

October 10, 2016

David Rhine, CPA
President, Kitsap County Estate Planning Council
Cox & Lucy, CPAs, PS
1590 Bay Street
Port Orchard, Washington 98366

**Re: Washington State Bar Association Real Property, Probate and Trust Section,
Legislative Committee—Washington Trust Decanting Statute and Comments**

Dear Mr. Rhine:

I am writing on behalf of the WSBA Real Property, Probate and Trust Section Legislative Committee to ask that you review the enclosed drafts of a Washington trust “decanting” statute and related comments. Our drafting subcommittee, made up of Fred Emry of Spokane, Tony Ramsey of Seattle and me, based the draft statute on the Uniform Trust Decanting Act (“UTDA”) which was approved by the National Conference of Commissioners on Uniform State Laws in July 2015. Please note that Susan Bart, the UTDA Reporter, reviewed our draft Washington statute and made significant recommendations which are reflected in its language. While our drafting committee substantially reduced the number of statutory sections and significantly rearranged the statute, Susan Bart has told us that, in her view, the Washington statute is “substantially similar” to the UTDA.

For general background regarding the UTDA and our proposed Washington trust decanting statute, please refer to the enclosed copy of an article from Probate & Property earlier this year. As you can see, 23 states currently have some form of decanting statute. These statutes are helpful in providing a relatively simple and low-cost procedure for modernizing a relatively old irrevocable trust document, at the same time protecting the interests of the beneficiaries.

This benefit can apply to a variety of irrevocable trusts in Washington. For example, in November 2015, at the 60th Annual Estate Planning Seminar in Seattle, speakers Mary Anne Mancini and Stephan Leimberg spoke at length about trust decanting as the best way to modernize an obsolete irrevocable life insurance trust (pages 14-20 to 14-23 of their seminar outline, “Solutions For Broken Insurance Trusts”).

Before closing, I should note that similar trust decanting statutes have been touted for years as one advantage to establishing an irrevocable trust in Delaware, Nevada, South Dakota or some

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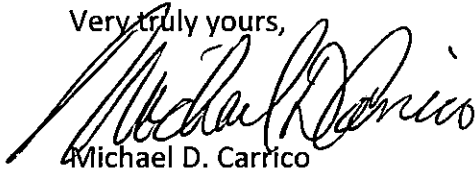
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other state which has drafted legislation to facilitate trust administration. In 2015 Washington enacted a Directed Trust Act with the clear purpose of authorizing this popular structure for irrevocable trusts in a manner similar to that used by Delaware and those other states. Enactment of the Washington trust decanting statute will be another way for Washington to ensure that it retains irrevocable trusts established by its citizens and to attract such trusts from other states.

Please note that copied on this letter is Alison Grazzini, our WSBA Legislative Affairs Manager. Please let us have your comments and questions about the enclosed materials and, if your organization favors enactment of the Washington trust decanting statute, please let us know. Thanks, and best regards.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael D. Carrico". The signature is fluid and cursive, written over the typed name.

Michael D. Carrico

of

RIDDELL WILLIAMS P.S.

Enclosures

cc: Alison Grazzini
Fred Emry
Tony Ramsey

WASHINGTON TRUST DECANTING STATUTE

DEFINITIONS, SECTION 1

In this Chapter:

(a) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A) or 26 U.S.C. Section 2514(c)(1) and any applicable regulations.

(b) "Charitable interest" means an interest in a trust which:

(1) is held by an expressly identified charitable organization and makes the organization a qualified beneficiary;

(2) benefits charitable organizations and, if the interest were held by an expressly identified charitable organization, would make the organization a qualified beneficiary; or

(3) is held solely for charitable purposes and, if the interest were held by an expressly identified charitable organization, would make the organization a qualified beneficiary.

(c) "Decanting power" or "the decanting power" means the power of a trustee under this Chapter to distribute income and principal of a first trust to one or more second trusts or to modify the terms of the first trust.

(d) "Expanded discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

(e) "First trust" means a trust over which a trustee may exercise the decanting power.

(f) "Limited discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

(g) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(h) "Qualified beneficiary" means a beneficiary that on the date of qualification is described in RCW 11.98.002(2).

(i) "Reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A) and any applicable regulations.

(j) "Second trust" means (1) a first trust after modification under this Chapter; or (2) a trust to which a distribution of income and principal from a first trust is or may be made under this Chapter.

DECANTING POWER UNDER EXPANDED DISCRETION, SECTION 2

Subject to subsection (a) and Section 7, a trustee that has expanded discretion to distribute the principal of a first trust to one or more current beneficiaries may exercise the decanting power over the principal of the first trust, subject to the following:

(a) Except as provided in Section 6, a second trust may not in an exercise of the decanting power under this Section:

(1) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection (b);

(2) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection (b); or

(3) reduce or eliminate a vested interest.

(b) Subject to subsection (a)(3) and Section 7, a second trust may in an exercise of the decanting power under this section:

(1) retain a power of appointment granted in the first trust;

(2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the trustee has expanded discretion to distribute principal to the current beneficiary; and

(4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

(c) A power of appointment described in subsections (b)(1) through (4) may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

(d) In an exercise of the decanting power under this Section, a second trust may be a trust created or administered under the law of any jurisdiction.

(e) If a trustee has expanded discretion to distribute part but not all of the principal of a first trust, the trustee may exercise the decanting power under this Section only over that part of the principal.

(f) In this section:

(1) "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

(2) "Successor beneficiary" means a beneficiary that on the date of the beneficiary's qualification is determined not to be a qualified beneficiary. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

(3) "Vested interest" means:

(A) a right to a mandatory distribution that is noncontingent as of the date of the exercise of the decanting power;

(B) a current and noncontingent right, annually or more frequently, to either a mandatory distribution of income or to withdraw income, a specified dollar amount, or a percentage of value of some or all of the trust income or principal;

(C) a presently exercisable general power of appointment; or

(D) a right to receive an ascertainable part of the trust principal on trust termination that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur.

DECANTING POWER UNDER LIMITED DISCRETION, SECTION 3

Subject to Section 7, a trustee that has limited discretion to distribute the principal of a first trust to one or more current beneficiaries may exercise the decanting power over the principal of the first trust, subject to the following:

(a) Second trusts under this Section, in the aggregate, must grant each beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(b) A power to make a distribution under the second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

- (1) the distribution is made for the benefit of the beneficiary;
 - (2) the beneficiary is incapacitated or otherwise under a legal disability or the trustee reasonably believes the beneficiary is incapacitated or under a legal disability, and the distribution is made as permitted by the first trust instrument or otherwise as permitted by law; or
 - (3) the distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary.
- (c) In an exercise of the decanting power under this Section, a second trust may be a trust created or administered under the law of any jurisdiction.
- (d) If a trustee has limited discretion to distribute part but not all of the principal of a first trust, the trustee may exercise the decanting power under this Section only over that part of the principal.

DECANTING STATUTE, PROCEDURE TO EXERCISE DECANTING POWER, SECTION 4

(a) The trustee of the first trust may exercise the decanting power under Sections 2 and 3 if:

(1) The trustee determines that the exercise of the decanting power is consistent with the trustee's fiduciary duties described in Section 8(a); and

(2) The trustee gives written notice of the trustee's intention to exercise the decanting power to each qualified beneficiary, each holder of a presently exercisable power of appointment over any part of the first trust and each person that currently has the right to remove or replace the trustee not less than sixty days prior to the effective date of the exercise.

(b) The trustee of the first trust, qualified beneficiaries and any other party as defined by RCW 11.96A.030(5) may agree to exercise by the trustee of the decanting power by means of a binding agreement under RCW 11.96A.220.

(c) The trustee of the first trust, a qualified beneficiary, a holder of a presently exercisable power of appointment over any part of the first trust and a person that currently has the right to remove or replace the trustee may petition the court under Chapter 11.96A RCW regarding exercise of the decanting power for the following relief:

(1) to provide instructions to the trustee regarding whether a proposed exercise of the decanting power is permitted under this Chapter and consistent with the fiduciary duties of the trustee;

(2) to approve an exercise of the decanting power;

(3) to determine that a proposed or attempted exercise of the decanting power is ineffective because the proposed or attempted exercise does not or did not comply with this Chapter or the proposed or attempted exercise would be or was an abuse of the trustee's discretion or a breach of fiduciary duty; or

(4) to order other relief to carry out the purposes of this Chapter.

(d) The trustee of the first trust may petition the court under Chapter 11.96A RCW regarding exercise of the decanting power for the following relief:

(1) An increase of the trustee's compensation under subsection 7(b)(2); or

(2) Modification under subsection 7(d)(2) of a provision granting a person the right to remove or replace the trustee.

(e) If there is at least one qualified beneficiary who is not a minor or who has a representative, the trustee is not required to give notice under subsection (a)(2) to a qualified beneficiary who is a minor and has no representative. If all qualified beneficiaries are minors and none has a representative, the trustee shall petition for appointment of a guardian ad litem under RCW 11.98A.160.

(f) The trustee is not required to give notice under this Section to a person who is not known to the trustee or is known to the trustee but cannot be located by the trustee after reasonable diligence.

(g) A notice under subsection (a) or petition under subsection (c) or (d) must: (1) specify the manner in which the trustee shall exercise the decanting power, (2) specify the proposed effective date for exercise of the decanting power, (3) include a copy of all governing instruments of the first trust and (4) include a copy of all governing instruments of the second trust. An exercise of the decanting power under this Section must be made in a record signed by the trustee; for this purpose, a "record signed by the trustee" shall include a court order under subsection 4(c).

(h) The decanting power may be exercised before expiration of the notice period under subsection (a) if all persons entitled to receive notice waive the period in writing. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection (a) if the trustee acted with reasonable care to comply with this Section.

DECANTING STATUTE, EFFECTS AND CONSEQUENCES OF AN EXERCISE OF THE DECANTING POWER, SECTION 5

(a) A trustee or other person that reasonably relies on the validity of a distribution of part or all of the income and principal of a trust to another trust, or a modification of a trust,

under this Chapter or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

(b) A debt, liability, or other obligation enforceable against income and principal of a first trust is enforceable to the same extent against that income and principal when held by the second trust after exercise of the decanting power.

(c) For purposes of the law of this state other than this Chapter and subject to this subsection, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust and the intent of a settlor of the second trust, if different, may be considered. The intent of the trustee may also be considered.

(d) If the trustee declares the intent to distribute all of the principal of a first trust to a second trust and the trustee makes a good faith effort to do so, subsection (d)(1) below shall apply. In all other cases, in an exercise of the decanting power:

(1) the distribution of all of the principal of a first trust to a second trust includes subsequently discovered assets otherwise belonging to the first trust and principal paid to or acquired by the first trust after the distribution of the first trust's principal; or

(2) the distribution of part of the principal of a first trust to a second trust does not include subsequently discovered assets belonging to the first trust or principal paid to or acquired by the first trust after the distribution of principal from the first trust to the second trust, and those assets or that principal remain the assets or principal of the first trust.

(e) A reference under Title 11 to a trust instrument or to terms of the trust includes the second trust, the second trust instrument, and the terms of the second trust.

(f) The title to all real estate and other property, both tangible and intangible, owned by the first trust remains vested in the second trust without reversion or impairment.

(g) An action or proceeding pending by or against the first trust may be continued by or against the second trust as if the decanting had not occurred.

(h) Except as otherwise provided by this Chapter, all of the rights, privileges, immunities, powers and purposes of the first trust remain vested in the second trust.

DECANTING STATUTE, TRUST FOR BENEFICIARY WITH A DISABILITY, SECTION 6

(a) In this section:

(1) "Beneficiary with a disability" means a beneficiary of the first trust who the trustee believes may qualify for governmental benefits based on disability, whether or not

the beneficiary currently receives those benefits or is an individual who is incapacitated within the meaning of RCW 11.88.010.

(2) "Governmental benefits" means financial aid or services from a state, federal, or other public agency.

(3) "Special needs trust" means a trust the trustee believes would not be considered a resource for purposes of determining whether the beneficiary with a disability is eligible for governmental benefits.

(b) A trustee may exercise the decanting power under Sections 2 and 3 over the property of the first trust as if the trustee had authority to distribute principal to a beneficiary with a disability subject to expanded discretion if:

(1) the second trust is a special needs trust that benefits the beneficiary with a disability; and

(2) the trustee determines that exercise of the decanting power will further the purposes of the first trust.

(c) In an exercise of the decanting power under this Section, the following rules apply:

(1) The interest in the second trust of a beneficiary with a disability may:

(A) be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. Section 1369p(d)(4)(C), as amended; or

(B) contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. Section 1369p(d)(4)(A), as amended.

(2) Section 2(a)(3) does not apply to the interests of the beneficiary with a disability.

(3) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.

DECANTING STATUTE, SPECIFIC PROHIBITIONS, SECTION 7

(a) A trustee may not exercise the decanting power to the extent the first trust instrument expressly prohibits exercise of the decanting power or a power granted by state law to the trustee to modify the trust, including but not limited to modification pursuant to Chapter 11.96A RCW, and any exercise of the decanting power shall be subject to the prohibition and the prohibition must be included in the second trust instrument or modified first trust

instrument. If the first trust instrument contains an express restriction on exercise of the decanting power or such a power to modify the trust, the exercise of the decanting power shall be subject to the restriction and the restriction must be included in the second trust instrument or modified first trust instrument.

(b) Whether or not a first trust instrument specifies a trustee's compensation, the trustee may not exercise the decanting power to increase the trustee's compensation beyond any compensation specified or above the compensation permitted by RCW 11.98.070(26) unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

(3) A change in a trustee's compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the trustee's compensation for purposes of this subsection (b).

(c) Except as otherwise provided in subsections (1), (2), and (3), a second trust instrument may not relieve a trustee from liability for breach of trust to a greater extent than the first trust instrument.

(1) A second trust instrument may provide for indemnification of a trustee of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

(2) A second trust instrument may not reduce fiduciary liability in the aggregate.

(3) Subject to subsection (2), a second trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees or statutory trust advisors, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this state other than this Chapter, this includes, but is not limited to, directed trusts.

(d) A trustee may not exercise the decanting power to modify a provision in the first trust instrument granting another person power to remove or replace the trustee unless:

(1) all qualified beneficiaries of the second trust consent to the modification in a signed record; or

(2) the court approves the modification and the modification grants a substantially similar power to another person.

(e) A second trust may have a duration that is the same as or different from the duration of the first trust. Notwithstanding the foregoing, to the extent that income and principal of a second trust is attributable to income and principal of the first trust, the second trust is subject to any maximum perpetuity, accumulation, or suspension-of-the power-of-alienation rules that were applicable to income and principal of the first trust.

(f) If a first trust contains a charitable interest, the Attorney General has the rights of a qualified beneficiary and may represent and bind the charitable interest and the Attorney General has the authority to participate in any proceedings in accordance with Chapter 11.110 RCW. If a first trust contains a charitable interest, the second trusts, in the aggregate, may not:

- (1) diminish the charitable interest;
- (2) diminish the interest of an expressly identified charitable organization that holds the charitable interest; or
- (3) alter any charitable purpose stated in the first trust instrument.

(g) If the first trust contains assets that qualified, or would have qualified but for the provisions of this Chapter other than this subsection, for a tax benefit as defined in subsection (1), the second trust instrument must not include or omit a term which would have prevented the first trust from qualifying in the same manner for, or would have reduced the amount of, that tax benefit.

(1) In this subsection (g), "tax benefit" includes any federal or state tax deduction, exemption, exclusion or other tax benefit under federal or state statute, regulation or other law, except for the benefit of being a grantor trust other than under 26 U.S.C. Section 672(f)(2)(A), including but not limited to the following:

(A) The marital deduction for gift, estate or inheritance tax purposes, including but not limited to the deductions under 26 U.S.C. Section 2056 and RCW 83.100.047;

(B) The charitable deduction for purposes of the income, gift, or estate tax under the Internal Revenue Code or a state income, gift, estate, or inheritance tax;

(C) The exclusion from the gift tax described in 26 U.S.C. Section 2503(b), including by application of 26 U.S.C. Section 2503(c);

(D) Status as a permitted shareholder in an S corporation, as defined in 26 U.S.C. Section 1361, including as a qualified subchapter-S trust with the meaning of 26 U.S.C. Section 1361(c)(2);

(E) Qualification for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c);

(F) Meeting required minimum distribution and any similar requirements under 26 U.S.C. Section 401(a)(9) and any applicable regulations; or

(G) Qualification as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A).

(2) Subject to subsection (g)(1)(G), the second trust may be a nongrantor trust, even if the first trust is a grantor trust, and except as otherwise provided in the following sentence the second trust may be a grantor trust, even if the first trust is a nongrantor trust. The trustee may not exercise the decanting power if the settlor objects in a written instrument delivered to the trustee within the notice period under Section 4(a)(2) and (A)(i) the first trust and second trust are both grantor trusts, in whole or in part, (ii) the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust and (iii) the second trust does not grant an equivalent power to the settlor or other person or (B) the first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor unless (i) the settlor has the power at all times to cause the second trust to cease to be a grantor trust or (ii) the first trust instrument contains a provision granting the settlor or another person the power to cause the first trust to cease to be a grantor trust and the second trust instrument contains the same provision.

(h) A trustee may not exercise the decanting power if RCW 11.98.200 applies to the first trust and exercise would cause RCW 11.98.200 not to apply to the second trust or modified first trust instrument.

(i) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

DECANTING STATUTE, MISCELLANEOUS, SECTION 8

(a) This Chapter applies to any express trust, within the meaning of RCW 11.98.009, other than a trust during such time as the grantor has retained the right to revoke or amend. In exercising the decanting power, the trustee shall act in accordance with the trustee's fiduciary duties, including the duty to act in accordance with the purposes of the first trust. Except as otherwise provided in the first trust instrument, for purposes of this Chapter the terms of the first trust are deemed to include the decanting power.

(b) This Chapter does not limit the power of a trustee, powerholder, or other person to distribute or appoint income and principal in further trust or to modify a trust under the trust instrument, law of this state other than this Title, a court order, or a nonjudicial agreement. This Chapter does not increase or modify the requirements for a binding agreement under RCW 11.96A.220 or the requirements for a directed trust under Chapter 11.98A RCW. This Chapter does not affect the ability of a settlor to provide in a trust instrument for the distribution or appointment in further trust of the trust income and principal or for modification of the trust instrument.

(c) This Chapter does not apply to a trust held solely for charitable purposes.

(d) This Chapter does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this Chapter.

(e) This Chapter applies to a trust created before, on, or after the effective date of this Chapter that:

(1) has its situs in this state, including a trust whose situs has been changed to this state; or

(2) provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for purposes of:

(A) administration, including a trust whose governing law for purposes of administration has been changed to the law of this state;

(B) construction of terms of the trust; or

(C) determining the meaning or effect of terms of the trust.

(f) A trustee may exercise the decanting power whether or not the trustee would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

(g) If exercise of the decanting power would be effective under this Chapter except that the second trust instrument in part does not comply with this Chapter, the exercise of the decanting power is effective and the following rules apply to the principal of the first trust subject to the exercise of the power:

(1) A provision in the second trust instrument which is not permitted under this Chapter is void to the extent necessary to comply with this Chapter.

(2) A provision required by this Chapter to be in the second-trust instrument which is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this Chapter.

(h) If a trustee of a second trust discovers that paragraph (g) applies to a prior exercise of the decanting power, the trustee shall take such appropriate corrective action as is consistent with the trustee's duties.

(i) If any provision of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable.