Affected by Recent Updates to Washington's Trust Law?

By Ryan M. Bray March 19, 2012

Jensen Edwards is a Seattle teacher and the trustee of a $5 million irrevocable trust. The trust was established in Washington by his brother Sean, for the benefit of Sean's daughter.
Sean created the trust after the technology company he founded was sold for a substantial sum. He chose his brother as trustee because he knew Jensen would always act in the child's best interest. Under the terms of the trust, Sean's daughter will not benefit financially until she reaches the age of 30—nor will she be given advance notice of the existence of the trust.

Fast forward five years to January 1, 2012.

Sean has a new son and wants to create a similar trust for him, with Jensen as trustee. However, the rules have changed for the Edwards family under the state's new Washington Trust Act. Jensen is concerned that he is not adequately prepared for the new duties and reporting responsibilities of a trustee under the Act. Sean is dismayed to learn that, at age 18, his son will be informed of the existence of the trust and have the right to detailed information that his father prefers to be kept secret.

If your estate plan includes a trust governed by Washington State law or you are the trustee or beneficiary of such a trust, it's important to understand how the new law impacts you.

Overview of the Washington Trust Act

The Washington Trust Act has been called the most sweeping piece of probate and trust legislation enacted in Washington State in more than a decade.

Effective as of January 1, 2012, the Act imposes new reporting and administrative requirements on trustees, provides new disclosure rights for beneficiaries, and clarifies or establishes a number of rules for trust administration. Trustees, in particular, will be required to provide financial reporting of trust activities to beneficiaries.

The Act generally applies to all trusts. However, the notice provisions apply only to irrevocable trusts created after December 31, 2011, or revocable trusts that become irrevocable after that date. It also applies to all trust-related judicial proceedings as of January 1, 2012.

Notification and Reporting Responsibilities

If you are the trustee of an irrevocable trust, or a revocable trust that will become an irrevocable trust, you have new notification and reporting responsibilities under the Act. If you are the beneficiary of such a trust, those new responsibilities translate to new rights for you. And if you are or intend to be a trustor or grantor, new rules may limit certain of your options in establishing the terms of the trust.

Notification Requirements

The notification requirements are one of the more controversial parts of the new law, because the new law explicitly requires trustees to provide much more informational reporting to beneficiaries than in the past. For example, where parents create a trust for their children, the parents may be disappointed to find that the new law requires the trustee to provide adult children with substantial information on trust activity. This can be a concern because many trustors create trusts either because the beneficiary is unable to responsibly manage large sums of money or to avoid creating a sense of entitlement in children.

Unfortunately, the new law only provides a mechanism to address these concerns under limited circumstances, two of which are as follows:

- Revocable trusts are generally exempt from the notification requirements. Such trusts are commonly used as a substitute for a will. During the trustor's life, notification need not go beyond the trustor. However this exception only lasts until the death of the trustor, as such a trust becomes irrevocable upon the trustor's passing.

- If a beneficiary of an irrevocable trust is entitled to trust income and also controls the disposition of trust assets, then notification is not required to successor beneficiaries.

As most irrevocable trusts will not qualify under either of the two above exceptions, the trustee will need to comply with the below notification requirements.

If you become the trustee of an irrevocable trust—or learn that the revocable trust for which you are trustee has become irrevocable—you have sixty days to notify all beneficiaries of the existence of the trust, its grantor, your name and contact information as trustee, and their right to request information that is reasonably necessary to protect their interests. If the beneficiary is a minor you must notify the child's guardian or, if there is no guardian, the child's parent.

This notification requirement cannot be waived in the trust documents. It generally applies to irrevocable trusts created after December 31, 2011 and revocable trusts that become irrevocable after that date.

Reporting Requirement

If you are a trustee, you have a duty to keep the trust's beneficiaries reasonably informed regarding the administration of the trust and all material facts they require to protect their interests. While you're not required to report on an annual basis, you must prepare your report sufficiently often to ensure that your fiduciary duty is met.

This reporting requirement cannot be waived in the trust documents. It applies to all irrevocable trusts, regardless of when they were created.

Safe Harbor Rule for Reporting

To assist trustees in meeting their fiduciary duty to keep beneficiaries reasonably informed, the Act provides a safe harbor rule. As trustee, you are presumed to have satisfied this duty if your report includes the following information for the period reported on:

- statement of receipts and disbursements of principal and income
- statement of assets and liabilities of the trust, including their beginning and ending values
- trustee's compensation
- agents hired by the trustee, their relationship to the trustee, and their compensation
- disclosure of any pledge, mortgage, option or lease of trust property, or other agreement affecting trust property that is binding for at least five years
- disclosure of certain transactions which may involve a conflict between the trustee's personal and fiduciary interests
- various mandatory statements with regard to petitions and claims, including the statute of limitations for a breach-of-trust claim against the trustee

Response to Beneficiary Request

Trustees are required to respond promptly to a beneficiary's request for information regarding the administration of the trust. If a beneficiary requests information reasonably necessary to protect his or her interests, the trustee must respond within 60 days of receiving the request.

Breach of Trust Claims

Under the Act, beneficiaries have a limited period of time to bring claims against trustees for breach of trust. Generally, that period is limited to three years after the date a report was reviewed by the beneficiary that "adequately disclosed the existence of a potential claim and informed the beneficiary of the time allowed for commencing a proceeding." A report that meets the Act's safe harbor reporting requirements is presumed to be satisfactory for this purpose.

The three-year period for breach of trust claims may also be determined with reference to the removal, resignation or death of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust.

A trustee is liable for the amount of profit the trustee made from the breach or, if greater, the amount required to restore the value of the property.

Other Changes in Trust Administration

The Act includes a number of provisions that affect the administration of Washington trusts. In addition to dispute resolution rules, they include rules for creating, amending and terminating a trust; determining the venue for dispute resolution; distributing trust property; contesting final distributions; amending and revoking revocable trusts; correcting mistakes in law or fact; and determining and changing a trust's situs, or location.

Impact on Trustors and Grantors

If you have a trust as part of your estate plan, whether irrevocable or revocable, it's important to understand the potential impact of the Washington Trust Act. You may find, as did the Jensen family, that new duties and rights afforded under the Act necessitate changes in trustee or trust provisions, or even updates to your estate plan.

If you are currently the trustee of an irrevocable trust, you should begin planning now to meet the new financial reporting requirements to beneficiaries under the Act.

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