty to seek deviation when there would be substantial distributions to beneficiaries who are legally competent to manage funds but practically at serious risk of squandering those distributions due, for example, to substance addiction or gambling. Although the Uniform Trust Decanting Act does not impose a duty to decant, an exercise of the decanting power would usually be an appropriate exercise of the authorized fiduciary's discretion in such circumstances. See also Restatement Third of Trusts § 87.

Where the trustee has a duty to seek a deviation and the appropriate deviation could be achieved by an exercise of the decanting power, the trustee could fulfill such duty by an exercise of the decanting power rather than seeking a judicial deviation.

Washington Statute	**UTDA**
Section 8(e)	Section 5

Washington Comment

Section 8(e) is based on Section 5 of the Uniform Trust Decanting Act. The Section 5 comment is set out below.

Uniform Act Comment

Because the authorized fiduciary by decanting is exercising a power over the first trust, the requirements in Section 5 apply to the first trust. It is irrelevant whether the second trust is governed by the law of the state or administered in the state.

The laws of different states may govern a trust for purposes of determining its validity, for purposes of construing the trust and for purposes of administration of the trust. The determination of the state law that governs for these purposes is also dependent upon whether the trust property consists of movables or land and whether the trust was created by a will or by an inter vivos instrument. See Restatement Second of Conflict of Laws §§ 267-279; Uniform Trust Code § 107; see also Uniform Probate Code § 2-703.

To provide greater certainty about whether the act applies to a trust, Section 5(2) provides that the act applies to a trust that by its terms provides that it is governed by the law of the enacting state, without further inquiry as to whether the law of the enacting state actually applies. The act also applies where the law of the enacting state in fact governs administration of the trust, construction of the terms of the trust, or determination of the meaning or effect of terms of the trust, whether or not the trust instrument expressly so states.

Decanting is considered an administrative power because it deals with the powers of the trustee. See Comment a to the Restatement Second Conflict of Laws § 271 (testamentary trusts) and Comment a to § 272 (inter vivos trusts). Decanting, however, can alter the beneficial interests of a trust. In order to avoid having different rules for the application of the act depending upon whether the exercise of the decanting power changes administrative provision or beneficial interests, and the difficulty of drawing a distinct line between modifications that are administrative in nature and modifications that change beneficial interests, the act is intended to have broad application.

This act applies if the law of the state governs for purposes of any one or more of administration, meaning or effect. "Meaning and effect" are the terms used in the Uniform Trust Code (see Section 107). "Construction" is the term used in the Restatement Second of Conflicts.

This act also applies if the trust instrument states that the law of the state governs for purposes of any one or more of administration, meaning or effect without the necessity of establishing that the law of the state in fact governs for such purpose.

Alternatively, it is sufficient if the trust has its principal place of administration in the state. See Section 108 of the Uniform Trust Code with respect to the principal place of administration of a trust. While a change of principal place of administration will usually change the law governing the administration of the trust, that is not the result under all circumstances. To avoid the difficulties of determining whether the law governing administration has changed when the principal place of administration has changed, the act applies to any trust with a principal place of administration in the state, regardless of what state law governs its administration and meaning and effect.

Washington Statute	UTDA
Section 8(f)	Section 21

Washington Comment

Section 8(f) is based on Section 21 of the Uniform Trust Decanting Act. The Section 21 comment is set out below. The comment refers to Sections 11 and 12 of the Uniform Act which appear in Sections 2 and 3 of the Washington statute.

Uniform Act Comment

Although the decanting power under Sections 11 and 12 is premised on the authorized fiduciary's power to distribute principal of the first trust to one or more current beneficiaries, the authorized fiduciary may exercise the decanting power even if the authorized fiduciary would not have made a distribution of principal to a current beneficiary under the distribution standard of the first trust. For example, assume a trust permits the trustee to distribute income and principal to S for S's support and health care, considering S's other resources, and that given S's other resources the trustee would not currently make a distribution to S. The trustee may still exercise the decanting power under Section 12.

Section 21, however, does not authorize an exercise of the decanting power under Sections 11 and 12 if the authorized fiduciary does not currently have a power to distribute principal. For example, if a trust permits income to be distributed to A, but does not permit principal distributions until A is age 25 or has a child, and A is age 21 and has no child, the trustee may not decant the trust under Section 11 or Section 12.

Washington Statute	UTDA
Section 8(g)	Section 22(a)

Washington Comment

Section 8(g) is based on Section 22(a) of the Uniform Trust Decanting Act. The Section 22(a) comment is set out below.

Uniform Act Comment

In order to provide as much certainty as possible to the trustee and the beneficiaries with respect to the operative terms of a trust, an exercise of a decanting power should not be wholly invalid because the second-trust instrument in part violates this act. Section 22(a) modifies the second-trust instrument to delete impermissible provisions in the second-trust instrument and to insert required provisions in the second-trust instrument. For example, if the second trust sets forth an impermissible rule against perpetuities period (see Section 20), the other modifications made by the decanting should be effective.

The remedial rules of Section 22 apply only to the least extent required to comply with this act. Thus if a provision in the second-trust instrument would be permissible with respect to some of the trust property but is impermissible with respect to other trust property, such provision will be void only as to the trust property with respect to which it is impermissible. Further, any modification to a provision of the second-trust instrument that is required by Section 22 should be the modification that implements the intended modifications to the greatest extent permitted under the act. Thus the authorized fiduciary's intent is relevant in determining how to apply the provisions of Section 22.

For example, assume a trust holds $500,000 of marketable assets and is the beneficiary of Grantor's $100,000 IRA. Grantor's Child is the sole current beneficiary of the trust. The trust is qualified to use Child's life expectancy in determining the distribution period for the IRA because the trust restricts all future beneficiaries, including appointees under any power of appointment and takers in default, to individuals younger than Child. The authorized fiduciary attempts to decant the trust to permit Child to appoint to her spouse. This is in violation of Section 19(b)(6) because if Child could appoint the IRA to a spouse who is older than Child, Trust would not have qualified to take IRA distributions over Child's life expectancy. Section 19(b)(6) causes the qualified benefit property and any reinvested distributions of the qualified benefit property to be treated as a separate share. Section 22 will void the power to appoint to a spouse only with respect to the qualified benefit property and any reinvested distributions of the qualified benefit property, and only if the spouse is (or could be) older than Child, because that is the least intrusive remediation required to comply with Section 19(b)(6).

As another example, assume the authorized fiduciary attempts to decant a trust to permit Child to appoint to her sibling. If Child's sibling is older than Child, this is in violation of Section 19(b)(6) because if Child could appoint the IRA to her older sibling, the trust would not have qualified to take IRA distributions over Child's life expectancy. Section 19(b)(6) causes the qualified benefit property and any reinvested distributions of the qualified benefit property to be treated as a separate share. Section 22 will void the power to appoint to a sibling only with respect to the qualified benefit property and any reinvested distributions of the qualified benefit property, which are treated as a separate share, and only if the sibling is older than Child, because that is the least intrusive remediation required to comply with Section 19(b)(6).

As yet another example, assume the authorized fiduciary attempts to decant Trust to change (1) the successor fiduciaries, (2) the manner in which the first trust instrument directed that the authorized fiduciary be compensated, which will increase the authorized fiduciary's compensation, and (3) the identity of the person who can remove the authorized fiduciary (the "Remover"). The authorized fiduciary obtains the written consent of the qualified beneficiaries of the second trust, but does not obtain consent of the Remover or approval by the court. The changes to the successor fiduciaries will be effective. The change to the authorized fiduciary's compensation will also be effective because the requirement in Section 16(a) or Section 16(b) was met. The change to the identity of the Remover will not be effective because the Remover named in the first trust instrument did not consent. See Section 18.

Washington Statute	UTDA
Section 8(h)	Section 22(b)

Washington Comment

Section 8(h) is based on Section 22(b) of the Uniform Trust Decanting Act. If a trustee decides to apply to the Court for instruction regarding corrective action, the trustee may file a petition under Chapter 11.96A RCW (in particular, RCW 11.96A.080). The Section 22(b) comment is set out below.

Uniform Act Comment

Section 22(b) provides that if the savings provision in Section 22(a) applies, the trustee or other fiduciary shall take corrective action consistent with the fiduciary's duties. When Section 22(a) applies, the copy of the second-trust instrument provided to qualified beneficiaries and other parties under Section 7 would not accurately state the terms of the second trust. A trustee or other fiduciary may have a duty to notify certain persons of the accurate terms of the second trust. See, for example, Section 813(a) of the Uniform Trust Code imposing a duty on the trustee to keep the qualified beneficiaries reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests.

Additional corrective action may be required, especially if distributions were made or not made in reliance on the assumed terms of the second-trust instrument and such terms are altered by Section 22(a).

Where a fiduciary is uncertain about whether corrective action should be taken, the fiduciary may apply to the court for instructions under Section 9.

Washington Statute	UTDA
Section 8(i)	Section 30

Washington Comment

No comment.

Uniform Act Comment

No comments listed.