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How the New Washington Trust Act and its 2013 Amendments Affect You and Your Clients

In 2011, the legislature adopted a new Washington Trust Act (the "2011 Act"). The 2011 Act took effect on January 1, 2012, and codified many changes to the duties of trustees and the rights of trust beneficiaries. Within 18 months, in May 2013, the legislature adopted additional new legislation that "amended the amendments" (the "2013 Amendments"). Although it would require a much longer article than this to address all of the changes to Washington trust law that became effective in 2012 and 2013, this article addresses some of the more significant provisions impacting both trustees and beneficiaries.

Notice of Existence of Trust: The 2011 Act required that trustees notify "all persons interested in the trust" of the existence of a trust within 60 days of acceptance of the position of trustee, or within 60 days of a revocable trust becoming irrevocable. This duty could not be waived or modified for trusts created after December 31, 2011, or for trusts that became irrevocable after December 31, 2011, even in situations where the trustor did not want beneficiaries to be notified of the trust's existence or of their status as beneficiaries. The new 2013 Amendments soften this requirement by providing that the trustor may waive or modify the notification requirement, either in the trust document or in a separate writing made at any time and delivered to the trustee. It is important to note that if the trustor does not waive this requirement by one of these two methods, the trustee is still bound by law to give the notice, even if the trustee believes that notification is a poor choice. Where applicable, the notice must include: 1) the fact that the trust exists; 2) the identity of the trustor(s); 3) the trustee's name, address and telephone number; and 4) notice of the beneficiaries' right to request information that would be reasonably necessary for a beneficiary to enforce his or her rights under the trust.

Ongoing Duties to Keep Beneficiaries "Reasonably Informed" About the Administration of the Trust; Trustee Liability for Breach of Fiduciary Duty: The 2013 Amendments retain the 2011 Act's language requiring the trustee to keep all "qualified beneficiaries" (a newly defined term) reasonably informed about the administration of the trust and of the material facts necessary for such beneficiaries to protect their interests. This requirement of keeping "qualified beneficiaries" reasonably informed about the administration of the trust may not be waived or modified by the trustor. Although, the 2013 amendments deleted the

list of specific elements of a periodic report to qualified beneficiaries that would create a presumption that the trustee has satisfied this duty, the information encompassed by this requirement is generally viewed as that information which would be significant in allowing beneficiaries to enforce their rights. Accordingly, individual trustees are advised to seek counsel about their fiduciary duties under this provision, so that they do not inadvertently expose themselves to liability. The list of specific information required for a "satisfactory" report continues to exist in the statute of limitations provisions of the Trust and Estate Dispute Resolution Act, found in Chapter 96A of RCW Title 11 ("TEDRA," RCW 11.96A et seq.). Providing a beneficiary with a report that contains the specified information, "delivered in the manner provided" in the law, will start the three year statute of limitations for bringing a claim of breach of fiduciary duty against the trustee. The 2013 Amendments also confirm that the statute of limitations for bringing a lawsuit for breach of fiduciary duty can also be triggered when a beneficiary or representative "should have known" of a potential claim against the trustee.

Clarification of the Doctrine of Virtual Representation: The 2013 Amendments continued the trend of the 2011 Act by broadening the range of those individuals that can serve as a "virtual representative" of a beneficiary who cannot speak or act for him or herself, due to being under the age of majority (18), incapacity, inability to be located or not being "reasonably ascertainable." For example, parents are now permitted to receive certain notices and, in many circumstances, act on behalf of their minor and their unborn children. Other adult beneficiaries can be virtually represented by someone with a "substantially similar interest" with respect to the particular question or dispute, so long as there is no conflict of interest. In addition, a competent adult may now object to being virtually represented by someone else, provided that his or her objection is made before the virtual representative's consent would otherwise be effective to bind the "represented" adult. These virtual representation powers can be very complex and mistakes in analyzing them can be costly for all parties. For this reason, consultation with counsel before relying on the authority or status of a proposed "virtual representative" is strongly recommended.

A Few Other Changes Arising From the 2013 Amendments: Certain nonprofit corporations, certain types of law firms, and certain state and regional colleges and universities may now serve as personal representatives or trustees. The 2013 Amendments also clarify how a nominated trustee can either accept or decline to serve as trustee. In addition, the 2013 Amendments now confirm that ambiguities in wills or trusts can be corrected, when all interested parties agree, by utilizing the binding, nonjudicial agreement procedures of TEDRA, or (if all interested parties cannot agree) by going to court and proving the intention of the testator or the trustor by "clear, cogent and convincing evidence." Certain definitional terms were also created in the 2013 Amendments, in order to distinguish between "permissible distributees" (generally speaking, current beneficiaries entitled to receive income or principal distributions from a trust) and "qualified beneficiaries" (generally speaking, these include both permissible distributees and those who would become eligible to receive income or principal distributions if the trust terminated or if the interest of the permissible distributee terminated).

As noted in the introduction, this article cannot address the full array of changes to Washington trust law that were enacted in 2011 and 2013. Any reader who is a trustee should be mindful of all the legal requirements that apply to service as a trustee. Similarly, if you work with either trustees or trust beneficiaries, you are strongly encouraged to educate yourself and your clients about the rights, duties and obligations applicable to these various roles under Washington trust law.

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