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CHAPTER ONE

2012 AND BEYOND: RISK MANAGEMENT FOR TRUSTEES IN THE CONTEXT OF THE NEW WASHINGTON TRUST ACT

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Substitute House Bill 1051, Chapter 327, Laws of 2011, hereinafter referred to as the “2011 Trust Act” or the “Act,” made the following major changes in Washington law effective January 1, 2012. Various technical, minor changes have been omitted from this outline.

1. Definition of Trustor and Settlor. The Act defines the terms “Trustor” and “Settlor” under RCW 11.02.005 as a person, including a testator, who creates, or contributes property to, a trust.¹

2. Notice to Trustee of Pendency of Probate. Regarding the required notice of pendency of probate under RCW 11.28.237, the Act provides if a trust is a legatee or devisee of the estate or a beneficiary or transferee of a nonprobate asset of the decedent, “then notice to the trustee is sufficient”.²

Practice Tip: Add this 20 day “notice to trustee” to your estate checklist.

3. Powers of Attorney. Regarding the unusual powers allowed under RCW 11.94.050 when expressly stated in a power of attorney (“POA”): the Act provides the principal may expressly grant the power to exercise the principal’s rights to distribute property in trust or cause a trustee to distribute property in trust “to the extent consistent with the terms of the trust agreement”.³

Practice Tip: Include this additional power in your client’s POA, where appropriate, and include corresponding language in your client’s trust authorizing these actions under a POA. See also, item 42 of this outline.

4. Reformation of Will or Trust under TEDRA. The Act makes numerous amendments to the Trust and Estate Dispute Resolution Act (“TEDRA”), Chapter 11.96A RCW. For example, the Act amends the definition of the term “matter” under RCW 11.96A.030 to include the reformation of a will or trust “to correct a mistake” under the new RCW section described in item 16 of this outline.⁴

5. Venue Related to Trusts under TEDRA. For testamentary trusts, the Act amends RCW 11.96A.050 to provide venue for proceedings related thereto is in the Superior Court of a county where the probate of the will occurred or, in the alternative, the Superior Court of a county where any beneficiary of the trust entitled to notice resides, the county where any trustee resides or has a place of business, or the county where any real property that is an asset of the trust is located. For all other trusts, venue is in the Superior Court of the county where any beneficiary of the trust entitled to notice resides, the county where any trustee resides or has a place of business, or the county where any real property that is an asset of the trust is located.⁵

¹ RCW 11.02.005(15) and (19)

² RCW 11.28.237

³ RCW 11.94.050

⁴ RCW 11.96A.030

⁵ RCW 11.96A.050

6. Change of Venue for Trust Proceedings; Court to Balance Factors. The Act also amends RCW 11.96A.050 to provide a party to a trust proceeding may request change of venue. If the request is made within four months of the giving of the first notice of a proceeding pertaining to the trust, except for good cause shown, “venue must be moved” to the county with the strongest connection to the trust. The Court is to determine the strongest connection by considering such factors as the residence of a beneficiary entitled to notice, the residence or place of business of a trustee, and the location of any real property that is an asset of the trust.⁶

Practice Tip: Add potential change of venue to your trust proceedings checklist to review whether venue should/must be moved.

7. Statutes of Limitation Prior to the Act. Prior to the Act going into effect on January 1, 2012, RCW 11.96A.070 provided for a three year statute of limitations for actions against trustees “from the earlier of” the time the alleged breach was discovered or reasonably should have been discovered; or the discharge of the trustee by agreement of the parties; or the time of termination of the trust or the trustee’s repudiation of the trust.⁷

8. Trustee Safe Harbor. The Act provides a beneficiary may not commence a proceeding against a trustee for breach of trust more than three years after the date the beneficiary or a representative of the beneficiary was sent “a report that adequately disclosed” the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

- a. A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.⁸
- b. A report that includes the following information is presumed to have provided such sufficient information regarding the existence of potential claims for breach of trust, [hereinafter this outline will refer to said report as the “**Trustee Safe Harbor Report**”]:
 - i. A statement of receipts and disbursements of principal and income that have occurred during the accounting period;
 - ii. A statement of the assets and liabilities of the trust and their values at the beginning and end of the period;
 - iii. The trustee's compensation for the period;
 - iv. The agents hired by the trustee, their relationship to the trustee, if any, and their compensation, for the period;

⁶ Id.

⁷ Laws of 1999, ch. 42, § 204 (amended by 2011 Trust Act)

⁸ RCW 11.96A.070

- v. Disclosure of any pledge, mortgage, option, or lease of trust property, or other agreement affecting trust property binding for a period of five years or more that was granted or entered into during the accounting period;
 - vi. Disclosure of all transactions during the period, that are equivalent to one of the types of transactions described in item 39 of this outline regarding “Duty of Loyalty”, or that otherwise could have been affected by a conflict between the trustee's fiduciary and personal interests;
 - vii. A statement that the recipient of the account information may petition the superior court pursuant to chapter 11.106 RCW to obtain review of the statement and of acts of the trustee disclosed in the statement; and
 - viii. A statement that claims against the trustee for breach of trust may not be made after the expiration of three years from the date the beneficiary receives the statement.
- c. In addition, the Act provides if the foregoing does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within three years after the first to occur of :
- i. The removal, resignation, or death of the trustee;
 - ii. The termination of the beneficiary's interest in the trust; or
 - iii. The termination of the trust.⁹

Practice Tip: Trustees should now adopt the practice of providing to the beneficiaries the Trustee Safe Harbor Report on an annual or more frequent basis. See also, item 19 of this outline.

9. Notice by E-mail. The Act amends RCW 11.96A.110 to provide for notice by e-mail, if the party receiving notice “has previously consented in a record delivered to the party giving notice”.¹⁰

10. Virtual Representation. The TEDRA provisions dealing with virtual representation, RCW 11.96A.120, are expanded to provide, where the interests of the fiduciary estate and the beneficiaries are not in conflict, that:

- a. A guardian may represent and bind the estate that the guardian controls;

⁹ Id.

¹⁰ RCW 11.96A.110

- b. An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- c. A trustee may represent and bind the beneficiaries of the trust; and
- d. A personal representative of a decedent's estate may represent and bind persons interested in the estate.¹¹

Practice Tip: A written waiver of conflict should still be signed by the beneficiaries where practicable.

11. Expansion of Allowable Notice under TEDRA. The Act amends RCW 11.96A.120 regarding notice requirements under TEDRA, adding a new provision which provides the holder of a general power of appointment or a limited power of appointment may accept notice and virtually represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power, to the extent there is no conflict of interest between the holder of the power of appointment and the persons represented.¹²

12. Conflict of Interest Cancels Virtual Representation. The Act amends RCW 11.96A.120 to provide that a party is not virtually represented by a person receiving notice if a conflict of interest involving the matter "is known to exist" between the notified person and the party.¹³

13. Cy Pres Distribution to Charity. The Act codifies the doctrine of Cy Pres by adding a new section to Chapter 11.96A RCW, to provide that, except as otherwise provided, with respect to any charitable disposition made in a will or trust, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

- a. The disposition does not fail, in whole or in part;
- b. The subject property does not revert to the alternative, residuary, or intestate heirs of the estate or, in the case of a trust, the trustor or the trustor's successors in interest; and
- c. The court may modify or terminate the trust by directing that the property be applied or distributed, in whole or in part, in a manner consistent with the testator's or trustor's charitable purposes.¹⁴

14. Circumstances of No Cy Pres Distribution to Charity. The new section added to Chapter 11.96A RCW further provides that a provision in the terms of a will or charitable trust that would result in distribution of the property to a noncharitable beneficiary prevails over the cy pres power of the court to modify or terminate the will provision or trust only if, when the provision takes effect:

¹¹ RCW 11.96A.120

¹² Id.

¹³ Id.

¹⁴ RCW 11.96A.127

- a. The property is to revert to the trustor and the trustor is still living; or
- b. Fewer than twenty-one years have elapsed since the following:
 - i. In the case of a charitable disposition in trust, the date of the trust's creation or the date the trust became irrevocable; or
 - ii. In the case of a charitable disposition in a will, the death of the testator.¹⁵

15. Definition of Charitable Purpose. The new section added to Chapter 11.96A RCW further provides that for purposes of Title 11 RCW a charitable purpose is one for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to a community.¹⁶

16. Reformation of Will or Trust. The Act adds a new section to Chapter 11.96A RCW to provide that the terms of a will or trust, "even if unambiguous", may be reformed by judicial proceedings or a nonjudicial binding agreement ("NBA") to conform the terms to the intention of the testator or trustor, provided there is clear, cogent and convincing evidence that both the intent of the testator or trustor and the terms of the document "were affected by a mistake of fact or law, whether in expression or inducement".¹⁷

17. Trustee Fiduciary Duties. Current law, RCW 11.97.010, provides that in no event may a trustee be relieved of the duty to act in good faith and with honest judgment. The Act expands the law to provide a trustee may not be relieved of the duty to provide information to beneficiaries as stated in item 18 of this outline (a new notice requirement under RCW 11.97.010). In addition, the Act provides notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.¹⁸

18. Sixty (60) Day Notice to Irrevocable Trust Beneficiaries. The Act adds a new notice requirement to RCW 11.97.010 as follows: within sixty (60) days after the date of acceptance of the position of trustee of an irrevocable trust, or the date the trustee of a formerly revocable trust acquires knowledge that the trust has become irrevocable, whether by the death of the trustor or otherwise, the trustee shall give notice of:

- a. The existence of the trust;
- b. The identity of the trustor or trustors;
- c. The trustee's name, address, and telephone number; and

¹⁵ Id.

¹⁶ Id.

¹⁷ RCW 11.96A.125

¹⁸ RCW 11.97.010

- d. The right to request such information as is reasonably necessary to enable the notified person to enforce his or her rights under the trust, to all persons interested in the trust, and who would be entitled to notice if they were a party to judicial proceedings regarding the trust. If any such person is a minor and no guardian has been appointed for such person by any court, then such notice may be given to a parent of the person. If a person otherwise entitled to notice under this section is a charitable organization, and the charitable organization's only interest in the trust is a future interest that may be revoked, then such notice shall instead be given to the attorney general. A trustee who gives notice pursuant to this section satisfies the duty to inform the beneficiaries of the existence of the trust. The notice required under this section applies only to irrevocable trusts created after December 31, 2011, and revocable trusts that become irrevocable after December 31, 2011, provided that all common law duties of a trustee to notify beneficiaries applicable to trusts created or that became irrevocable before such date are not affected.¹⁹

Practice Tip: Add this 60 day notice to trust beneficiaries to your estate checklist.

19. Duty to Keep Beneficiaries Reasonably Informed. RCW 11.97.010 is further amended by the Act to provide a trustee shall keep all persons interested in the trust, and who would be entitled to notice, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. A report that contains the **Trustee Safe Harbor Report** is presumed to satisfy the trustee's duty to keep such persons reasonably informed for the relevant period of trust administration.²⁰

20. Trustee Duty to Respond Within 60 Days to Information Requests. RCW 11.97.010 is further amended by the Act to provide that, unless unreasonable under the circumstances, a trustee shall promptly respond to any beneficiary's request for information related to the administration of the trust. If a person entitled to notice requests information reasonably necessary to enable the notified person to enforce his or her rights under the trust, then the trustee must provide such information within sixty (60) days of receipt of such request. Delivery of the entire trust instrument to the persons entitled to notice who request said information concerning the terms of the trust is deemed to satisfy this trustee obligation.²¹

Practice Tip: The Trustee watchword is "communication, communication, communication."

21. Rules of Construction. The Act adds a new section to Chapter 11.97 RCW to provide the rules of construction that apply to the interpretation of a will and disposition of property by will also apply to the interpretation of the terms of a trust and the disposition of the trust property.²²

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² RCW 11.97.020

22. Methods of Creating a Trust. The Act adds a new section to Chapter 11.98 RCW to provide a trust may be created by:

- a. Transfer of property to another person as trustee during the trustor's lifetime or by will or other disposition taking effect upon the trustor's death;
- b. Declaration by the owner of property that the owner holds identifiable property as trustee; or
- c. Exercise of a power of appointment in favor of a trustee.²³

23. Requirements for Creation of a Trust. The Act adds a new section to Chapter 11.98 RCW to provide a trust is created only if:

- a. The trustor has capacity to create a trust;
- b. The trustor indicates an intention to create the trust;
- c. The trust has a definite beneficiary or is:
 - i. A charitable trust;
 - ii. A trust for the care of an animal, as provided in chapter 11.118 RCW; or
 - iii. A trust for a noncharitable purpose, as further provided (see, item 27 of this outline);
- d. The trustee has duties to perform; and
- e. The same person is not the sole trustee and sole beneficiary.

The Act further provides a beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities. Further, the Act provides a power in a trustee to select a beneficiary from an indefinite class is valid, except to the extent that the trustee may distribute trust property to himself or herself. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.²⁴

24. Trusts Created in Other Jurisdictions. The Act adds a new section to Chapter 11.98 RCW to provide a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation or in the case of a revocable trust, at the time the trust became irrevocable:

²³ RCW 11.98.008

²⁴ RCW 11.98.011

- a. The trustor was domiciled, had a residence, or was a national;
- b. The trustee was domiciled or had a place of business; or
- c. Any trust property was located.²⁵

25. Trust Purposes. The Act adds a new section to Chapter 11.98 RCW to provide a trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve.²⁶

26. Evidence of Oral Trust. The Act adds a new section to Chapter 11.98 RCW to provide a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear, cogent, and convincing evidence.²⁷

27. Noncharitable Trust Without Ascertainable Beneficiary. The Act adds a new section to Chapter 11.98 RCW to provide, except as otherwise provided in chapter 11.118 RCW regarding pet trusts or by another statute, the following rules apply:

- a. A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for longer than the time period specified in RCW 11.98.130 as the period during which a trust cannot be deemed to violate the rule against perpetuities;
- b. A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court; and
- c. Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the trustor, if then living, otherwise to the trustor's successors in interest. Successors in interest include the beneficiaries under the trustor's will, if the trustor has a will, or, in the absence of an effective will provision, the trustor's heirs.²⁸

28. Change to Foreign Trustee. The Act amends RCW 11.98.039 to provide a change of trustee to a foreign trustee does not change the situs of the trust. Transfer of situs of a trust to another jurisdiction requires compliance with three separate statutes.²⁹

²⁵ RCW 11.98.012

²⁶ RCW 11.98.013

²⁷ RCW 11.98.014

²⁸ RCW 11.98.015

²⁹ RCW 11.98.039

29. Situs of Trust and Governing Law. The Act adds a new section to Chapter 11.98 RCW which provides if a trust instrument designates Washington as the situs or Washington law to govern, then the situs of the trust is Washington provided one of the following conditions is met:

- a. A trustee has a place of business in or a trustee is a resident of Washington; or
- b. More than an insignificant part of the trust administration occurs in Washington; or
- c. The trustor resides in Washington at the time situs is being established, or resided in Washington at the time the trust became irrevocable; or
- d. One or more of the beneficiaries resides in Washington; or
- e. An interest in real property located in Washington is an asset of the trust.

Additional provisions in the new law address required procedures when a trust does not designate Washington as the situs or designate Washington law to apply to the trust.³⁰

30. Registration of Trust. The new section added to Chapter 11.98 RCW also provides, in the event the trust is a Washington Trust, the Trustee "may" register the trust as a Washington trust if any of the five factors in item 29 of this outline are present. If registration of the trust is desired, the trustee "shall" register the trust by filing with the clerk of court in any county where venue lies a statement including the following information:

- a. The name and address of the trustee;
- b. The date of the trust, name of the trustor, and name of the trust, if any;
- c. The factor or factors listed in item 29 of this outline that are present for the trust and which qualify the trust for registration.

Within five days of filing the registration with the Court, the trustee is required to mail a copy of the registration to each person entitled to notice. The notice form is set forth in the new statute. Unless an objection is filed within thirty (30) days, the registration will be deemed the equivalent of a court order declaring the trust situs is Washington. The Act also addresses in detail the issue of situs in those instances where the trust instrument does not designate Washington as the situs or designate Washington law to apply and the trustee has not registered the trust.³¹

Practice Tip: Add to your estate checklist the option of registering the trust as a Washington trust. Use the notice form provided by the statute.

³⁰ RCW 11.98.005

³¹ Id.

31. Transfer of Situs of Trust to Jurisdiction other than Washington. The Act amends Chapter 11.98 RCW regarding the procedures required to transfer the situs of a trust to a jurisdiction other than Washington. The Act adds a sixty day notice requirement before initiating the transfer. In addition, the Act provides a change of trust situs does not authorize a change of trustee. Change of trustee must comply with RCW 11.98.039.³²

32. Trustee Power to Pay to or for Beneficiary under Disability. The Act amends RCW 11.98.070 (16) to expand the ability of a trustee to pay an amount distributable to a beneficiary who is under a legal disability, or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

- a. Paying it to a guardian;
- b. Paying it to a custodian and, "for that purpose, creating a custodianship";
- c. If no guardian or custodian is known, then paying it to an adult relative having physical care of the beneficiary "with instructions to expend the funds on the beneficiary's behalf"; or
- d. Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.

If the trustee pays any amount to a third party under a, b or c above, the trustee has no further obligations regarding the amounts so paid.³³

Practice Tip: The new law provides more flexibility to avoid court proceedings when benefits are payable to a beneficiary under disability.

33. Additional Powers of Trustee. The Act further amends RCW 11.98.070 adding new trustee powers to pay, contest or settle claims by or against the trust; to exercise tax elections; to prosecute or defend claims "to protect trust property and the trustee in the performance of the trustee's duties"; to exercise powers appropriate to wind up a trust; to select a mode of payment to the trustee as beneficiary; and to collect proceeds.³⁴

34. Distribution Upon Termination. The Act adds a new section to Chapter 11.98 RCW to provide, upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposed plan to distribute existing trust assets. A beneficiary must object within thirty (30) days after the proposal was sent, including the right to object to nonpro rata distributions, but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.³⁵

Practice Tip: Include in your trust termination procedures a distribution proposal which informs the beneficiary of the right to object within 30 days.

³³ RCW 11.98.070

³⁴ Id.

³⁵ RCW 11.98.145

35. Nonliability of Third Persons Without Knowledge of Breach. The Act adds a new section to Chapter 11.98 RCW to provide:

- a. A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.
- b. A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.
- c. A person who in good faith delivers assets to a trustee need not ensure their proper application.
- d. A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.
- e. Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.³⁶

36. Exculpation of Trustee. The Act adds a new section to Chapter 11.98 RCW to provide:

- a. An exculpatory term which was inserted as the result of an abuse of a fiduciary or confidential relationship between the trustor and the trustee is unenforceable.
- b. An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the trustor.³⁷

37. Beneficiary's Consent, Release, or Ratification. The Act adds a new section to Chapter 11.98 RCW to provide a trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

³⁶ RCW 11.98.105

³⁷ RCW 11.98.107

- a. The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
- b. At the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.³⁸

38. Certification of Trust. The Act adds a new section to Chapter 11.98 RCW to provide:

- a. Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:
 - i. That the trust exists and the date the trust instrument was executed;
 - ii. The identity of the trustor;
 - iii. The identity and address of the currently acting trustee;
 - iv. Relevant powers of the trustee;
 - v. The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
 - vi. The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and
 - vii. The name of the trust or the titling of the trust property.
- b. A certification of trust may be signed or otherwise authenticated by any trustee or by an attorney for the trust.
- c. A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.
- d. A certification of trust need not contain the dispositive terms of a trust.
- e. A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction or any other reasonable information.
- f. A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

³⁸ RCW 11.98.108

- g. A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.
- h. A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages, including reasonable attorney fees, if the court determines that the person did not act in good faith in demanding the trust instrument.
- i. This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.³⁹

Practice Tip: Furnish a "Certification of Trust" to financial institutions instead of a copy of the trust instrument.

39. Duty of Loyalty. The Act adds a new section to Chapter 11.98 RCW to provide:

- a. A trustee shall administer the trust solely in the interests of the beneficiaries.
- b. Subject to the rights of persons dealing with or assisting the trustee as provided in RCW 11.98.090, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
 - i. The transaction was authorized by the terms of the trust;
 - ii. The transaction was approved by the court or approved in a nonjudicial binding agreement in compliance with RCW 11.96A.210 through 11.96A.250;
 - iii. The beneficiary did not commence a judicial proceeding within the time allowed by RCW 11.96A.070;
 - iv. The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 30 of the Act; or
 - v. The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
- c. A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be "otherwise affected" by a conflict between fiduciary and personal interests under this section if it is entered into by the trustee with:
 - i. The trustee's spouse or registered domestic partner;

³⁹ RCW 11.98.075

- ii. The trustee's descendants, siblings, parents, or their spouses or registered domestic partners;
- iii. An agent or attorney of the trustee; or
- iv. A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

This presumption is rebutted if the trustee establishes that the conflict did not adversely affect the interests of the beneficiaries.

- d. A sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account that is voidable under subsection (b) above may be voided by a beneficiary without further proof.
- e. An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of chapter 11.100 RCW. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee must at least annually notify the persons entitled under RCW 11.106.020 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.
- f. The following transactions, if fair to the beneficiaries, cannot be voided under this section:
 - i. An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
 - ii. Payment of reasonable compensation to the trustee and any affiliate providing services to the trust, provided total compensation is reasonable;
 - iii. A transaction between a trust and another trust, decedent's estate, or guardianship of which the trustee is a fiduciary or in which a beneficiary has an interest;
 - iv. A deposit of trust money in a regulated financial-service institution operated by the trustee or its affiliate;
 - v. A delegation and any transaction made pursuant to the delegation from a trustee to an agent that is affiliated or associated with the trustee; or
 - vi. Any loan from the trustee or its affiliate.
- g. The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

- h. If a trust has two or more beneficiaries, the trustee shall act impartially in administering the trust and distributing the trust property, giving due regard to the beneficiaries' respective interests.⁴⁰

Practice Tip: Consider the appointment of a special fiduciary if you are Trustee and your duty of loyalty could become an issue.

40. Damages for Breach of Trust. The Act adds a new section to Chapter 11.98 RCW to provide, a trustee who commits a breach of trust is liable for the greater of:

- a. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
- b. The profit the trustee made by reason of the breach.

Except as otherwise provided in this paragraph, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.⁴¹

41. Capacity of Trustor of Revocable Trust. The Act adds a new Chapter to Title 11, Chapter 11.103 RCW entitled "Revocable Trusts", which provides the capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.⁴²

42. Revocation or Amendment of Revocable Trust. The new Chapter 11.103 RCW also provides:

- a. Unless the terms of a trust expressly provide that the trust is revocable, the trustor may not revoke or amend the trust.
- b. If a revocable trust is created or funded by more than one trustor and unless the trust agreement provides otherwise:
 - i. To the extent the trust consists of community property, the trust may be revoked by either spouse or either domestic partner acting alone but may be amended only by joint action of both spouses or both domestic partners;

⁴⁰ RCW 11.98.078

⁴¹ RCW 11.98.085

⁴² RCW 11.103.020

- ii. To the extent the trust consists of property other than community property, each trustor may revoke or amend the trust with regard to the portion of the trust property attributable to that trustor's contribution;
- iii. The character of community property or separate property is unaffected by its transfer to and from a revocable trust; and
- iv. Upon the revocation or amendment of the trust by fewer than all of the trustors, the trustee shall promptly notify the other trustors of the revocation or amendment.⁴³

Practice Tip: Add to your checklist regarding trust amendment or revocation the Trustee's duty to notify any non-signing Trustor.

- c. The trustor may revoke or amend a revocable trust:
 - i. By substantial compliance with a method provided in the terms of the trust; or
 - ii. If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
 - A. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
 - B. A written instrument signed by the trustor evidencing intent to revoke or amend.
 - C. The requirements of Chapter 11.11 RCW do not apply to revocation or amendment of a revocable trust under this subsection.⁴⁴
- d. Upon revocation of a revocable trust, the trustee shall deliver the trust property as the trustor directs.
- e. A trustor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the power, as provided in RCW 11.94.050(1) and to the extent consistent with or expressly authorized by the trust agreement.⁴⁵

Practice Tip: Coordinate drafting of the trust instrument with the client's power of attorney. See also, item 3 of this outline.

⁴³ RCW 11.103.030

⁴⁴ Id.

⁴⁵ Id.

- f. A guardian of the trustor may exercise a trustor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship pursuant to RCW 11.92.140.
- g. A trustee who does not know that a trust has been revoked or amended is not liable to the trustor or trustor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked
- h. This section does not limit or affect operation of RCW 11.96A.220 through 11.96A.240.⁴⁶

43. Trustor's Powers – Powers of Withdrawal. The new Chapter 11.103 RCW also provides while a trust is revocable by the trustor, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the trustor. If a revocable trust has more than one trustor, the duties of the trustee are owed to all of the trustors having the right to revoke the trust.⁴⁷

44. Limitation on Action Contesting Validity if Revocable Trust – Distribution of Trust Property. The new Chapter 11.103 RCW also provides:

- a. A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the trustor's death within the earlier of:
 - i. Twenty-four months after the trustor's death; or
 - ii. Four months after the trustee sent to the person by personal service, mail, or in an electronic transmission if there is a consent of the recipient to electronic transmission then in effect under the terms of RCW 11.96A.110, a notice with the information required in RCW 11.97.010, and notice of the time allowed for commencing a proceeding.⁴⁸

Practice Tip: Add the four month notice to your revocable trust estate administration checklist in order to shorten the time a party may contest the validity of the trust.

- b. Upon the death of the trustor of a trust that was revocable at the trustor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust, unless:
 - i. The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

⁴⁶ Id.

⁴⁷ RCW 11.103.040

⁴⁸ RCW 11.103.050

- ii. A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty days after the contestant sent the notification.⁴⁹

Practice Tip: Do not distribute the property of a decedent's revocable trust until the four month notice period to contest its validity has expired.

- c. A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.⁵⁰

Practice Tip: Do not count on the beneficiary to still have the property.

45. Application. Except as otherwise provided in the Act:

- a. The Act applies to all trusts created before, on, or after January 1, 2012;
- b. The Act applies to all judicial proceedings concerning trusts commenced on or after January 1, 2012;
- c. Any rule of construction or presumption provided in the Act applies to trust instruments executed before January 1, 2012, unless there is a clear indication of a contrary intent in the terms of the trust;
- d. An action taken before January 1, 2012, is not affected by the Act; and
- e. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before January 1, 2012, that statute continues to apply to the right even if it has been repealed or superseded.⁵¹

⁴⁹ Id.

⁵⁰ Id.

⁵¹ RCW 11.103.020 (historical notes (1) through (5)).

20 Questions – The 2012 Trust Act

20 Questions – but not 20 answers

- *Facts:* The grantor of a revocable living trust died in mid-December 2011. The revision to RCW 11.103.050(1)(b) says that if a person interested in the trust is given notice under RCW 11.97.010, then that person may not bring an action to contest the trust more than 4 months after the notice was sent. RCW 11.97.010(2) expressly states that "the notice required . . . applies only to . . . irrevocable revocable trusts created after December 31, 2011, and revocable trusts that become irrevocable after December 31, 2011." So with a death in December, notice is not *required*.
- *Question:* If notice is given – even though it is not required - does the trust get the benefit of the four month statute of limitation?

- *Answer #1:* "I do not believe so."
- *Answer #2:* "When I looked at this in another context I came to a different conclusion. It seems that Section 40 of the Act makes its provisions apply to all trust, no matter when created, "except as otherwise provided" in the act. The carve-out in RCW 11.97.010 only deals with when notice is required under subsection (2). I don't read that as limiting the provisions of RCW 11.103.050, and that section does not provide itself that it only applies prospectively."

1. What's the Statute of Limitations?

- Under RCW 11.103.050, for actions challenging revocable trusts, the earlier of:
 - Twenty-four months after the trustor's death; or
 - Four months after the trustee sent a notice with the information required in RCW 11.97.010, and notice of the time allowed for commencing a proceeding.
- Under RCW 11.96A.070(1)(a), for actions alleging breaches of trust,
 - 3 years after the trustee sent a notice with the information required in RCW 11.97.010(3).

- The "discovery rule" language that was in RCW 11.96A.07091(a)(i) – 3 years from . . . "the time the alleged breach was discovered or reasonably should have been discovered" for actions challenging breaches of fiduciary duty has been removed from the statute.

2. What's Happened to a Trustee's Discretion?

- There is new language in the statute, but not all of what is there is a change.
- RCW 11.97.010(1) now explicitly provides that using terms such as "absolute", "sole" or "uncontrolled" discretion found in many trust documents does not relieve a trustee from the duty to act "in good faith", in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries.
- RCW 11.97.010(1) adds that a trustee *cannot* be relieved of the duty to "provide information to beneficiaries as required in this section."

3. What's New for Trustees in Keeping Beneficiaries informed?

RCW 11.97.010 allows a trustor to articulate what a trustee can and cannot do, and to relieve a trustee of certain statutory duties.

But RCW 11.97.010 specifically prohibits a trustor from relieving the trustee of providing the information set out in this section of Title 11.

RCW 11.97.010(3) specifically states that a trustee shall keep "all persons interested in the trust" and who would be entitled to notice if there are judicial proceedings, "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interest".

So what do trustees need to report?

The statute then creates a "safe harbor" for trustees. Providing the following information is presumed to satisfy the trustee's duty:

- A statement of receipts and disbursements of principal and income during the accounting period
- A statements of assets and liabilities and values at beginning and end of period;
- The trustee's compensation;
- Identity of agents hired by trustee, their relationship to trustee if any and their compensation;
- Disclosure of any pledge, mortgage, option, lease or other agreement affecting property for more than 5 years entered into during the reporting period;
- Disclosure of all transactions of a type listed in RCW 11.98.078 or "otherwise affected by a conflict between the trustee's fiduciary and personal interests"
- A statement of rights to petition the court under RCW 11.106
- Disclosure of a three year statute of limitations running from receipt of the statement.

And what does the trustee have to do when asked for information?

RCW 11.97.010(4) provides "unless unreasonable under the circumstances, a trustee shall promptly respond to any beneficiary's request for information related to the administration of the trust."

RCW 11.97.010(5) then sets a 60 day turn around time for a trustee to respond to requests for information "reasonably necessary to enable the notified person to enforce . . . rights under the trust . . . "

4. Who can be a Virtual Representative?

RCW 11.96A.120(4) still provides that there can be no virtual representation if a conflict of interest involving the matter is known to exist between the notified person and the party.

But the statute has been expanded to identify new categories of potential virtual representatives:

- A guardian may represent and bind the estate that the guardian controls;
- An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- A trustee may represent and bind the beneficiaries of the trust; and
- A personal representative of a decedent's estate may represent and bind persons interested in the estate
- **AND**

- The "holder of a general power of appointment, exercisable either during the power holder's life or by will, or a limited power of appointment, exercisable either during the power holder's life or by will, that excludes as possible appointees only the power holder, his or her estate, his or her creditors, and the creditors of his or her estate"

5. Where's my situs?

- Hello 21st century; good bye "location of the books and records"
- The trustor may designate Washington as the situs of the trust or any of the following facts may make Washington the situs of a trust:
 - Trustee's place of business is in Washington or trustee is a Washington resident;
 - A significant part of the trust administration occurs in Washington
 - The trustor resided in Washington when the trust was established or the trust became irrevocable;
 - One or more beneficiaries reside in Washington;
 - The trust has an interest in Washington real estate.

6. What's Trust Registration?

- This is a new concept in Washington law.
- If one the statutory factors is met, the trustee may register the trust as a Washington trust.
- Within five days of filing the registration with the Court, the trustee is required to mail a copy of the registration to each person entitled to notice. The notice form is set forth in the new statute.
- Unless an objection is filed within thirty days, the registration will be deemed the equivalent of a court order declaring the trust situs is Washington.

- How is registration done?
- The trustee files with the clerk of court in any county where venue lies a statement with the following information:
 - The name and address of the trustee;
 - The date of the trust, name of the trustor, and name of the trust, if any;
 - The factor or factors listed in the statute that qualify the trust for registration.

7. What does it take to "reform" a Trust?

RCW 11.96A has permitted nonjudicial agreements that modify wills or trusts.

RCW 11.96A.125 is a new statute that permits "reformation" of a will or trust. There is a corresponding addition to what is a "matter" under RCW 11.96A.030(h) that references reformation of a will or trust to correct a mistake.

How is this done and what's required?

- Either by judicial proceedings *or* a nonjudicial agreement,
- If there is "clear, cogent, and convincing evidence"
- That "both the intent of the testator or trustor" and "the terms of the will or trust were affected by a mistake of fact or law, whether in "expression" or inducement".

8. Who has capacity to execute a Trust?

While this is a new section of Title 11, this is one of a number of new statutory sections that many practitioners would say is not a change in the law.

RCW 11.103.020 explicitly adopts the capacity requirements to execute a will to

- creating, amending, or revoking a trust,
- adding property to a revocable trust and
- "directing the actions of a trustee of a revocable trust"

9. What's this Notice to Beneficiaries?

RCW 11.97.010 provides that within 60 days of when

- a trustee of an irrevocable trust accepts the position of trustee *or*
- a trustee of a formerly irrevocable trust learns the trust has become irrevocable,
- The trustee shall give notice of -

- The existence of the trust;
- The identity of the trustor or trustors;
- The trustee's name, address, and telephone number; and
- The right to request such information as is reasonably necessary to enable the notified person to enforce his or her rights under the trust.
- To all persons interested in the trust, and who would be entitled to notice if they were a party to judicial proceedings regarding the trust and
- If any such person is a minor and no guardian has been appointed for such person by any court, then such notice may be given to a parent of the person and
- If a person otherwise entitled to notice under this section is a charitable organization, and the charitable organization's only interest in the trust is a future interest that may be revoked, then such notice shall instead be given to the attorney general.

10. Who can revoke a trust?

- RCW 11.103.030 provides that trust must expressly state the trust is revocable.
- If the trust was created or funded by more than one trustor, unless the trust provides otherwise:
 - If the trust consists of *community property*, either spouse or domestic partner may act alone to revoke the trust.
 - But if that occurs, the spouse or domestic partner who revokes the trust has to notify the other spouse or domestic partner.
 - If the trust consists of *community property*, both spouses or domestic partners must act *together* to *amend* the trust.

- If the trust consists of property other than community property, each trustor may revoke or amend the trust with regard to the portion of the trust property attributable to that trustor's contribution;
- If either one of the trustors revokes or amends the trust with regard to separate property, the party who revokes the trust has to notify the other trustors.

11. Can I distribute this Trust?

- When the trustor of a revocable trust dies, the trustee may distribute the trust property unless
 - the trustee knows of a proceeding contesting the validity of the trust or
 - a potential contestant has notified the trustee he intends to challenge the trust *and* starts that proceeding within 60 days of giving that notice.
 - remember the notice to the beneficiary needs to tell the beneficiary of the right to object and the time within which the objection must be made.

12. What's Certification of a Trust?"

Instead of furnishing a copy of the full trust document to a person other than a beneficiary, the trustee may furnish a "certification" of trust containing the following information:

- That the trust exists and the date the trust instrument was executed;
- The identity of the trustor;
- The identity and address of the currently acting trustee;
- Relevant powers of the trustee;
- The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and
- The name of the trust or the titling of the trust property.

- A certification of trust may be signed or otherwise authenticated by any trustee or by an attorney for the trust.
- A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.
- A certification of trust need not contain the dispositive terms of a trust.
- A recipient of a certification of trust may require the trustee to furnish copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction or any other reasonable information.

13. What's new for Powers of Attorney?

Question: Can an agent, acting under a power of attorney, revoke or amend a trust?

Question: Can an agent, acting under a power of attorney, distribute trust property?

Answer: Yes.

RCW 11.94.050 is the statute that limits powers of an agent in fact with regard to making, amending, later or revoking wills and codicils as well as other important "estate planning" or "financial" documents.

It has been amended to permit these additional powers if the documents explicitly authorize the action.

14. Are there Changes to a Trustee's Duty of Loyalty?

- Probably not, but RCW 11.98.078 explicitly states that the trustee "shall administer the trust solely in the interests of the beneficiaries."
- The trust document can still authorize transactions between the trustee and the trust, or an affiliate or subsidiary of the trustee.
- But the statute now describes "voidable" transactions.

- If the transaction is covered by the new statute, it is *voidable* by a beneficiary unless
 - The transaction was authorized by the terms of the trust;
 - The transaction was approved by the court or approved in a nonjudicial binding agreement under RCW 11.96A;
 - The beneficiary did not commence a judicial proceeding within the time allowed by RCW 11.96A.070;
 - The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance the new statute; or
 - The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

- "Without further proof", a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account may be voided by a beneficiary.

15. What action by a trustee is "affected" by a conflict?

Under RCW 11.98.078(3) some actions are *presumed* to be affected by a conflict.

If the transaction is entered into by the trustee with:

- The trustee's spouse or registered domestic partner;
- The trustee's descendants, siblings, parents, or their spouses or registered domestic partners;
- An agent or attorney of the trustee; or
- A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

The presumption of a conflict is rebutted "if the trustee establishes that the conflict did not adversely affect the interest of the beneficiaries."

Under RCW 11.98.078(5), some actions are *presumed not* to be affected by a conflict.

- If the investment complies with the prudent investor rule, an investment by the trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee, is presumed not to be affected by a conflict.
- The trustee may also be compensated as trustee and for providing the investment services, but the trustee must then give notice under RCW 11.106.020 of the rate and method of the trustee's compensation for those services.

16. Are there some transactions that may not be voidable?

Under RCW 11.98.078(6), the following cannot be voided if they are "fair to the beneficiaries":

- An agreement between a trustee and beneficiary about the appointment of the trustee;
- An agreement between a trustee and beneficiary about the trustee's compensation;
- Payment of reasonable compensation to the trustee or an affiliate providing services to the trustee;
- Depositing money in a regulated financial-services institution operated by the trustee or its affiliate;
- A delegation by a trustee to an agent affiliated to or associated with the trustee;
- A loan from the trustee or its affiliate.

17. And what if there is a conflict? What's a "Special Fiduciary"?

- RCW 11.98.080(7) creates a new type of fiduciary to deal with conflict situations.
- The court may appoint a "special fiduciary" to "make a decision with respect any proposed transaction that might violate this section if entered into by the trustee."

18. Cy Pres is Not a Tree: Or does this charitable gift fail?

- The statute incorporates the common law for charitable gifts that appear to "fail" because the purpose becomes "unlawful, impracticable, impossible to achieve, or wasteful".
- If there appears to be a problem with a charitable gift, don't give up and assume the gift fails. The court may now modify or terminate the trust and order the property applied or distributed in a manner consistent with the testator's charitable intentions.
- There is a new definition of "charitable purpose" that includes "relief from poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or the purposes the achievement of which is beneficial to a community." This is broader than the common law.

19. Can I get a venue?

- RCW 11.96A.050 that sets venue for probate and trust matters has been changed.
- A party to a proceeding about a trust, probate, or the administration and disposition of nonprobate assets may request a change of venue.
- Requests made within 4 months must be granted absent good cause.
- If the request is made "more than four months after the commencement of the action", it may be granted in the discretion of the court.

- For probate and proceedings about other property, including nonprobate assets, "A party to a proceeding may request that venue be changed if the request is made within four months of the mailing of the notice of appointment and pendency of probate required by RCW 11.28.237."
- If that request is made with the four month window, except for good cause shown, venue must be moved to the county as set out in the statute, which varies for residents and nonresidents.

- For trusts, the four month period runs from "the giving of the first notice of a proceedings pertaining to the trust".
- If that request is made within the four month window, except for good cause shown, "venue must be moved" to the county with the strongest connection to the trust considering factors such as the residence of a beneficiary entitled to notice, the residence or place of business of a trustee, and the location of any real property that is an asset of the trust.

20. And now your questions ???