

COMMENTS

A Proposal for a Variation of Trusts Statute in Washington

I. INTRODUCTION

Beneficiaries sometimes wish to vary the terms of a trust that does not expressly authorize a variation. Commonly, the problem arises because the settlor did not anticipate the circumstances now facing the beneficiaries. Except in limited situations, the courts approve variations only reluctantly.¹

In 1958 the English Parliament relieved some of the practical problems facing beneficiaries by enacting the Variation of Trusts Act.² The Act permits a court to authorize variations in the distributive provisions of a trust. Under this Act, a court may approve an arrangement on behalf of minor, disabled, unborn, or unascertained beneficiaries if it finds that the arrangement will benefit such persons.³ Ontario has enacted sim-

1. See generally 2 A. SCOTT, *THE LAW OF TRUSTS* § 167 (3d ed. 1967).

2. English Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, ch. 53.

3. The English Act provides:

1.(1) Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or

(b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or

(c) any person unborn, or

(d) any person in respect of any discretionary interest of his under protective trust where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomsoever proposed, and whether or not there is any

ilar legislation.⁴

In 1983 Missouri became the first state to enact legislation, patterned after the English Act, that permits courts to approve trust variations.⁵ Under the Missouri statute, the court can approve variations that reallocate the relative shares of the beneficiaries either by reducing the shares of some beneficiaries and increasing those of others or by terminating the trust earlier than indicated by the trust terms.⁶

This Comment argues that similar legislation would be desirable in Washington.⁷ Even though the proposed statute would entail a substantial deviation from the common-law rule, the resulting benefits justify the change. This Comment also examines the retroactive application of variation of trusts statutes and concludes that a retroactive application is constitutional. A requirement that courts consent⁸ on behalf of the bene-

other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

English Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, ch. 53, § 1, sched. 1.

4. ONT. REV. STAT. ch. 519 (1980).

5. MO. ANN. STAT. § 456.590(2) (Vernon Supp. 1985).

6. MO. ANN. STAT. § 456.590(2) (Vernon Supp. 1985) provides:

When all of the adult beneficiaries who are not disabled consent, the court may, upon finding that such variation will benefit the disabled, minor, unborn, and unascertained beneficiaries, vary the terms of a private trust so as to reduce or eliminate the interests of some beneficiaries and increase those of others, to change the times or amounts of payments and distributions to beneficiaries, or to provide for termination of the trust at a time earlier or later than that specified by the terms.

7. In March 1984 the Washington Legislature passed a statute authorizing nonjudicial resolution of trust disputes. WASH. REV. CODE § 11.96.170 (Supp. 1984). This section allows beneficiaries to enter into a written agreement concerning trust disputes. A personal representative may be appointed to represent minor, incompetent, disabled, unborn, or unascertained beneficiaries. WASH. REV. CODE § 11.96.170(2) (Supp. 1984). The statute authorizes the special representative to enter into a binding agreement on behalf of such beneficiaries. This statute, however, is not as broad as a variation of trusts statute because it appears that the statute will be used when resolving disputes rather than merely because the beneficiaries want the proposed variation. The provision became effective on January 1, 1985.

8. Note that the Missouri statute does not authorize the court to "consent" on behalf of the beneficiaries but instead provides that the court may "vary" the terms of the trust only when the court finds that the variation benefits the disabled, minor, unborn, or unascertained beneficiaries. MO. ANN. STAT. § 456.590(2) (Vernon Supp. 1985). The decision not to use the word "consent" may have been in recognition that under Missouri common law the beneficiaries of a trust may not terminate a trust, even when

ficiaries only when the variation benefits the beneficiaries in some manner⁹ sufficiently protects the beneficiaries' constitutional interests under the contract clause¹⁰ and the due process clause¹¹ of the federal Constitution. Finally, this Comment proposes that a Washington variation of trusts statute include: (1) a provision directing the court to consider the settlor's intentions before approving a requested variation, to maintain the stability of trusts validly created under Washington law; (2) a provision for separate representation for minor, disabled, unborn, or unascertained beneficiaries, to ensure that their interests are accurately represented to the court; and (3) a provision directing costs to be charged to adult beneficiaries when a variation is denied, to discourage frivolous trust litigation.

II. BACKGROUND

The majority common-law rule followed by Washington courts permits a court to authorize a variation from the terms of a trust if, because of circumstances unknown or unanticipated by the settlor, compliance with the original trust provisions would defeat or substantially impair the accomplishment of the trust's purposes.¹² Under this rule, the court asserts equitable

all the beneficiaries consent, when the termination would thwart the settlor's intentions. *Evans v. Rankin*, 329 Mo. 411, 422, 44 S.W.2d 644, 649 (1931). For example, when a trust provides for the support or education of a beneficiary, the court will not allow a trust to be terminated unless the trust purpose is first accomplished, even if a beneficiary consents. *Gross v. Gross*, 625 S.W.2d 655, 667-68 (Mo. App. 1981).

By contrast, in England a trust may be terminated or modified by the consent of all the beneficiaries even though the trust purposes have not been accomplished. *Saunders v. Vautier*, 4 Beav. 115, 115 (1841). Consequently, the language in the English Variation of Trusts Act, 1958, quoted *supra* note 3, allowing courts to "approve on behalf" of beneficiaries unable to consent, would be sufficient to cover the situations in which the beneficiaries are unable to consent. See 4 A. SCOTT, *supra* note 1, § 337, at 2655-56 for a discussion of the English rule.

9. Under the Missouri statute, the court may authorize a variation only "upon finding that such variation will benefit the disabled, minor, unborn, and unascertained beneficiaries." MO. ANN. STAT. § 456.590(2) (Vernon Supp. 1985).

10. U.S. CONST. art. I, § 10.

11. U.S. CONST. amend. XIV, § 1.

12. *Donnelly v. National Bank of Wash.*, 27 Wash. 2d 622, 625, 179 P.2d 333, 334 (1947). In *Donnelly*, the settlor had expressed the intention in his will to give his grandson \$750 a year to enable the grandson to complete his collegiate and professional education. The settlor established a time limit, however, providing that the payments were to end on Dec. 31, 1945. The court extended the time limit because the grandson had been called to serve in the armed forces, a circumstance that was unforeseen by the settlor. *Id.* at 627-28, 179 P.2d at 335-36. See also *Esmieu v. Schrag*, 92 Wash. 2d 535, 539-40, 598 P.2d 1366, 1369 (1979) (approving *Donnelly*).

power to vary only the administrative provisions of the trust.¹³ The court may authorize the trustee to sell, lease, mortgage, or improve trust property, or to invest trust funds in specified ways even when the trust terms expressly or impliedly deny these powers to the trustee.¹⁴ Nevertheless, the nonstatutory authority of the courts to permit a trustee to deviate from the terms of a trust is restricted. First, a change in circumstances must occur that was unforeseen by the settlor.¹⁵ Second, the trustee must demonstrate not only that the deviation would benefit the trust or the beneficiaries but also that a failure to deviate would impair the accomplishment of the trust's purposes.¹⁶ Third, without statutory authorization a court cannot permit deviation from the trust terms in a manner that benefits some beneficiaries at the expense of others.¹⁷

In 1925 Parliament enacted legislation that eliminated the first two restrictions in England by authorizing the court to empower the trustee to perform any act of administration deemed expedient.¹⁸ A number of states have enacted legislation resembling the 1925 English Act.¹⁹

13. See G. BOGERT & G. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* § 146, at 521 (5th ed. 1973). See also *Esmieu v. Schrag*, 92 Wash. 2d 535, 539-40, 598 P.2d 1366, 1369 (1979) (authorizing a diversification of trust assets for administrative purposes).

14. 2 A. SCOTT, *supra* note 1, § 167, at 1267-69; *RESTATEMENT (SECOND) OF TRUSTS* § 167, at 351 (1959). The Washington statute recognizes this judicial authority. WASH. REV. CODE § 11.100.040 (Supp. 1984). For example, suppose a settlor creates a trust of a hotel for the purpose of paying income to members of the settlor's family. The trust terms prohibit the trustee powers of sale and mortgage. Yet, if the hotel burns down and the trustee cannot produce income without a sale or mortgage, a court of equity could confer on the trustee the power to sell or mortgage. See also *Donnelly v. National Bank of Wash.*, 27 Wash. 2d 622, 625, 179 P.2d 333, 334 (1947) (following *RESTATEMENT OF TRUSTS* § 167, at 415 (1935)).

15. *Donnelly v. National Bank of Wash.*, 27 Wash. 2d 622, 625, 179 P.2d 333, 334 (1947); 2 A. SCOTT, *supra* note 1, § 167, at 1268.

16. *Donnelly v. National Bank of Wash.*, 27 Wash. 2d 622, 625, 179 P.2d 333, 334 (1947) (following *RESTATEMENT OF TRUSTS* § 167, at 415 (1935)); G. BOGERT & G. BOGERT, *supra* note 13, § 146, at 522. See also *Crocker-Citizens Nat'l Bank v. Younger*, 4 Cal. 3d 202, 211-12, 481 P.2d 222, 228, 93 Cal. Rptr. 214, 220 (1971) (deviation from the trust terms was unjustified because there was no reason to believe that the circumstances were unforeseen or that the purposes of the trust would be defeated if the variation were denied). See generally *Annot.*, 56 A.L.R.3d 1228 (1971) (alteration of or deviation from express trust power).

17. See *Bright v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 30 Cal. 2d 285, 293, 182 P.2d 565, 572 (1947) (citing *RESTATEMENT OF TRUSTS* § 168 comment d (1935) (now *RESTATEMENT (SECOND) OF TRUSTS* § 168 comment d (1959))).

18. *Trustee Act*, 1925, 15 & 16 Geo. 5, ch. 19, § 57. The Missouri Legislature also adopted this provision. MO. ANN. STAT. § 456.590(1) (Vernon Supp. 1985).

19. See, e.g., CAL. PROB. CODE § 1120.2 (West 1981); N.J. STAT. ANN. § 3B: 14-24

Courts of equity in this country do not have the power to vary the relative shares of the beneficiaries.²⁰ The courts have refused to make such variations on the theory that a court has the duty to carry out the intentions of the settlor unless the trust provisions violate settled principles of public policy.²¹ This restrictive doctrine often prevents the authorization of variations that would benefit the beneficiaries when the variations are not essential to carry out the purposes of the trust.²²

Several exceptions to this common-law doctrine exist, but they fail to cover many situations. For example, one exception provides that when the settlor is the sole beneficiary of a trust and has the legal capacity to revoke the trust, the settlor can revoke the trust even though the original trust purposes have not been accomplished.²³ Because most trusts are created for persons other than the settlor, however, this exception rarely applies. Another exception allows the settlor to revoke a trust if all the beneficiaries consent, even if the trust purports to be irrevocable.²⁴ This exception provides no relief, however, when the settlor is deceased or when certain beneficiaries are legally incapable of consenting because they are minor, disabled, unborn, or unascertained.²⁵ Variation of trusts statutes solve this

(West 1983); N.Y. EST. POWERS & TRUSTS LAW § 11-1.1(c) (McKinney 1967); UNIFORM TRUSTEES' POWERS ACT § 5(a) (1964). The Washington statute provides: "Nothing contained in this chapter shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property." WASH. REV. CODE § 11.100.040 (Supp. 1984).

20. See, e.g., *Stewart v. Hamilton*, 151 Tenn. 396, 399, 270 S.W. 79, 80 (1925); Annot., 39 A.L.R. 37, 40 (1925). See generally G. BOGERT & G. BOGERT, *supra* note 13, § 146.

21. E.g., *Shelton v. King*, 229 U.S. 90, 101 (1913) ("There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid.").

22. *Id.* The Court in *Shelton* refused to terminate a trust to allow the appellants, who had vested and indefeasible interests in the trust legacies, to use the income from the trust before the youngest reached age 25. The only duty placed on the trustee was to "lock the fund up" until the youngest reached 25, the age stated in the trust instrument. *Id.* at 92 (referring to brief for appellants).

23. *Hall v. Malstrom*, 29 Wash. 2d 746, 749, 189 P.2d 471, 473 (1948); 4 A. SCOTT, *supra* note 1, § 339, at 2694.

24. 4 A. SCOTT, *supra* note 1, § 338, at 2687.

25. See *Bright v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 30 Cal. 2d 285, 294-95, 182 P.2d 565, 572-73 (1947). The court in *Bright* refused an advancement to a life beneficiary who needed money because she was ill. *Id.* The court refused to make the advancement because the interests of contingent beneficiaries might be reduced, *id.*, arguing that sympathy for the needs of the life beneficiary would not empower the court to deprive the

problem by permitting the court to consent on behalf of those beneficiaries who are incapable of consenting. The underlying theory is that the court, upon a determination that the variation will benefit the minor, disabled, unborn, or unascertained beneficiaries, will make the decision that the beneficiaries would have made if they had been competent adults.²⁶

Variation of trusts statutes can solve a wide range of problems, depending on specific trust terms and the specific needs of the trust beneficiaries. For example, variation of trusts statutes have been used to create tax savings,²⁷ to advance money to life beneficiaries in need,²⁸ to increase the trustees' investment powers,²⁹ to eliminate unfair restrictions on beneficiaries,³⁰ to equalize benefits to children born after the creation of a trust,³¹ and to redistribute trust assets among the beneficiaries so that each beneficiary can make the best use of his or her trust assets.³²

III. PROTECTING THE SETTLOR'S INTENT

Under the common law of Washington and throughout the United States, courts have taken special care to carry out the intentions of the settlor in trust litigation.³³ In *Shelton v. King*,³⁴ the United States Supreme Court upheld the trustee's refusal to terminate a trust, saying: "There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid."³⁵

A settlor who creates a trust under valid state law wants assurance that the trust will be carried out substantially as the

residuary beneficiaries of their interests in the trust. *Id.* at 295, 182 P.2d at 573. The contingent beneficiaries in *Bright* were incapable of consenting to the variation because they were minor and unborn. *Id.* at 287, 182 P.2d at 568.

26. Albery, *Modern Developments in Equity Law and Variation of Trusts Act*, 6 REAL PROP. PROB. AND TR. J. 504, 510 (1971).

27. *Chapman v. Chapman*, [1959] 1 W.L.R. 372, 374.

28. *In re Rouse's Will Trusts*, [1959] 1 W.L.R. 374, 374.

29. *In re Coates' Trusts*, [1959] 1 W.L.R. 375, 378.

30. *Hooper v. Wenhaston*, [1970] 1 Ch. 560, 567.

31. *In re Zekelman*, 19 D.L.R.3d 652, 654 (1971).

32. *Wilson v. Holt*, [1968] 1 Ch. 100, 117-18.

33. *See, e.g., Donnelly v. National Bank of Wash.*, 27 Wash. 2d 622, 625, 179 P.2d 333, 334 (1947) (following RESTATEMENT OF TRUSTS § 167, at 415 (1935)). *See supra* note 12 and accompanying text.

34. 229 U.S. 90 (1913).

35. *Id.* at 101.

settlor intended.³⁶ Under present common law, when the court allows an administrative change in a trust, the court does so only to accomplish the real intent and purpose of the settlor.³⁷ Similarly, the court should consider the settlor's intentions before authorizing a variation in the relative shares of the beneficiaries. Any variation that destroys the underlying purpose of the trust should be denied. Without this protection, trusts would cease to be useful devices for settlors because a settlor would have no assurance that the trust purposes would be carried out once the settlor relinquished control over the trust.

The economic theory behind upholding the settlor's intentions is that settlors will be encouraged to accumulate wealth if they have control over their property.³⁸ The countervailing argument, however, is that trust beneficiaries should receive the maximum benefit from the trust property. A variation of trusts statute would allow beneficiaries to take advantage of opportunities that would otherwise be unavailable, by allowing the beneficiaries more freedom to use trust property without unnecessary restrictions.³⁹ In analyzing the settlor's intent, the court should

36. *Bright v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 30 Cal. 2d 285, 295, 182 P.2d 565, 573 (1947). The court in *Bright* refused to allow an invasion of the trust corpus to aid testatrix's daughter, even though the daughter suffered from a disease believed to be incurable and had special medical needs. *Id.* The disease had arisen after the creation of the trust. *Id.* at 287, 182 P.2d at 567. The court followed the common-law rule disallowing variations in the distributive provisions of a trust, reasoning that to allow the variation would amount to taking property from one beneficiary and giving it to another. *Id.* at 293, 182 P.2d at 571. The court emphasized that "[s]ympathy for the needs of the respondents does not empower the court to deprive the residuary beneficiaries of their interests in the corpus of the trust without their consent." *Id.* at 295, 182 P.2d at 573. The court explained that upholding the settlor's intentions is necessary, for otherwise "there would be no stability to any testamentary trust in this state." *Id.*

37. *Esmieu v. Schrag*, 92 Wash. 2d 535, 539, 598 P.2d 1366, 1369 (1979). In *Esmieu*, the court permitted a variation in order to carry out the settlor's intent. *Id.* The variation allowed a diversification of the trust assets and was administrative only. *Id.* at 536, 539, 598 P.2d at 1367, 1369. See G. BOGERT & G. BOGERT, *supra* note 13, § 146, at 521. See also *supra* notes 12-17 and accompanying text for an explanation of administrative variations.

38. Jones, *The Dead Hand and the Law of Trusts*, in DEATH TAXES AND FAMILY PROPERTY, ESSAYS AND AMERICAN ASSEMBLY REPORT 120 (E. Halbach ed. 1977). See also Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 145 (1936) (noting that one purpose in allowing a testator freedom to dispose of property is that "[t]here would be no incentive to ingenuity, productiveness and thrift unless a man could direct the enjoyment of his property").

39. See Scott, *Control of Property of the Dead. II*, 65 U. PA. L. REV. 632, 654 (1917). See also L. SILK, *ECONOMICS IN PLAIN ENGLISH* 57 (1978), in which the author explains the efficiency of choice: "To economize is to choose. Each individual must choose how best to satisfy his wants by allocating his limited time and energy to different uses and

consider that the settlor's primary intent is to benefit the beneficiaries named in the trust. If the beneficiaries collectively can use the trust fund in a more efficient manner, the court can determine whether the settlor would have acquiesced if the settlor had foreseen the future events.

Most courts in this country would probably consider the settlor's intentions with or without statutory direction. Nevertheless, a legislature adopting a variation of trusts statute should avoid ambiguity by including language in the statute directing the courts to consider the settlor's intentions before authorizing a variation. Such statutory protection might also encourage settlors to state their primary intentions and purposes in trust documents to aid later judicial interpretations.

Several English decisions interpreting the Variation of Trusts Act⁴⁰ illustrate how the settlor's intentions can be ignored without a specific statutory mandate. Early decisions under the Act indicated that the court should consider the wishes of the settlor when evaluating a proposed variation.⁴¹ Yet, in *Hooper v. Wenhaston*,⁴² the court approved a variation that clearly defeated the settlor's expressed intention.⁴³ The trust in that case contained a forfeiture provision cutting off beneficiaries who practiced Roman Catholicism.⁴⁴ The beneficiaries requested the court to delete the forfeiture provision.⁴⁵ Even though the deletion would defeat the settlor's expressed intentions, the court authorized the variation because it benefited the beneficiaries⁴⁶ and because the variation was a "fair

by distributing his income among the goods and services he wants to buy." See generally Fratcher, *Fiduciary Administration in England*, 40 N.Y.U. L. Rev. 12, 38 (1965).

40. English Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, ch. 53, § 1.

41. *In re Steed's Will Trusts*, [1960] 1 Ch. 407, 413. In *In re Steed's*, the court refused a variation that "cut at the root of the testator's wishes and intentions." *Id.* at 422. See also *In re Burney's Settlement Trusts*, [1961] 1 W.L.R. 545. In *In re Burney's*, the court granted a proposal to convert a husband's reversionary interest, which is a "protective" life interest, into an absolute life interest, noting that the court should consider the proposal as a whole, "taking into account the purpose of the trust and the intention of the settlor." *Id.* at 550. The court determined that the settlor could not have intended to provide benefits for a second wife of the husband or benefits for the issue of the husband's second marriage when the evident purpose of the trust was to protect the settlor's husband, as the father of the settlor's family, and for the benefit of that family. *Id.*

42. [1970] 1 Ch. 560.

43. *Id.* at 567.

44. *Id.* at 562.

45. *Id.* at 563.

46. *Id.* at 567. The court said that the proposed arrangement would have three pos-

and proper one."⁴⁷ The fact that the variation defeated the settlor's intentions was held to be "serious but by no means conclusive."⁴⁸ The court held that these particular forfeiture provisions were undesirable and that their deletion was therefore fair and proper.⁴⁹ The court did not offer general guidelines for a determination of when the settlor's intentions could be disregarded, but the court focused instead on the needs of the beneficiaries.⁵⁰

Perhaps the *Hooper* decision was justified on the grounds that the forfeiture provisions violated public policy, yet the opinion is ambiguous. In the United States, courts will disregard the settlor's intentions when those intentions clearly violate public policy.⁵¹ Without further clarification, the English courts might conclude that the settlor's intentions need not be considered. To avoid such an interpretation, a variation of trusts statute should contain language requiring the court to consider the settlor's intentions when the intentions do not violate public policy.

IV. PRACTICAL APPLICATIONS OF A VARIATION OF TRUSTS STATUTE

A. *Tax Savings*

A variation of trusts statute has several practical applications. One familiar problem arises when a settlor creates a trust without knowledge of the tax consequences.⁵² The English Act

sible benefits: (1) the beneficiaries would not be deterred from practicing Roman Catholicism; (2) the beneficiaries would not be deterred from marrying someone who practiced that faith; and (3) family dissension would be reduced by the distribution of benefits without regard to religious beliefs. *Id.* at 566-67.

47. *Id.* at 567.

48. *Id.*

49. *Id.*

50. *Id.*

51. A. SCOTT, *ABRIDGMENT OF THE LAW OF TRUSTS* § 62.13 (1960). See, e.g., *Colonial Trust Co. v. Brown*, 105 Conn. 261, 286, 135 A. 555, 564 (1926). In *Brown*, the court held that a provision in a trust restricting the leases of the trust property to one year and prohibiting any promises of longer leases and another provision that directed "that no new buildings [be] placed upon the Exchange Place property and the homestead shall exceed three stories in height" violated public policy, as the provisions constituted unreasonable restrictions that "would carry a serious threat against . . . proper growth." *Id.* at 284, 135 A. at 564. The court also noted that the provisions were disadvantageous to the beneficiaries and that "they are designed to benefit no one, and are harmful to all persons interested." *Id.* at 286, 135 A. at 564.

52. See, e.g., *Chapman v. Chapman*, [1959] 1 W.L.R. 372, 374 (settlor was unaware of the tax consequences when he set up the trust).

was enacted chiefly to allow taxpayers to arrange their transactions to minimize the tax consequences.⁵³ Often, subsequent changes in tax laws defeat the settlor's original plan, even though the settlor had carefully created the trust to minimize tax consequences. Variation of trusts statutes allow the court to rearrange the shares to minimize taxes.⁵⁴ The court merely allows the beneficiaries to do what they otherwise would be able to do if all of the beneficiaries were legally capable of consenting to a variation initiated by the settlor. Under current common law, a variation would not be authorized if the variation was unnecessary to fulfill the trust purposes or if certain trust beneficiaries were incapable of consenting to the variation.⁵⁵

For example, suppose that a third party created an irrevocable trust to pay income for life to a married couple, *A* and *B*, and then to pay the whole trust fund to *C* and *D*, the children of *A* and *B*. Assume that *C* and *D* are both seventeen years old and are planning to attend college. Assume also that the settlor, unaware of the tax consequences, set up the terms of the trust so that all of the income was required to be distributed currently to *A* and *B*. Under section 652 of the Internal Revenue Code of

53. See Albery, *supra* note 26, at 509.

54. See *Chapman v. Chapman*, [1959] 1 W.L.R. 372, 374 (court permitted a variation under the Variation of Trusts Act to minimize the tax).

55. See *supra* notes 21 & 23-25 and accompanying text. A settlor under current common law may be able to have a trust modified or revoked if the court finds that the settlor was induced by a mistake regarding tax consequences. 4 A. SCOTT, *supra* note 1, § 333.4, at 2634. See also RESTATEMENT (SECOND) OF TRUSTS § 333, at 149 (1959), which provides that: "A trust can be rescinded or reformed upon the same grounds as those upon which a transfer of property not in trust can be rescinded or reformed."

One court allowed a rescission of a gift on the ground that the settlors had made a mistake of law as to the tax consequences of the creation of a trust, when the sole purpose of setting up the trust was to minimize taxes. *Stone v. Stone*, 319 Mich. 194, 198-200, 29 N.W.2d 271, 273 (1947). Yet, the Michigan court denied a rescission when minimizing tax consequences was not the settlor's sole purpose in setting up the trust. *Lowry v. Kavanagh*, 322 Mich. 532, 544, 34 N.W.2d 60, 65 (1948). Thus, the mistake-of-law rationale may not be sufficient in cases in which the settlor has not set up a trust for the sole purpose of minimizing taxes. In addition, the mistake-of-law rationale will not work when the settlor did not even consider the tax consequences of the creation of a trust.

Some courts may also refuse a reformation after the death of a settlor. See *Rentmeister v. DeSilva*, 553 P.2d 411, 412 (Utah 1976). Nevertheless, the Massachusetts Supreme Judicial Court did allow a reformation after the settlor's death when the trust omitted a provision for a marital deduction because of a clerical error, and when the mistake could be proved by full, clear, and decisive proof. *Berman v. Sandler*, 379 Mass. 506, 509-11, 399 N.E.2d 17, 19-20 (1980). A variation of trusts statute could allow the beneficiaries to take advantage of tax benefits regardless of whether the settlor was alive or whether a mistake of law concerning tax consequences could be proved.

1954 (I.R.C.),⁵⁶ if *A* and *B* use the income to pay for the college education of *C* and *D*, *A* and *B* will be taxed on the income. Section 652 provides that income that is required to be distributed currently under I.R.C. section 651⁵⁷ will be included in the gross income of the beneficiaries to whom the income is required to be distributed, whether distributed or not. *A* and *B* would not want to renounce completely their interests under the trust, but they would like to change the trust terms so that the income used for the education of *C* and *D* would be taxed to *C* and *D*.

Under a variation of trusts statute, *A* and *B*, as adult beneficiaries, could request that the court approve a variation allowing the trustee to use discretion in making distributions to *A* and *B* and allowing the trustee to distribute money to *C* and *D* for their college educations. This variation would prevent *A* and *B* from being taxed on the portion of the income distributed to *C* and *D* under I.R.C. section 652.⁵⁸

Note that this variation does not change the tax laws. It merely allows the beneficiaries to take advantage of the current tax laws. *A* and *B* are not getting a tax break without sacrifice in this example; they are relinquishing some control over the income to achieve the desired result.

The court could easily find that *C* and *D*, as minor beneficiaries, benefit from this variation. The variation would allow money to be advanced to *C* and *D* for their education. This educational benefit would outweigh the disadvantage created by the tax on the income distributed to *C* and *D*. Under common law, this variation could not be accomplished because *C* and *D* would be unable to consent and because the variation would not be necessary to carry out the essential trust purposes.

If the settlor is still alive, the court could determine whether the settlor's intent would be thwarted by the proposed variation, either by asking the settlor or by requiring the settlor to consent to the variation. If the settlor is dead, the variation of trusts statute should direct the court to examine the trust to determine

56. I.R.C. § 652 (1984).

57. I.R.C. § 651 (1984).

58. I.R.C. § 652 (1984). This example assumes that *A* and *B* have no support obligation under local law to pay for the college education of *C* and *D*. If *A* and *B* did have an obligation to provide such support, then they would still be taxed on the income. A person will be treated as a beneficiary of income when the income is used to satisfy a person's legal obligation. I.R.C. § 643(c) (1984). See Treas. Reg. § 1.662(a)-4 (1984) for a definition of legal obligation. See also Treas. Reg. § 1.643(c)(1) (1984).

whether the variation would interfere with any express or implied purpose of the trust. If the court finds that the settlor's primary purpose was to benefit A and B, the court should find that this proposed variation, initiated by A and B, will have a beneficial result. The court should therefore authorize the variation. If, on the other hand, the court determines that the proposed variation somehow violates the settlor's purpose in setting up the trust, the court should deny the variation.

B. *Advancement of Trust Funds When Remote Contingent Beneficiaries Exist*

Variation of trusts statutes could solve another common problem by permitting an advancement of trust funds to current beneficiaries before the time designated in the trust instrument. The advancement could be permitted when the court finds that minor, disabled, unborn, or unascertained beneficiaries would reap some compensating advantage from the variation. Under current common law, advancement is usually denied because advancement is unnecessary to fulfill the purposes of the trust and because the minor, disabled, unborn, or unascertained beneficiaries are unable to consent to the variation.⁵⁹ A variation of trusts statute would create greater flexibility for such advancement.

The compensating advantage need not be financial, according to the English and Ontario interpretations.⁶⁰ The benefit may be financial, educational, social, or any other kind of benefit.⁶¹ The court must also be satisfied that the arrangement is fair and proper.⁶²

For instance, in *In re Zekelman*,⁶³ the Ontario court, following the English courts' interpretations, held that the benefit need not be financial. The court found that if the time of vesting

59. *Bright v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 30 Cal. 2d 285, 295, 182 P.2d 565, 573 (1947) (beneficiaries did not have the legal capacity to consent).

60. See *In re C.L.*, [1968] 1 All E.R. 1104. In *In re C.L.*, relatives of a mental patient petitioned for a variation that would eliminate the mental patient's life interest in a trust in order for the relatives to realize eventual savings in estate duty. *Id.* at 1106. Although the court acknowledged that this arrangement would not benefit the patient-beneficiary financially, the court nevertheless approved the variation, finding that it was the type of variation that the patient would have consented to, had she been able to, because it would create substantial savings for her family. *Id.* at 1109.

61. *Hooper v. Wenhaston*, [1970] 1 Ch. 560, 566.

62. *Id.* at 567.

63. 19 D.L.R.3d 652 (1971).

of the beneficiaries' interests were accelerated, there would be two possible benefits. First, family dissension would be reduced because the variation would eliminate discrimination among the settlor's children. Second, the variation would probably reduce taxes.⁶⁴

Consider the following example of a variation that accelerates certain beneficiaries' interests. Suppose that a settlor creates a trust for his daughter, *A*, and his son-in-law, *B*, upon their marriage. The trust terms provide that the trust fund is to accumulate income until *A* and *B* reach fifty, when the fund will be transferred to them or to the survivor. The trust terms also provide that if both *A* and *B* die before the age of fifty, then the accumulated fund will pass to their issue per stirpes on the death of the survivor. Assume that both *A* and *B* are now forty-five years old and that they have two children, *X* and *Y*. Assume also that *Y* is blind and needs an eye operation. Under a variation of trusts statute, if the family cannot afford to pay for the operation, the variation could be granted. *A*, *B*, *X*, and *Y*, as adult beneficiaries, could petition the court to release enough money from the trust corpus to pay for the operation. Under the common law, however, the advancement of income would not be permitted because unborn contingent beneficiaries might have their shares reduced by the proposed variation. These unborn contingent beneficiaries, whose potential existence is highly improbable, are incapable of consenting to this arrangement.

Under a variation of trusts statute, the court would be required to consider the different classes of beneficiaries who might eventually be entitled to the trust fund and to determine whether all of the different classes of beneficiaries would benefit from the proposed arrangement.⁶⁵ For example, the English court in *Eliot-Cohen v. Cohen*⁶⁶ refused to authorize an arrangement in which there was a possibility that a remote great-grandchild would take nothing under the agreement.⁶⁷ The court later approved the arrangement with an amendment stipulating that in the event the unlikely contingency occurred, the trustees would compensate the beneficiaries.⁶⁸

Thus, in the present example, the court would have to con-

64. *Id.* at 654.

65. *Eliot-Cohen v. Cohen*, [1965] 1 W.L.R. 1229, 1237.

66. *Id.*

67. *Id.*

68. *Id.*

sider the possibility that *A* and *B* would have additional children and that both *A* and *B* might die before they reach the age of fifty. Even though *A* and *B* are both forty-five years old and do not plan to have any more children, most states will presume that they might have more children.⁶⁹ The court would also have to consider the consequences if, after the operation, either *X* or *Y* marries and has a child and then *A*, *B*, *X*, and *Y* all die before *A* and *B* reach the age of fifty. In both hypothetical situations, the recently born beneficiaries would have been deprived of part of the trust because of the premature expenditure of the trust corpus for the operation. Before the court can consent on behalf of these beneficiaries, the court must find that these beneficiaries will gain some advantage by the proposed variation.

If the dollar amount that a contingent beneficiary stands to lose is great, the court might authorize a variation only on the condition that *A*, *B*, *X*, and *Y* agree to secure the contingent beneficiaries' interests with an insurance policy or a bond.⁷⁰ If the contingent beneficiaries are then born and are entitled to the trust, money will be available to compensate for the portion of the trust fund used prematurely. The court should approve the variation if it finds that a contingent beneficiary, as a reasonably prudent person, would consent to the variation if the beneficiary had the capacity to do so.⁷¹

The court must also consider the settlor's primary intent in setting up the trust, either by asking the settlor, if the settlor is living, or by examining the terms of the trust. In the present situation, the court would probably find that the settlor's primary intent was to benefit *A* and *B* by making a large sum available as they reached retirement. Yet, the court could also determine that the settlor would have favored an advancement of the trust funds if the settlor had been aware of the circumstances facing *A* and *B*.

In summary, a variation of trusts statute permits the

69. Some states treat the presumption that anyone is capable of bearing children until death as conclusive only in perpetuities cases. The presumption is usually rebuttable as to termination of trusts, although the cases are divided on this point. See 4 A. SCOTT, *supra* note 1, § 340.1, at 2714 & n.4. See also *Betchard v. Iverson*, 35 Wash. 2d 344, 351, 212 P.2d 783, 787 (1949) (holding in a perpetuities case that the presumption is conclusive); 76 AM. JUR. 2D *Trusts* § 72 (1975).

70. Some courts have allowed modifications of contingent interests when these interests could be secured with a bond or insurance. See *Frank v. Frank*, 153 Tenn. 215, 218, 280 S.W. 1012, 1013 (1925); Annot., 98 A.L.R.2d 1281, 1293 (1964).

71. See *Wilson v. Holt*, [1968] 1 Ch. 100, 112.

advancement of trust funds when the contingent beneficiaries would directly benefit or when the contingent beneficiaries' interests could be adequately protected.

V. COSTS OF LITIGATION

The English, Ontario, and Missouri variation of trusts statutes do not specify who should pay legal costs incurred under a variation of trusts suit. The question arises whether the expenses incurred to employ guardians ad litem or attorneys to represent the minor, disabled, unborn, or unascertained beneficiaries would be paid by the adult beneficiaries, out of trust funds, or out of the personal assets of the minor, disabled, unborn, or unascertained beneficiaries. To avoid later disputes a variation of trusts statute should specify who should bear this burden.

The general rule is that attorneys' fees or costs are not allowable absent either statutory authority or an agreement of the parties.⁷² The courts of equity make certain exceptions, however, in suits seeking the construction of wills or trusts.⁷³

Generally, expenses incurred by beneficiaries in suits against the trustee are properly chargeable against the trust when the suit is brought to preserve or to benefit the trust.⁷⁴ Similarly, when a trustee properly incurs expenses in applying for court instructions concerning administration of a trust, the court will allow the trustee to pay these expenses out of the trust.⁷⁵ The trustee is also entitled to indemnity for expenses if the trustee has benefited the trust estate in good faith.⁷⁶

Similarly, under a variation of trusts statute, if the proposed arrangement benefited the trust, the court might allow the litigation costs to be paid out of the trust. On the other hand, if

72. *Mellor v. Chamberlin*, 100 Wash. 2d 643, 649, 673 P.2d 610, 613 (1983) ("In Washington attorney fees may be recovered only when authorized by a private agreement of the parties, a statute, or a recognized ground of equity."). See Annot., 30 A.L.R.2d 1148, 1150 (1953) ("Costs' are statutory allowances to a party to an action for his expenses incurred therein.").

73. *Wool v. LaSalle Nat'l Bank*, 89 Ill. App. 3d 560, 563, 411 N.E.2d 1135, 1138 (1980) (e.g., courts will make exceptions "when there is an honest difference of opinion as to the meaning of the maker's language").

74. *Id.* at 564, 411 N.E.2d at 1139. The court in *Wool* held that the benefit conferred in seeking to obtain control over the trustees was a benefit personal to the beneficiaries, and not a benefit to the trust. *Id.* at 565, 411 N.E.2d at 1139.

75. 3 A. SCOTT, *supra* note 1, § 188, at 1525 & § 259, at 2214-15.

76. *Id.*

the application for a variation is denied because the court finds that the application was brought in bad faith or that the variation would not benefit the minor, disabled, unborn, or unascertained beneficiaries, the court might order the plaintiffs (the adult beneficiaries) to pay the litigation costs. This flexible solution would discourage frivolous suits under a variation of trusts act. The legislature should specifically authorize costs to be paid according to these equitable rules.⁷⁷

VI. CONSTITUTIONALITY OF THE RETROACTIVE APPLICATION OF VARIATION OF TRUSTS STATUTES

A variation of trusts statute that closely follows the English Act would apply both prospectively and retroactively. The English Act applies to trusts arising "before or after the passing of the Act."⁷⁸ Similarly, the Missouri statute provides that "[e]xcept as otherwise specifically provided in the terms of the trust, the provisions of . . . this chapter apply to any trust established before or after September 28, 1983, and to any trust asset acquired by the trustee before or after September 28, 1983."⁷⁹

Prospective application of a variation of trusts statute does not offend the Constitution because a state may define the rights to receive, enjoy, and dispose of property as the state sees fit.⁸⁰

77. The current Washington guardian ad litem statutes provide some flexibility. WASH. REV. CODE § 11.88.090, .92.180 (1983 & Supp. 1984). Section 11.92.180 provides that a guardian or limited guardian shall be allowed such compensation for services as the court shall deem just and reasonable. Section 11.88.090(6) provides that the fee for the guardian shall be paid by the incompetent or disabled person unless the court finds that such payment would result in substantial hardship to such person, in which case the county will be responsible for such costs. If, however, the petition is found to be frivolous or not brought in good faith, the guardian fee shall be charged to the petitioner. See WASH. REV. CODE § 11.96.140 (Supp. 1984), which states that "[e]ither the superior court or the court on appeal, may, in its discretion, order costs, including attorneys fees, to be paid by any party to the proceedings or out of the assets of the estate, as justice may require." See also WASH. REV. CODE § 4.84.150 (1983), which provides:

In [an] action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by or against a person prosecuting in his own right, but such costs shall be chargeable only upon or collected of the estate of the party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense.

78. English Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, ch. 53, § 1, sched. 1.

79. MO. ANN. STAT. § 456.600 (Vernon Supp. 1985).

80. See *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (rights to succession to property are statutory in nature, and nothing in the federal Constitution forbids a state

Once the state extends the right to a settlor to create a trust, however, the issue arises whether a retroactive⁸¹ modification of that trust offends either the contract clause⁸² or the due process clause⁸³ of the United States Constitution.⁸⁴

A review of United States Supreme Court decisions reveals that the Court generally considers three factors when determining whether to uphold a retroactive statute under both the contract and due process clauses: (1) the nature of the abrogated or modified right; (2) the extent of modification or abrogation; and (3) the strength of the public interest served by the statute.⁸⁵

Variation of trusts statutes serve an important public interest by promoting the efficient use of trust property.⁸⁶ A variation of trusts statute will not substantially impair contract rights if the settlor's intent is considered,⁸⁷ nor will there be a substantial deprivation of property if the court consents only to variations that truly benefit the beneficiaries.⁸⁸

Three categories of interests may be altered or eliminated by a variation of trusts statute: (1) the settlor's interests; (2) the interest of unascertained and contingent beneficiaries;⁸⁹ and (3)

legislature from limiting, conditioning, or even abolishing the rights of succession to property within the court's jurisdiction).

81. A retroactive statute is one that gives conduct occurring before the passage of an act a different legal effect than it would have had without the passage of the statute. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960).

82. U.S. CONST. art. I, § 10.

83. U.S. CONST. amend. XIV.

84. See Scott, *supra* note 39, at 654 (discussing the public policy against restraints on alienation).

85. Hochman, *supra* note 81, at 697. Some commentators argue that retroactive legislation violates the Constitution if the legislation abrogates vested rights. *Id.* at 696. This explanation proves unsatisfactory because it is not always clear what constitutes a vested right. One circular definition of a vested right is that a right is vested when it has been so far perfected that it cannot be taken away by statute. *Id.* Constitutional analysis is further complicated because not all retroactive impairment of even clearly vested rights will violate the Constitution. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1976). See *infra* text accompanying notes 109-15 for a brief explanation of the facts in *United States Trust*.

86. See Scott, *supra* note 39, at 646. Public policy favors allowing beneficiaries of trusts to have maximum enjoyment from trust property, much as public policy favors limiting restraints on alienation. See *supra* text accompanying note 39. Nevertheless, the courts, in absence of a statute, enforce the whim of the testator unless the provision violates public policy. Scott, *supra* note 39, at 648.

87. See *supra* notes 36-37 and accompanying text.

88. See *supra* note 3 and accompanying text.

89. This Comment will not analyze the unborn beneficiaries' interests under the Constitution in view of the United States Supreme Court decision in *Roe v. Wade*, 410

the interests of minor and disabled beneficiaries who are certain to take an interest in the trust. These interests will be evaluated according to the nature of the property interests, the extent of the modification or abrogation, and the strength of the public interest served by the statute.⁹⁰

A. *The Settlor's Interests and the Contract Clause*

Commentators argue that even though a settlor has no natural right to create a trust,⁹¹ once the state grants the settlor the right to create a trust, a contract right is created that is protected from legislative encroachment.⁹² The Supreme Court held in *Coolidge v. Long*⁹³ that trust deeds are contracts within the meaning of the federal contract clause.⁹⁴ Yet, the *Coolidge* Court gave no rationale for its conclusion.

One plausible explanation is that a trust is a kind of contract between the settlor and the trustee. Like the terms of a contract, the terms of the trust document control.⁹⁵ The trustee is under an obligation to carry out the terms of the trust,⁹⁶ just as a party to a contract is under an obligation to carry out the terms of a contract.

Even assuming that a trust is a contract within the meaning of the federal contract clause, it does not necessarily follow that a retroactively applied variation of trusts statute violates the

U.S. 113 (1973). The Court held that the word "person" as used in the 14th amendment does not include the unborn. *Roe*, 410 U.S. at 158. Yet courts are likely to protect the interests of unborn beneficiaries, even without a constitutional mandate, just as courts protect contingent beneficiaries' interests to fulfill the settlor's intent. See *infra* text accompanying notes 128-30.

90. Hochman, *supra* note 81, at 697.

91. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

92. J. GRAY, *THE RULE AGAINST PERPETUITIES* § 590, at 472 n.3 (3d ed. 1915).

93. 282 U.S. 582 (1931).

94. *Id.* at 595. *Contra* *Adams v. Cook*, 15 Cal. 2d 352, 361, 101 P.2d 484, 489 (1940) (rule prohibiting judicial modification of the terms of a contract does not apply to the declarations of trust when the primary purpose of the trust would not be accomplished and when the advantages would not accrue to the beneficiaries by "a slavish adherence to the terms of the trust").

95. See Note, *Trusteeship in Modern Business*, 42 HARV. L. REV. 1048, 1052 (1929).

96. Normally, the trust instrument constitutes the measure of the trustee's powers. The usual view of a trust is that of a fiduciary relationship between the settlor and the trustee. See 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 11, §§ 10, 11, 77 (1974); 1 A. SCOTT, *supra* note 1, § 14.3, at 149-51. The analysis under the contract clause is illustrative, nevertheless, of possible constitutional objections to variation of trusts statutes. See, e.g., *Wells Fargo Bank Am. Trust Co. v. Baxter*, 207 Cal. App. 2d 818, 831, 24 Cal. Rptr. 872, 880 (1962).

contract clause. In a leading contract clause case, *Home Building & Loan Association v. Blaisdell*,⁹⁷ the United States Supreme Court emphasized that the prohibition against the impairment of contracts is not an absolute one.⁹⁸ In *Blaisdell*, the Court held that the economic interests of the state may justify the exercise of state power notwithstanding the retroactive interference with contracts.⁹⁹ The Court stated that the proper test of constitutionality is whether the legislation is addressed to a legitimate public end and whether the measures taken are reasonable and appropriate to that end.¹⁰⁰

The statute¹⁰¹ at issue in *Blaisdell* authorized special judicial proceedings permitting the postponement of foreclosures and execution sales "for such a time as the court may deem just and equitable."¹⁰² Aside from the extension of time, the other conditions of redemption remained unaltered.¹⁰³ While the mortgagor remained in possession of the property, the mortgagor had to pay the reasonable rental value determined by the court.¹⁰⁴ The Supreme Court found that the legislation was reasonable because the mortgage obligation was not substantially impaired¹⁰⁵ and because the period of redemption was merely extended.¹⁰⁶

Recently, in *Allied Structural Steel Co. v. Spannaus*,¹⁰⁷ the Supreme Court approved the *Blaisdell* analysis. The *Allied* Court said that if impairment results in only a minimal alteration of contractual obligations, the inquiry need not extend further; there is no violation of the contract clause.¹⁰⁸

97. 290 U.S. 398 (1934).

98. *Id.* at 428.

99. *Id.* at 427-28.

100. *Id.* at 438.

101. Minnesota Mortgage Moratorium Act, 1933 Minn. Laws 514.

102. 290 U.S. at 416.

103. *Id.* at 425.

104. *Id.*

105. *Id.* at 445.

106. *Id.*

107. 438 U.S. 234 (1978).

108. *Id.* at 235. The *Allied* Court struck down a Minnesota statute, the Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.01-.17 (1974), which imposed a "pension funding charge" on private employers with 100 employees or more if the private employer terminated the plan or closed a Minnesota office. 438 U.S. at 238. The Act imposed a charge if pension funds were insufficient to cover full pensions for all employees who had worked at least 10 years. *Id.* *Allied Structural Steel* began closing its Minnesota office in 1974 and brought an action for injunctive and declaratory relief, declaring that the Act unconstitutionally impaired contractual obligations to its employees under

In *United States Trust Co. v. New Jersey*,¹⁰⁹ the Court reaffirmed the *Blaisdell* analysis but concluded that the extent of abrogation went too far, and the Court consequently struck down the statute.¹¹⁰ The statute in issue repealed a 1962 covenant between New York and New Jersey that limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves.¹¹¹ The appellees argued that repeal of the statute was necessary to encourage the use of mass transportation.¹¹² The repeal would allow the states to raise bridge and tunnel tolls and to use the revenues to subsidize improved commuter railroad service.¹¹³ The Court noted that the extent of the abrogation was great because the statute repealed an important security provision without compensating the bondholders.¹¹⁴ In addition, the Court rejected the public interest justification, stating that the repeal of the covenant was neither necessary to the achievement of the goals nor reasonable.¹¹⁵

The foregoing decisions indicate that a variation of trusts statute will not offend the contract clause if impairment of the contract obligation is minimal and if the variation serves a valid public interest. A variation of trusts statute can be justified as necessary to protect the social and economic interests of the state.¹¹⁶ Under a variation of trusts statute, the court can authorize changes in a trust that would allow trust funds to be used in the most effective manner. Beneficiaries who have special need for trust funds or who can save taxes can take advantage of opportunities that would otherwise be unavailable. Variation of trusts statutes ensure that the use of trust property will

Allied's pension agreement. *Id.* at 239-40. The Supreme Court struck down the Act, reasoning that the Act's effect on Allied's contractual obligation was severe, *id.* at 246, sudden and unanticipated, *id.* at 249, and not purportedly enacted to deal with a broad, generalized economic or social problem. *Id.* at 250.

109. 431 U.S. 1 (1976).

110. *Id.* at 32.

111. *Id.* at 3.

112. *Id.* at 5-6.

113. *Id.* at 29.

114. *Id.* at 18 n.15.

115. *Id.* at 29.

116. For example, the Washington Legislature updated Washington's trust legislation and justified the legislation as "necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions." 1984 Wash. Laws ch. 149, § 180, at 730. This illustrates that the Washington Legislature deems trust legislation in the public interest.

not be unnecessarily restricted and thereby result in a less than optimum use of property by the living generation.¹¹⁷ The United States Supreme Court recognizes that it is each state's responsibility to determine what legislation protects the social and economic welfare of the state's citizens¹¹⁸ and, therefore, the Court defers to the state legislative determination of what is necessary to accomplish legitimate public ends.¹¹⁹

The extent of alterations of trusts under a variation of trusts statute will usually be minimal in the sense that whenever a variation reduces a beneficiary's share, the court will ensure that the beneficiary is better off or has been compensated in some fashion. Any variation should be minimal if the court considers the underlying purpose of the trust before granting a variation. Although existing variation of trusts statutes do not specifically require the court to take into account the purposes of the trust, a court should not authorize variations that defeat the primary purpose of a trust.¹²⁰ When an alternative variation would provide the same benefits for the beneficiaries without straying as far from the settlor's purposes, then the court should approve the alternative variation. If the courts consider the settlor's intentions when applying a variation of trusts statute, the reasonableness of the statute will be increased because the impairment of the trust terms will be minimal.

In summary, under current constitutional decisions, alterations of trusts will not violate the settlor's contract rights

117. See generally Fratcher, *supra* note 39, at 38 (discussion of the benefits of the trustees' and courts' powers in England).

118. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1976).

119. *Id.*

120. See Note, *Variation of Private Trusts in Response to Unforeseen Needs of Beneficiaries: Proposals for Reform*, 47 B.U.L. REV. 567, 580 (1967), in which the commentator suggests that "[p]reservation of this freedom requires at least that the testator's 'real intent' should prevail over a rigidly conceptualistic application of legal definitions in the name of certainty." The commentator also discusses the ability of the courts to distinguish between a settlor's primary (or general) intent and the settlor's secondary intent. *Id.* at 582.

In determining a settlor's intentions, a court may be "ascertaining not what the settlor actually intended in regard to a particular matter but what he would have intended if he had thought about the matter." Scott, *Deviation from the Terms of a Trust*, 44 HARV. L. REV. 1025, 1027 (1931). Thus, in *Petition of Wolcott*, 95 N.H. 23, 27, 56 A.2d 641, 644 (1948), the court determined that the settlor's primary intent was to provide reasonable support to his widow, and the settlor's secondary intent was to benefit the remaindermen. The court noted that "[t]he remaindermen are deprived of no rights so long as rights which the life tenant was intended to have are not exceeded." *Id.* at 27, 56 A.2d at 641.

because alterations will serve a legitimate public interest in efficient use of trust funds or trust property and because the alterations will be minimal; the alterations will neither defeat the settlor's primary intent nor deprive beneficiaries without providing a corresponding benefit.

B. *Contingent Beneficiaries' Interests and Substantive Due Process*

In *Blaisdell*, the Supreme Court indicated that the same factors determine whether a retroactive statute violates the due process clause as determine whether a statute violates the contract clause.¹²¹ Thus, a statute allowing a modification of contingent interests will not offend the due process clause of the Constitution if the public interest is furthered by the modification and if the statute provides a reasonable method to achieve this public interest.¹²²

Some courts have held that a right must be more than a mere expectation to be protected under the contract clause and the due process clause of the United States Constitution. According to this view, the property right must be a title, legal or equitable, to enforce a legal demand in the present or future or to be exempt from a demand of another.¹²³ Thus, it can be argued that contingent interests, because they are only expectations, are not vested and can be constitutionally eliminated without additional analysis. The better view, followed by most modern courts,¹²⁴ is that if the public interest in modifying these interests outweighs their value, then the courts can modify these interests without violating the Constitution.¹²⁵

A variation of trusts statute similar to the English and Missouri statutes would give the court the power to eliminate completely a contingent beneficiary's interest under a trust.¹²⁶ A court in these jurisdictions cannot authorize the variation, however, unless it finds that the contingent beneficiary will be better

121. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934).

122. See Hochman, *supra* note 81.

123. See generally 28 AM. JUR. 2D *Estates* § 6 (1975). See also *Love v. McDonald*, 201 Ark. 882, 886, 148 S.W.2d 170, 173 (1941).

124. See *infra* notes 151 & 153-54 and accompanying text.

125. Sparks, *Future Interests*, 32 N.Y.U. L. REV. 419, 420 (1957).

126. The Missouri statute permits the courts to "vary the terms of a private trust so as to reduce or eliminate the interests of some beneficiaries and increase those of others." MO. ANN. STAT. § 456.590(2) (Vernon Supp. 1985).

off under the variation.¹²⁷ Thus, even though the court might *constitutionally* modify contingent interests given the proper circumstances, the court has no statutory authority to modify contingent interests unless the court can ensure that the contingent beneficiary receives some compensating advantage.

Traditionally, courts under the common law have protected contingent interests in order to carry out the settlor's intentions. For example, the court in *Stewart v. Hamilton*¹²⁸ refused to advance money for the maintenance of a living beneficiary because the shares of contingent beneficiaries might have been reduced as a result.¹²⁹ The court noted that "[t]he necessities of the present life tenant cannot be satisfied at the expense of some other object of the trustor's bounty."¹³⁰

Several states¹³¹ have upheld the constitutionality of legislation cancelling or modifying possibilities of reverter and powers of termination. These interests are similar to the interests of contingent beneficiaries because possibilities of reverter and powers of termination may never become vested interests if the proper conditions do not occur.

In *Trustees of Schools v. Batdorf*,¹³² the Illinois Supreme Court upheld a statute that limited possibilities of reverter and rights of entry to a period of fifty years.¹³³ If fifty years had already passed since the creation of these interests, the statute gave the holders of the interests one year from the effective date of the act to enforce their rights.¹³⁴ The court held that a possibility of reverter under Illinois law was nothing more than a mere "expectation" and was thus subject to legislative modification or abolition.¹³⁵ The public interest was served, according to the *Batdorf* court, by eliminating clogs on titles.¹³⁶ The court found that possibilities of reverter removed property from the mortgage market long after the individual, social, and economic

127. See *supra* note 9 and accompanying text.

128. 151 Tenn. 396, 270 S.W. 79 (1925).

129. *Id.* at 401, 270 S.W. at 80.

130. *Id.*

131. See, e.g., *Trustees of Schools v. Batdorf*, 6 Ill. 2d 486, 493, 130 N.E.2d 111, 115 (1955); *Hiddleston v. Nebraska Jewish Educ. Soc'y*, 186 Neb. 786, 791, 186 N.W.2d 904, 907 (1971). See also L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1994 (2d ed. 1956). See generally *Annot.*, 87 A.L.R.3d 1011 (1978).

132. 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

133. *Id.* at 493, 130 N.E.2d at 115.

134. *Id.* at 490, 130 N.E.2d at 113.

135. *Id.* at 491, 130 N.E.2d at 114.

136. *Id.* at 492, 130 N.E.2d at 114.

reasons for their creation had ceased.¹³⁷ In balancing the interests of the public against those of the holders of the reverter interests, the court deferred to the legislative finding that the economic value of possibilities of reverter was outweighed by the inconvenience and expense caused by their continued existence.¹³⁸

In addition, the *Batdorf* court held that the extent of the abrogation under the Illinois statute was slight.¹³⁹ The statute merely shortened the time within which a suit could be brought to enforce the possibilities of reverter and powers of termination.¹⁴⁰ The statute still allowed a reasonable time to enforce these rights.¹⁴¹

The Washington Supreme Court, in dicta, has supported the view that possibilities of reverter are subject to legislative modification. In *Gillis v. King County*,¹⁴² the court held that property interests similar to possibilities of reverter were mere expectations and therefore could be defeated by statute.¹⁴³

Other state courts have held that statutes cancelling possibilities of reverter violate the due process clause and the contract clause of the United States Constitution.¹⁴⁴ In *Biltmore Village v. Royal*,¹⁴⁵ the Florida Supreme Court struck down a statute cancelling all reverter provisions in plats and deeds that had been in effect for more than twenty-one years.¹⁴⁶ The court

137. *Id.* at 492, 130 N.E.2d at 114-15.

138. *Id.* at 492, 130 N.E.2d at 115.

139. *Id.* at 493, 130 N.E.2d at 115.

140. *Id.*

141. *Id.*

142. 42 Wash. 2d 373, 255 P.2d 546 (1953).

143. *Id.* at 378, 255 P.2d at 549 (alternative holding). In *Gillis*, a statute provided that publicly dedicated streets would be vacated for public use for a period of five years. *Id.* at 375, 255 P.2d at 547. The plaintiffs in *Gillis* were abutting landowners who claimed that they had vested rights under the statute. *Id.* The defendant, King County, defended the action by citing a 1909 amendment that eliminated the automatic vacation when the public dedication was recorded in any plat. *Id.* at 375-76, 255 P.2d at 548. The plaintiffs argued that the 1909 provision did not apply to the dedication in question because the dedication was made prior to the amendment. *Id.* at 376, 255 P.2d at 548. The court compared the rights granted under the original statute to possibilities of reverter and held that the rights were based on a mere expectancy that depended on a street remaining unopened for a five-year period. *Id.* at 377-78, 255 P.2d at 549. The street in question had only remained unopened for three years. *Id.* at 377, 255 P.2d at 548. The court determined, therefore, that the plaintiffs did not have vested rights when the amended statute was enacted. *Id.* at 378, 255 P.2d at 549.

144. See generally Annot., 87 A.L.R.3d 1011 (1978).

145. 71 So. 2d 727 (Fla. 1954).

146. *Id.* at 729.

held that the statute violated the contract clause and the due process clause of the federal Constitution.¹⁴⁷ The statute contained a clause that gave the holders of these rights one year from the date of the enactment to enforce their rights.¹⁴⁸ The court found, however, that the one-year provision would be ineffective to protect a holder's rights when a breach of the condition did not occur within that year.¹⁴⁹

The divergent results may be explained by the degree of impairment permitted under these statutes. The statute in *Batdorf* allowed the holders a longer period to enforce the possibility of reverter than did the statute in *Biltmore*. Thus, under the analysis in *Blaisdell*,¹⁵⁰ the severity of impairment was greater in *Biltmore* than in *Batdorf* and required that the statute be struck down.

In a recent case, *Hiddleston v. Nebraska Jewish Education Society*,¹⁵¹ the Nebraska Supreme Court confronted the constitutionality of limiting possibilities of reverter and followed the *Blaisdell*¹⁵² approach. In *Hiddleston*, the court held that the constitutionality of a retroactive statute depends on the nature and strength of the public interest in the legislation, the extent of the modification, and the nature of the right affected by the statute.¹⁵³ The court found that the Nebraska statute limiting possibilities of reverter to thirty years was reasonable because, while the value of the possibilities was slight, the public interest in the marketability of titles was substantial.¹⁵⁴ The court also found that the methods authorized by the statute were certain, uniform, and inexpensive.¹⁵⁵ Overall, the statute met the *Blais-*

147. *Id.* at 728-29.

148. *Id.* at 729.

149. *Id.* See also *Board of Educ. v. Miles*, 259 N.Y.S.2d 129, 15 N.Y.2d 364, 207 N.E.2d 181 (1965). The *Miles* court considered the validity of a statute similar to the statute in *Biltmore*. The statute, N.Y. Real Prop. Law § 345 (1958), required a holder of a contingent power of reverter to record the interest on or before Sept. 1, 1961, if the date of creation was prior to Sept. 1, 1931. *Id.* at 136-37, 15 N.Y.2d at 373, 207 N.E.2d at 186. Although the court did not pass on the constitutionality of the section, *id.* at 136, 15 N.Y.2d at 372, 207 N.E.2d at 186, the court invalidated the statute as a statute of limitations because the statute purported to bar the remedy before the right to enforce a power of reverter had matured. *Id.* at 137, 15 N.Y.2d at 374, 207 N.E.2d at 187.

150. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). See *supra* notes 97-115 and accompanying text.

151. 186 Neb. 786, 186 N.W.2d 904 (1971).

152. *Id.* at 790, 186 N.W.2d at 906.

153. *Id.*

154. *Id.* at 791, 186 N.W.2d at 907.

155. *Id.*

dell constitutionality test.¹⁵⁶

These decisions indicate that a properly applied variation of trusts statute will not violate the due process clause. The public has a substantial interest in the most efficient use of trust property.¹⁵⁷ In addition, because the court must find either that the variation benefits the beneficiaries or that some other compensating advantage is given to the beneficiary, the severity of impairment of contingent interests will be minimal.

C. *Minor and Disabled Beneficiaries' Interests and Substantive and Procedural Due Process*

The constitutionality of variation of trusts statutes must be evaluated with respect to the modification of property rights of minor or disabled beneficiaries. An evaluation of the nature of the abrogated or modified right, the extent of the abrogation or modification, and the strength of the public interest served by the statute¹⁵⁸ reveals that a variation of trusts statute does not violate minor or disabled beneficiaries' due process rights. Although minor and disabled beneficiaries may have vested interests in the trust property, the public interest in allowing the most efficient use of the trust favors modification of these property interests. The modification of the minor or disabled beneficiaries' interests will be minimal, as it is with contingent beneficiaries, because the court must ensure either that the trust variation directly benefits them or that they are compensated in some fashion.

A variation of trusts statute must also meet the standards for procedural due process to avoid conflict with the due process clause. Procedural due process requires that when a deprivation of life, liberty, or property is threatened, the interested parties must be given reasonable notice of the pendency of the action.¹⁵⁹ In addition, the parties must have an opportunity for a hearing appropriate to the nature of the case, given at a meaningful time and in a meaningful manner.¹⁶⁰ The requirements for procedural due process will be met under a variation of trusts statute if the

156. *Id.*

157. See *supra* notes 7 & 86 and accompanying text.

158. See *supra* notes 97-115 and accompanying text.

159. See *Olympic Forest Prods., Inc. v. Chausee Corp.*, 82 Wash. 2d 418, 422, 511 P.2d 1002, 1005 (1973); see also *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

160. *Olympic Forest Prods., Inc. v. Chausee Corp.*, 82 Wash. 2d 418, 422, 511 P.2d 1002, 1005 (1973).

interests of minor or disabled beneficiaries, as well as those of contingent beneficiaries, are properly represented by counsel in court.

English courts often require that separate counsel be provided on behalf of the minor, disabled, unborn, or unascertained beneficiaries for whom the court consents.¹⁶¹ When the court finds that the interests of adult beneficiaries are substantially the same as the interests of the minor, disabled, unborn, or unascertained beneficiaries, however, the court does not require separate representation.¹⁶² Similarly, under the common law in Washington and in most other states, courts of equity have the power to bind all persons holding property interests of either a vested or a contingent nature who are either before the court or who are represented by parties before the court who hold similar interests.¹⁶³

Separate representation for the minor, disabled, unborn, or unascertained beneficiaries ensures that the court will be informed of all relevant factors concerning the proposed variation. Without separate representation, the court may be misled by the assertions of adult beneficiaries requesting the variation. Adult beneficiaries, seeking to increase their own shares of the trust at the expense of others, may invent reasons why a variation will benefit unrepresented beneficiaries. Proper representation will ensure that the courts consent on behalf of minor, disabled, unborn, and unascertained beneficiaries only when the beneficiaries directly benefit or where some alternative compen-

161. See *Eliot-Cohen v. Cohen*, [1965] 1 W.L.R. 1229, 1231 (the minors in *Cohen* were represented by separate counsel). See also *In re Rouse's Will Trusts*, [1959] 1 W.L.R. 374, 375, in which the court said, "[e]verybody, including the trustees and the next of kin should be separately represented by counsel. I am not suggesting that the solicitors are not competent to represent persons with varying interests but it is desirable that counsel appear in a critical mood so that the whole picture is before the court."

162. *In re Munro's Settlement Trusts*, [1963] 1 W.L.R. 145, 146.

163. See, e.g., *Newell v. Ayers*, 23 Wash. App. 767, 771-72, 598 P.2d 3, 6 (1979) (guardian ad litem found unnecessary under WASH. REV. CODE § 4.08.050 when minors had common interests with the defendants who had competent counsel). See generally 59 AM. JUR. 2D *Parties* § 68 (1971). When the interests are not so similar, courts will appoint a guardian ad litem to ensure that the interests of minor, disabled, unborn, or unascertained beneficiaries are adequately represented. See *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 566 (D.C. Cir. 1966). Some states expressly authorize the courts to appoint a guardian ad litem. See, e.g., WASH. REV. CODE § 11.96.170(2) (Supp. 1984), which provides that a "personal representative or trustee may petition the court for the appointment of a special representative to represent a person interested in the estate or trust" and that "[t]he special representative may be appointed for more than one person or class of persons if the interests of such persons or class are not in conflict."

sation is provided.

VII. CONCLUSION

Variation of trusts statutes do not violate either the contract clause or the due process clause of the United States Constitution because the public interest in allowing these variations is great, while impairment of the various interests is slight. Impairment is slight because the court will consider the settlor's intentions when evaluating a proposed variation and because the court will only consent to a variation when the minor, disabled, unborn, or unascertained beneficiaries will benefit. Consequently, the Washington Legislature should consider the benefits of adopting a variation of trusts statute. The statute should contain a provision directing costs to be charged to the adult beneficiaries when a variation is denied and a provision for separate representation for the interests of minor, disabled, unborn, or unascertained beneficiaries.

Decisions under the English and Ontario statutes suggest that Washington would be well served by a variation of trusts statute allowing the court to consent on behalf of minor, disabled, unborn, or unascertained beneficiaries. A variation of trusts statute would allow the court to vary a trust to meet changes in the tax law, to alleviate problems unanticipated by the settlor, to advance trust funds to needy beneficiaries, or to eliminate other common problems facing beneficiaries. A variation of trusts statute serves the public interest by allowing the most efficient use of trusts. Often, such variations would better fulfill the intentions of the settlor than would the original terms of the trust.

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