2013 Updates to the Washington Trust Act

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The Washington Trust Act, as amended by the legislature in 2011, and various other sections of Title 11 RCW were amended by Senate Bill 5344 ("SB 5344"), which became effective July 28, 2013 (the "2013 Legislation"). While not as expansive as the changes made to the Washington Trust Act in 2011, the 2013 Legislation included major revisions to the Trustee's duties to keep beneficiaries informed and to the virtual representation statute. This article includes a detailed review of the changes made to both of those areas of law. In addition, this article includes a broad summary of all of the statutes that were modified by the 2013 Legislation. References to sections of SB 5344 are used throughout where statutory citations are unavailable as of the date of publication. This article includes various excerpts from an article published in the November 2013 *Washington Law Review* by Karen Boxx and Katie Groblewski.[1]

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An Overview of Washington's Foreclosure Fairness Act; Using Net Present Value Analysis in Foreclosure Mediation

1 RCW 61.24.163 – 61.24.177.
2 RCW 61.24.163(1); *www.commerce.wa.gov/Programs/housing/Foreclosure/Pages/default.aspx*.
3 RCW 61.24.005: Notes 1(d).
4 RCW 61.24.005: Notes 2(c).
5 RCW 61.24.005(9).
6 RCW 61.24.163(1).
7 RCW 61.24.163(3)
8 RCW 61.24.163(4).
9 RCW 61.24.163(5)(g).
10 RCW 61.24.163(6); RCW 61.24.163(7)(b).
11 RCW 61.24.163(8)(a).
12 RCW 61.24.163(9)(b).
13 RCW 61.24.163(12).
14 *Id.*
15 RCW 61.24.163(12).
16 "NPV Test" actually refers to any use of NPV and a combination of other factors to assess whether a loan modification will benefit a lender. Most lenders, banks, and other institutions have proprietary NPV Tests that they use to approve or deny homeowners for loan modifications. These proprietary NPV Tests are not available to the public, but the HAMP and FDIC tests approximate what those tests would likely take into account.
17 Treasury Department Supplemental Directive 09-01, April 6, 2009, at 1, available at: *www.hmpadmin.com//portal/programs/docs/hamp_servicer/sd0901.pdf*.
18 For more information on the HAMP NPV Test, go to *www.checkmynpv.com* and click on "Frequently Asked Questions."
19 Additional information on the FDIC Test can be found at: *www.nclc.org/images/pdf/foreclosure_mortgage/mediation/model-faq-fdic-spreadsheet.pdf*.
20 HAMP defines an affordable loan payment as 31 percent of the homeowner's monthly income. The HAMP method tries to bring the monthly payments down to 31 percent without going below that level. The FDIC method tries to bring the monthly payments to between 31 and 38 percent of the homeowner's monthly income.
21 RCW 61.24.163(14)(c).

I. The Duty to Keep Beneficiaries Informed

The common law has long recognized the duty of a Trustee to keep beneficiaries informed about trust administration.[2] However, there has been significant disagreement in Washington and elsewhere about which beneficiaries are owed the duty to inform, how to comply with the duty, and how to balance some Trustors' desire to keep a trust secret from the beneficiaries with the concern that a secret trust may leave beneficiaries' interests vulnerable. Largely in response to the concerns of local practitioners, the 2013 Legislation dialed back some of the provisions implemented in 2011 by incorporating additional concepts from the Uniform Trust Code (the "UTC") and by preserving Washington's longstanding case law history regarding the duty to inform. For clarity, in this article, the Trustee's duty to keep beneficiaries informed is referred to as the "general duty" and the Trustee's duty to provide beneficiaries with 60-days' notice of the existence of trust is referred to as the "specific duty."

A. New Definitions

The 2013 Legislation adopted the UTC definitions of "permissible distributee" and "qualified beneficiary" for purposes of Chapter 11.98 RCW and other limited sections of Title 11.[3] A "permissible distributee" is a current mandatory or discretionary trust beneficiary. A "qualified beneficiary" is either a permissible distributee or a beneficiary who would become a permissible distributee if either all permissible distributees died or the trust terminated (i.e., the "presumptive remaindermen"). It is important to note that the general term "beneficiary" can include beneficiaries more remote than those that are determined to be qualified beneficiaries. The determination of the qualified beneficiaries of a trust is not static; it should be made before any action is commenced, notice is given, or report is made by a Trustee. In a further effort to clarify the persons to whom Trustees may deliver information or obtain consent from, or the persons who should be involved in a Chapter 11.96A RCW matter, the 2013 Legislation also updated the Washington virtual representation statute. These changes are discussed further in section II of this article.

B. General Duty to Keep Beneficiaries Informed

The 2013 Legislation moved the provisions regarding the general duty to inform from RCW 11.97.010(3) to Chapter 11.98 RCW.[4] There were four significant changes made to the Trustee's general duty to inform by the 2013 Legislation: (1) the scope of persons to whom the general duty is owed, (2) the method of compliance with the general duty,

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(3) the removal of a time period in which to respond to a request for information and (4) the addition of exceptions to the application of the general duty.

The new law now provides that the Trustee has a general duty to keep all qualified beneficiaries of a trust "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."[5] In addition, the general duty also requires the Trustee to respond promptly to any beneficiary's request for information related to the administration of the trust, unless the request is unreasonable under the circumstances.[6] The revised general duty is taken verbatim from section 813(a) of the UTC.

The use of the phrase "qualified beneficiaries" ultimately serves to limit the potential persons to whom the general duty to inform is owed and to provide clarity to the Trustee. However, in an effort not to preclude more remote trust beneficiaries from having access to trust information, beneficiaries with remote remainder interests (i.e., nonqualified beneficiaries) may request information from the Trustee. In addition, if appropriate, the Trustee may deliver notice or information on behalf of a qualified beneficiary to a virtual representative.

The 2011 legislation had introduced a "safe harbor report" presumption that the Trustee had complied with the general duty by providing certain enumerated information. The 2013 Legislation removed these provisions, eliminating any statutory presumption regarding the type of information that would fulfill the Trustee's general duty. The removal of the "safe harbor report" presumption confirms that the manner and method of compliance with the general duty is the same as has always existed in Washington case law, with the exception of the change in the types of beneficiaries to whom the duty is owed and the application of statutory exceptions discussed below. The Trustee is entirely responsible for determining the timing and method of complying with the general duty.[7]

Compliance with the general duty in Washington is heavily fact dependent.[8] Generally, the more information that is shared, the more likely the Trustee has satisfied the general duty. In some cases, providing the qualified beneficiaries with a copy of an annual account or brokerage statement and responding to any reasonable requests for relevant information may be sufficient to satisfy the duty. There may be other circumstances where a Trustee may consider providing the qualified beneficiaries with additional information or information in advance of a transaction. The Trustee will have to be flexible and adjust his or her reporting to beneficiaries to suit the activity in, and assets of, the trust.

Note that compliance with the general duty to inform does not preclude a Trustee from also having to comply with the reporting that may be required by RCW 11.100.140 (i.e., significant non-routine transactions) and RCW 11.106.020 (i.e., Trustee's annual statement). In addition, the 2013 Legislation maintained the report section from the statute of limitations section of RCW 11.96A.070(1)(b). Therefore, a Trustee who would like to trigger the running of the statute of limitations for a breach of trust claim still has a guideline to follow regarding the necessary information to disseminate. Since the statute of limitations report is drafted to be very inclusive of possible trust activities, it is possible the delivery of that report may have the added benefit of satisfying the general duty to the qualified beneficiaries with respect to the period included in the report. However, be aware that the statute of limitations report must be delivered to each beneficiary for whom the Trustee wants to trigger the three-year period, which may include beneficiaries beyond the qualified beneficiaries.

The 2013 Legislation also removed the reference to the 60-day time period for response to a reasonable request for information that had been introduced in 2011. However, in order to provide some leverage for beneficiaries to obtain information, the 2013 Legislation included a provision allowing a qualified beneficiary to obtain an order for costs and reasonable attorney's fees if he or she is forced to compel production of information from the Trustee.[9]

C. Specific Duty to Inform

The 2013 Legislation moved the provisions regarding the specific duty to inform from RCW 11.97.010(2) to Chapter 11.98 RCW. The 2013 Legislation modified the Trustee's specific duty to provide the 60-days' notice of the existence of trust that had been introduced to Washington law in the 2011 legislation. There were four significant changes made by the 2013 Legislation: (a) the scope of persons to whom the notice is required to be delivered, (b) the events that trigger the requirement to deliver the notice, (c) the addition of statutory exceptions related to the delivery of the notice, and (d) the waivability of the specific duty to provide this notice by the Trustor.

The law now provides that for all trusts that were created or became irrevocable after December 31, 2011, the Trustee is required to deliver notice of: (a) the existence of trust, (b) the identity of the trustor(s), (c) the Trustee's contact information and (d) the right to request trust administration information that is reasonably necessary to enable the beneficiary to protect his interest.[10] The class of persons who are entitled to this notice is now limited to the qualified beneficiaries of the trust.[11] This approach

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mirrors sections 813(b)(2) and (3) of the UTC. In addition, if appropriate, the Trustee may deliver this notice to a beneficiary's virtual representative.

Unless waived or modified by the Trustor, or unless an exception applies, the Trustee must deliver this notice within 60 days from the acceptance of the position of Trustee.[12] The 2013 Legislation removed any reference tying the 60-day notice period to "knowledge" that a trust has become irrevocable and instead simply used the phrase "acceptance of the position of Trustee." It no longer matters whether the trust is revocable or irrevocable; the only event triggering the requirement to deliver notice is the acceptance of a trusteeship. In addition, the 2013 Legislation incorporated the "acceptance of Trusteeship" statute from the UTC to provide for a clear time point that triggers the 60-day notice period.[13]

D. Exceptions to the Duties to Inform

The 2013 Legislation has implemented two default exceptions to the general duty to keep beneficiaries informed and the specific duty to provide 60-days' notice of the existence of trust. In the case of a revocable trust, the Trustee has no obligation to provide any information or to otherwise keep beneficiaries other than the Trustor informed about the trust administration while the Trustor is alive.[14] In addition, in the case of a trust where the spouse of the Trustor is the only permissible distributee and the descendants of the spouse and Trustor are the only remaindermen (a "Spousal Trust"), the Trustee has no obligation to provide any information or to otherwise keep beneficiaries other than the Trustor's spouse informed about the trust administration while the spouse has capacity.[15] The Trustor may modify or waive the application of either of these exceptions to the general and specific duties to inform.

E. Waiver or Modification of the Duties to Inform

Under the 2013 Legislation, RCW 11.97.010 still contains its previous authorization permitting a Trustor to waive or modify the Trustee's duties in the trust document, with the following specific exceptions. As a general prohibition, the newly revised RCW 11.97.010 provides that the Trustor may not waive or modify the Trustee's general duty to provide information to the qualified beneficiaries or the duty to respond to the request for reasonable information of any trust beneficiary. In addition, RCW 11.97.010 now also provides that the definitions of "qualified beneficiary" and "permissible distributee" may not be modified by the Trustor.

The 2013 Legislation also included specific provisions in Section 16(5) of SB 5344 that permit the Trustor to waive or modify the Trustee's duty to provide 60-days' notice of the existence of trust and the application of the Spousal Trust statutory exception. Section 16(5) of SB 5344 specifically permits the Trustor to waive or modify the specific duty to provide 60-days' notice of the existence of trust and to waive or modify the application of the Spousal Trust exception in the trust document or in a separate writing.[16] The purpose of permitting a Trustor to waive or modify duties and exceptions in a separate writing was to permit Trustors to affect irrevocable trusts that were created before the effective date of the new law without a non-judicial binding agreement.

The new statutory structure therefore includes some overlap between the provisions of RCW 11.97.010 and Section 16(5) of SB 5344. In addition, because these two statutes now create both exceptions to the general and specific duties to inform and then permit waiver or modification of the specific duty and of the exceptions to the general and specific duties, this article will review each scenario independently, even if some repetition results.

Section 16(5) of SB 5344 permits the Trustor to waive or modify the specific duty of t he Trustee to provide 60-days' notice of the existence of trust by a separate writing or by the terms of the trust document. RCW 11.97.010, by omission, impliedly permits the Trustor to waive or modify the specific duty to provide the 60-days' notice. The major difference between these two provisions is that section 16(5) of SB 5344 permits waiver or modification by a separate writing and by the terms of the trust document. These waiver provisions ultimately allow the Trustor to, for example, provide that the Trustee shall not be required to deliver notice of the existence of trust, or alternatively, that the Trustee be required to deliver such notice only to the qualified beneficiaries that are over a certain age. The Trustor can accomplish this either by including the desired language in the trust document (i.e., for a new trust), or in a separate writing (i.e., for an existing irrevocable trust).

Section 16(5) of SB 5344 also permits the Trustor to waive or modify the application of the Spousal Trust exception to the general and specific duties to inform by a separate writing or by the terms of the trust document. RCW 11.97.010, also by omission, impliedly permits this waiver or modification, but as described above, section 16(5) of SB 5344 permits waiver or modification by a separate writing and by the terms of the trust document. These waiver provisions ultimately allow the Trustor to, for example, provide that the Trustee must provide QTIP trust administration to the remainder beneficiaries (e.g., his and his spouse's children) for the duration of trust, regardless of whether the spouse has capacity. The Trustor can accomplish this either

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by including the desired language in the trust document (i.e., for a new trust), or in a separate writing (i.e., for an existing irrevocable trust).

RCW 11.97.010, again by omission, impliedly permits the Trustor to waive or modify, in the trust agreement, the "revocable trust" exception to the general and specific duties to inform. This waiver provision allows the Trustor to, for example, provide that another beneficiary – perhaps his spouse – is entitled to and must receive trust administration information while he is alive, particularly if he is incapacitated. The ability to waive or modify the "revocable trust" exception was not included in section 16(5) of SB 5344 because in the revocable trust context, the drafting committee felt that it would be best practice for the Trustor to incorporate the waiver or modification into the terms of a revocable trust by actually amending the trust.

F. Effective Dates of the New Notice Provisions

The 2013 Legislation contains a general effective date provision that states it applies to all existing trusts and trusts created after the date of the Washington Trust Act, except as otherwise provided.[17] However, the 2013 Legislation provides that the revised specific duty to provide 60 days' notice of the existence of trust applies only to trusts that are created or become irrevocable after December 31, 2011.[18] As mentioned above, a Trustor may waive or modify the notification requirements at any time, even after creation or irrevocability of the trust,[19] so a Trustor wanting to take advantage of the new waiver provision can reduce or modify the notice requirements now. In the absence of a waiver or modification by the Trustor, the mandatory 60-days' notice provisions enacted in 2011 are binding on Trustees and their actions for the period from January 1, 2012 until July 28, 2013. Note that in *In re Estate of Ehlers*, the Court of Appeals held that delivering an untimely accounting per RCW 11.106 that was complete, accurate and showed no harm to the beneficiaries was not a breach of the Trustee's fiduciary duty.[20] However, the Trustee was penalized by having Trustees' fees denied.[21] Presumably, by analogy, if the Trustee's specific duty is waived later by the Trustor and no harm to the beneficiaries has occurred, then a Trustee's failure to deliver the 60-days' notice during the gap between the 2011 and 2013 Legislation will not, by itself, give rise to an actionable breach of fiduciary duty claim.

II. Representation

RCW 11.96A.120 was significantly revised in 2011 and revised again in the 2013 Legislation to fill various gaps in Washington's approach to representation and to modernize the statute. The collective changes have reorganized and clarified the section language, broadened the applicability of virtual representation, confirmed fiduciary representation and refined court-appointed representation.

A. General Overview

Representation allows for a living person to act on behalf of another individual or a potentially interested party in a dispute or non-judicial matter, such as by receiving notice or giving consent on behalf of the represented party. There are generally three different categories of representation, namely virtual representation, fiduciary representation, and court-appointed representation.[22] Virtual representation permits, in certain situations, living beneficiaries to represent unborn, minor or unascertained future beneficiaries, and in some cases, living, adult beneficiaries who have interests in the trust similar to the interests of the person representing them.[23] Fiduciary representation permits, in certain situations, trustees or personal representatives to represent beneficiaries, guardians to represent wards, and attorneys-in-fact to represent principals. Court-appointed representation permits a guardian ad litem or another third-party representative appointed by the court to represent specific beneficiaries for specific purposes.

B. Summary of New Statute

As a condition precedent to permissible virtual representation, all of the Washington representation subsections provide that the interests of the representative and the represented party may not be in conflict. The official comments to RCW 11.96A.120, as enacted in 1999, are still relevant and represent the modern interpretation of conflict in this context. They state that a conflict exists when the would-be representative has significantly different economic interests in the matter from the would-be represented party.

The 2013 Legislation specifically validates the concept of substitute notice and the ability of the representative to give binding consent.[24] The statute also permits the represented party to object to the representation before consent is given to nullify the representation.[25] Under Washington law, both historically and in the current revised statute, there are statutorily permitted situations when adult beneficiaries may be virtually represented without the overt requirement to provide notice of a hearing on the matter in question, of the virtual representation itself, or to require the beneficiary's involvement in a non-judicial matter.[26] Therefore, the section allowing a represented party to object does not override the ability of the representative to accept notice on behalf of the represented party and does not create additional notice requirements. This analysis simply means that the determination of whether a conflict of interest exists at any time during the representation is

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a crucial determination to the effectiveness of the representation and, by extension, the resolution to which the representative is a party. However, a subsequent finding of a conflict that invalidates future representation will not invalidate notice previously given to the representative if, at the time notice is delivered, no conflict existed.

The new statute includes sections that clarify when virtual representation of or by a Trustor is not permitted.[27] The statute has codified that RCW 11.96A.120 cannot supersede the rules of Chapters 11.88 or 11.92 RCW related to the representation of an incapacitated person, where court supervision already exists via a court appointed guardian. Representation of a Trustor is also subject to RCW 11.103.030, which requires court approval for the guardian to represent an incapacitated trustor in amending or modifying his trust. In addition, the new statute provides that a Trustor may not represent any beneficiary in the context of a trust modification or termination.

The newly revised RCW 11.96A.120(4)(a) through (e) specifically codify fiduciary representation in Washington, permitting fiduciaries with specific statutory authority (*e.g.,* a guardian) or with specifically granted authority (*e.g.,* an agent acting under a power of attorney) to virtually represent an individual. However, the new section RCW 11.96A.120(4)(b) provides that the guardian of the person of an incapacitated beneficiary may bind and represent such person if a guardian of the person's estate has not been appointed. This addition expands the authority of a guardian of the person under Chapters 11.88 and 11.92 RCW.

New section RCW 11.96A.120(4)(f) permits parents to bind and represent their minor and unborn children who do not have court-appointed guardians. This provision was added in the 2013 Legislation to further streamline the utility of virtual representation and to incorporate UTC section 303(f). This provision may be unavailable in some circumstances in Washington, because if community property is contributed to a trust, both parents would be considered Trustors of the trust. As mentioned above, the Trustor is prohibited from representing a beneficiary in the context of a termination or modification of trust. In addition, representation by the parent-Trustor, while not determinative, may indicate the taint of retained control of gifted property by the parent under IRC § 2036.

New section RCW 11.96A.120(5) permits living, adult beneficiaries to bind and represent living minor beneficiaries and unborn, unascertainable, and known but unlocatable beneficiaries if they have "substantially identical" interests. Practically, this revision acts to supplement RCW 11.96A.120(6),[28] which, for example, requires notice to be given to all "living persons" who are class beneficiaries. For example, a Trustor creates a trust for the lifetime benefit of all of his children equally, and he has three children, only one of whom is an adult. Under former law, notice must be given to the adult child and a special representative or guardian ad litem would need to be appointed to represent the interests of the living, minor children and the unborn children as other potential class members. Under the new law, the living, adult child may accept notice for and represent his minor and unborn siblings if they all have substantially identical interests in the trust. The new section is not limited to horizontal representation and allows virtual representation in any circumstance where a present, competent adult holds an interest that is "substantially the same" as a minor, unborn, incapacitated, or missing beneficiary.[29]

New section RCW 11.96A.120(9) broadened permissible virtual representation by power-holders. As in the 2011 amendments, the holder of a general appointment, whether exercisable during life or at death, may still represent the takers in default or the permissible appointees.[30] For example, a Trustor creates a trust for the benefit of his spouse, giving her a testamentary general power to appoint the trust property at her death to any person or charity, and in default of her exercise, the trust property will pass to their children. In this case, the general power-holder, the Trustor's spouse, may represent and bind their children, the takers in default. Virtual representation by a limited power-holder was modified significantly in 2013. First, the type of limited power of appointment to which the virtual representation may apply has been broadened. The statute no longer requires that the limited power of appointment be the broadest type of limited power.[31] Second, the holder of a limited power of appointment, whether exercisable at death or during life, may now represent permissible appointees and takers in default, but only if the takers in default to be represented are also permissible appointees. The intent of this particular change was to make the application of a limited power more practical. The drafting committee felt that most practitioners were using more restrictive limited powers in their practice. For example, a Trustor creates a trust for the benefit of his spouse, giving her a testamentary limited power to appoint the trust property at her death to any descendant of his or any qualified charity, and in default of her exercise, the trust property will pass to their children. In this case, qualified charities and descendants of the Trustor are permissible appointees and because their children, as takers in default, would, by definition, be permissible appointees (as descendants of the Trustor), the spouse may represent and bind the children.

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New section RCW 11.96A.120(10) includes the Attorney General as a permissible virtual representative for charitable interests in a trust that are subject to change or divestment, as long as the charity is not a Trustee or a permissible distributee. This section was meant to replace similar language regarding notice to divestible charitable interests formerly included in RCW 11.97.010(2) in the 2011 legislation. For example, a Trustor creates a trust for the benefit of a child of his, giving her a testamentary limited power to appoint the trust property at her death to his descendants and any qualified charity, and in default of her exercise, the trust property will pass to her children, or if none, to the XYZ Foundation. The trustor's child has no children. In this case, the Trustor gave the child the power to redirect the assets away from the XYZ Foundation, and the XYZ Foundation is not a trustee or a permissible distributee of the trust. If the trustor's child cannot virtually represent the XYZ Foundation (as a power-holder) due to a conflict of interest, then the Attorney General could serve as virtual representative for the XYZ Foundation.[32]

The changes to RCW 11.96A.250 were also made in the 2013 Legislation to be consistent with the approach taken when revising virtual representation. Under the new law, instead of only allowing a Personal Representative or a Trustee to petition the court for the appointment of a special representative, any party to a matter (as defined by RCW 11.96A.030), or the parent of a minor party to a matter may now request the appointment of a special representative. This change reflects the fact that modern practice incorporates the use of a special representative in many types of matters,[33] not only those that involve a Personal Representative or a Trustee. This section does not preclude a party who is conflicted for the purposes of virtual representation from petitioning the court for the appointment of a special representative for a beneficiary. In fact, many times, a parent may be the most logical virtual representative for his or her child, but is subject to a conflict that precludes representation. The court may always consider the interests of the petitioner in the matter when determining whether the proposed special representative is appropriate.[34]

C. Liability of Representatives

Representation by a fiduciary is subject to the principles of fiduciary law. Therefore, when acting as a representative, a fiduciary must meet fiduciary standards of care, or risk suit for breach of fiduciary duty. Court-appointed representatives are subject to court review[35] and to statutory schemes which may provide for liability (or a release therefrom). Virtual representatives do not owe fiduciary duties to their represented parties and are not subject to court review. The concept behind virtual representation has always been that the representing party's self-interested involvement will adequately represent the interests of the represented party, as long as their interests in the matter align.[36] There is no liability assigned to the virtual representative for inappropriately acting or making a bad decision. Instead, the virtual representation is generally inapplicable if the interest represented was not sufficiently protected, meaning that the representative acted in "hostility to the interest" of the person represented.[37] Hostility can be shown by the representative's affirmative conduct demonstrating adversity to the represented party's interests.[38] In addition, the more modern interpretation of "hostility" in the context of virtual representation is the conflict of the economic interests of the representative and the represented party.[39] Again, the determination of whether a conflict exists between the representative and the represented party is imperative for the effectiveness of the virtual representation and the binding nature of the agreement, judgment, or proper delivery of notice and information on and to the represented party.

III. Summary of Bill Provisions

This section of the article provides a broad summary of the provisions in SB 5344.

A. SB 5344 §§ 1 and 2 – RCW 11.36.010; 11.36.021

The changes made to these two statutes included specific authorization to permit nonprofit corporations, and LLCs and LLPs, where all of the members or partners are attorneys, to serve as personal representative or trustee. The changes also confirmed that state and regional colleges and universities, and community or technical colleges may serve as trustee. RCW 28B.20.130(7), 28B.30.150(24) and 28B.35.120(10) already provided that state and regional colleges and universities, and community or technical colleges may receive gifts in trust; however, the former RCW 11.36.021 did not include those institutions in its list of permitted trustees. Confirming language was added to RCW 11.36.021 to avoid any ambiguity.

B. SB 5344 §§ 3, 11, 12, 13, 14, 15, 22, 23, 26, 27 – RCW 11.96A.050; 11.98.015; 11.98.019; 11.98.039; 11.98.041; 11.98.045; 11.98.051; 11.98.078; 11.106.020; 11.118.050

These sections were modified to integrate the new definitions of "permissible distributee" and "qualified beneficiary," to update statutory references, and to integrate the new statutory section regarding the duties to keep beneficiaries informed.

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C. SB 5344 § 4 – RCW 11.96A.070

This section was modified to clarify the method of delivery of a report for the purposes of starting the statute of limitations for a breach of trust claim. In addition, language related to beneficiary knowledge of a potential claim was clarified to comport with Washington evidentiary law standards.

D. SB 5344 § 5 – RCW 11.96A.120

This section was modified to include additional options for the virtual representation of another party.

E. SB 5344 § 6 – RCW 11.96A.125

This section was modified to clarify that the evidentiary standard contained in this section only applies to reformations by judicial procedure. It is longstanding law in Washington that reformations may be made by agreement under RCW 11.96A.220 without application of the evidentiary standard.

F. SB 5344 § 21 – RCW 11.96A.250

This section was modified to allow for any party to a matter, or the parent of a party to a matter (as defined by RCW 11.96A.030) to petition for the appointment of a special representative to represent the interests of a minor, or an unborn, incapacitated, unknown or unlocatable party.

G. SB 5344 § 7 – RCW 11.97.010

This section was simplified, and provisions describing the general duty of the Trustee to provide beneficiaries with trust administration information are now contained in new SB 5344 § 16.

H. SB 5344 § 8 – NEW SECTION

This new section was added to provide definitions of "permitted distributee" and "qualified beneficiary." These terms are used in the Uniform Trust Code and were incorporated into certain portions of RCW Title 11. Each definition clarifies the class of beneficiaries to whom certain notices are to be given or from whom consents are to be received.

I. SB 5344 9 – RCW 11.98.005

This section was modified to integrate the new definitions in new SB 5344 § 8. The changes also clarify when a trust may have situs in Washington if the trust document is silent as to situs or governing law.

J. SB 5344 § 22 – NEW SECTION

This new section clarifies how a named Trustee can accept or decline the position of Trustee.

K. SB 5344 § 16 – NEW SECTION

As described in this article, this new section clarifies the general duty of a Trustee to provide administration information to trust beneficiaries. This section includes language previously contained in RCW 11.97.010, with additional modifications discussed above.

L. SB 5344 § 17 – RCW 11.98.080

This section was modified to clarify the methods for consolidating trusts. The revised statute also incorporates a new method (used in the UTC), which is to provide notice of the consolidation to the qualified beneficiaries and give them an opportunity to object. If no objection is received within a 30-day period, the consolidation may take place.

M. SB 5344 § 18 – RCW 11.98.090

This section was deleted in its entirety because RCW 11.98.105, enacted in 2011, superseded this statute, whic was inadvertently not repealed at that time.

N. SB 5344 § 24 – RCW 11.103.030

Subsection (5) of this section was modified solely to clarify the language. No substantive change was made.

O. SB 5344 § 19 – RCW 11.103.040

This section was modified to clarify that no duties are owed to beneficiaries of a revocable trust other than the Trustor while the Trustor of such is living.

P. SB 5344 § 20 – RCW 11.103.050

This section was modified to clarify the information that is to be provided to start the running of the statute of limitations for contesting the validity of a revocable trust.

Q. SB 5344 § 25 – RCW 11.106.010

This section was modified to permit the application of the accounting act to trusts that are created by the court. This change is similar in purpose to the change made to RCW 11.98.009 in 2011.

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1 Karen E. Boxx & Katie S. Groblewski, *Washington Trust Laws' Extreme Makeover: Blending with the Uniform Trust Code and Taking Reform Further with Innovation in Notice, Situs and Representation*, 88 WALR 813 (2013). A copy of the complete article is currently available online at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340718*.

2 *See Restatement of Trusts* § 173 (1935), *Restatement (Second) of Trusts* § 173 (1959) and *Restatement (Third) of Trusts* § 82 (2008); *See also* Bogert § 962 (2012).

3 2013 Wash. Sess. Laws 1552, 1561 (ch. 272, § 8).

4 As of the date of publication, the sections of SB 5344 have not yet been codified.

5 2013 Wash. Sess. Laws 1552, 1567 (ch. 272, § 16(1)).

6 *Id.*

7 As a part of the duty to inform, section 16(1) of SB 5344 clarified that the Trustee is deemed to have satisfied a request regarding the trust terms if the Trustee provides a copy of the complete trust document. 2013 Wash.

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Attorney's Fees Under TEDRA

by Tiffany Gorton – Kutscher Hereford Bertram Burkart PLLC

Washington is governed by the "American rule," which requires each party to litigation to bear its own attorney's fees unless there is a specific agreement, statute authorizing or equitable basis for the court to rule otherwise. Pursuant to the Washington Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A.150, the court has discretion to award costs, including attorney's fees, to any party from any party to the proceedings, from the estate assets or from any nonprobate assets that are subject to the proceedings.[1] Likewise, this provision gives the court the broad discretion to award attorney's fees and costs as the court determines to be equitable, considering any and all factors that it deems relevant and appropriate.[2]

Courts commonly look at the following factors in exercising their discretion to award attorney's fees: preservation of the estate, benefit to the trust or estate, whether the parties acted in bad faith or good faith, whether there was a breach of fiduciary duty and whether the issue before the court was novel or unique. The broad discretion of the court makes the question of a fee award somewhat of a gamble. RCW 11.96A.150 is an excellent resource to allow the court to place the burden of litigation expenses on the proper party, especially when one has acted in bad faith. However, because these factors are not hard and fast, the outcome can be somewhat unpredictable, especially with respect to novel or unique issues, as discussed below. Therefore, as practitioners, it is important to raise the issue of ultimate responsibility for legal fees with clients as there is no guarantee that the court will award fees in favor of any party, even if it seems clear that one is completely without blame.

Generally, Washington favors the protection of estates through the award of attorney's fees.[3] Because preservation of the estate for the intended beneficiaries is one of the main concerns of Washington courts with respect to fee awards, courts have frequently found that equity requires a party who unsuccessfully brings a suit that does not benefit the estate to pay the attorney's fees of others involved in the litigation.

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2013 Updates to the Washington Trust Act

Sess. Laws 1552, 1567 (ch. 272 § 16(1)).

8 A detailed summary of the Washington case law describing the Trustee's duty to inform will be included in the author and Karen Boxx's forthcoming *Washington Law Review* article.

9 2013 Wash. Sess. Laws 1552, 1567 (ch. 272, § 16(1)).

10 2013 Wash. Sess. Laws 1552, 1567 (ch. 272, § 16(2)(a)).

11 *Id*.

12 *Id*.

13 2013 Wash. Sess. Laws 1552, 1564 (ch. 272, § 10). This section also provides a specific statutory method for declining a trusteeship and dictates what a person can do to protect trust assets without having accepted the trusteeship.

14 2013 Wash. Sess. Laws 1552, 1568 (ch. 272, § 16(4)).

15 2013 Wash. Sess. Laws 1552, 1567-1568 (ch. 272, § 16(3)).

16 There may be a concern that the separate writing is not an appropriate method to amend terms of the trust, but because the statute specifically allows for it, it should be considered an effective way to modify the Trustee's duty.

17 2013 Wash. Sess. Laws 1552, 1577 (ch. 272, § 28).

18 2013 Wash. Sess. Laws 1552, 1567 (ch. 272, § 16(2)(b)).

19 2013 Wash. Sess. Laws 1552, 1568 (ch. 272, § 16(5)).

20 80 Wash. App. 751, 761 (1996).

21 *Id*. at 758.

22 *See, e.g., Restatement (First) of Property* §§181-186, UTC Article III.

23 A classic example of virtual representation is: a trust is set up for Ann for life, remainder to Ann's children, but if any of Ann's children die before her, leaving children, then the children of the deceased child would take their parent's share. Ann has one son, Tom. Tom can virtually represent his children's contingent interests in the trust because Tom's children's interest is the same as Tom's.

24 2013 Wash. Sess. Laws 1552, 1557 (ch. 272 § 5(1)).

25 2013 Wash. Sess. Laws 1552, 1557 (ch. 272 § 5(2)).

26 For example, pursuant to RCW 11.96A.030(5), the "parties" who must be joined for an effective non-judicial binding agreement related to a trust matter would include the Trustor, if living, the Trustee, the trust beneficiaries, and where applicable, the virtual representative of any of those described persons if "the giving of notice to [the representative] would meet the notice requirements of RCW 11.96A.120." Where RCW 11.96A.120(1) specifically validates the concept of constructive notice to a represented party, the represented party does not need to be a party to the non-judicial agreement and may not ever know that it occurred (unless a conflict exists).

27 2013 Wash. Sess. Laws 1552, 1557 (ch. 272 § 5(3)).

28 Former RCW11.96A.120(3)(a) (2012).

29 The addition of this section, using verbatim UTC language, raises an interpretive question regarding whether the "substantially identical interests" standard is different from the "same interest" standard contained in the newly revised RCW 11.96A.120(6), (7) and (8). While the common law indicates that the interpretive trend for the phrase "same interest" is to equate it with "substantially identical interest," the use of the two phrases in the same statute may warrant further amendment for clarification.

30 2013 Wash. Sess. Laws 1552, 1559 (ch. 272 § 5(9)).

31 Former RCW 11.96A.120(3)(d) (2012) required that a limited power-holder have a power that permitted them to appoint trust property "among anyone other than the power-holder, his or her estate, his or her creditors and the creditors of his or her estate."

32 The XYZ Foundation may object to the representation before any binding action is taken by the Attorney General in order to nullify the representation.

33 As defined in RCW 11.96A.030.

34 RCW 11.96A.250(1)(b).

35 *See, e.g.*, RCW 11.96A.070(3).

36 *Restatement (First) of Property* § 181, comment (a).

37 *Restatement (First) of Property* §§ 181 and 185 (1936).

38 *Restatement (First) of Property* § 185, comment d (1936).

39 Begleiter, Martin D., *Serve the Cheerleader--Serve the World: An Analysis of Representation in Estate and Trust Proceedings and Under the Uniform Trust Code and other Modern Trust Codes*, 43 *Real Prop. Tr. & Est*. L.J. 311, 326, 337-338 (2008).