

Trust and Estates Law Update

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Recent Updates to Washington Trust Law

Trusts are commonly used in estate planning as a method to transfer property. They can be revocable or irrevocable and can be created during life or at death. A trust is created when an individual (a “trustor”) transfers property to a trustee. The trustee holds legal title to the property, and additionally holds and administers the property for the benefit of the trust beneficiaries.

On May 12, Governor Gregoire signed Substitute House Bill 1051 enacting sweeping changes to Washington trust law. These changes will have a significant impact on the administration of trusts, the duties of trustees and the rights of trust beneficiaries. This update focuses on the most important changes to Washington trust law, and discusses housekeeping and planning opportunities.

Which Trusts Are Subject to the New Law?

The new law will apply to all trusts created before, on, or after January 1, 2012. Certain notice requirements, however, will apply only to irrevocable trusts created after December 31, 2011, and revocable trusts that become irrevocable after December 31, 2011.

Do I Have to Execute a New Trust?

No. If you have a revocable trust as your primary estate planning document, the new law does not require you to make any changes. However, individuals may want to revise their estate planning documents in order to address issues that may arise due to the new provisions regarding notice to beneficiaries of the existence of the trust. In addition, individuals may want to make sure their trusts comply with the provisions of the new law regarding creation of a trust and to preserve their ability to amend a revocable trust (discussed below).

If you have already executed or plan to execute an irrevocable trust prior to December 31, 2011, the new notice requirements under the new law will not apply to such trusts.

What Does the New Law Provide Regarding Creation and Amendment of Trusts?

Under the new law, a trust will be created only if the trustor has capacity to create a trust, the trustor indicates an intention to create the trust, and the trust has a definite beneficiary (or is a charitable trust or a trust for the care of an animal). The legal test for whether a person has “capacity” to create a revocable trust is now the same test that has always been used to determine whether a person has “capacity” to make a will. Further, under the new law, unless the terms of a trust expressly provide that a trust is revocable, a trustor may not revoke or amend the trust. There are also important changes with respect to joint revocable trusts, executed by husbands and wives or registered domestic partners.

When Can Someone Challenge the Validity of a Revocable Trust After the Death of the Trustor?

Under the new law, a beneficiary may commence a judicial proceeding to contest the validity of a revocable trust within the earlier of: (1) twenty-four months after the trustor’s death, or (2) four months after the trustee sent notice to the trustor’s heirs including notice of the time allowed for commencing a proceeding. This new law is similar to the current law allowing an individual to contest a will.

After the Trustor Dies, Does the Trustee Have to Wait to Distribute Property?

Under the new law, upon the death of the trustor of a revocable trust, the trustee may proceed to distribute the trust property in accordance with the terms of the trust, unless: (1) the trustee knows of a proceeding contesting the validity of the trust, or (2) a potential contestant has notified the trustee of a possible proceeding to contest the trust, and a proceeding is commenced within sixty days after the contestant sends the notification.

Do I Have to Execute a New Power of Attorney?

No. If you already have a durable power of attorney, it is not necessary to execute a new durable power of attorney. Individuals may want to revise their powers of attorney, however, to allow their attorneys-in-fact to exercise certain powers over trust assets.

Powers of attorney often grant the attorney-in-fact the power to make gifts on the principal’s behalf. Under the new law, an attorney-in-fact under a power of attorney will not have the power to exercise the principal’s rights to distribute property in trust or cause a trustee to distribute property in trust, unless such powers are specifically provided for in the power of attorney. In other words, if a principal’s assets are owned by a trustee of a revocable trust, the attorney-in-fact will not be able to direct the trustee to distribute assets to the attorney-in-fact for purposes of making gifts unless the power is specifically set forth in the power of attorney.

If I Am a Trustee, What Are My New Responsibilities?

Notice to Beneficiaries Regarding the Existence of the Trust. Under the new law, trustees will have a duty to provide notice to certain beneficiaries in certain circumstances. These notice provisions will significantly impact how trusts are administered.

The new law is very specific regarding the information that must be contained in the notice to the beneficiaries. The new law also allows a trustee to provide the required notice via electronic transmission. If a minor is entitled to notice, then the notice must be given to the guardian or the minor's parent if no guardian has been appointed by the court.

Annual Reporting to the Beneficiaries Regarding the Administration of the Trust. In addition, a trustee must keep all beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Again, the new law is very specific regarding the information that must be included in the report for it to be presumed to satisfy the trustee's duty to keep beneficiaries reasonably informed.

Respond Promptly to a Beneficiary's Request for Information. A trustee will now have to promptly respond to any beneficiary's request for information related to the administration of the trust. If a beneficiary requests information reasonably necessary to enable the beneficiary to enforce his or her rights under the trust, then the trustee must provide the information within sixty days of receipt of the request. Delivery of the entire trust instrument to a beneficiary who requests information concerning the terms of the trust will be deemed to satisfy the trustee's obligations to provide the information necessary for the beneficiary to enforce his or her rights under the trust instrument.

How Does the Trustee Properly Terminate a Trust?

Under the new law, upon termination or partial termination of a trust, the trustee may send notice to the beneficiaries of a proposed plan to distribute existing trust assets. A beneficiary must notify the trustee of any objection to the plan, including an objection to non-pro rata distributions within thirty days after the proposed plan was sent, but only if the proposed plan informed the beneficiary of the right to object and of the time allowed for the objection. The notice provision, with respect to termination of a trust, does not act as a release of the trustee. Rather, it only prevents the beneficiary from contesting the distribution itself.

What Kind of Information Must a Trustee Provide to Third Parties?

Currently, if a person other than a beneficiary requests information about a trust and the trustor wants to keep the trust instrument private, the trustee must provide various pages from the trust instrument (e.g., first page, signature page, trustee powers, etc.) in order to provide the requested information. Under the new law, if a person other than a beneficiary requests information regarding the trust, the trustee may provide the requesting party a certification of trust containing only certain prescribed information.

What Changes Does the New Law Make to Trust and Estate Dispute Resolution?

The new law makes significant changes to the Trust and Estate Dispute Resolution Act.

Venue for Dispute Resolution. Under current law, venue is determined by the location of the trust situs or is located in the county where letters testamentary were granted to a personal representative of an estate. Under the new law, venue for all court proceedings will be in the county where the probate of a will is being administered, where the beneficiary of a trust resides, where the trustee resides or has a place of business, or where the real property of a trust is located. It will be possible under the new law for a party interested in a trust to request a change of venue as long as the request is made within four months of receipt of notice of the court proceeding. Upon request, venue must be moved to the county with the strongest connection to the trust.

Time for Bringing Claims Against the Trustee. Another significant change to the Trust and Estate Dispute Resolution Act involves breach of trust. Under current law, if a beneficiary believes a trustee has committed a breach of trust, the beneficiary must commence a proceeding within three years from the earlier of the time that the alleged breach was discovered or should have been discovered, the discharge of the trustee, or the termination of the trust. Under the new law, the three-year time limit for bringing a claim against a trustee is commenced by the trustee's provision to the beneficiary of the report described above, which requires specific types of information. If a beneficiary believes a trustee has committed a breach of trust, the beneficiary must bring a claim against the trustee within three years from the date that the beneficiary received a report that adequately disclosed the existence of a potential claim and informed the beneficiary of the time allowed for commencing a proceeding, or from the earliest of the date the trustee died, resigned or was discharged, or the date the beneficiary's interest in the trust terminated, or the date the trust terminated.

Remedies Against a Trustee Who Has Breached His or Her Fiduciary Duty. A trustee who commits a breach of trust is liable for the greater of the amount required to restore the value of the property or the profit the trustee made from the breach.

Housekeeping and Planning Opportunities – What the New Law Means for You.

Between the changes to federal estate, gift and generation-skipping transfer tax laws that were enacted under the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 [<http://www.lanepowell.com/13617/2010-tax-relief-act/>] and the changes to Washington trust laws, individuals should seriously consider revisiting their estate planning documents in order to take advantage of tax planning opportunities and to address issues raised by the new Washington trust laws.

1. Review Existing Estate Plans. It is important to re-examine existing estate plans to confirm that estate planning documents continue to accomplish your goals and to make sure that revocable trusts meet the new laws with respect to their creation and continued revocability. Individuals who do not want notice provided to possible trust beneficiaries may want to revise their estate plans in order to plan around the new notice requirements. If you want your

attorney-in-fact to make gifts from trusts or have other powers with respect to trusts, you may need to revise your power of attorney to grant such powers to the attorney-in-fact.

2. Reconsider Trustee Selection. Given the new notice requirements and annual information that must be provided to beneficiaries in order to keep them reasonably informed, clients may want to revisit their choice of trustee. An individual or family member trustee who is not sophisticated, with respect to financial information or investing, may not be equipped to handle the new notice and annual information requirements. Given the requirements and responsibilities imposed on trustees by the new law, an individual who is well organized and knowledgeable about finance and accounting or a corporate trustee may be a more prudent choice.

3. Get Ready for New Forms of Annual Reports and Accountings. Trustees, whether individual or corporate, will want to calendar the annual reporting for all trusts and establish a mechanism to easily produce the information required under the new notice provisions.

**For more information, please contact the Trust and Estates Practice Group
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