



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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April 24, 2018

Emily M. Thor  
Department of Water Resources  
Office of the Chief Counsel  
1416 Ninth Street, Room 1104  
Sacramento, CA 95814

Re: Your Request for Advice  
**Our File No. A-18-043**

Dear Ms. Thor:

This letter responds to your request for advice regarding the statement of economic interest disclosure provisions of the Political Reform Act (the "Act").<sup>1</sup> Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

### QUESTION

Are you required to report your interest in two trusts established for your mother's lifetime benefit on your Statement of Economic Interests (Form 700)?

### CONCLUSION

No. You are not required to report your interest in the two trusts established for your mother's lifetime benefit on your Form 700 as you receive no income from the trust and trustees for both trusts may consume and invade the trust principal for the benefit of your mother.

### FACTS AS PROVIDED BY REQUESTOR

#### Robert A. Wertsch's Estate

Your grandfather died on December 11, 2017. His two children, your mother ("Janet") and your uncle, survive him. Your grandfather held most of his assets in a revocable living trust, denominated the Robert A. Wertsch Trust ("Robert's Trust").

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Under the terms of Robert's Trust, after distribution of certain pre-residuary bequests, including a cash bequest to you of \$150,000,<sup>2</sup> the successor Trustee is to allocate one-half of the residue of Robert's Trust to a separate trust for your mother's lifetime benefit ("Robert's Trust f/b/o Janet"). The dispositive terms of Robert's Trust f/b/o Janet during Janet's lifetime include:

- Janet is entitled to all the net income of the trust each year.
- In addition to income, the Trustee shall pay to Janet, or apply for her benefit, "as much of the principal of her trust as the Trustee deems necessary for Janet's proper support, health, maintenance, and education" after considering, "to the extent the Trustee deems advisable," Janet's other income or resources.

At Janet's death, if your father survives her, 80% of the remaining balance of Robert's Trust f/b/o Janet will be held in further trust for the benefit of your father, and the remaining 20% of the trust will be distributed to Janet's issue who survive her, by right of representation. Your mother has three children and, if you survive her, your share of the trust would amount to one-third of 20%. The dispositive terms of the trust for your father's benefit, if he survives your mother, are the same as above. Specifically, your father will be entitled to all of the net income each year, and "as much of the principal" of his trust "as the Trustee deems necessary" for his "proper support, health, maintenance, and education," after considering, "to the extent the Trustee deems advisable," his other income or resources.

If your father does not survive your mother, then the entire trust estate will be distributed to your mother's surviving issue, by right of representation. Thus, in the event that you survive your mother, you would be entitled to a one-third remainder interest in the entire trust estate.

Your mother's interest in Robert's Trust f/b/o Janet is vested, since she survived your grandfather, although her trust will not be funded until the post-mortem administration of Robert's Trust is completed. Your interest as one of the three remainder beneficiaries is contingent. You will have more than a 10% interest as a remainder beneficiary if you survive your mother and father, and only if the trust principal has not been fully distributed by that point in time.

### **Harriet M. Wertsch's Estate**

Your grandmother died on October 21, 1996. Her will and codicil thereto (collectively her "Will"), were admitted to probate on December 24, 1996. Your grandfather was appointed as executor of her Will. Under the terms of her Will, after certain pre-residuary bequests, the residue of her estate was to be held in trust for your grandfather's benefit for the rest of his life. Upon his death, one-half of the remaining trust estate was to be held in further trust for the benefit of your mother for life. For reasons unknown to you, the probate proceeding for your grandmother's estate was never completed, and no order for distribution was issued for the trust for your grandfather's benefit.

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<sup>2</sup> In the Act's definition of a "gift," Section 82028(b)(5) specifically excludes "any devise or inheritance." (See also Regulation 18942(a)(5).) Therefore, you are not required to report the cash bequest from Robert's Trust on your Form 700.

At the time of your request, by reason of your grandfather's death, one-half of the residue of your grandmother's estate will ultimately be distributed to a trust for your mother's benefit. The dispositive terms of your mother's trust under the Will ("Harriet's Trust f/b/o Janet") are similar, but not identical, to those of Robert's Trust f/b/o Janet. Specifically, during your mother's lifetime:

- Janet is entitled to the entire net income of the trust, quarter-annually or more frequently.
- "If the Trustee shall deem such income payments to be insufficient," the Trustee shall pay to Janet, or apply for her benefit, "such sums out of principal as the Trustee, in the Trustee's discretion" shall deem necessary [sic] for her proper support, care and maintenance," after taking into consideration, "to the extent the Trustee shall deem advisable" any other income of resources of Janet.

At Janet's death, the remaining trust estate of Harriet's Trust f/b/o Janet will be distributed to Janet's issue who survive her, by right of representation. As you are one of three children, you will have a one-third remainder interest in your mother's trust, if you survive her and the trust has not been consumed for your mother's benefit.

Since your mother has survived your grandmother, your mother's interest in Harriet's Trust f/b/o Janet has vested. However, the trust will not be funded until the probate proceeding for your grandmother's estate has been re-opened, a new executor appointed, and an order for final distribution is entered.

### ANALYSIS

Certain state public officials must file periodic Statements of Economic Interests (hereafter SEI or Form 700) disclosing personal assets and interests that may be affected during the performance of their official duties. (Sections 87200-87350.) Public officials who are required to file SEIs are either identified in Section 87200 (statutory filers) or designated in an agency's conflict-of-interest code (designated employees or code filers). (See Sections 87300 and 87302.)

Under the Act, reportable investments and interests include "indirect" investments and interests, which are defined to include "any investment or interest owned ... by a business entity or trust in which the official ... own[s] directly, indirectly, or beneficially a 10-percent interest or greater." (Section 87103; Regulation 18234(a).) Regulation 18234 further defines when an official has a direct, indirect, or beneficial interest in a trust. Specific to your facts, Regulation 18234 provides:

"(c) For purposes of determining whether an official has an economic interest in interests in real property, sources of income, and investments of a trust, the official has a direct, indirect, or beneficial interest in a trust if the official is:

[¶] . . . [¶]

"(2) A beneficiary and:

"(A) Presently receives income; or

“(B) Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable, unless one of the following applies:

“(i) Powers exist to consume, invade, or appoint the principal for the benefit of beneficiaries other than the official and such powers are not limited by an ascertainable standard relating to the health, education, support, or maintenance of the beneficiaries; or

“(ii) Under the terms of the trust, someone other than the official can designate the persons who shall possess or enjoy the trust property or income.”

Under your facts, you do not receive income from either trust, and are not entitled to receive income therefrom during your mother’s lifetime. You have an irrevocable future right to receive trust income or principal. However, the principal of Robert’s Trust f/b/o Janet and the principal of Harriet’s Trust f/b/o Janet may be invaded for the benefit of your mother. Nevertheless, Regulation 18234(c)(2)(B)(i) establishes that an official still has a reportable interest if the power to invade is limited by an “ascertainable standard relating to the health, education, support, or maintenance of the beneficiaries other than the official.”

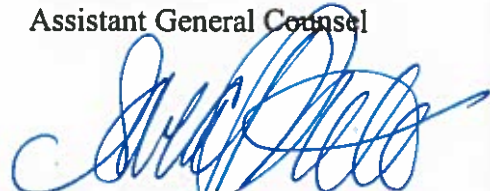
We previously advised that the power to invade trust principal “as necessary for the proper support, care and maintenance of the decedent’s wife and sister” did not limit the trustee’s discretion to an ascertainable standard. (*Van de Kamp* Advice Letter, No. A-88-169.) We have also advised that the power to invade trust principal where limited to health, education, support, and maintenance needs, as deemed necessary in the trustee’s discretion, did not amount to an ascertainable standard. (*LaPorte* Advice Letter, No. A-07-074.) In contrast, as you pointed out, the power to invade trust principal “at the trustees’ discretion, in the amount of \$25,000 per year” established an ascertainable standard by limiting disbursement to a fixed amount over a fixed period of time. (*McAndrews* Advice Letter, No. 91-403.) We did note that a “necessary or appropriate” limitation on the power to invade, standing alone, would not appear to limit the power to invade by an ascertainable standard. (*Ibid.*)

Based on your facts, the trustee of Robert’s Trust f/b/o Janet may disburse as much of the trust’s principal “as the Trustee deems necessary for Janet’s proper support, health, maintenance, and education ... to the extent the Trustee deems advisable.” Similarly, the trustee of Harriet’s Trust f/b/o Janet may disburse “such sums out of principal as the Trustee, in the Trustee’s discretion, shall deem necessary for her proper support, care and maintenance ... to the extent the Trustee shall deem advisable.” The limitations of both trusts are comparable to those imposed in the *LaPorte* and *Van de Kamp* letters where no “ascertainable standard” could be found. Therefore, the power to invade the trust principal in both Robert’s Trust f/b/o Janet and Harriet’s Trust f/b/o Janet fall within the exemption established in Regulation 18234(c)(2)(B)(i), and you are not required to report your interest in your mother’s trusts.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Brian G. Lau  
Assistant General Counsel



By: Sara K. Puricelli  
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