

The report was received and the committee was discharged.

MOTION

On motion of Senator Bottiger, the Senate Journal of the Sixtieth Day of the 1984 Regular Session of the Forty-eighth Legislature was approved.

MOTION

At 2:05 a.m., on motion of Senator Bottiger, the 1984 Regular Session of the Forty-eighth Legislature adjourned SINE DIE.

JOHN A. CHERBERG, President of the Senate.
SIDNEY R. SNYDER, Secretary of the Senate.

APPENDIX A

COMMENTS ON THE 1984 REVISION OF THE WASHINGTON
TRUST ACT

Prepared by the Trust Task Force
of the Real Property, Probate and
Trust Section, Washington State
Bar Association (See SHB 1213,
page 666)

Section references are to
Engrossed Substitute House Bill No. 1213

DELETION OF RCW 4.16.110(2)

Sec. 1 4.16.110 Actions limited to one year. Within one year:

~~((2) An action by an heir, legatee, creditor or other party interested, against an executor or administrator, for alleged misfeasance, malfeasance or mismanagement of the estate within one year from the time of final settlement, or, the time such alleged misconduct was discovered.))~~

sec. 2 4.16.370 Actions against personal representatives and trustees for breach of fiduciary duty. The statute of limitations for actions against a personal representative or trustee for breach of fiduciary duties shall be as set forth in RCW 11.96.060.

~~7.24.040 Rights of persons interested in estates, trusts, etc. A person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto.~~

~~(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or~~

~~(2) to direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or~~

~~(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (1935 c 113 §4, RRS §784-4.)~~

Comment: This section is replaced by new RCW 11.96.010.

sec. 4 11.02.005 Definitions and use of terms. When used in this title, unless otherwise required from the context:

(1) "Personal representative" includes executor, administrator, special administrator, guardian or limited guardian, and special representative.

Comment: The addition of "special representative" picks up the new designation in RCW 11.96.170.

(2) "Net estate" refers to the real and personal property of a decedent exclusive of homestead rights, exempt property, the family allowance and enforceable claims against, and debts of, the estate.

(3) "Representation" refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: After first determining who, of those entitled to share in the estate, are in the nearest degree of kinship, the estate is divided into equal shares, the number of shares being the sum of the number of persons who survive the intestate who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate but who left issue surviving the intestate; each share of a deceased person in the nearest degree shall be divided among those of ~~((his))~~ the intestate's issue who survive the intestate and have no ancestor then living who is in the line of relationship between them and the intestate, those more remote in degree taking together the share which their ancestor would have taken had he or she

survived the intestate. Posthumous children are considered as living at the death of their parent.

(4) "Issue" includes all the lawful lineal descendants of the ancestor and all lawfully adopted children.

(5) "Degree of kinship" ~~((shall))~~ means the degree of kinship as computed according to the rules of the civil law; that is, by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of these two counts.

(6) "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on ~~((his))~~ the decedent's death intestate.

(7) "Real estate" includes, except as otherwise specifically provided herein, all lands, tenements, and hereditaments, and all rights thereto, and all interest therein possessed and claimed in fee simple, or for the life of a third person.

(8) "Will" means an instrument validly executed as required by RCW 11.12.020 and includes all codicils.

Comment: This change is to assure that all references to "wills" in this statute mean validly executed wills.

(9) "Codicil" ~~shall~~ means an instrument that is validly executed in the manner provided by this title for a will and that ~~which~~ refers to an existing will for the purpose of altering or changing the same, and which need not be attached thereto.

Comment: This change was to add "validly" to parallel the change in subsection (8).

(10) "Guardian" or "limited guardian" means a personal representative of the person or estate of an incompetent or disabled person as defined in RCW 11.88.010 and the term may be used in lieu of "personal representative" wherever required by context.

(11) "Administrator" means a personal representative of the estate of a decedent and the term may be used in lieu of "personal representative" wherever required by context.

(12) "Executor" means a personal representative of the estate of a decedent appointed by will and the term may be used in lieu of "personal representative" wherever required by context.

(13) "Special administrator" means a personal representative of the estate of a decedent appointed for limited purposes and the term may be used in lieu of "personal representative" wherever required by context.

(14) "Trustee" means an original, added, or successor trustee and includes the state, or any agency thereof, when it is acting as the trustee of a trust to which Chapter 11.98 RCW applies.

~~(14)~~(15) Words that import the singular number only, may also be applied to the plural of persons and things.

~~(15)~~(16) Words importing the masculine gender only may be extended to females also. (1977 ex.s. c 80 Chap. 14; 1975 '76

2nd ex.s.c 42 Chap. 23; 1965 c 145 Chap. 11.02.005. Former RCW Sections: Subd. (3), RCW 11.04.110; subd. (4), RCW 11.04.010; subd. (5), RCW 11.04.100; subd.(6), RCW 11.04.280; subd. (7), RCW 11.04.010; subd. (8) and (9), RCW 11.12.240; subd. (14) and (15), RCW 11.102.040).

Comment: Renumbering required by inclusion of new Section (14).

11.02.010 ~~Jurisdiction in probate matters Powers of courts. The superior courts in the exercise of their jurisdiction of matters of probate shall have power to probate or refuse to probate wills, appoint personal representatives of deceased or incompetent persons and administer and settle all such estates, award processes and cause to come before them all persons whom they may deem it necessary to examine, and order and cause to be issued all such writs as may be proper or necessary, and do all things proper or incident to the exercise of such jurisdiction.~~
~~{1965 c 145 § 11.02.010. Prior. 1917 c 156 § 1, RRS § 1371, prior. 1891 c 155 § 1, Code 1881 § 1299, 1873 p 253 § 3, 1863 p 199 § 3, 1860 p 167 § 3, 1854 p 309 § 3. Formerly RCW 11.16.010.}~~

~~"Incompetent" person defined, includes minors. RCW 11.88.010.~~

~~"Personal representative" defined. RCW 11.02.005(1).~~

Comment: Revised, See RCW 11.96.010

11.02.020 ~~Powers of courts when law inapplicable, insufficient, or doubtful. It is the intention of this title that the courts mentioned shall have full and ample power and authority to administer and settle all estates of decedents and incompetent persons in this title mentioned. If the provisions of this title with reference to the administration and settlement of such estates should in any cases and under any circumstances be inapplicable or insufficient or doubtful, the court shall nevertheless have full power and authority to proceed with such~~

~~administration and settlement in any manner and way which to the court seems right and proper, all to the end that such estates may be by the court administered upon and settled. (1965 c 14 §11.02.020. Prior: 1917 c 156 § 219, RRS § 1589. Formerly RCW 11.16.020.)~~

Comment: Revised, See RCW 11.96.020

11.02.030 ~~Exercise of powers Orders, writs, process, etc.. In exercising any of the jurisdiction or powers by this title given or intended to be given, the court is authorized to make, issue and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes not inconsistent with the provisions of this title, which may be considered proper or necessary in the exercise of such jurisdiction. (1965 c 145 § 11.02.030. Prior: 1917 c 156 § 220, RRS § 1590. Formerly RCW 11.16.030.)~~

Comment: Revised, See RCW 11.96.030

11.02.050 Uniform declaratory judgments act, proceedings under.

Comment: Removed now in RCW 11.96.070

sec. 5 11.12.250 ~~[Devise or bequest]~~ Gifts by Will to trusts. A ~~[devise or bequest]~~ gift may be made by a will to a trustee ~~[or trustee]~~ of a trust ~~[created]~~ executed by ~~[the testator and/or some other person or persons]~~ any trustor or testator (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) ~~[established by written instrument executed before or concurrently with the execution of such will.]~~ if (a) the trust is identified in the testator's will and (b) its terms are evidenced either (i) in a written instrument (other than a will) executed by the trustor prior to or concurrently with the execution of the testator's will or (ii) in the will of a person who has predeceased the testator, regardless of when executed. The existence, size, or character of the corpus of the trust is immaterial to the validity of the gift. Such [devise or bequest] gift shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the testator's will or after the testator's death. Unless the will provides otherwise, the property so [devised or bequeathed] given shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given to be administered and disposed of in accordance with the [provisions] terms of the instrument establishing such the trust, including any amendments thereto, made prior to the death of the testator, and regardless of whether made before or after the execution of the will. Unless

the will provides otherwise, an express ~~entire~~ revocation of the trust prior to the testator's death ~~shall~~ invalidates the ~~devise or bequest~~ gift. Any termination of the trust other than by express revocation does not invalidate the gift. For purposes of this section, the term "gift" includes an exercise of any testamentary power of appointment. [1965 c 145 §11.12.250. Prior: 1959 c 116 §1.]

Comment: This revised statute is based on both the Uniform Probate Code and Uniform Testamentary Additions to Trust Act. The revised statute allows "pour-overs" from the testamentary estate to an unfunded trust. The reason for these changes is to protect "pour-overs" when the lawyer failed to use the technique of incorporating the terms of a trust by incorporation by reference. (See RCW 11.12.255.)

Changing the phrase "trust executed by any testator" clarifies the moment of execution and eliminates the signature of the trustee as the moment of execution.

Sec. 6 11.12.255 [New Section] Incorporation by reference. A will may incorporate by reference any writing in existence when the will is executed if the will itself manifests the testator's intent to incorporate the writing and describes the writing sufficiently to permit its identification. In the case of any inconsistency between the writing and the will, the will shall control.

Comment: This section is intended to codify the requirements for incorporation by reference as discussed in Baarslag v. Hawkins, 12 Wn. App. 756; 531 P.2d 1283 (1975); except the requirement that the will itself refer to the writing to be incorporated "as being in existence" has been omitted. The committee felt that this requirement was vague and served little, if any, useful purpose. Thus, incorporation by reference is accomplished if the will shows the testator's intent to make the incorporation and sufficiently identifies the writing to be incorporated for purposes of identification. The statute requires the writing to be in existence in fact at the time the will is executed, which is consistent with Baarslag v. Hawkins. See RCW 11.12.260 for different rules applying to incorporation of writings dealing with tangible personal property.

Sec. 7 11.12.260 [New section] Separate Writing Identifies Bequest of Tangible Personalty. (1) A will may refer to a writing that directs disposition of tangible personal property not otherwise specifically disposed of by the will, other than property used primarily in trade or business. Such a writing shall not be effective unless: (a) an unrevoked will refers to such writing, (b) the writing is either in the handwriting of, or signed by, the testator, and (c) the writing describes the items and the recipients of the property with reasonable certainty.

(2) The writing may be written or signed before or after the execution of the will and need not have significance apart

from its effect upon the dispositions of property made by the will. A writing that meets the requirements of this section shall be given effect as if it were actually contained in the will itself, except, that if any person designated to receive property in the writing dies before the testator, the property shall pass as further directed in the writing and in the absence of any further directions, the disposition shall lapse and RCW 11.12.110 shall not apply to such lapse.

(3) The testator may make subsequent handwritten or signed changes to any writing. If there is an inconsistent disposition of tangible personal property as between writings, the most recent shall control.

(4) As used in this section "tangible personal property" means articles of personal or household use or ornament, for example, furniture, furnishings, automobiles, boats, airplanes, and jewelry, as well as precious metal in any tangible form, for example, bullion or coins. The term includes articles even if held for investment purposes and encompasses tangible property that is not real property. The term does not include mobile homes or intangible property, for example, money that is normal currency or normal legal tender, evidences of indebtedness, bank accounts or other monetary deposits, documents of title, or securities.

Comment: This section is patterned after Section 2-513 of the Uniform Probate Code. It is designed to apply clearly, however, to all tangible personal property (even if held as an

investment), except property primarily used in a trade or business. The committee felt the statute should apply as broadly as possible, with the exception that property primarily used in a trade or business should require disposition by will. In spite of changes from Section 2-513 of the Uniform Probate Code, "tangible personal proeprty" is intended to have its usual meaning. That is, the term does not include intangibles such as money that is normal currency or normal legal tender, evidences of indebtedness, bank accounts or other monetary deposits, documents of title, or securities. The term is, however, intended to include precious metals in any tangible form, including bullion or coins.

The section applies only if a will has been made, thus initially providing the protections of the formalities of making a testamentary disposition. Like UPC Section 2-513, it does not require that the writing be dated, although the writing must be either in the handwriting of or signed by the testator. The committee felt that requiring a writing to be dated would result in many attempts to utilize the procedure not being validly completed and that the handwriting or signature requirement was sufficient to provide evidence of the writing's authenticity. Of course, a writing may be dated and such a date would be evidence of the time the writing was prepared. In any dispute over the time at which a writing has been prepared, the issue would be determined in court based on all relevant evidence.

The section also provides that if a person named to receive property in a writing has died before the testator, the item of property passes under the testator's will unless an alternate disposition is made in the writing itself. The committee felt this result would be the one most testators would want.

Finally, the section provides for the validity of more than one writing, with the only limitation being that the most recent writing shall control as to inconsistent dispositions in the writings, but a will specifically disposing of property will always control.

~~11.16.050 Venue. Wills shall be proved and letters testamentary or of administration shall be granted:~~

~~(1) In the county of which deceased was a resident at the time of his death.~~

~~(2) In the county in which he may have died, or in which any part of his estate may be, he not being a resident of the state.~~

~~(3) In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death. {1967 c 168 § 4, 1965 c 145 § 11.16.050. Prior. 1917 c 156 § 6, RRS § 1376, prior. Code 1981 § 1340, 1963 p 210 § 76, 1960 p 173 § 43.}~~

Comment: Revoked, See RCW 11.96.030.

Sec. 8 11.28.240 Request for special notice of proceedings in probate. At any time after the issuance of letters testamentary or of administration or certificate of qualification upon the estate of any decedent, any person interested in ~~said the~~ the estate as an heir, devisee, distributee, legatee or creditor whose claim has been duly served and filed, or the lawyer attorney for ~~such the~~ the heir, devisee, distributee, legatee, or creditor may serve upon the personal representative (~~or upon the attorney lawyer for such the personal representative~~) and file with the clerk of the court wherein the administration of ~~such the~~ the estate is pending, a written request stating that he desires special notice of any or all of the following named matters, steps or proceedings in the administration of ~~said the~~ the estate, to wit:

- (1) Filing of petitions for sales, leases, exchanges or mortgages of any property of the estate.
- (2) Petitions for any order of solvency or for nonintervention powers.
- (3) Filing of accounts.
- (4) Filing of petitions for distribution.
- (5) Petitions by the personal representative for family allowances and homesteads.
- (6) The filing of a declaration of completion.
- (7) The filing of the inventory.
- (8) Notice of presentation of personal representative's claim against the estate.
- (9) Petition to continue a going business.

(10) Petition to borrow upon the general credit of the estate.

(11) Petition for judicial proceeding under chapter 11.96 RCW.

(12) Petition to reopen an estate.

(13) Intent to distribute estate assets (other than distributions in satisfaction of specific bequests or legacies of specific dollar amounts).

(14) Intent to pay attorney's or personal representative's fees.

~~Such~~ The requests shall state the post office address of ~~such the~~ the heir, devisee, distributee, legatee or creditor, or his attorney or her lawyer, and thereafter a brief notice of the filing of any of ~~such the~~ the petitions, accounts, declaration, inventory or claim, except petitions for sale of perishable property, or other tangible personal property which will incur expense or loss by keeping, shall be addressed to ~~such the~~ the heir, devisee, distributee, legatee or creditor, or his or her attorney lawyer, at the ~~his stated~~ post office address stated in the request, and deposited in the United States post office, with the prepaid postage ~~thereon prepaid~~ at least ten days before the date of the hearing of such the petition, account or claim or of the proposed distribution or payment of fees; or personal service of ~~such the~~ the notices may be made on ~~such the~~ the heir, devisee, distributee, legatee, or creditor, or attorney, not less than five days before ~~such time hearing~~, and ~~such the~~ the personal

service shall ~~be equivalent to such~~ have the same effect as deposit in the post office, and proof of mailing or of personal service must be filed with the clerk before the date of the hearing of ~~such~~ the petition, account or claim or of the proposed distribution or payment of fees. ~~If upon the hearing it shall appear to the satisfaction of the court that the said the~~ notice has been regularly given, any distribution or payment of fees and the court shall so find in its any order or judgment made in accord therewith, and such judgment shall be final and conclusive. [1965 c 145 §11.28.240. Prior: 1941 c 206 §1; 1939 c 132 §1; 1917 c 156 §64; Rem. Supp. 1941 §1434.]

Comment: These changes were made to include judicial proceedings under chapter 11.96, distributions of estate assets (other than distributions in satisfaction of specific bequests or legacies of specific dollar amounts), and the payment of fees amongst the proceedings subject to the special notice requirements of this section.

sec. 9 11.36.021 Trustees.

(a) The following may serve as trustees:

(i) Any suitable persons over the age of eighteen years, if not otherwise disqualified;

(ii) Any trust company regularly organized under the laws of this state and national banks when authorized to do so;

(iii) Any nonprofit corporation, if the articles of incorporation or bylaws of that corporation permit the action and the corporation is in compliance with all applicable provisions of Title 24 RCW;

(iv) Any professional service corporations regularly organized under the laws of this state whose shareholder or shareholders are exclusively attorneys; and

(v) Any other entity so authorized under the laws of the state of Washington.

(b) The following are disqualified to serve as trustees:

(i) Minors, persons of unsound mind, or persons who have been convicted of any felony or a misdemeanor involving moral turpitude;

(ii) A corporation organized under Title 23A RCW that is not authorized under the laws of the state of Washington to act as a fiduciary.

Sec. 10 11.68.090 Powers of personal representative ~~under~~ with nonintervention ~~will~~ powers - Scope - Presumption of necessity. Any personal representative acting under nonintervention powers ~~((--))~~ may borrow money on the general credit of the estate and may mortgage, encumber, lease, sell, exchange, ~~((and))~~ convey, ~~((the real and personal property of the decedent, and borrow money on the general credit of the estate,))~~ and otherwise do anything a trustee may do under Chapters 11.98, 11.100 and 11.102 RCW with regard to the assets of the estate, both real and personal, all without an order of the court ~~((that))~~ and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of court. Any ~~((other))~~ party to any such transaction and his successors in interest shall be entitled to have it conclusively presumed that such transaction is necessary for the administration of the decedent's estate.

Comment: This change removes any doubt as to whether the nonintervention personal representative's fiduciary powers are more restrictive than the fiduciary powers of a trustee. As changed, the nonintervention personal representative has the same powers as a trustee in the administration of the estate.

sec. 11 11.68.110 Declaration of completion of probate - Contents - Filing - Form - Notice - Waiver of notice. If a personal representative who has acquired nonintervention powers ~~shall~~ does not apply to the court for either of the final decrees provided for in RCW 11.68.100 as now or hereafter amended, the personal representative shall, when the administration of the estate has been completed, file a declaration to that effect, which declaration shall state as follows:

(1) The date of the decedent's death, and his residence at the time of death, whether or not the decedent died testate or intestate, and if testate, the date of his last will and testament and the date of the order admitting ~~said~~ the will to probate;

(2) That each creditor's claim which was justly due and properly presented as required by law has been paid or otherwise disposed of by agreement with the creditor, and that the amount of state inheritance and federal estate tax due as the result of the decedent's death has been determined, settled, and paid;

(3) The personal representative has completed the administration of the decedent's estate without court intervention, and the estate is ready to be closed;

(4) If the decedent died intestate, the names, addresses (if known), and relationship of each heir of the decedent, together with the distributive share of each ~~said~~ heir; and

(5) The amount of fees paid or to be paid to each of the following: (a) Personal representative or representatives, (b)

~~attorney~~ lawyer or ~~attorneys~~ lawyers, (c) appraiser or appraisers, and (d) accountant or accountants; and that the personal representative believes ~~said~~ the fees to be reasonable and does not intend to obtain court approval of the amount of ~~said~~ the fees or to submit an estate accounting to the court for approval.

Subject to the requirement of notice as provided in this section, unless an heir, devisee, or legatee of a decedent ~~shall~~ petitions the court either for an order requiring the personal representative to obtain court approval of the amount of fees paid or to be paid to the personal representative, ~~his attorneys~~ lawyers, appraisers, or accountants, or for an order requiring an accounting, or both, within thirty days from the date of filing a declaration of completion of probate, the personal representative will be automatically discharged without further order of the court and his powers will cease thirty days after the filing of ~~said~~ the declaration of completion of probate, and ~~said~~ the declaration of completion of probate shall, at said time, be the equivalent of the entry of a decree of distribution in accordance with the provisions of chapter 11.76 RCW for all legal intents and purposes.

Within five days of the date of the filing of the declaration of completion, the personal representative or his attorney shall mail a copy of ~~said~~ the declaration of completion to each heir, legatee, or devisee of the decedent (who has not waived notice of said filing, in writing, filed, in the cause) together

with a notice which shall be substantially as follows:

CAPTION
OF
CASE

NOTICE OF FILING OF
DECLARATION OF COMPLETION
OF PROBATE

NOTICE IS ~~HEREBY~~ GIVEN that the attached Declaration of Completion of Probate was filed by the undersigned in the above-entitled court on the ____ day of _____, 19____; unless you ~~shall~~ file a petition in the above-entitled court requesting the court to approve the reasonableness of ~~said~~ the fees, or for an accounting, or both, and serve a copy thereof upon the personal representative or his ~~attorney~~ or her lawyer, within thirty days after the date of the ~~said~~ filing, the amount of fees paid or to be paid will be deemed reasonable, the acts of the personal representative will be deemed approved, and the personal representative will be automatically discharged without further order of the court, and the Declaration of Completion of Probate will be final and deemed the equivalent of a Decree of Distribution entered under chapter 11.76 RCW.

If you file and serve a petition within the period specified, the undersigned will request the court to fix a time and place for the hearing of ~~said~~ your petition, and you will be notified of the time and place thereof, by mail, or personal service, not less than ten days before the hearing on ~~said~~ the petition.

Dated this ____ day of _____, 19__.

Personal Representative

If all heirs, devisees, and legatees of the decedent ~~shall~~ waive, in writing, the notice required by this section, the personal representative ~~shall~~ will be automatically discharged without further order of the court and the declaration of completion of probate will become effective as a decree of distribution upon the date of filing thereof. In those instances where the personal representative has been required to furnish bond, and a declaration of completion ~~shall have been~~ is filed pursuant to this section, any bond furnished by the personal representative shall be automatically discharged upon the discharge of the personal representative. [1977 ex.s. c 234 §26; 1974 ex.s. c 117 §23.]

Comment: Amendments to this section simply clarify that the personal representative is automatically discharged in 30 days if no person objects to the Declaration of Completion.

Sec. 12 11.92.040 Duties of guardian or limited guardian in general. It shall be the duty of the guardian or limited guardian:

(1) To make out and file within three months after his or her appointment a verified inventory of all the property of the incompetent or disabled person which ~~((shall))~~ comes to his or her possession or knowledge, including a statement of all encumbrances, liens, and other secured charges on any item;

(2) To file annually, within thirty days after the anniversary date of ~~((his))~~ the guardian's or limited guardian's appointment, and also within thirty days after termination of ~~((his))~~ the appointment, a written verified account of ~~((his))~~ the administration: PROVIDED, That the court in its discretion may allow ~~((such))~~ reports at intervals of up to thirty-six months, with instruction to the guardian or limited guardian that any substantial increase in income or assets or substantial change in the incompetent's or disabled person's condition shall be reported within thirty days of ~~((such))~~ the substantial increase or change;

(3) Consistent with the powers granted by the court, if he or she is a guardian or limited guardian of the person, to care for and maintain the incompetent or disabled person, assert his or her rights and best interests, and provide timely, informed consent to necessary medical procedures, and if the incompetent or disabled person is a minor, to see that the incompetent or disabled person is properly trained and educated and that the

incompetent or disabled person has the opportunity to learn a trade, occupation, or profession. As provided in RCW 11.88.125 as now or hereafter amended, the standby guardian may provide timely, informed consent to necessary medical procedures if the guardian or limited guardian cannot be located within four hours after the need for such consent arises. The guardian or limited guardian of the person may be required to report the condition of his or her incompetent or disabled person to the court, at regular intervals or otherwise as the court may direct:

PROVIDED, That no guardian, limited guardian, or standby guardian may involuntarily commit for mental health treatment, observation, or evaluation an alleged incompetent or disabled person who is, himself or herself, unable or unwilling to give informed consent to such commitment unless the procedures for involuntary commitment set forth in chapters 71.05 or 72.23 RCW are followed: PROVIDED FURTHER, That nothing in this section shall be construed to allow a guardian, limited guardian, or standby guardian to consent to:

- (a) Therapy or other procedure which induces convulsion;
- (b) Surgery solely for the purpose of psychosurgery;
- (c) Amputation;
- (d) Other psychiatric or mental health procedures which are intrusive on the person's body integrity, physical freedom of movement, or the rights set forth in RCW 71.05.370.

A guardian, limited guardian, or standby guardian who believes such procedures to be necessary for the proper care and maintenance of the incompetent or disabled person shall petition the court for an order unless the court has previously approved ~~((such))~~ that procedure within thirty days immediately past. The court may make such order only after an attorney is appointed in accordance with RCW 11.88.045, as now or hereafter amended, if none has heretofor appeared, notice is given, and a hearing is held in accordance with RCW 11.88.040, as now or hereafter amended;

(4) If he or she is a guardian or limited guardian of the estate, to protect and preserve it, to apply it as provided in this chapter, to account for it faithfully, to perform all of the duties required ~~((of him))~~ by law, and at the termination of the guardianship or limited guardianship, to deliver the assets of the incompetent or disabled person to the persons entitled thereto. Except as provided to the contrary herein, the court may authorize a guardian or limited guardian to do anything that a trustee can do under the provisions of RCW ~~((30.99.070))~~ 11.98.070 for a period not exceeding one year from the date of the order or for a period corresponding to the interval in which the guardian's or limited guardian's report is required to be filed by the court pursuant to subsection (2) of this section, whichever period is longer;

(5) To invest and reinvest the property of the incompetent or disabled person in accordance with the rules applicable to

investment of trust estates by trustees as provided in chapter ~~((30-24))~~ 11.100 RCW, except that:

(a) No investments shall be made without prior order of the court in any property other than unconditional interest bearing obligations of this state or of the United States and in obligations the interest and principal of which are unconditionally guaranteed by the United States, and in share accounts or deposits which are insured by an agency of the United States government. Such prior order of the court may authorize specific investments, or, in the discretion of the court, may authorize the guardian or limited guardian during a period not exceeding one year following the date of the order or for a period corresponding to the interval in which the guardian's or limited guardian's report is required to be filed by the court pursuant to subsection (2) of this section, whichever period is longer, to invest and reinvest as provided in chapter ~~((30-24))~~ 11.100 RCW without further order of the court;

(b) If it is for the best interests of the incompetent or disabled person that a specific property be used by the incompetent or disabled person rather than sold and the proceeds invested, the court may so order:

(6) To apply to the court for an order authorizing any disbursement on behalf of the incompetent or disabled person: PROVIDED, HOWEVER, That the guardian or limited guardian of the estate, or the person, department, bureau, agency, or charitable organization having the care and custody of an incompetent or

disabled person, may apply to the court for an order directing the guardian or limited guardian of the estate to pay to the person, department, bureau, agency, or charitable organization having the care and custody of an incompetent or disabled person, or if the guardian or limited guardian of the estate has the care and custody of the incompetent or disabled person, directing the guardian or limited guardian of the estate to apply an amount weekly, monthly, quarterly, semi-annually, or annually, as the court may direct, to be expended in the care, maintenance, and education of the incompetent or disabled person and of his or her dependents. In proper cases, the court may order payment of amounts directly to the incompetent or disabled person for his or her maintenance or incidental expenses. The amounts authorized under this section may be decreased or increased from time to time by direction of the court. If payments are made to another under ~~((such))~~ an order of the court, the guardian or limited guardian of the estate is not bound to see to the application thereof.

Comment: revised by Code revisor's office.

Sec. 13 11.92.140 Gifts from Guardianship Funds. The court, upon the petition of a guardian of the estate of an incompetent or disabled person (collectively hereafter referred to in this section as "incompetent"), other than the guardian of a minor, and after such notice as the court directs and other notice to all persons interested as required by Chapter 11.96 RCW, may authorize the guardian to take any action, or to apply funds not required for the incompetent's own maintenance and support, in any fashion the court approves as being in keeping with the incompetent's wishes so far as they can be ascertained and as designed to minimize insofar as possible current or prospective state or federal income and estate taxes, and to provide for gifts to such charities, relatives and friends as would be likely recipients of donations from the incompetent.

The action or application of funds may include but shall not be limited to the making of gifts, to the conveyance or release of the incompetent's contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to the exercise or release of the incompetent's powers as donee of a power of appointment, the making of contracts, the creation of revocable or irrevocable trusts of property of the incompetent's estate which may extend beyond the incompetent's disability or life, the exercise of options of the incompetent to purchase securities or other property, the exercise of the incompetent's right to elect options and to change beneficiaries

under insurance and annuity policies, and the surrendering of policies for their cash value, the exercise of the incompetent's right to any elective share in the estate of the incompetent's deceased spouse, and the renunciation or disclaimer of any interest acquired by testate or intestate succession or by inter-vivos transfer.

The guardian in the petition shall briefly outline the action or application of funds for which approval is sought, the results expected to be accomplished thereby and the tax savings expected to accrue. The proposed action or application of funds may include gifts of the incompetent's personal or real property. Gifts may be for the benefit of prospective legatees, devisees or heirs apparent of the incompetent or may be made to individuals or charities in which the incompetent is believed to have an interest. Gifts may or may not, in the discretion of the court, be treated as advancements to donees who would otherwise inherit property from the incompetent under the incompetent's will or under the laws of descent and distribution. The guardian shall also indicate in the petition that any planned disposition is consistent with the intentions of the incompetent insofar as they can be ascertained, and if the incompetent's intentions cannot be ascertained, the incompetent will be presumed to favor reduction in the incidence of the various forms of taxation and the partial distribution of the incompetent's estate as provided in this section. The guardian shall not, however, be required to include

as a beneficiary any person whom there is reason to believe would be excluded by the incompetent.

No guardian may be required to file a petition as provided in this section, and a failure or refusal to so petition the court does not constitute a breach of the guardian's fiduciary duties.

Comment: This statute is modeled after a 1982 Rhode Island statute. Similar, but less specific authority for making gifts from incompetent's estates is found in Section 5-408 of the Uniform Probate Code. At this time, 32 states have either adopted the Uniform Probate Code or have statutes which specifically authorize gifts from guardianships for reasons other than support. Adding to these states the number of states which have adopted the doctrine of substituted judgment in their common law clearly shows that the doctrine of substituted judgment is the majority rule in the United States today.

Sec. 14 11.92.150 Request for special notice of proceedings. At any time after the issuance of letters of guardianship in the estate of any incompetent or disabled person, any person interested in ~~said~~ the estate, or in ~~such~~ the incompetent or disabled person, or any relative of ~~such~~ the incompetent or disabled person, or any authorized representative of any agency, bureau, or department of the United States government from or through which any compensation, insurance, pension or other benefit is being paid, or is payable, may serve upon ~~such~~ the guardian or

limited guardian, and file with the clerk of the court in which ~~wherein~~ the administration of ~~such~~ the guardianship or limited guardianship estate is pending, a written request stating that special notice is desired of any or all of the following matters, steps or proceedings in the administration of such estate:

(1) Filing of petition for sales, exchanges, leases, mortgages, or grants of easements, licenses or similar interests in any property of the estate.

(2) Filing of all intermediate or final accountings or accountings of any nature whatsoever.

(3) Petitions by the guardian or limited guardian for family allowances or allowances for the incompetent or disabled person or any other allowance of every nature from the funds of the estate.

(4) Petition for the investment of the funds of the estate.

(5) Petition to terminate guardianship or limited guardianship or petition for adjudication of competency.

(6) Petition for judicial proceedings under chapter 11.96 RCW.

~~Such~~ The request for special written notice shall designate the name, address and post office address of the person upon whom ~~such~~ the notice is to be served and no service shall be required under this section and RCW 11.96.160 as now or hereafter amended other than in accordance with ~~such~~ the designation unless and until a new designation shall have been made.

When any account, petition, or proceeding is filed in ~~such~~ the estate of which special written notice is requested ~~as herein provided~~, the court shall fix a time for hearing thereon which shall allow at least ten days for service of ~~such~~ the notice before ~~such~~ the hearing; and notice of ~~such~~ the hearing shall be served upon the person designated in such written request at least ten days before the date fixed for ~~such~~ the hearing. The service may be made by leaving a copy with the person designated, or his or her authorized representative, or by mailing through the United States mail, with postage prepaid to the person and place designated. [1975 1st ex.s. c 96, §30; 1969 c 18 §1; 1965 c 145 §11.92.150. Prior: 1925 ex.s. c 104 §1; RRS §1586-1.]

Comment: This is a housekeeping change to include judicial proceedings under chapter 11.96 in the list of requested notices.

CHAPTER 11.93

UNIFORM GIFTS TO MINORS ACT

11.93.010	Definitions
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Sec. 16 11.93.010 Definitions. In this chapter, unless the context otherwise requires:

(1) ~~An "adult" is a person who has attained the age of eighteen years.~~

Comment: This change is designed to make gifts to minors under Washington law parallel to federal tax law.

(1) A "bank" is a bank, trust company, national banking association, or mutual savings bank.

(2) A "broker" is a person lawfully engaged in the business of effecting transactions in securities for the account of others. The term includes a bank which effects such transactions. The term also includes a person lawfully engaged in buying and selling securities for his or her own account, through a broker or otherwise, as a part of a regular business.

(3) "Court" means the superior courts of the state of Washington.

(4) The "custodial property" includes:

(a) ~~Any property transferred to All securities, life insurance policies, annuity contracts and money under the supervision of the same custodian for the same minor as a consequence of a gift or gifts made to the minor in a manner prescribed in this chapter.~~

(b) the income from the custodial property; and

(c) the proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment, surrender or

other disposition of such custodial property. ~~securities, money, life insurance policies, annuity contracts and income.~~

(5) A "custodian" is a person who is eighteen years or older and is so designated as custodian in a manner prescribed in this chapter; the term includes a successor custodian.

Comment: This change allows a person eighteen or older to be a custodian, even though the new changes to RCW 11.93.040(4) require the custodianship to continue to age twenty-one.

(6) A "financial institution" is a bank, a federal savings and loan association, a savings institution chartered and supervised as a savings and loan or similar institution under federal law or the laws of a state or a federal credit union or credit union chartered and supervised under the laws of a state; and "insured financial institution" is one, deposits (including a savings, share, certificate or deposit account) in which are, in whole or in part, insured by the federal deposit insurance corporation, or by the federal savings and loan insurance corporation, or by a deposit insurance fund approved by this state.

(7) A "guardian" of a minor means the general guardian, guardian, tutor or curator of the minor's ~~his~~ property, or estate appointed or qualified by a court of this state or another state.

(8) An "issuer" is a person who places or authorizes the placing of his or her name on a security (other than as a transfer agent) to evidence that it represents a share, participation or other interest in his or her property or in an enterprise or to evidence his or her duty or undertaking to

perform an obligation evidenced by the security, or who becomes responsible for or in place of any such person.

(9) A "legal representative" of a person is his or her personal representative, executor or the administrator, general guardian, guardian, committee, conservator, tutor or curator of his or her property or estate.

Comment: "Personal representative" was added to parallel RCW 11.02.005(1).

(10) A "life insurance policy or annuity contract" means a life insurance policy or annuity contract issued by an insurance company authorized to do business in this state on the life of a minor to whom a gift of the policy or contract is made in the manner prescribed in this chapter or on the life of a member of the minor's family.

(11) A "member" of a "minor's family" means any of the minor's parents, grandparents, brothers, sisters, uncles and aunts, whether of the whole blood or the half blood, or by or through legal adoption, a step parent or person who has raised a child without the formality of a guardianship or a close family friend.

Comment: This change is to increase the class of permitted successor custodians under RCW 11.93.020.

(12) A "minor" is a person who has not attained the age of ~~eighteen~~ twenty-one years.

Comment: This change is designed to make gifts to minors under Washington law parallel to federal tax law.

(13) A "security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, any interest in a general or limited partnership, collateral trust certificate, transferable share, voting trust certificate, or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing. The term does not include a security of which the donor is the issuer. A security is in "registered form" when it specifies a person entitled to it or to the rights it evidences and its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer.

Comment: The additional language in this section specifies that partnership interests may be the subject of gifts to minors under this chapter.

(14) A "transfer agent" is a person who acts as authenticating trustee, transfer agent, registrar or other agent for an issuer in the registration of transfers of its securities or in the issue of new securities or in the cancellation of surrendered securities.

(15) A "trust company" is a bank or corporation organized under the laws of the State of Washington which is authorized to engage in trust business.

(16) A "real property interest" includes any note, mortgage, contract to purchase or sell real property, option to purchase or to sell real property, deed evidencing any title to or interest in real property, or, in general, any interest or instrument commonly recognized as evidencing or purporting to evidence an interest in real property, however minimal. The term does not include a "security" within the definition set forth in subsection (12).

Comment: Formerly RCW 21.25.010(12).

Severability -- 1971 ex.s. c 292; See note following RCW 26.28.010.

Effective date -- 1967 ex.s. c 88; "The effective date of this 1967 act is July 1, 1967." [1967 ex.s. c 88 §20.] This applies to RCW 21.24.010-21.24.040, 21.24.060, 21.24.070, 21.24.091 and 21.25.010-21.25.900.

Severability -- 1967 ex.s. c 88; See RCW 21.24.900.

Comment: This chapter was formerly RCW Chapter 21.24 Uniform Gifts to Minors Act and RCW Chapter 21.25-Gifts of Realty to Minors Act. The latter chapter (RCW Chapter 21.25) has been eliminated as unnecessary and now RCW 11.93 provides for gifts of personal property and real property to a minor. The age of majority for RCW 11.93 has been returned to twenty-one to parallel federal tax law.

sec. 17 11.93.020 Manner of Making Gift. (1) ~~An adult person who is eighteen years or older may, outright or by a trust agreement executed during his or her lifetime or by will testamentary disposition, make or provide for a gift of tangible or intangible personal property, including securities, money, life insurance policies, annuity contracts, or real property interests + security or money or a life insurance policy or annuity contract or money~~ to a person who is a minor on the date of the gift or distribution:

(a) If the subject of the gift is a security in registered form, by registering it in the name of the donor, another adult person who is eighteen years or older or a trust company, followed, in substance, by the words: "as custodian for (name of minor) under the Washington Uniform Gifts to Minors Act,"

(b) If the subject of the gift is a security not in registered form, by delivering it to an adult person who is eighteen years or older other than the donor or a trust company, accompanied by a statement of gift in the following form, in substance, signed by the donor and the person designated as custodian:

"GIFTS UNDER THE WASHINGTON UNIFORM GIFTS TO MINORS ACT

I, (name of donor) hereby deliver to (name of custodian) as custodian for (name of minor) under the Washington Uniform Gifts to Minors Act, the following ~~security(ies)~~ property: (Insert an appropriate description of the tangible or intangible property

~~security or securities~~ delivered sufficient to identify it or them).

Dated: _____
(Signature of donor)

(Name of custodian) hereby acknowledges receipt of the above described ~~security(ies)~~ property as custodian for the above minor under the Washington Uniform Gifts to Minors Act.

Dated: _____
(Signature of custodian)

(c) If the subject of the gift is money, by paying or delivering it to a broker or domestic financial institution for credit to an account in the name of the donor, another ~~adult~~ person who is eighteen years or older or a trust company, followed, in substance, by the words: "as custodian for (name of minor) under the Washington Uniform Gifts to Minors Act."

(d) If the subject of the gift is a real property interest, and constitutes a recordable interest or charge in or against real property in the records of the county auditor or recorder, by registering it in the name of the donor, another person who is eighteen years or older or a trust company, followed, in substance, by the words: "as custodian for (name of minor) under the Washington Uniform Gifts to Minors Act."

Comment: Formerly RCW 21.25.020.

(e) If the subject of the gift is a life insurance policy or annuity contract, by causing the ownership of the policy or contract to be registered with the issuing insurance

company in the name of the donor, another adult person who is eighteen years or older, or a trust company, followed, in substance, by the words: "as custodian for (name of minor) under the Washington Uniform Gifts to Minors Act."

(f) If the gift is by will or as a distribution pursuant to a trust agreement, by the legal representative or trustee delivering the subject of the gift to the person, who is eighteen years or older, or a trust company designated by the decedent or settlor to serve as custodian for the minor under the Washington Uniform Gifts to Minors Act or similar Uniform Act of the domicile of the designated custodian and causing the subject of such gift to be registered in the name of that custodian, followed, in substance, by the words: "as custodian for (name of minor) under the Washington (or, alternatively, state of the custodian's domicile) Uniform Gifts to Minor's Act." If the decedent or settlor fails to designate a specific custodian or if the designated custodian dies or is unable or unwilling to serve, the legal representative, with the approval of the court having jurisdiction over the decedent's estate, or the trustee may designate a member of the minor's family, who is eighteen years or older, a guardian of the minor, or a trust company as custodian. The legal representative or trustee may designate himself or herself as custodian, provided he or she falls within the class of persons or entities described in the foregoing sentence. The receipt of the custodian shall constitute a sufficient release and discharge of further accountability by the

legal representative or trustee for the gift and acceptance of the custodianship by the custodian.

Comment: This section confirms that a decedent or settlor has the right to direct distribution of property in a will or trust to a minor in the form of a gift under this chapter.

(2) Each gift made in a manner prescribed in subsection (1) may be made to only one minor and only one person may be a custodian.

(3) A donor who makes a gift to a minor in a manner prescribed in subsection (1) shall promptly do all things within his or her power to put the subject of the gift in the possession and control of the custodian, but neither the donor's failure to comply with this subsection, nor his or her designation of an ineligible person as custodian, nor renunciation by the person designated as custodian affects the consummation of the gift.

(4) The legal representative of an estate to whom a certificate of qualification, or letters testamentary or of administration are issued may, with the approval of the court having jurisdiction over the decedent's estate, or the trustee of a trust of which a minor is a distributee or beneficiary may pay or transfer to a custodian for the minor under this Act or a similar Uniform Act of the jurisdiction in which the minor may be domiciled, in the form and manner prescribed in paragraphs (a) through (e) of subsection (1) or comparable provisions of the Uniform Act of the other jurisdiction, any money, security or other property qualifying for custodial gifts which is

distributable to the minor. The legal representative or trustee may make distribution in this manner if the legal representative or the trustee deems it to be in the best interests of the minor, except where the decedent, settlor or court authorizing the distribution has expressly directed that distribution of the property due such minor shall not be made in the manner provided for in this subsection. The legal representative, with the approval of the court having jurisdiction over the decedent's estate, or the trustee shall designate a member of the minor's family, who is eighteen years or older, a guardian of the minor, or a trust company as custodian. The legal representative or trustee may designate himself or herself as custodian, provided he or she falls within the class of persons or entities described in the prior sentence. The provisions of this Chapter shall govern the custodianship in the same manner as though the legal representative or trustee were the donor. The receipt of the custodian shall constitute a sufficient release of the transferor and discharge of further accountability by the legal representative or trustee for the property distributed and acceptance of the custodianship by the custodian.

Comment: This section gives a personal representative or trustee the right to direct distribution of property due a minor in the form of a gift under this chapter, even if the controlling instrument does not expressly so empower the personal representative or trustee.

(5) Only property that could be the subject of a lifetime gift pursuant to this Chapter may be distributed under subsections (1)(f) and (4) of this section.

(6) This section is applicable to gifts made before or after the effective date of this 1984 Act and regardless of whether the persons who made the gifts are alive on that date.

Comment: Formerly RCW 21.24.020.

Sec. 18 11.93.030 Effect of gift. (1) A gift made in a manner prescribed in this chapter is irrevocable and conveys to the minor indefeasibly vested legal title to the security, real property, life insurance policy, annuity contract or money given, but no guardian of the minor has any right, power, duty or authority with respect to the custodial property except as provided in this chapter.

Comment: To add real estate from former RCW Chapter 21.25.

(2) By making a gift in a manner prescribed in this chapter, the donor incorporates in ~~his~~ the gift all the provisions of this chapter and grants to the custodian, and to any issuer, transfer agent, bank, financial institution, life insurance company, broker or third person dealing with a person designated as custodian, the respective powers, rights and immunities provided in this chapter. [1967 ex.s. c 88 §3; 1959 c 202 §3.]

Comment: Formerly RCW 21.24.030.

sec. 19 11.93.040 Duties and powers of custodian. (1) The custodian shall collect, hold, manage, invest and reinvest the custodial property.

(2) The custodian shall pay over to the minor for expenditure by the minor ~~him~~, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his or her discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or herself or of any other person to support the minor or his or her ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

(3) The court, on the petition of a parent or guardian of the minor or of the minor, if ~~he~~ the minor has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by ~~him~~ the minor or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education.

(4) To the extent that the custodial property is not so expended, the custodian shall deliver or pay it over to the minor on ~~his~~ attaining the age of eighteen ~~eighteen~~ twenty-one years, or, if the minor dies before attaining the age of ~~eighteen~~ twenty-one years, ~~he~~ shall thereupon deliver or pay it over to the estate of the minor.

Comment: This provision is changed to twenty-one years to parallel federal tax law.

(5) The custodian, notwithstanding statutes restricting investments by fiduciaries, shall invest and reinvest the custodial property as would a prudent person ~~man~~ of discretion and intelligence who is seeking a reasonable income and the preservation of ~~his~~ capital, except that he or she may, in his or her discretion and without liability to the minor or his or her estate, retain a security given to the minor in a manner prescribed in this chapter or hold money so given in an account in a financial institution to which it was paid or delivered by the donor.

(6) The custodian may sell, exchange, convert, surrender or otherwise dispose of custodial property in the manner, at the time or times, for the price or prices and upon the terms he deems advisable. The custodian ~~He~~ may vote in person or by general or limited proxy a security which is custodial property. ~~He~~ The custodian may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of an issuer, a security which is custodial property, and to the sale, lease, pledge or mortgage of any property by or to such an issuer, and to any other action by such an issuer. ~~He~~ The custodian may execute and deliver any and all instruments in writing which ~~he~~ the custodian deems advisable to carry out any ~~of his~~ power as custodian.

(7) The custodian shall register each security which is custodial property and in registered form in the name of the custodian, followed, in substance, by the words: "as custodian for (name of minor) under the Washington Uniform Gifts to Minors Act." The custodian shall hold all money which is custodial property in an account with a broker or in an insured financial institution in the name of the custodian, followed, in substance, by the words: "as custodian for (name of minor) under the Washington Uniform Gifts to Minors Act." The custodian shall keep all other custodial property separate and distinct from ~~his~~ the custodian's own property in a manner to identify it clearly as custodial property.

(8) The custodian shall keep records of all transactions with respect to the custodial property and make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if ~~he~~ the minor has attained the age of fourteen years.

(9) A custodian has, with respect to the custodial property, in addition to the rights and powers provided in this chapter, all the rights and powers which a guardian has with respect to property not held as custodial property, and all the rights and powers of a trustee under RCW 11.98.070.

(10) If the subject of the gift is a life insurance policy or annuity contract, the custodian:

(a) in ~~his~~ the capacity as custodian, has all the incidents of ownership in the policy or contract to the same

extent as if ~~he~~ the custodian were the owner, except that the designated beneficiary of any policy or contract on the life of the minor shall be the minor's estate and the designated beneficiary of any policy or contract on the life of a person other than the minor shall be the custodian as custodian for the minor for whom ~~he~~ the custodian is acting; and

(b) may pay premiums on the policy or contract out of the custodial property. [1971 ex.s. c 292 §31; 1967 ex.s. c 88 §4; 1959 c 202 §4.]

Severability -- 1971 ex.s. c 292: See note following RCW 26.28.010.

Comment: Formerly RCW 21.24.040. This change gives the custodian the powers of a trustee under new RCW 11.98.070 and thus, among other things, clarifies that the custodian can borrow and receive interest free loans.

Sec. 20 11.93.050 Custodian's expenses, compensation, bond, and liabilities.

(1) A custodian is entitled to reimbursement from the custodial property for ~~his~~ reasonable expenses incurred in the performance of ~~his~~ custodial duties.

(2) A custodian may act without compensation for ~~his~~ services.

(3) Unless he or she is a donor, a custodian may receive from the custodial property reasonable compensation for his or her services determined by one of the following standards in the order stated:

- (a) A direction by the donor when the gift is made;
- (b) An order of the court.

(4) Except as otherwise provided in this chapter, a custodian shall not be required to give a bond for the performance of his or her duties.

(5) A custodian not compensated for ~~his~~ services is not liable for losses to the custodial property unless they result from ~~his~~ bad faith, intentional wrongdoing or gross negligence or from ~~his~~ failure to maintain the standard of prudence in investing the custodial property provided in this chapter. [1959 c 202 §5.]

Comment: Formerly RCW 21.24.030.

Sec. 21 11.93.060 Exemption of third persons from liability. No issuer, transfer agent, bank, life insurance company, broker or other person or financial institution acting on the instructions of or otherwise dealing with any person purporting to act as a donor or in the capacity of a custodian is responsible for determining whether the person designated as custodian by the purported donor or by the custodian or purporting to act as a custodian has been duly designated or whether any purchase, sale or transfer to or by or any other act of any person purporting to act in the capacity of custodian in accordance with or authorized by this chapter, or is obliged to inquire into the validity or propriety under this chapter of any instrument of instructions executed or given by a person purporting to act as a donor or in

the capacity of a custodian, or is bound to see to the application by any person purporting to act in the capacity of a custodian of any money or other property paid or delivered to ~~him~~ the custodian. No issuer, transfer agent, bank, life insurance company, broker or other person or financial institution acting on any instrument of designation of a successor custodian, executed as provided in subsection (1) of RCW 11.93.070, as now or hereafter amended, by a minor to whom a gift has been made in a manner prescribed in this chapter, and who has attained the age of fourteen years, is responsible for determining whether the person designated by the minor as successor custodian has been duly designated, or is obliged to inquire into the validity or propriety under this chapter of the instrument of designation. [1967 ex.s. c 88 §5; 1959 c 202 §6.]

Comment: Formerly RCW 21.24.060.

Sec. 22 11.93.070 Resignation, death, or removal of custodian -- Bond -- Appointment of successor custodian. (1) Only an ~~adult~~ member of the minor's family who is eighteen years or older, a guardian of the minor or a trust company is eligible to become successor custodian. A custodian may designate ~~his~~ a successor by executing and dating an instrument of designation before a subscribing witness other than the successor; the instrument of designation may but need not contain the resignation of the custodian. If the custodian does not so designate ~~his~~ a

successor before ~~he~~ the custodian dies or becomes legally incapacitated, and the minor has attained the age of fourteen years, the minor may designate a successor custodian by executing an instrument of designation before a subscribing witness other than the successor. A successor custodian has all the rights, powers, duties and immunities of a custodian designated in a manner prescribed by this chapter.

(2) The designation of a successor custodian as provided in subsection (1) takes effect as to each item of the custodial property when the custodian resigns, dies or becomes legally incapacitated and the custodian or his or her legal representative:

(a) causes the item if it is a security in registered form or a life insurance policy or annuity contract, to be registered, with the issuing insurance company in the case of a life insurance policy or annuity contract, in the name of the successor custodian followed, in substance, by the words: "as custodian for (name of minor) under the Washington Uniform Gifts to Minors Act"; and

(b) delivers or causes to be delivered to the successor custodian any other item of the custodial property, together with the instrument of designation of the successor custodian or a true copy thereof and any additional instruments required for the transfer thereof to the successor custodian.

(3) A custodian who executes an instrument of designation of ~~his~~ a successor containing the custodian's resignation as provided in subsection (1) shall promptly do all things within his or her power to put each item of the custodial property in the possession and control of the successor custodian named in the instrument. The legal representative of a custodian who dies or becomes legally incapacitated shall promptly do all things within his or her power to put each item of the custodial property in the possession and control of the successor custodian named in an instrument of designation executed as provided in subsection (1) by the custodian or, if none, by the minor if ~~he~~ the minor has no guardian and has attained the age of fourteen years, or in the possession and control of the guardian of the minor if ~~he~~ the minor has a guardian. If the custodian has executed as provided in subsection (1) more than one instrument of designation, ~~his~~ the custodian's legal representative shall treat the instrument dated on an earlier date as having been revoked by the instrument dated on a later date.

(4) If a person designated as custodian or as successor custodian by the custodian as provided in subsection (1) is not eligible, dies or becomes legally incapacitated before the minor attains the age of ~~eighteen~~ twenty-one years and if the minor has a guardian, the guardian of the minor shall be successor custodian. If the minor has no guardian and if no successor custodian who is eligible and has not died or become legally incapacitated has been designated as provided in subsection (1),

a donor, his or her legal representative, the legal representative of the custodian or an adult member of the minor's family may petition the court for the designation of a successor custodian.

(5) A donor, the legal representative of a donor, a successor custodian, ~~an adult~~ member of the minor's family who is eighteen years or older, a guardian of the minor or the minor, if ~~he~~ the minor has attained the age of fourteen years, may petition the court that, for cause shown in the petition, the custodian be removed and a successor custodian be designated or, in the alternative, that the custodian be required to give bond for the performance of his or her duties.

(6) Upon the filing of a petition as provided in this section, the court shall grant an order, directed to the persons and returnable on such notice as the court may require, to show cause why the relief prayed for in the petition should not be granted and, in due course, grant such relief as the court finds to be in the best interests of the minor. [1971 ex.s. c 292 §32; 1967 ex.s. c 88 §6; 1959 c 202 §7.]

Severability -- 1971 ex.s. c 292: See note following RCW 26.28.010.

Comment: Formerly RCW 21.24.070.

Sec. 23 11.93.080 Accounting by custodian. (1) The minor, if ~~he~~ the minor has attained the age of fourteen years, or the legal representative of the minor, ~~an adult~~ member of the minor's

family who is eighteen years or older, or a donor or his or her legal representative may petition the court for an accounting by the custodian or his legal representative.

(2) The court, in a proceeding under this chapter or otherwise, may require or permit the custodian or his or her legal representative to account and, if the custodian is removed, shall so require and order delivery of all custodial property to the successor custodian and the execution of all instruments required for the transfer thereof. [1959 c 202 §8.]

Comment: Formerly RCW 21.24.080.

Sec. 24 11.93.900 Short title. This chapter may be cited as the "Washington Uniform Gifts to Minors Act." [1959 c 202 §10.]

Comment: Formerly RCW 21.24.100.

Sec. 24 11.93.910 Construction -- 1959 c 202. (1) This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(2) This chapter shall not be construed as providing an exclusive method for making gifts to minors. [1959 c 202 §9.]

Comment: Formerly RCW 21.24.090.

Sec. 24 11.93.911 Construction -- 1967 ex.s. c 88. The provisions of chapter 202, Laws of 1959 hereby amended as hereby amended shall be construed as a continuation of chapter 202, Laws of 1959 hereby amended according to the language employed and not as a

new enactment. This amendment of chapter 202, Laws of 1959 hereby amended does not affect gifts made in the manner prescribed therein nor the powers, duties or immunities conferred by gifts in such manner upon custodians and persons dealing with custodians. The provisions of chapter 202, Laws of 1959 hereby amended as hereby amended henceforth apply, however, to all gifts made in a manner and form prescribed in chapter 202, Laws of 1959 hereby amended except insofar as such application impairs constitutionally vested rights. [1967 ex.s. c 88 §7.]

Comment: Formerly RCW 21.24.091.

Sec. 25 11.93.912 Construction -- 1984. All custodianships established prior to the effective date of these 1984 amendments which have not been fully distributed as of such date shall not terminate upon the minor attaining the age of eighteen (18), but such custodianships shall remain operative until the minor reaches the age of twenty-one (21) or sooner dies, except that, as to any custodianship established after August 9, 1971, but before the date of this 1984 act, a minor shall have the right after attaining the age of eighteen (18) to demand delivery of all or any portion of the custodianship property.

Sec. 24 11.93.920 Severability - 1959 c 202. If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be

given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. [1959 c 202 §11.].

Comment: Formerly RCW 11.93.920.

All of RCW 21.25 is repealed.

Comment: The amendment to RCW 21.24 allowing gifts of real estate eliminate the necessity of a separate section on gifts of realty to minors.

CHAPTER 11.94

POWER OF ATTORNEY

- 11.94.010 Designation - Authority
- 11.94.020 Effect of death, disability or incompetence of principal
- 11.94.030 Banking transactions
- 11.94.040 Release from liability
- 11.94.050 Exempted matters
- 11.94.060 Homesteads

Sec. 26 11.94.010 Designation - Authority - Effect of acts done - appointment of guardian, effect - Accounting. Whenever a principal designates another ~~his~~ the attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding ~~his~~ the principal's disability, the authority of the attorney in fact or agent is exercisable ~~by him~~ as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or ~~his~~ the principal's guardian or heirs, devisees and personal representatives as if the principal were alive, competent and not disabled. A principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or

disqualification. If a guardian thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the guardian rather than the principal. The guardian ~~has~~ the same power the principal would have had if ~~he~~ the principal were not disabled or incompetent, to revoke, suspend or terminate all or any part of the power of attorney or agency. [1974 ex.s. c 117 §52.]

Comment: The added material comes from the Uniform Durable Power of Attorney Act (§3(b)), and allows the principal to designate his guardian in advance and thus allows the guardian to be the same person as the attorney-in-fact. The court is directed to follow the nomination except for good cause or disqualification of the nominee. A similar change has been made to RCW 11.88.010.

Sec. 27 11.94.020 Effect of death, disability or incompetence of principal - Acts without knowledge. (1) The death, disability, or incompetence of any principal who has executed a power of attorney in writing other than a power as described by RCW 11.94.010, does not revoke or terminate the agency as to the attorney in fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and ~~his~~ the principal's heirs, devisees, and personal representatives.

(2) An affidavit, executed by the attorney in fact, or agent, stating that he or she did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence, is, in the absence of a showing of fraud or bad faith, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

(4) Any person may place reasonable reliance on any determination of disability or incompetence as provided in the instrument which specifies the time and the circumstances under which the power of attorney document becomes effective. [1977 ex.s. c 234 §27; 1974 ex.s. c 117 §53.]

Comment: Various documents provide various manners in which disability or incompetence may be determined. Some require the statement of a doctor or doctors, some require only a letter from someone with knowledge, some require a court determination, etc. The purpose of this statute is to allow the third party relying on the power of attorney to rely on the manner of determining disability or incompetence provided for in the instrument. This will leave such determination up to the individual drafting of

the draftsman and does not require uniformity in how a determination is to be made.

sec. 28 11.94.030 Banking Transactions. Whenever a principal, pursuant to RCW 11.94.010, has given a designated attorney in fact or agent all his or her powers of absolute ownership or has used language to indicate that the attorney in fact or agent shall have all the powers the principal would have if alive and competent, then such language, notwithstanding any statutory language found in RCW 30.22 or elsewhere, shall include the authority (1) to deposit and to make payments from any account in a financial institution, as defined in RCW 30.22.040, in the name of the principal, and (2) to enter any safe deposit box to which the principal has a right of access, subject to any contrary provision in any agreement governing the safe deposit box.

Comment: The purpose of RCW 11.94 in its original enactment was to enable a person to name someone as attorney in fact for him or her in order to transact all business of whatever kind or nature, which the principal could do if alive and competent. RCW 30.22.170 was intended to protect financial institutions in allowing an agent to deposit and make payments from a principal's account. The definition of "agent" in RCW 30.22.040(4) is a person with "authority to deposit and to make payments from an account in the name of the depositor or depositors." Such language left uncertain whether such authority to the agent needed to be specifically stated in a power of attorney or

whether simple reference by the principal to "all powers which I might have," or something similar, would be sufficient. The purpose of this statute is to clarify that the use of the term "all" when referring to all powers that the principal might have, or all authority the principal might have, is intended to be all inclusive, notwithstanding any ambiguity that specific wording in any other statutes might raise.

Sec. 29 11.94.040 Release from liability. Any person acting without negligence and in good faith in reasonable reliance on a power of attorney shall not incur any liability thereby. Unless the document contains a time limit, the length of time which has elapsed from its date of execution shall not prevent a party from reasonably relying on the document. Unless the document contains a requirement that it be filed for record to be effective, a person may place reasonable reliance on it whether or not it is so filed.

Comment: To enable the purpose of RCW 11.94 to be fully carried out, and to encourage third parties to be willing to deal in good faith and in reliance on powers of attorney, this section provides a defense of reasonable reliance. Because many powers of attorney are executed well in advance of the time they are actually needed, it is the intent of this statute to indicate that documents whenever executed can be relied upon so that the fact that the document was executed well in the past, and was not

needed until the present, will not be a reason for a third party to refuse to rely on the document.

sec. 30 11.94.050. Exempted Matters. (1) Except as provided in subsection (2) of this section, even though a designated attorney in fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney in fact or agent shall have all the powers the principal would have if alive and competent, the attorney in fact or agent shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter, or revoke any of the principal's wills, codicils, life insurance beneficiary designations, trust agreements, community property agreements; to make any gifts of property owned by the principal; to make transfers of property to any trust (whether or not created by the principal) unless the trust benefits the principal alone and does not have dispositive provisions which are different from those which would have governed the property had it not been transferred into the trust, or to disclaim the property.

(2) Nothing in subsection (1) of this section prohibits a spouse of a principal from acting as an attorney in fact or as an agent to make any transfer of resources not prohibited under RCW 74.09.532 when the transfer is for the purpose of qualifying the principal for medical assistance or the limited casualty program for the medically needy.

Comment: This is further refinement of the term "all." It is anticipated that certain non-cash assets which are liquid and easily reducible to cash may be expended by the attorney in fact,

Bank accounts or stocks which are held as joint tenants with right of survivorship, may need to be cashed to provide for the principal. But to the extent possible, estate planning and testamentary documents should not be altered and, specifically, none of the above specified documents should be changed.

Sec. 31 11.94.060 Homesteads. If a principal, pursuant to 11.94.010, has given a designated attorney in fact or agent all the principal's powers of absolute ownership or has used language to indicate that the attorney in fact or agent shall have all the powers the principal would have if alive and competent, then such powers shall include the right to convey or encumber the principal's homestead.

Comment: The purpose of RCW 11.94 in its original enactment was to enable a person to name someone as attorney in fact for him or her in order to transact all business of whatever kind and nature which the principal could do if alive and competent. Senate Bill No. 3426 provided the homestead of a married person could be conveyed or encumbered if a husband or wife or both jointly make and execute powers of attorney for that purpose. The question again arises as to whether reference to that specific power must be specified in the power of attorney. The purpose of this statute is to clarify that the use of the term "all" when referring to all powers that the principal might have, or all authority that the principal might have, is intended to be all inclusive notwithstanding any ambiguity that specific wording in the Senate Bill might raise. It is believed that this bill was an amendment to RCW 6.12.110.

CHAPTER 11.95

POWERS OF APPOINTMENT

11.95.010 Releases

11.95.020 Partial releases

11.95.030 Form and substance - delivery

11.95.040 Effect on prior releases

11.95.050 Filing with Secretary of State

11.95.060 Exercise of powers of appointment

11.95.070 Application

CHAPTER 11.95
POWERS OF APPOINTMENT

Sec. 33 11.95.010 Releases. Any power ~~which is~~ exercisable by ~~deed, by will,~~ by deed or ~~by~~ will, or otherwise, ~~whether general or special,~~ other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the holder thereof and delivered as herein-after provided. ~~unless the instrument creating the power provides otherwise.~~

Comment: Former RCW 64.24.010. Powers covered by new RCW 11.98.019 dealing with relinquishment of tax sensitive trustee attributes have been excluded from the general provisions of Ch. 11.95.

Sec. 34 11.95.020 Partial releases. A power which is releasable may be released with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes ~~or~~ of persons or objects, in whose favor ~~the such~~ powers would otherwise be exercisable. No release of a power shall be deemed to make imperative a power which was not imperative prior to the ~~such~~ release, unless the instrument of release expressly so provides.

Comment: Former RCW 64.24.020.

Sec. 35 11.95.030 Form and substance - Delivery. In order to be effective as a release of a power, the instrument of release must, ~~as to form and substance, comply with the requirements therefor, if any, set forth in the instrument creating the power, and must be delivered to the person or persons designated in any one or more of the following:~~

~~(1) Each person specified for such purpose in the instrument creating the power, and,~~

~~(2) any trustee or cotrustee of the property, and the person holding the property, to which the power relates, and, Delivery of a copy of the instrument of release may be made to (3) the office of the secretary of state, and such delivery which shall from the time thereof of delivery constitute notice of such the release to all other persons, other than those specified in subdivisions (1) and (2) above.~~

Comment: former RCW 64.24.030. The requirement to file with the Secretary of State has been eliminated because the Committee felt such filing should not be necessary for a release to be effective. A copy of the release may be filed with the Secretary of State in order to give notice to third parties. Requirements in the instrument will be imposed by virtue of new Chapter 11.97 and thus the provisions referencing the instrument in this section can be deleted.

Sec. 36 11.95.040 Effect on prior releases. The enactment of RCW ~~11.95.64.24.010~~ through ~~11.95.64.24.050~~ shall not be construed to impair the validity of any release heretofore made which was otherwise valid when executed.

Comment: Former RCW 64.24.040.

Sec. 37 11.95.050 Filing with secretary of state - Fee. It shall be the duty of the secretary of state to mark such instrument of release filed in his office with a consecutive file number and with the date and hour of filing, and to note and index the filing in a suitable alphabetical index according to the name or names of the person or persons signing the same and containing a notation of the address or addresses of the signer or signers, if given in the instrument. The fee for filing is one dollar. The secretary of state shall deliver or mail to the person filing the instrument a receipt showing the filing number and date and hour of filing.

Comment: Former RCW 64.24.050. Unchanged.

Sec. 38 11.95.060 Exercise of Powers of Appointment.

(1) Type of Appointment. The holder of any testamentary or lifetime power of appointment may exercise the power by appointing property outright or in trust and may grant further powers to appoint. The powerholder may designate the trustee, powers, situs, and governing law for any property appointed in trust.

(2) Method of Exercising Testamentary Power. The holder of a testamentary power may exercise the power only by the powerholder's last will (signed before or after the effective date of the instrument granting the power) that manifests an intent to exercise the power and that identifies the instrument granting the power and its date. Unless the person holding the property subject to the power has within six (6) months after the holder's death received written notice that the powerholder's last will has been admitted to probate or an adjudication of testacy has been entered with respect to the powerholder's last will in some jurisdiction, the person may, until the time the notice is received, transfer the property subject to appointment on the basis that the power has not been effectively exercised. The person holding the property shall not incur liability to anyone for transfers so made. A testamentary residuary clause shall not be deemed the exercise of a testamentary power.

(3) Method of Exercising Lifetime Power. The holder of a lifetime power of appointment shall exercise that power only by delivering a written instrument, signed by the holder, to the person holding the property subject to the power. If the holder conditions the distribution of the appointed property on a future event, the written instrument may be made revocable until the event specified has occurred and shall specify the method of its revocation. If the written instrument is revoked, the holder of the power may reappoint the property that was appointed in the instrument. In the absence of signing and delivery of such a

written instrument, a lifetime power shall not be deemed exercised.

Comment: The guidelines specify ways in which a power of appointment must be exercised in the absence of specific instructions in an instrument. It gives a power holder the ability to appoint broadly and requires that the power be clearly exercised in order to be effective. It also protects the holder of property subject to a power of appointment from liability in making an alternate distribution of property unless notice of a Will admitted to probate or processed under an adjudication of testacy is received within a certain time.

Sec. 39 11.95.070 Application. This chapter does not apply to any power as trustee described in and subject to RCW 11.98.019.

CHAPTER 11.96

DISPUTE RESOLUTION

- 11.96.009 Jurisdiction in probate and trust matters
- 11.96.020 Power of courts when law inapplicable, insufficient, or doubtful.
- 11.96.030 Exercise of power -- orders, writs, process, etc.
- 11.96.040 Situs of trust
- 11.96.050 Venue - proceedings involving probate or trust
- 11.96.060 Statutes of limitations - proceedings involving trusts and estates
- 11.96.070 Petition for judicial proceedings
- 11.96.080 Hearing and form of notice
- 11.96.090 Power of clerk to fix dates of hearings
- 11.96.100 Notice for judicial proceedings
- 11.96.110 Constructive notice
- 11.96.120 Special notice
- 11.96.130 Trial rules; judgments
- 11.96.140 Costs, discretion to order payment by parties or from estate
- 11.96.150 Execution upon trust income or vested remainder
- 11.96.160 Appeals to Supreme Court or Court of Appeals
- 11.96.170 Nonjudicial resolution of disputes
- 11.96.180 Appointment of guardians ad litem

Sec. 41 11.96.009 Jurisdiction in probate and trust matters -
Powers of courts.

(1) The superior court shall have original jurisdiction over probates in the following instances:

(a) When a resident of the state dies; or

(b) When a non-resident of the state dies in the state;

or

(c) When a non-resident of the state dies outside the state.

(2) The superior court shall have original jurisdiction over trusts and trust matters.

(3) The superior courts in the exercise of their jurisdiction of matters of probate and trusts shall have power to probate or refuse to probate wills, appoint personal representatives of deceased, ~~or~~ incompetent, or disabled persons and administer and settle all such estates, and administer and settle all trusts and trust matters, award processes and cause to come before them all persons whom they may deem it necessary to examine, and order and cause to be issued all such writs as may be proper or necessary, and do all things proper or incident to the exercise of such jurisdiction. [1965 c 145 § 11.02.010. Prior: 1917 c 156 § 1; RRS § 1371; prior 1891 c 155 §1; Code 1881 § 1299; 1873 p 253 § 3; 1863 p 199 § 3; 1860 p 167 § 3; 1854 p 309 § 3. Formerly RCW 11.16.010.]

Comment: Formerly RCW 11.02.010. New language clarifies that superior courts have jurisdiction over trusts.

Sec. 42 11.96.020 Powers of courts when law inapplicable, insufficient, or doubtful. It is the intention of this title that the courts mentioned shall have full and ample power and authority to administer and settle all estates of decedents, and incompetent and disabled persons in this title mentioned and to administer and settle all trusts and trust matters. If the provisions of this title with reference to the administration and settlement of such estates or trusts should in any cases and under any circumstances be inapplicable or insufficient or doubtful, the court shall nevertheless have full power and authority to proceed with such administration and settlement in any manner and way which to the court seems right and proper, all to the end such estates or trusts may be by the court administered upon and settled. [1965 c 145 § 11.02.020. Prior: 1917 c 156 § 219; RRS § 1589. Formerly RCW 11.16.020.]

Comment: Formerly RCW 11.02.020

Sec. 43 11.96.030 Exercise of powers -- Orders, writs, process, etc. In exercising any of the jurisdiction or powers by this title given or intended to be given, the court is authorized to make, issue and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes not inconsistent with the provisions of this title, which may be considered proper or necessary in the

exercise of such jurisdiction. [1965 c 145 § 11.01.030. Prior: 1917 c 156 § 220; RRS § 1590. Formerly RCW 11.16.030.]

Comment: Formerly RCW 11.02.030

Sec. 45 11.96.040 Situs of Trust. Unless otherwise provided in the instrument creating the trust, the situs of a trust is the place in which is located the principal place of administration of the trust. As used in this section, the "principal place of administration of the trust" is the trustee's usual place of business where the day-to-day records pertaining to the trust are kept or the trustee's residence if it has no such place of business.

Comment: Cal. Code - Probate §1138.3 as modified by draftsman. The California statute deals only with inter vivos trusts. This statute covers all trusts.

Sec. 46 11.96.050 Venue - proceedings involving probate or trust. For purposes of venue in proceedings involving probate or trusts and trust matters, the following shall apply:

(1) Proceedings under Title 11 RCW pertaining to trusts shall be commenced either:

(a) In the superior court of the county in which the situs of the trust is located as provided in RCW 11.96.040;

(b) In the superior court of the county in which a trustee resides or has its principal place of business; or

(c) As respects testamentary trusts, in the superior court of the county where letters testamentary were granted to a personal representative, and in the absence of such letters, then in any county where letters testamentary could have been granted in subsection (2) below.

(2) Wills shall be proven, letters testamentary or of administration granted, and other proceedings under Title 11 RCW pertaining to probate commenced, either:

(a) In the county in which the decedent was a resident at the time of death;

(b) In the county in which the decedent may have died, or in which any part of the estate may be, if the decedent was not a resident of this state; or

(c) In the county in which any part of the estate may be, the decedent having died out of state, and not having been resident in this state at the time of death.

(3) No action undertaken is defective or invalid because of improper venue if the court has jurisdiction of the matter.

Comment: The above statute specifies the county where legal proceedings must be commenced if they involve probate or trust. The portion of the statute dealing with probate was formerly RCW 11.16.050.

Sec. 47 11.96.060 Statutes of limitations - proceedings involving trusts and estates.

(1) Any action against the trustee of an express trust (excluding those trusts excluded from the definition of express trusts under RCW 11.98.009, but including all express trusts, whenever executed), for any breach of fiduciary duty, must be brought within three years from the earlier of (a) the time the alleged breach was discovered or reasonably should have been discovered or (b) the time of termination of the trust or the trustee's repudiation of the trust.

(2) Any action by an heir, legatee, or other interested party, to whom proper notice was given if required, against a personal representative for alleged breach of fiduciary duty must be brought prior to discharge of the personal representative.

(3) The tolling provisions of RCW 4.16.190 shall apply to this statute, except that the running of the statute of limitations stated in subsection (2) above is not tolled if the minor, incompetent or disabled person had a guardian to represent the person during the probate proceeding or had a guardian ad litem or a limited guardian to represent such person with respect to the matter.

(4) Notwithstanding subsections (2) and (3), any cause of action against a trustee of an express trust, as provided for in subsection (1) is not barred by the statute of limitations if it is brought within three years from the date of enactment of this

statute. In addition, any action as specified in subsection (2) against the personal representative is not barred by this statute of limitations if it is brought within one year from the date of enactment of this statute.

Comment:

(1) The general rule in Washington as stated in Hotchkin v. McHought - Collins Improvement Co., 102 Wash. 161, 172 Pac. 864 (1918) appears to be that the statute of limitations against the trustee of an express trust does not begin to run until the trust is repudiated by the trustee or terminated. There appears to be no exception if the beneficiary had knowledge of the alleged wrongdoing but made no effort to bring suit within a reasonable time from the alleged wrongdoing. There is further confusion as to which statute of limitation period applies upon the termination or repudiation of a trust. The possible statutes of limitations run between 3 and 10 years, depending on the type of wrongdoing alleged. It is believed that uniformity in this area is necessary and that the 3 year statute of limitation period is sufficiently long and should begin to run from the earlier of the termination or repudiation of the trust, or the time the alleged breach was or should have been discovered.

(2) This portion of the statute replaces former RCW 4.16.110(2) providing for a one-year statute of limitation from the time of final settlement or the discovery of the alleged misconduct. This revision was made to conform with the rule that

closure of an estate and discharge of a personal representative is res judicata and is a final adjudication which, although appealable, cannot be subsequently attacked. Henrickson v. Baker - Boyer Nat. Bank, 139 F.2d 877 (1944), Alaska Banking and Safe Co. v. Noyes, 64 Wash. 672, 117 Pac. 492 (1911); Laack v. Hawkins, 155 Wash. 308, 284 Pac. 89 (1930).

Sec. 48 11.96.070 Petition for judicial proceedings. A personal representative, trustee, or other fiduciary, creditor, devisee, legatee, heir, or trust beneficiary interested in the administration of a trust, or the attorney general in the case of a charitable trust under RCW 11.119.020, or of the estate of a decedent, incompetent or disabled person, may have a judicial proceeding for the declaration of rights or legal relations in respect to the trust or estate:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(2) To direct the personal representatives or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings; or

(4) To confer upon the personal representatives or trustees any necessary or desirable powers not otherwise granted in the

instrument or given by law that the court determines are not inconsistent with the provisions or purposes of the will or trust; or

(5) To amend or conform the will or the trust instrument in the manner required to qualify the gift thereunder for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest; or

(6) To resolve any other matter in this title referencing this judicial proceedings section.

The provisions of this chapter shall apply to disputes arising in connection with estates of incompetents, or disabled persons unless otherwise covered by the provisions of chapters 11.88 and 11.92 RCW.

Comment: Formerly 7.24.040. Subsections (4), (5) and (6) are designed to provide more remedial authority in the courts.

Sec. 49 11.96.080 Hearing and form of notice. The court shall make an order fixing the time and place for hearing the petition. The court shall approve the form and content of the notice. Notice of hearing shall be signed by the clerk of the court.

Sec. 51 11.96.090 Power of clerk to fix dates of hearings. The clerk of each of the superior courts is authorized to fix the time of hearing of all applications, petitions and reports in probate and guardianship proceedings, except the time for hearings upon show cause orders and citations and except for the time of hearings set under RCW 11.96.080. The authority herein granted is in addition to the authority vested in the superior courts and superior court commissioners.

Comment: Formerly RCW 11.02.060.

Sec. 53 11.96.100 Notice for judicial proceedings under RCW Title 11. Subject to RCW 11.96.110, notice shall be personally served or mailed to each trustee, personal representative, heir, beneficiary (which includes devisees, legatees, and heirs), guardian ad litem and person having an interest in the trust or estate whose name and address are known to the petitioner in all proceedings under title 11, at least twenty days prior to the hearing on the petition (unless otherwise ordered by the court under RCW 11.96.080). Proof of such service or mailing shall be made by affidavit which shall be filed at or before the hearing. Further, notice shall also be given to the attorney general if required under RCW 11.110.120.

Comment: This new section 11.96.100 is based upon the California statutory notice provisions which are set forth in §1215 of the California Probate Code.

sec. 54 11.96.110 Constructive Notice. Notwithstanding other provisions of this Chapter to the contrary, it is a sufficient compliance with Title 11 RCW insofar as it requires notice to be given to the beneficiaries of, or persons interested in an estate or a trust, or to beneficiaries or remaindermen, including all living persons who may participate in the corpus or income of the trust or estate, to give notice as follows:

(1) When an interest in an estate or trust has been given to persons who compose a certain class upon the happening of a certain event, notice shall be given to the living persons who would constitute the class if such event had happened immediately before the commencement of the proceeding requiring notice.

(2) When an interest in an estate or trust has been given to a living person, and the same interest, or a share in it, is to pass to the surviving spouse or to persons who are, or may be, the distributees, heirs, issue or other kindred of such living person upon the happening of a future event, notice shall be given to such living person.

(3) Except as otherwise provided in section (2), if an interest in an estate or trust has been given to a person, or a class of persons, or both, upon the happening of any future

event, and the same interest, or a share of such interest, is to pass to another person, or class of persons, or both, upon the happening of an additional future event, notice shall be given to the living person or persons who would take the interest upon the happening of the first such event.

(4) Notice shall be given to persons who would not otherwise be entitled to notice by law if a conflict of interest involving the subject matter of the trust or estate proceeding exists between a person to whom notice is given and a person to whom notice need not be given under Title 11 RCW.

Any action taken by the court shall be conclusive and binding upon each person receiving actual or constructive notice in the manner provided herein.

Comment: This new section 11.96.110 gives statutory recognition to the doctrine of virtual representation and is designed to eliminate the expense associated with requiring the appointment of guardians ad litem to represent the interests of minor, unborn or unascertained beneficiaries under certain limited circumstances.

Sec. 55 11.96.120 Special notice. Nothing in this chapter eliminates the requirement to give notice to a person who has requested special notice pursuant to RCW 11.28.240 or RCW 11.92.150.

Sec. 56 11.96.130 Trial rules; judgments. All issues of fact joined in probate or trust proceedings shall be tried in conformity with the requirements of the rules of practice in civil actions. The probate or trust proceeding may be commenced as a new action, or as an action incidental to an existing probate or trust proceeding. Once commenced, the action may be consolidated with an existing probate or trust proceeding, or converted to a separate action, upon the motion of any party, for good cause shown, or by the court on its own motion. If the action is incidental to an existing proceeding, all pleadings shall set forth the caption of the existing proceeding followed by an appropriate caption designating the parties to the new proceeding. The party affirming is plaintiff, and the one denying or avoiding is defendant. When a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, must settle and frame the issues to be tried. If no jury is demanded, the court must try the issues joined, and sign and file its findings and decision in writing, as provided in civil actions. Judgment on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions.

Comment: Portions of this statute come from §1230 of the California Probate Code. This statute is intended to permit a probate or trust proceeding to be filed either under the probate

cause number or as an independent action under a new cause number.

Sec. 57 11.96.140 Costs; discretion to order payment by parties or from estate. Either the superior court or the court on appeal, may, in its discretion, order costs, including attorneys fees, to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.

Comment: This statute comes from part of §1232 of the California Code.

Sec. 58 11.96.150 Execution upon trust income or vested remainder -- Permitted, when. Nothing in RCW 6.32.250 shall forbid execution upon the income of any trust created by a person other than the judgment debtor for debt arising through the furnishing of the necessities of life to the beneficiary of such trust; or as to such income forbid the enforcement of any order of the superior court requiring the payment of support for the children under the age of eighteen of any beneficiary; or forbid the enforcement of any order of the superior court subjecting the vested remainder of any such trust upon its expiration to execution for the debts of the remainderman.

Comment: This section, formerly RCW 30.30.120 of the Trustee's Accounting Act, was more appropriately placed in this dispute resolution portion of Title 11. See also RCW 19.36.020

providing that certain conveyances in trust for the grantor's use are void as against existing or subsequent creditors of the grantor.

sec. 59 11.96.160 Appeals to supreme court or court of appeals. Any interested-party may appeal to the supreme court or the court of appeals from any final order, judgment or decree of the court, and such appeals shall be in the manner and way provided by law for appeals in civil actions. [1971 c 81 §53; 1965 c 145 §11. 96.010. Prior: 1917 c 156 §221; RRS §1591. Formerly RCW 11.16.040.]

Comment: Formerly RCW 11.96.010.

sec. 61 11.96.170 Nonjudicial resolution of disputes. (1) If the persons listed in RCW 11.96.070 and those entitled to notice under RCW 11.96.100 and 11.96.110 can agree on any matter listed in RCW 11.96.070 or any other matter in Title 11 RCW referencing this nonjudicial resolution procedure, then the agreement shall be evidenced by a written agreement executed by all necessary persons as provided in this section.

(2) If necessary, the personal representative or trustee may petition the court for the appointment of a special representative to represent a person interested in the estate or trust who is a minor, incompetent, disabled or who is yet unborn or unascertained, or a person whose identity or address is

unknown. The special representative has authority to enter into a binding agreement on behalf of the person or beneficiary. The special representative may be appointed for more than one person or class of persons if the interests of such persons or class are not in conflict. Those entitled to receive notice for persons or beneficiaries described in RCW 11.96.110 may enter into a binding agreement on behalf of such persons or beneficiaries.

(3) The special representative shall be a lawyer duly licensed to practice before the courts of this state, or an individual with special skill or training in the administration of estates or trusts. The special representative shall have no interest in any affected estate or trust, and shall not be related to any personal representative, trustee, beneficiary or other person interested in the estate or trust. The special representative is entitled to reasonable compensation for services which shall be paid from the principal of the estate or trust whose beneficiaries are represented. Upon execution of the written agreement the special representative shall be discharged of any further responsibility with respect to the estate or trust.

(4) The written agreement or a memorandum summarizing the provisions of the written agreement may at the option of any person interested in the estate or trust, be filed with the court having jurisdiction over the estate or trust.

The person filing the agreement or memorandum shall within five days thereof mail a copy of the agreement and a notice of the filing to each person interested in the estate or trust whose address is known. Notice shall be in substantially the following form:

CAPTION
OF CASE

NOTICE OF FILING OF AGREEMENT
OR MEMORANDUM OF AGREEMENT

Notice is hereby given that the attached document was filed by the undersigned in the above entitled court on the ____ day of _____, 19___. Unless you file a petition objecting to the agreement within 30 days of the above specified date the agreement will be deemed approved and will be equivalent to a final order binding on all persons interested in the estate or trust.

If you file and serve a petition within the period specified, you should ask the court to fix a time and place for the hearing on the petition and provide for at least a ten days notice to all persons interested in the estate or trust.

DATED this ____ day of _____, 19__.

(party to the agreement)

Unless a person interested in the estate or trust files a petition objecting to the agreement within thirty days of the filing of the agreement or the memorandum, the agreement will be

deemed approved and will be equivalent to a final order binding on all persons interested in the estate or trust. If all persons interested in the estate or trust waive the notice required by this section, the agreement will be deemed approved and will be equivalent to a final order binding on all persons interested in the estate or trust effective upon the date of filing.

Comment. This section permits interested parties in a trust or estate to enter into a binding agreement if there is an issue or dispute pertaining to the administration of a trust or estate. A "special representative" may be appointed by the court if the personal representative or trustee requests that one be named for any incompetent, unborn or unknown beneficiary. The special representative once appointed has authority to enter into a binding agreement on behalf of those for whom he or she is appointed. The special representative is to be a lawyer or an individual having special skill or training in trust administration. If a special representative is not appropriate, the agreement can also be approved by an individual who represents others in a representative class as provided at RCW 11.96.110 which codifies the doctrine of virtual representation. The agreement or a memorandum of its terms can be filed with the court if any interested party elects to do so. Unless the agreement is objected to within thirty days after the parties have been notified of its filing, it will have the effect of a

final order binding on all persons interested in the estate or trust.

Sec. 62 11.96.180 Appointment of guardians ad litem.

(1) The court, upon its own motion or on request of a person interested in the trust or estate, at any stage of a judicial proceeding or at any time in a nonjudicial resolution procedure, may appoint a guardian ad litem to represent the interests of a minor, incapacitated, unborn, or unascertained person, or person whose identity and address are unknown, or a designated class of persons who are not ascertained or are not in being. When not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(2) For the purposes of this section, a trustee is a person interested in the trust and a personal representative is a person interested in an estate.

(3) The court appointed guardian ad litem supersedes the special representative if so provided in the court order.

(4) The court may appoint the guardian ad litem at an ex parte hearing, or the court may order a hearing as provided in RCW 11.96.070 with notice as provided in RCW 11.96.080, 11.96.100 and 11.96.110.

Comment: This section allows the court to appoint a guardian ad litem at any time (including during an effort at non-judicial resolution of a dispute) to represent incompetent parties.

CHAPTER 11.97

EFFECT OF TRUST INSTRUMENT

11.97.010 Power of trustor
 11.97.900 Application of chapter

Chapter 11.97

EFFECT OF TRUST INSTRUMENT

sec. 64 11.97.010 Power of Trustor -- Trust provisions control chapter provisions. The trustor of a trust may by the provisions of the trust thereof relieve the trustee from any or all of the duties, restrictions and liabilities which would otherwise be imposed by Chapters 11.95, 11.98, 11.100, and 11.104 RCW and RCW 11.106.020 this chapter; or may alter or deny any or all of the privileges and powers conferred by such this chapters; or may add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by such this chapters. If any specific provision of such this chapters is in conflict with or inconsistent with the provisions of a trust, the provisions of the trust shall control whether or not specific reference is made therein in the trust to any of such this chapters. In no event may any trustee be relieved of the duty to act in good faith and with honest judgment. [1959 c 124 § 2.]

sec. 65 11.97.900 Application of Chapter. This chapter shall apply to the provisions of Chapters 11.95, 11.98, 11.100, and 11.104 RCW and RCW 11.106.020 ("such chapters").

Comment: Section 11.97.010 was formerly RCW 30.99.020. The purpose of this section is to put in one place the principle that the trust provisions will govern any statutory requirements rather than having language to that effect contained in numerous provisions throughout new Title 11. The last sentence was added to make clear that a trustee cannot be exonerated for failing to

act in good faith and with honest judgment. The committee feels that this requirement is probably stated in case law and should, as a matter of public policy, be stated specifically in a statute.

CHAPTER 11.98

TRUSTS

- 11.98.009 Application of chapter
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- 11.98.029 Resignation of trustee
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- 11.98.110 Contract and tort liability
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- 11.98.140 Distribution of assets and vesting of interest during period trust not invalid
- 11.98.150 Distribution of assets at expiration period

11.98.160 Effective date of creation of trust
 11.98.170 Trustee or custodian named as beneficiary of life insurance policy or retirement plan
 11.98.900 Application of chapter
 11.98.910 Severability -- 1959 c 124
 11.98.920 Short title

sec. 67 11.98.009 Application of chapter. Except as provided in this section, this chapter ~~shall~~ applies to express trusts, except as hereinafter limited, which are executed by the trustor after June 10, 1959, ~~the effective date hereof. This chapter shall and does~~ not apply to resulting trusts, constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiary, investment trusts, voting trusts, trusts in the nature of mortgages or pledges, trusts created by the judgment or decree of a court not sitting in probate, liquidation trusts, or trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, trusts created in deposits in any ~~banking financial institution pursuant to Chapter 30.22 RCW~~ RCW 30.20-035 or RCW 32.12-030, ~~or in accounts in savings and loan associations pursuant to RCW 33.20-070,~~ unless any such trust which is created in writing incorporates this chapter in whole or in part. [1959 c 124 §1.]

Comment: Formerly RCW 30.99.010.

Sec. 68 11.98.016 Exercise of powers by cotrustees.

(1) Action by Majority. Any power vested in three or more trustees jointly may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power ~~shall be~~ is liable to the beneficiaries or to others for the consequences of such exercise; nor ~~shall is~~ a dissenting trustee ~~be~~ liable for the consequences of an act in which he joins at the direction of

the majority of the trustees, if he expressed his dissent in writing to each of his cotrustees at or before the time of such joinder.

(2) Failure of cotrustees to Serve. Where two or more trustees are appointed to execute a trust and one or more of them for any reason does not accept the appointment or having accepted ceases to be a trustee, the survivor or survivors shall execute the trust and shall succeed to all the powers, duties and discretionary authority given to the trustees jointly.

(3) Delegation by Individual Trustee. Any individual trustee, with a cotrustee's consent, may, by a signed, written instrument, delegate any power, duty, or authority as trustee to such cotrustee. Such delegation shall be effective upon delivery of the instrument to such cotrustee and may be revoked at any time by delivery of a similar signed, written instrument to such cotrustee. However, if a power, duty, or authority is expressly conferred upon only one trustee, it shall not be delegated to a cotrustee, if it is expressly excluded from exercise by a trustee, it shall not be delegated to such excluded trustee.

(4) Approval Through Notice to All cotrustees. If one trustee gives written notice to all other cotrustees of an action that such trustee proposes be taken, then the failure of any such cotrustee to deliver a written objection to the proposal to such trustee, at the trustee's then address of record and within fifteen (15) days from the date such cotrustee actually receives the notice, shall constitute formal approval by such cotrustee,

cotrustee had previously given written notice (then unrevoked) to such trustee that this 15-day notice provision is inoperative.

(5) Liability of Cotrustee for Failure to Act. As to any effective delegation made under Subsection (3) a cotrustee has no liability for failure to participate in the administration of the trust. Nothing in this section, however, shall otherwise excuse a cotrustee from liability for failure either to participate in the administration of the trust ~~or~~ and nothing in this section, including subsection (3) above, excuses a cotrustee from liability for the failure to attempt to prevent a breach of trust. [1959 c 124 §3.]

Comment: Subsections (1) and (2) and portions of subsection (5) were formerly RCW 30.99.030.

Subsection (3) provides authority for an individual cotrustee to delegate any of his or her powers, duties, or authorities to a cotrustee, if the cotrustee consents. The purpose of this subsection is to specifically permit an individual cotrustee to delegate any or all of the trustee's responsibilities to another cotrustee and should be particularly helpful in delegating an individual trustee's responsibilities to a corporate cotrustee where that is desirable. Subsection (5) states that such a delegation will not give rise to liability for failure to participate in trust administration.

Subsection (4) provides a method for a single trustee to obtain approval of a proposed action in a situation where the other cotrustees are unwilling to participate. If cotrustees are

in disagreement, then this subsection would have no applicability. Its main purpose is to provide a method for a trustee to obtain authority without resort to court or other dispute resolution procedures in a situation where a cotrustee or cotrustees are refusing to approve or disapprove a proposed action.

Sec. 69 11.98.019 Release of powers by cotrustee. Any individual cotrustee may, by written instrument delivered to a then acting cotrustee and to the current adult income beneficiaries of the trust, relinquish to any extent and upon any terms any or all of the trustee's powers, rights, authorities, or discretions that are or may be tax sensitive in that they cause or may cause adverse tax consequences to the trustee or the trust. Any trustee not relinquishing such a relinquished power, right, authority, or discretion and upon whom it is conferred continues to have full power to exercise it.

Comment: This section deals with the ability of an individual cotrustee to relinquish a power, right, authorization, or discretion conferred upon a cotrustee if it is a tax sensitive one that causes or may cause adverse tax consequences to the trustee or the trust. It provides a method of relinquishing attributes of being a trustee that is less detailed and less limited than would be available under chapter RCW 11.86, which permits disclaimers generally. For example, under this section a cotrustee may relinquish a power simply by a written instrument

delivered to a then acting cotrustee and to the current adult income beneficiaries of the trust.

The purpose of the section is to clearly permit the relinquishment of a tax sensitive power, right, authorization, or discretion in any manner to a cotrustee. That is, relinquishment in whole or in part, temporarily or permanently, and revocably or irrevocably would be permitted. The relinquishment would be important where a cotrustee wanted to relinquish part or all of a power, right, authorization, or discretion that results in an adverse tax consequence to the trustee or trust.

In the event of a relinquishment, the attribute relinquished will continue to be exercisable by the other trustees upon whom it is conferred. The section does not provide authority for exercise of an attribute by a trustee who is expressly excluded from exercising it.

Sec. 70 11.98.029 Resignation of trustee. Upon petition of the trustee of a trust, the superior court having jurisdiction may accept ~~his~~ its resignation and discharge ~~him~~ it from the trust upon such notice, if any, and upon such terms as ~~each~~ the court may require. [1959 c 124 §4.]

Comment: Formerly RCW 30.99.040.

Sec. 72 11.98.039 Changing Trustee.

(1) Nonjudicial change of trustee. The beneficiaries and trustee of a trust may agree for the non-judicial change of the

trustee under RCW 11.96.170 where the governing instrument does not name a successor trustee who is willing to serve. The trustee shall give written notice of the proposed change in trustee to every beneficiary or special representative, and the trustor if alive. The notice shall: (a) state the name and mailing address of the trustee; (b) include a copy of the governing instrument; and (c) the name and mailing address of the successor trustee. The notice shall advise the recipient of the right to petition for the judicial determination of the proposed change in trustee as provided in subsection (2) of this section. The notice shall include a form on which consent or objection to the proposed change in trustee may be indicated.

(2) Judicial change of trustee. Any beneficiary of a trust, the trustor if alive, or the trustee may in writing petition the superior court having jurisdiction for the appointment or change of a trustee as provided in chapter 11.96 RCW (a) whenever the office of trustee becomes vacant, or (b) upon filing of a petition of resignation by a trustee, or (c) for any other reasonable cause. The court shall make an order fixing the time and place for hearing the petition and the notice thereof shall be signed by the clerk of said court. Petitioner shall cause a copy of the notice to be mailed to each beneficiary, the trustor if alive, and to the incumbent trustee, if any, whose names and addresses are known to him, not less than ten days before the date of the hearing. Proof of the mailing of such notice shall be made by affidavit which shall be filed at or before the

~~hearing. All those whose names or addresses are not known or are not legally competent and any beneficiary who is not ascertained shall be represented at the hearing by a guardian ad litem appointed by the court when it sets the time of hearing. Upon conclusion of the hearing the court shall appoint a successor trustee after giving due consideration to the individual or corporate character of trustor's original trustee, any nominations by those entitled to petition for the appointment or by the guardian ad litem, and all other relevant and material facts.~~
[1959 c 124 §5.]

(3) Liability of successor fiduciary for acts or omissions of predecessor fiduciary. For purposes of this section, the term fiduciary shall include both trustee and personal representative

(a) Except as otherwise provided in the governing instrument, a successor fiduciary, absent actual knowledge of a breach of fiduciary duty: (i) is not liable for any act or omission of a predecessor fiduciary and is not obligated to inquire into the validity or propriety of any such act or omission; (ii) is authorized to accept as conclusively accurate any accounting or statement of assets tendered to the successor fiduciary by a predecessor fiduciary; (iii) is authorized to receipt only for assets actually delivered and has no duty to make further inquiry as to undisclosed assets of the trust or estate.

(b) Nothing contained in this section relieves any successor fiduciary from liability for retaining improper

investments, nor does this section in any way bar the successor fiduciary, trust beneficiaries or any other party in interest from bringing any action against any predecessor fiduciary arising out of the acts or omissions of the predecessor fiduciary, nor does it relieve the successor fiduciary of any liability for its own acts or omissions except as specifically stated or authorized in this section.

Comment: Formerly RCW 30.99.050. The new provisions of section (1) and (2) are designed to allow the non-judicial appointment of a successor trustee under new non-judicial resolution of dispute section of RCW 11.96.140, while preserving the right of the named parties to judicial review. Subsection (3) limits the liability of a successor fiduciary, modifying the common law rule that a successor trustee is liable for breach of trust if the successor neglects to take steps necessary to compel the predecessor trustee to redress a breach of trust.

Sec. 74 11.98.045 Criteria for transfer of trust administration.

(1) A trustee may transfer trust assets to a trustee in another jurisdiction or may transfer the place of administration of a trust to another jurisdiction if the trust instrument so provides or in accordance with RCW 11.98.052 or RCW 11.98.053.

(2) Transfer pursuant to this section shall be permitted only if:

(a) The transfer would facilitate the economic and convenient administration of the trust;

(b) The transfer would not materially impair the interests of the beneficiaries or others interested in the trust;

(c) The transfer does not violate the terms of the trust; and

(d) The new trustee is qualified and able to administer the trust or such assets on the terms set forth in the trust.

(3) Acceptance of such transfer by a foreign corporate trustee or trust company pursuant to this section, RCW 11.98.052 and RCW 11.98.053 shall not be construed to be doing a "trust business" within the meaning of RCW 30.08.150(9).

Sec. 75 11.98.051 Nonjudicial transfer of trust administration.

(1) The trustee may transfer trust assets or the place of administration in accordance with the provisions of RCW 11.96.170. In addition, the trustee shall give written notice to those persons entitled to notice as provided for under RCW 11.96.100 and RCW 11.96.110 and to the attorney general in the case of a charitable trust subject to chapter 11.110 RCW. The notice shall:

(a) State the name and mailing address of the trustee;

(b) Include a copy of the governing instrument of the trust;

(c) Include a statement of assets and liabilities of the trust dated within 90 days of the notice;

(d) State the name and mailing address of the trustee to whom the assets or administration will be transferred together with evidence that such trustee has agreed to accept the assets or trust administration in the manner provided by law of the new place of administration. The notice shall also contain a statement of the trustee's qualifications and the name of the court, if any, having jurisdiction of such trustee or in which a proceeding with respect to the administration of the trust may be heard;

(e) State the facts supporting the requirements of RCW 11.98.045(2);

(f) Advise the beneficiaries of the right to petition for judicial determination of the proposed transfer as provided in RCW 11.98.055; and

(g) Include a form on which the recipient may indicate consent or objection to the proposed transfer.

(2) If the trustee receives written consent to the proposed transfer from all persons entitled to notice the trustee may transfer the trust assets or place of administration as provided in the notice. Transfer in accordance with the notice is a full discharge of the trustee in relation to all property referred to therein. Any person dealing with the trustee is entitled to rely on the authority of the trustee to act and is not obliged to inquire into the validity or propriety of the transfer.

sec. 76 11.98.055 Judicial transfer of trust administration.

(1) Any trustee, beneficiary, or beneficiary representative may petition the superior court of the county of the situs of the trust for a transfer of trust assets or transfer of the place of administration in accordance with the provisions of Chapter 11.96 RCW.

(2) At the conclusion of the hearing, if the court finds the requirements of RCW 11.98.045(2) have been satisfied, it may direct the transfer of trust assets or the place of trust administration on such terms and conditions as it shall deem appropriate. The court in its discretion may provide for payment from the trust of reasonable fees and expenses for any party to such proceeding. Delivery of trust assets in accordance with the court's order is a full discharge of the trustee in relation to all transferred property.

Comment: This statute is based primarily on a similar transfer statute contained in Cal. Prob. Code §1139 et seq. It provides for nonjudicial transfer of trust assets and trust administration similar to the nonjudicial dispute resolution statute. The statute also makes clear that a transfer of trust assets pursuant to these sections will not create problems for the new foreign corporate trustee or trust company insofar as it may then be considered as doing a "trust business" within the State of Washington.

Sec. 77 11.98.060 Power of successor trustee. A successor trustee of a trust shall succeed to all the powers, duties and discretionary authority of the original trustee. [1959 c 124 §6.]

Comment: Formerly RCW 30.99.060.

Sec. 78 11.98.065 Change in form of corporate trustee. Any appointment of a specific bank, trust company, or corporation as trustee shall be conclusively presumed to authorize the appointment or continued service of such entity's successor in interest in the event of a merger, acquisition, or reorganization, and no court proceeding shall be necessary to affirm such appointment or continuance of service.

Comment. This section has been added to clarify the status of a corporate fiduciary who is appointed trustee in the event of a merger, acquisition or corporate reorganization. Under this statute, the successor organization shall serve or continue to serve barring contrary direction in the instrument.

Sec. 80 11.98.070 Power of trustee. A trustee, or the trustees jointly, of a trust ~~shall~~, in addition to the authority otherwise given by law, have ~~the discretionary power, and the exercise of discretion in the application thereof,~~ to acquire, invest, reinvest, exchange, sell, convey, control, divide, partition, and manage the trust property in accordance with the standards provided by law, and in so doing may:

Comment: Additional powers added to preamble.

(1) Receive property from any source as additions to the trust or any fund thereof of the trust to be held and administered under the provisions ~~thereof of the trust~~;

(2) Sell on credit; ~~((and grant, purchase or exercise options,))~~

Comment: Options transactions separated from credit transactions. Deleted portion of subsection (2) appears in subsection (3) below.

(3) Grant, purchase, or exercise options;

~~((3))~~(4) Sell or exercise subscriptions to stock or other corporate securities and to exercise conversion rights; ~~((deposit stock or other corporate securities with any protective or other similar committee, and assent to corporate sales, leases and encumbrances,))~~

Comment: Powers regarding securities separated into three subsections: (4), (5), and (6).

(5) Deposit stock or other corporate securities with any protective or other similar committee;

(6) Assent to corporate sales, leases, and encumbrances;

~~((4))~~(7) Vote trust securities in person or by proxy with power of substitution; and enter into voting trusts;

~~((5))~~(8) Register and hold any stocks, securities or other property in the name of a nominee or nominees without mention of the trust relationship, provided the trustee or trustees ~~shall be~~ are liable for any loss occasioned by the acts of any ~~such~~ nominee;

~~((6))~~(9) Grant leases of trust property, with or without options to purchase or renew, to begin within a reasonable period and for terms within or extending beyond the duration of the trust, for any purpose, including exploration for and removal of oil, gas and other minerals; enter into community oil leases, pooling, and unitization agreements; ~~((create restrictions, easements, and other servitudes; alter, renovate, add to or demolish any building, subdivide, develop, improve, dedicate to public use, make or obtain the vacation of public plats, adjust boundaries, partition real property and on exchange or partition to adjust differences in valuation by giving or receiving money or money's worth.))~~

Comment: See subsection (20) regarding easements and servitudes. See §(19) regarding renovation and demolition of buildings. See subsection (10) for remaining portion of subsection (9) deleted above. Subsection (9) has been divided in order to separate trustee's powers regarding leasing, creation of restrictions, renovation of structures, and development of real property.

(10) Subdivide, develop, dedicate to public use, make or obtain the vacation of public plats, adjust boundaries, partition real property, and on exchange or partition to adjust differences in valuation by giving or receiving money or money's worth;

~~((7))~~ (Section moved to subsection (23) below.)

~~((8))~~(11) Compromise or submit claims to arbitration;
~~((advance funds and borrow money, secured or unsecured, from any~~

~~source, including a corporate trustee's banking department, and mortgage, pledge the assets or credit of the trust estate or otherwise encumber trust property, including future income.))~~

Comment: See subsection (12) regarding advancing and borrowing money. See (18) regarding mortgaging trust property.

(12) Borrow money, secured or unsecured, from any source, including a corporate trustee's banking department, or from the individual trustee's own funds.

Comment: From RCW 30.99.070(8). Strikes "advance funds and" as unnecessary. Clause after "department" is new to show an intent that the borrowing of money from the individual trustee would not, per se, be a breach of the trustee's duty against self-dealing. See also RCW 11.99.090.

(13) Make loans, either secured or unsecured, at such interest as the trustee may determine to any person, including any beneficiary of a trust, except that no trustee who is a beneficiary of any trust may participate in decisions regarding loans to such beneficiary from the trust;

~~((9))~~(14) Determine the hazards to be insured against and maintain insurance ~~therefor~~ for them;

~~((10))~~(15) Select any part of the trust estate in satisfaction of any partition or distribution, in kind, in money, or both; ~~((pay any income or principal distributable to or for the use of any beneficiary, whether or not such beneficiary is under legal disability, to him or his use to his parent, guardian, person with whom he resides or third persons.))~~ make non-pro

rata distributions of property in kind; allocate particular assets or portions of them or undivided interests in them to any one or more of the beneficiaries without regard to the income tax basis of specific property allocated to any beneficiary and without any obligation to make an equitable adjustment;

Comment:

1. Power to pay over to beneficiary separated from distributions in kind. See subsection (16) regarding payments for beneficiary.

2. Comment per J. Cunningham regarding addition to above section: "As revised, the above statute would avoid the difficulties described in Priv. Ltr. Ruling 8119040 and Rev. Rul. 69-486, 1969-2 C.B. 159 where a non-pro rata distribution of trust assets not authorized by the trust instrument or local law was treated for federal income tax purposes as a non-pro rata distribution followed by an exchange between the beneficiaries resulting in the realization of gain or loss by the beneficiaries."

(16) Pay any income or principal distributable to or for the use of any beneficiary, whether or not such beneficiary is under legal disability, to him or for his use to his parent, guardian, custodian under the uniform gifts to minors act of any state, person with whom he resides or third person;

Comment: This section formerly appeared as a part of RCW 30.99.070(10). It has been expanded to allow the trustee also to make a distribution to the custodian for a minor. This change is

consistent with the provision regarding distributions from an estate or trust which appear in RCW 11.93.020(f).

(17) Change the character of or abandon a trust asset or any interest in it;

Comment: From §3(c)(7) UTPA and CPC §1120.2(5).

(18) Mortgage, pledge the assets or the credit of the trust estate, or otherwise encumber trust property, including future income, *whether an initial encumbrance or a renewal or extension of it, *for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

Comment: Beginning portion of section to first * is from RCW 30.99.070(8). Balance of section from second * to end is from §3(c)(7) UTPA. Words between each * are new.

(19) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, to demolish any improvements, to raze existing structures, and to make any improvements to trust property;

Comment: From §3(c)(8) UTPA and CPC §1120.2(6). (19) changes RCW 30.99.070(6) to allow extraordinary repairs of buildings, extraordinary repairs or alterations of trust property other than buildings, demolition of party walls and improvements to personal property.

(20) Create restrictions, easements, *including easements to public use without consideration,* and other servitudes;

Comment: From RCW 30.99.070(6), §3(c)(9) UTPA, and CPC §1120.2(7). Words between asterisks are from UTPA and CPC.

(21) Manage any business interest, regardless of form, received by the trustee from the trustor of the trust, as a result of the death of a person, or by gratuitous transfer from any other transferor; and in respect to it, to have the following powers:

Comment: This preamble is intended to include the receipt by the trustee of a trust of any business interest to be held pursuant to the terms of the trust, including any gratuitous transfer to the trustee by the trustor or another, or a receipt of such business interest by the trustee arising out of the termination of a prior estate.

(a) To hold, retain and continue to operate such business interest solely at the risk of the trust, without need to diversify and without liability on the part of the trustee for any resulting losses;

(b) To enlarge or diminish the scope or nature or the activities of any business;

(c) To authorize the participation and contribution by the business to any employee benefit plan, whether or not qualified as being tax deductible, as may be desirable from time to time;

(d) To use the general assets of the trust for the purpose of the business and to invest additional capital in or make loans to such business;

(e) To endorse or guarantee on behalf of the trust any loan made to the business and to secure the loan by the trust's interest in the business or any other property of the trust;

(f) To leave to the discretion of the trustee the manner and degree of the trustee's active participation in the management of the business, and the trustee is authorized to delegate all or any part of the trustee's power to supervise, manage, or operate to such persons as the trustee may select, including any partner, associate, director, officer, or employee of the business; and also including electing or employing directors, officers, or employees of the trustee to take part in the management of such business as directors or officers or otherwise, and to pay any such person reasonable compensation for his services without regard to the fees payable to the trustee;

(g) To engage, compensate, and discharge or to vote for the engaging, compensating, and discharging of such managers, employees, agents, lawyers, accountants, consultants, or other representatives, including anyone who may be a beneficiary of the trust or any trustee;

(h) To cause or agree that surplus be accumulated or that dividends be paid;

(i) To accept as correct financial or other statements rendered by any accountant for any sole proprietorship or by any partnership or corporation as to matters pertaining to the business except upon actual notice to the contrary;

(j) To treat the business as an entity separate from the trust, and in any accounting by the trustee, it shall be sufficient if the trustee reports the earning and condition of the business in a manner conforming to standard business accounting practice;

(k) To exercise with respect to the retention, continuance, or disposition of any such business all the rights and powers which the trustor of the trust would have if alive at the time of such exercise, including all powers as are conferred on the trustee by law or as are necessary to enable the trustee to administer the trust in accordance with the provisions of the instrument governing the trust, subject to any limitations provided for in the instrument; and

(l) To satisfy contractual and tort liabilities arising out of an unincorporated business, first out of the business and second out of the estate or trust, but in no event shall there be a liability of the trustee, and if the trustee shall be liable, the trustee shall be entitled to indemnification from the business and the trust, respectively;

(22) Participate in the establishment of, and thereafter in the operation of, any business or other enterprise according to the provisions set forth in the preceding §(21) and all the subparagraphs thereof except that the trustee shall not be relieved of the duty to diversify;

Comment: From §3(c)(3) UTPA which reads in part: "to continue or participate in the operation of any business or other

enterprise. . . ." Also follows §1120.2(17) Cal. Probate Code "except "the operation of" does not appear in the Cal. Code. This section is intended to relate to a new business or other enterprise started by the trustee which did not constitute original property of the trust that was either delivered by the trustor to the trustee or received by the trustee from the trustor's estate.

~~((7)) (23) Cause or participate in, directly or indirectly, the formation, reorganization, merger, consolidation, ~~((and))~~ dissolution ~~((of))~~, or other change in the form of any corporate or other business undertaking((s)) where trust property may be affected and retain any property received pursuant thereto to the change; ~~((limit management participation in any partnership and to act as a limited partner, charge profits and losses of any business or farm operation to the trust estate as a whole and not to the trustee, and make available to or invest in any business or farm operation additional moneys from the trust estate or other sources,))~~~~

Comment: Powers regarding partnerships and business operations separated into subsections (22) and (23). Deletions and additions to subsection (23) above are based on §(3)(c)(3) and (15) of the Uniform Trustees' Powers Act set forth in 41 Wash. Law Rev. 1 at 41.

(24) Limit participation in the management of any partnership and act as a limited or general partner;

Comment: The first clause in subsection (24) formerly appeared in RCW 30.99.070(7) and read as follows: ". . . limit

management participation in any partnership. . . ." The change has been made to more clearly reflect the trustee's power to take less than a full time management role in a partnership which forms a part of the trust. The second clause also appears in RCW 30.99.070(7), but "or general" has been added to subsection (24) to broaden the trustee's powers. This change regarding a trustee's powers in a partnership is the result of work by B. Flynn.

(25) Charge profits and losses of any business or farm operation to the trust estate as a whole and not to the trustee; make available to or invest in any business or farm operation additional moneys from the trust estate or other sources;

(26) Pay reasonable compensation to the trustee or cotrustees considering all circumstances including the time, effort, skill, and responsibility involved in the performance of services by the trustee;

Comment: From §3(c)(20) UTPA up to "commensurate." Balance of section reflects the general standards upon which the compensation to the trustee is to be based, which are, among other things: the time involved, the difficulty of the services performed, the responsibilities imposed on the trustee, and the skill of the trustee in administering the trust.

(27) Employ persons, including lawyers, accountants, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of the trustee's duties or to perform any act, regardless of

whether any such act is discretionary, and to act without independent investigation upon their recommendations, except a trustee may not delegate all of the trustee's duties and responsibilities, and except that such employment does not relieve the trustee of liability for the discretionary acts of any such person, which if done by the trustee, would result in liability to the trustee, or of the duty to select and retain any such person with reasonable care.

Comment: In part from section 3(c)(24) UTPA. This section expands the power of the trustee to employ others, even if associated with the trustee, and to delegate discretionary acts to agents. The section changes the common law by relieving the trustee of the duty to make an independent investigation or an independent judgment regarding recommendations made by the agent. Further, the trustee has the right under this section to delegate the performance of a discretionary act to another without incurring any liability to the beneficiary of the trust merely because the act was delegated or the delegate performed the act without the prior approval of or consultation with the trustee. The foregoing comments are restricted to the extent that the trustee has the duty to hire and retain the agent with reasonable care and is liable to the beneficiary of the trust for the negligence or intentional misconduct of the agent as to the delegated discretionary acts. There may be an additional restriction that the reasonable care standard for the selection and retention of the

agent includes the requirement that any delegation, or the continuation of any delegation, to an agent represent prudent conduct of the trustee under the circumstances.

The authority to delegate in this section does not extend to the power of the trustee to delegate the trustee's entire administration to another. The trustee commits a breach of trust in delegating the whole management of the trust to another without the consent of the trust beneficiary or without being permitted to do so by the trust instrument. In such an instance the trustee is liable not only for the negligence or other improper conduct of the delegate but also for any losses occasioned by acts of the delegate regardless of the degree of care exercised by the delegate.

(28) Appoint an ancillary trustee or agent to facilitate management of assets located in another state or foreign country;

(29) Retain and store such items of tangible personal property as the trustee shall select and pay reasonable storage charges thereon from the trust estate;

(30) Issue proxies to any adult beneficiary of a trust for the purpose of voting stock of a corporation acting as the trustee of the trust;

(31) Place all or any part of the securities at any time held by the trustee in the care and custody of any bank, trust company, or member firm of the New York Stock Exchange with no obligation while the securities are so deposited to inspect or

verify the same and with no responsibility for any loss or misapplication by the bank, trust company, or firm, so long as the bank, trust company, or firm was selected and retained with reasonable care, and have all stocks and registered securities placed in the name of the bank, trust company, or firm, or in the name of its nominee, and to appoint such bank, trust company, or firm agent as attorney to collect, receive, receipt for, and disburse any income, and generally may perform, but is under no requirement to perform, the duties and services incident to a so-called "custodian" account;

(32) Determine at any time that the corpus of any trust is insufficient to implement the intent of the trust, and upon such determination by the trustee, terminate the trust by distribution of the trust to the current income beneficiary or beneficiaries of the trust or their legal representatives, except that such determination may only be made by the trustee if the trustee is neither the grantor nor the beneficiary of the trust, and if the trust has no charitable beneficiary;

(33) Rely with acquittance on advice of counsel on questions of law; and

(34) Continue to be a party to any existing voting trust agreement or enter into any new voting trust agreement or renew an existing voting trust agreement with respect to any assets contained in trust.

Sec. 81 11.98.080 Consolidation of Trusts.

(1) Criteria. Two or more trusts may be consolidated if:

- (a) The trusts so provide; or
- (b) Whether provided in the trusts or not, in accordance with subsection (2) if all interested persons consent as provided in subsection (2)(c) and the requirements of subsection (1)(d) are satisfied; or
- (c) Whether provided in the trusts or not, in accordance with subsection (3) if the requirements of subsection (1)(d) are satisfied.
- (d) Consolidation pursuant to subsection (2) or subsection (3) is permitted only if:
 - (i) The dispositive provisions of each trust to be consolidated are substantially similar;
 - (ii) Consolidation is not inconsistent with the intent of the trustor of any trust to be consolidated; and
 - (iii) Consolidation would facilitate administration of the trusts and would not materially impair the interests of the beneficiaries.
- (e) Trusts may be consolidated whether created inter vivos or by will, by the same or different instruments, by the same or different trustors, whether or not the trustees are the same, and regardless of where the trusts were created or administered.

Comment: This is a new statute providing for non-judicial and judicial consolidation of trusts. The purpose of this

subsection (1) is to address some of the issues that could be raised in litigation and to provide general guidelines for determining whether consolidation is appropriate.

(2) Nonjudicial Consolidation. The trustees of any two or more trusts may consolidate the trusts on such terms and conditions as they deem appropriate without court approval as provided in RCW 11.96.170.

(a) The trustee shall give written notice of proposed consolidation by personal service or by certified mail to the beneficiaries of every trust affected by the consolidation as provided in RCW 11.96.100 and RCW 11.96.110 and to any trustee of such trusts who does not join in the notice. The notice shall:

- (i) state the name and mailing address of the trustee;
- (ii) include a copy of the governing instrument of each trust to be consolidated;
- (iii) include a statement of assets and liabilities of each trust to be consolidated, dated within 90 days of the notice;
- (iv) fully describe the terms and manner of consolidation; and
- (v) state the reasons supporting the requirements of subsection (1)(d).

The notice shall advise the recipient of the right to petition for a judicial determination of the proposed consolidation as provided in subsection 3. The notice shall include a form on which consent or objection to the proposed consolidation may be indicated.

(b) If the trustee receives written consent to the proposed consolidation from all persons entitled to notice as provided in RCW 11.96.100 and RCW 11.96.110, the trustee may consolidate the

trusts as provided in the notice. Any person dealing with the trustee of the resulting consolidated trust shall be entitled to rely on the authority of such trustee to act and shall not be obliged to inquire into the validity or propriety of the consolidation pursuant to this section.

(3) Judicial Consolidation.

(a) Any trustee, beneficiary, or special representative may petition the superior court of the county in which the principal place of administration of a trust is located for an order consolidating two or more trusts under RCW Chapter 11.96. If non-judicial consolidation has been commenced pursuant to Section 2, a petition may be filed under this section unless the trustee has received all necessary consents. The principal place of administration of the trust shall be the trustee's usual place of business where the records pertaining to the trust are kept, or the trustee's residence if he has no such place of business.

(b) At the conclusion of the hearing, if the court finds that the requirements of subsection (1)(d) have been satisfied, it may direct consolidation of two or more trusts on such terms and conditions as it shall deem appropriate. The court in its discretion may provide for payment from one or more of the trusts of reasonable fees and expenses for any party to such proceeding.

(4) Effective Date. This section applies to all trusts whenever created.

Comment: This is different from the effective date of RCW 30.99.010. It is appropriate, however, since the consolidation cannot proceed unless the court or trustee determines that the standards set forth in Section 1(d) are satisfied.

Sec. 83 11.98.090 Nonliability of third persons without knowledge of breach. In the absence of knowledge of a breach of trust, no party dealing with a trustee ~~shall be~~ is required to see to the application of any moneys or other properties delivered to the trustee. [1959 c 124 §8.]

Comment: Formerly RCW 30.99.080.

Sec. 84 11.98.100 Nonliability for action or inaction based on lack of knowledge of events. When the happening of any event, including but not limited to events such as marriage, divorce, performance of educational requirements or death, affects the administration or distribution of the trust then a trustee who has exercised reasonable care to ascertain the happening of ~~such~~ the event shall not be liable for any action or inaction based on lack of knowledge of ~~such~~ the event. A corporate trustee ~~shall not be~~ is not liable prior to receiving such knowledge or notice in its trust department office where the trust is being administered.

[1959 c 124 §9.]

Comment: Formerly RCW 30.99.090.

Sec. 85 11.98.110 Contract and tort liability. Actions on contracts which have been transferred to a trust and on contracts made by a trustee, and actions in tort for personal liability incurred by a trustee in the course of his administration may be maintained by the party in whose favor the cause of action has accrued as follows:

(1) The plaintiff may sue the trustee in his representative capacity and any judgment rendered in favor of the plaintiff ~~shall be~~ is collectible by execution out of the trust property; except if the action is in tort, collection shall not be had from the trust property unless the court shall determine in ~~such~~ the action that (a) the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or (b) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or (c) that, although the tort did not fall within classes (a) or (b) above, it increased the value of the trust property. If the tort is within classes (a) or (b) above, collection may be had of the full amount of damage proved, and if the tort is within class (c) above, collection may be had only to the extent of the increase in the value of the trust property.

(2) If the action is on a contract made by the trustee, the trustee may be held personally liable on ~~such~~ the contract, if personal liability is not excluded. Either the addition by the trustee of the words "trustee" or "as trustee" after the signature of a trustee to a contract or the transaction of business as trustee under an assumed name in compliance with RCW 19.80.010 to *19.80.050 inclusive shall exclude the trustee from personal liability. If the action is on a contract transferred to the trust or trustee, subject to any rights therein vested at time of such transfer, the trustee shall be personally liable only if he has in writing assumed such liability.

(3) In any action under this section against the trustee in his representative capacity the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

(4) The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement:

(a) A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if (i) the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust, or (ii) although the tort was not a common incident of such activity, if neither

the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability;

(b) A trustee who commits a tort which increases the value of the trust property ~~shall be~~ is entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

(5) The procedure for all actions provided in this section shall be as provided in Chapter 11.96 RCW. ~~No judgment shall be rendered in favor of the plaintiff in any such action unless the plaintiff shall cause a copy of the notice of the hearing on such action to be mailed not less than twenty days before the date thereof to the trustor, if living, the trustee and to each beneficiary whose name and address is known to him. Proof of the mailing of such notice shall be made by affidavit which shall be filed at or before the hearing. All those whose names or addresses are not known or are not legally competent and any beneficiary who is not ascertained shall be represented at the hearing by a guardian ad litem appointed by the court when it sets the time of hearing.~~

Comment: This change allows use of the non-judicial and judicial resolution of disputes under new chapter 11.96 RCW.

(6) Nothing in this section shall be construed to change the existing law with regard to the liability of the trustee of a charitable trust for the torts of the trustee. [1959 c 124 §10.]

*Reviser's note: RCW 19.80.050 is now codified in RCW 19.80.040.

Comment: Formerly RCW 30.99.100. The revised proposed addition to the Washington Uniform Partnership Act includes the terms "trustees and personal representatives" within the definition of the word "person." Also, as an additional consideration, the provision of the Uniform Partnership Act which deals with a partner's liability to third persons is amended to refer to the contract and tort liability section (RCW 11.98.110(2)) of the Washington Trust Act.

Sec. 87 11.98.130 Violation of rule against perpetuities by instrument -- Periods during which trust not invalid. If any provision of an instrument creating a trust, including the provisions of any further trust created, or any other disposition of property made pursuant to exercise of a power of appointment granted in or created through authority under such instrument shall violates the rule against perpetuities, neither such provision nor any other provisions of the trust, or such further trust or other disposition, shall ~~is~~ thereby be rendered invalid during any of the following periods:

(1) The twenty-one years following the effective date of the instrument.

(2) The period measured by any life or lives in being or conceived at the effective date of the instrument if by the

terms of the instrument the trust is to continue for such life or lives.

(3) The period measured by any portion of any life or lives in being or conceived at the effective date of the instrument if by the terms of the instrument the trust is to continue for such portion of such life or lives; and

(4) The twenty-one years following the expiration of the periods specified in subsections (2) and (3) above. [1969 c 145 §11.98.010. Prior: 1959 c 146 §1.]

Comment: Formerly RCW 11.98.010.

Sec. 88 11.98.140 Distribution of assets and vesting of interest during period trust not invalid. If, during any period in which an instrument creating a trust, as described in RCW 11.98.130, or any provision thereof, is not to be rendered invalid by the rule against perpetuities, any of the trust assets should by the terms of the instrument, or pursuant to any further trust or other disposition resulting from exercise of a power of appointment granted in or created through authority under such instrument, become distributable or any beneficial interest ~~therein in any of the trust assets~~ should by the terms of the instrument, or such further trust or other disposition become vested, such assets shall be distributed and such beneficial interest shall validly vest in accordance with the instrument, or such further trust or

other disposition. [1965 c 145 §11.98.020. Prior 1959 c 146 §2.]

Comment: Formerly RCW 11.98.020.

Sec. 89 11.98.150 Distribution of assets at expiration period. If, at the expiration of any period in which an instrument creating a trust (as described in RCW 11.98.009) or any portion thereof, is not to be rendered invalid by the rule against perpetuities, any of the trust assets have not by the terms of the trust instrument become distributable or vested, then ~~such the~~ assets shall be ~~then~~ distributed as the superior court having jurisdiction shall direct, giving effect to the general intent of the creator of the trust or person exercising a power of appointment in the case of any further trust or other disposition of property made pursuant to exercise of a power of appointment. [1965 c 145 §11.98.030. Prior: 1959 c 146 §3.]

Comment: Formerly RCW 11.98.030.

Comments for 11.98.130, 140 and 150 changes. A power of appointment could be exercised under new Section 11.95.060(1) to postpone vesting beyond the period permitted under the rule against perpetuities. These amendments will apply the existing "wait and see rule" that applies to trusts to property dispositions made pursuant to the exercise of powers of appointment. Thus, exercise of a power in a way that would violate the rule against perpetuities will be prevented. If a

power of appointment could be so exercised, adverse estate tax consequences could result under Treasury Regulation §20.2041-3(3)(1) in certain circumstances.

Sec. 90 11.98.160 Effective Date of Creation of Trust. For the purposes of this chapter the effective date of an instrument purporting to create an irrevocable inter vivos trust ~~shall be its~~ is the date of delivery on which it is executed by the trustor, and the effective date of an instrument purporting to create either a revocable inter vivos trust or a testamentary trust shall be the date of the trustor's or testator's death. [1965 c 145 §11.98.040. Prior: 1959 c 146 §4.]

Comment: Formerly RCW 11.98.040. Changes creation of an irrevocable inter vivos trust from an ambiguous "date of delivery" to a definite date on which the trust was executed. This change impacts the rule against perpetuities in that the rule can run from either execution and/or delivery of assets to the trust.

Sec. 91 11.98.170 Trustee or Custodian Named as Beneficiary of Life Insurance Policy or Retirement Plan.

(1) Trustee named by will or under trust agreement. Any life insurance policy or retirement plan payment provision may designate as beneficiary

(a) a trustee named or to be named by will, and immediately after the proving of the will, the proceeds of such

insurance or of such plan designated as payable to such trustee (in part or in whole) shall be paid to the trustee in accordance with the beneficiary designation, to be held and disposed of under the terms of the will governing the testamentary trust ~~created therein~~; or

(b) a trustee named or to be named under a trust agreement executed by the insured, the plan participant, or any other person, and the proceeds of such insurance or retirement plan designated as payable to such trustee (in part or in whole) shall be paid to the trustee in accordance with the beneficiary designation, to be held and disposed of by the trustee as provided in such trust agreement; a trust ~~shall be~~ is valid even if the only corpus consists of the right, of the trustee to receive as beneficiary such insurance or retirement plan proceeds; any such trustee may also receive assets, other than insurance or retirement plan proceeds, by testamentary disposition or otherwise and, unless directed otherwise by the transferor of the assets, shall administer all property of the trust according to the terms of the trust agreement.

(2) Procedure if no qualified trustee. - If no qualified trustee makes claim to the insurance policy or retirement plan proceeds from the insurance company or the plan administrator within twelve months after the death of the insured or plan participant, determination of the proper recipient of the proceeds shall be made pursuant to the judicial or non-judicial dispute

resolution procedures of RCW Chapter 11.96, unless prior to the institution of such judicial procedures, or qualified trustee makes claim to such proceeds, ~~provided, however, except~~ that (a) if satisfactory evidence is furnished the insurance company or plan administrator within such twelve-month period showing that no trustee can or will qualify to receive such proceeds, payment shall be made to those otherwise entitled to the proceeds under the terms of the policy or retirement plan, including the terms of the beneficiary designation, ~~and, provided, further, except that~~ (b) if there is any dispute as to the proper recipient of insurance policy or retirement plan proceeds, the dispute shall be resolved pursuant to the judicial or non-judicial resolution procedures in RCW Chapter 11.96.

(3) Proceeds not subject to debts or claims. The proceeds of ~~such~~ insurance or retirement plan as collected by the trustee ~~shall~~ are not ~~be~~ subject to debts of the insured or the plan participant to any greater extent than if ~~such~~ the proceeds were payable to any named beneficiary other than the personal representative or the estate of the insured or of the plan participant.

(4) Custodian considered as trustee. For purposes of this section, the term "trustee" includes any custodian under RCW Chapter 11.93 or any similar statutory provisions of any other state and the terms "trust agreement" and "will" refer to the provisions of RCW Chapter 11.93 or such similar statutory provisions of any other state.

(5) Other definitions. For purposes of this section the following definitions shall apply:

(a) "Retirement plan" means any plan, account, deposit, annuity, or benefit (other than a life insurance policy) that provides for payment to a beneficiary designated by the plan participant for whom the plan is established. The term includes, without limitation, such plans regardless of source of funding, and, for example, includes pensions, annuities, stock bonus plans, employee stock ownership plans, profit sharing plans, self-employed retirement plans, individual retirement accounts, individual retirement annuities, and retirement bonds, as well as any other retirement plan or program.

(b) "Plan administrator" means the person upon whom claim must be made in order for retirement plan proceeds to be paid upon the death of the plan participant.

(6) Current designations not affected. Enactment of this section ~~shall~~ does not invalidate ~~previous~~ life insurance policy or retirement plan beneficiary designations executed prior to the effective date of this 1984 Act naming a trustee established by will or by trust agreement.

Comment: This section combines into one place the provisions under prior RCW 48.18.450 and prior RCW 48.18.452 and also specifically authorizes payment of life insurance or retirement plan proceeds to a custodian under the Uniform Gifts to Minors Act of any state. The section is intended to authorize the

CHAPTER 11.100

INVESTMENT OF TRUST FUNDS

- 11.100.010 Provisions of chapter to control
- 11.100.015 Guardians, guardianships and funds are subject to chapter
- 11.100.020 General specifications
- 11.100.023 Investments in certain enterprises
- 11.100.025 Marital deduction interests
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- 11.100.050 Scope of chapter
- 11.100.060 Liability of a fiduciary holding trust property
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- 11.100.090 Dealings with self or affiliate
- 11.100.120 Investments in policies of life insurance

- 11.100.130 Person to whom power or authority to direct or control acts of trustee or investments of a trust are conferred deemed a fiduciary -- Liability
- 11.100.140 Notice and procedure for non-routine transaction

Sec. 95 11.100.010 Provisions of chapter to control. Any corporation, association, or person handling or investing trust funds as a fiduciary shall be governed in the handling and investment of such funds as in this chapter specified. [1955 c.33 §30.24.010. Prior: 1947 c 100 §1; Rem. Supp. 1947 §3255-10a.]

Comment: Formerly RCW 30.24.010.

Sec. 95 11.100.015 Guardians, guardianships and funds are subject to chapter. In addition to other fiduciaries, a guardian of any estate is a fiduciary within the meaning of this chapter; and in addition to other trusts, a guardianship of any estate is a trust within the meaning of this chapter; and in addition to other trust funds, guardianship funds are trust funds within the meaning of this chapter. [1955 c 33 §30.24.015. Prior: 1951 c 218 §1.]

Comment: Formerly RCW 30.24.015.

Sec. 97 11.100.020 General specifications.

(1) A fiduciary is authorized to acquire and retain every kind of property. In acquiring, investing, reinvesting, exchanging, selling and managing property for the benefit of another, a fiduciary, in determining the prudence of a particular investment, shall give due consideration to the role that the proposed investment or investment course of action plays within the overall portfolio of assets. In applying such total asset management approach, a fiduciary shall exercise the judgment and

care under the circumstances then prevailing, which ~~men~~ persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds; and if the fiduciary has special skills or is named trustee on the basis of representations of special skills or expertise, the fiduciary is under a duty to use those skills.

(2) Except as may be provided to the contrary in the instrument, the following are among the factors that should be considered by a fiduciary in applying such total asset management approach:

- (a) probable income as well as the probable safety of their capital,
- (b) marketability of investments,
- (c) length of the term of the investments,
- (d) duration of the trust,
- (e) liquidity needs,
- (f) requirements of the beneficiary or beneficiaries,
- (g) other assets of the beneficiary or beneficiaries, including earning capacity, and
- (h) effect of investments in increasing or diminishing liability for taxes.

Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment specifically including but not by way of limitation, debentures and other

corporate obligations, and stocks, preferred or common, which ~~men~~ persons of prudence, discretion and intelligence acquire for their own account.

Comment: The revisions to the statute, formerly RCW 30.24.020, were made to give statutory recognition to the more modern total asset approach to investment management in contrast to the old rule that each individual asset had to satisfy the prudent man rule on its own merits. The Uniform Probate Code concept of requiring a higher standard of care for fiduciaries with special skills has been included and the statute has been broadened to provide an internal checklist of some of the more important factors which should be considered in applying the total asset management approach.

Sec. 98 11.100.023 Investments in certain enterprises. Subject to the standards of 11.99.020, a fiduciary is authorized to invest in new, unproven, untried, or other enterprises with a potential for significant growth whether or not producing a current return, either by investing directly therein or by investing as a limited partner or otherwise in one or more commingled funds which in turn invest primarily in such enterprises. The aggregate amount of investments made by a fiduciary under the authority of this section shall not exceed ten percent (10%) of the net fair market value of the trust corpus at the time any such investment is made. Any investment which would have been authorized by this

section if in force at the time the investment was made is hereby authorized.

Comment: This is a new statute to affirm that in certain situations it may be prudent for a fiduciary to invest in new untried enterprises. Repeals RCW 30.24.080.

Sec. 99 11.100.025 Marital Deduction Interests. With respect to trusts for which a federal estate or gift tax marital deduction is taken, any investment in or retention of unproductive property shall be subject to a power in the spouse of the trust's creator to require either that any such asset be made productive, or that it be converted to productive assets within a reasonable period of time unless the instrument creating the interest provides otherwise.

Comment: This provision is intended to preserve a federal estate or gift tax marital deduction in the event the trust holds unproductive property. The retention of such assets can cause a marital deduction to be denied. However, giving the spouse a power to require that the assets be made productive, or that they be converted to productive assets, will save the deduction. Treas. Reg. §20.2056(b)-5(f)(4).

Sec. 101 11.100.030 Investment in savings accounts -- Requirements. A corporation doing a trust business may invest trust funds in savings accounts with itself to the extent that such deposits are insured by the Federal Deposit Insurance Corporation-- an agency

of the federal government. ~~That~~ Additional trust funds may be so invested by the corporation only if it first sets aside under the control of its trust department as collateral security:

(1) Direct obligations of the United States or other obligations fully guaranteed by the United States as to principal and interest; or

(2) Bonds or other obligations which constitute general obligations of any state of the United States or municipal subdivision thereof.

The securities so deposited or securities substituted therefor as collateral shall at all times be at least equal in market value to the amount of such funds so deposited. [1967 c 133 §3; 1955 c 33 §3024.030. Prior: 1947 c 100 §3; Rem. Supp. 1947 §3255-10c.]

Comment: Formerly RCW 30.24.030.

Sec. 102 11.100.035 Investments in securities of certain investment trusts. Within the standards of judgment and care established by law, and subject to any express provisions or limitations contained in any particular trust instrument, guardians, trustees and other fiduciaries, whether individual or corporate, are authorized to acquire and retain securities of any open-end or closed-end management type investment company or investment trust registered under the Federal Investment Company act of 1940 as now or hereafter amended. [1955 c 33 §30.24.035. Prior: 1951 c 132 §1.].

Comment: Formerly RCW 30.24.035.

Sec. 104 11.100.037 Investment or distribution of funds held in fiduciary capacity -- Deposit in other departments authorized -- Collateral security required, exception. Funds held by a bank or trust company in a fiduciary capacity awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account. Such funds, including managing agency accounts, may, unless prohibited by the instrument creating the trust or by other statutes of this state, be deposited in the commercial or savings or other department of the bank or trust company, ~~provided that~~ only if the bank or trust company ~~shall~~ first sets aside under control of the trust department as collateral security:

(1) Direct obligations of the United States or other obligations fully guaranteed by the United States as to principal and interest; or

(2) Bonds or other obligations which constitute general obligations of any state of the United States or municipal subdivision thereof.

The securities so deposited or securities substituted therefor as collateral shall at all times be at least equal in market value to the amount of such funds so deposited, but such security shall not be required to the extent that the funds so deposited

are insured by the Federal Deposit Insurance Corporation an agency of the federal government. [1967 c 133 §4.]

Comment: Formerly RCW 30.24.037.

Sec. 105 11.100.040 Court may permit deviation from terms of trust instrument. Nothing contained in this chapter shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property. [1955 c 33 §30.24.040. Prior: 1947 c 100 §4; Rem. Supp. 1947 §3255-10d.]

Comment: Formerly RCW 30.24.040.

Sec. 107 11.100.050 Scope of chapter. The provisions of this chapter shall govern fiduciaries acting under wills, trusts, agreements, court orders, and other instruments now or hereafter in force effective before or after the effective date of this 1984 Act. [1955 c 33 §30.24.050. Prior: 1947 c 100 §5; Rem. Sup. 1947 §3255-10e.]

Comment: Formerly RCW 30.24.050. The amendment is designed to make sure that this chapter applies to all trusts now in existence or hereafter created.

Sec. 108 11.100.060 Liability of a Fiduciary Holding Trust Property.
Any fiduciary may hold during the life of the trust all securi-

ties or other property, real or personal, received into or acquired by the trust from any source, excepting such as are purchased by the fiduciary in administering the trust, unless there are express provisions to the contrary in the instrument.

Any fiduciary may invest funds held in trust under an instrument creating such trust, in any manner and in any investment and in any class of investments authorized by the instrument.

The investments described in this section are permissible even though such securities or other property are not permitted under other provisions of this Chapter, and even though such securities may be securities issued by the corporation which is the fiduciary.

A fiduciary is not liable for any loss incurred with respect to any investment held under the authority of or pursuant to this section if such investment was permitted when received, or when the investment was made by the fiduciary, and if such fiduciary exercises due care and prudence in the disposition or retention of any such investment.

Comment: This statute which was formerly RCW 30.24.060 and 070 was drafted to codify the case of Baldus v. Bank of California, 12 Wn. App. 621 (1975), regarding the question of fiduciary liability where assets are held in trust by a fiduciary pursuant to the authority of RCW 11.99.060. The statute is patterned after Cal. Code §2261(2) and New York Code Article 11, Section 2.2.

Sec. 110 11.100.070 Terms of trust instrument defining permitted investments controlling. ~~Any fiduciary may invest funds held in trust under an instrument creating such trust, in any manner and/or in any investment and/or in any class of investments authorized by such instrument, whether or not the same is otherwise qualified for the investment of trust funds.~~ The term "legal investment" or "authorized investment" or words of similar import, as used in any such instrument, shall be taken to mean any investment which is permitted by the terms of Chapter 11.99 RCW. [1955 c 33 §30.24.070. Prior: 1947 c 100 §7; 1941 c 41 §13; Rem Supp. 1947 §3255-13.]

Comment: Formerly RCW 30.24.070. The omitted portion of the above section is now covered by 11.99.060 and new Chapter 11.97, which states simply that the terms of the trust instrument shall govern all provisions of Chapter 11.99.

Sec. 111 11.100.090 Dealings with self or affiliate. Unless the instrument creating the trust expressly provides to the contrary, any fiduciary in carrying out the obligations of the trust, may not buy or sell investments from or to himself or itself or any affiliated or subsidiary company or association. This section shall not be construed as prohibiting the trustee's powers authorized under RCW 11.98.070(12). [1955 c 33 §30.24.090. Prior: 1947 c 100 §9; 1941 c 41 §17; Rem. Supp. 1947 §3255-17.]

Comment: Formerly RCW 30.24.090 with the exception of the last sentence which was added for clarification regarding a trustee's power to advance or borrow money from the trustee's own funds.

Sec. 112 11.100.120 Investments in policies of life insurance. ~~Within Subject to the standards of judgment and care established by law, RCW 11.100.020, and subject to any express provisions or limitations contained in any particular trust instrument, guardians, trustees and other fiduciaries, whether individual or corporate, are a fiduciary is authorized to invest the principal of use trust funds to acquire and retain policies of life insurance made upon the life of any person for whose benefit the fiduciary holds property or made beneficiary or upon the life of another in whose life such person beneficiary has an insurable interest. the policy and the proceeds or avails thereof to be the property of the fiduciary.~~

~~The purpose of this section is to affirm that certain policies of life insurance are among the investments authorized for fiduciaries, but without creating any inference that a policy of life insurance is preferable to other authorized investments in a particular instance. (1973 1st ex.s. c 89 §1.)~~

Comment: Formerly RCW 30.24.120. This statute was revised to refer specifically to the new Prudent Person Rule as set forth in RCW 11.100.020 and to make other clarifying changes. The revisions are not intended to make any substantive changes in the

law with regard to the appropriateness by fiduciaries of investments in life insurance.

Sec. 113 11.100.130 Person to whom power or authority to direct or control acts of trustee or investments of a trust are conferred deemed a fiduciary -- Liability. Whenever power or authority to direct or control the acts of a trustee or the investment of a trust is conferred directly or indirectly upon any person other than the designated trustee of the trust, such person shall be deemed to be a fiduciary and shall be liable to the beneficiaries of said trust and to the designated trustee to the same extent as if he were a designated trustee in relation to the exercise or nonexercise of such power or authority. [1973 1st ex.s. c 89 §2.]

Comment: Formerly RCW 30.24.130.

Sec. 114 11.100.140 Notice and procedure for non-routine transactions. (1) A trustee shall not enter into a significant non-routine transaction in the absence of a compelling circumstance without:

(a) Providing the written notice called for by subsection (3); and

(b) If the significant non-routine transaction is of the type described in subsection (2)(a) below, obtaining an independent appraisal, or selling in an open-market transaction.

(2) A "significant non-routine transaction" for the purpose of this section is defined as any of the following:

(a) any sale, option, lease or other agreement, binding for a period of ten years or more, dealing with any interest in real estate (other than real estate purchased by the trustee or a vendor's interest in a real estate contract) the value of which constitutes twenty-five percent (25%) or more of the net fair market value of trust principal at the time of the transaction; or

(b) the sale of any item or items of tangible personal property, including a sale of precious metals or investment gems, (other than precious metals or investment gems purchased by the trustee) the value of which constitutes twenty-five percent (25%) or more of the net fair market value of trust principal at the time of the transaction; or

(c) the sale of shares of stock in a corporation whose stock is not traded on the open market, if the stock in question constitutes more than twenty-five percent (25%) of the corporation's outstanding shares; or

(d) the sale of shares of stock in any corporation where the stock to be sold constitutes a controlling interest, or would cause the trust to no longer own a controlling interest, in the corporation.

(3) A "compelling circumstance" for the purpose of this section is defined as a condition, fact or event which the trustee believes necessitates action without compliance with this

section in order to avoid immediate and significant detriment to the trust. If faced with a compelling circumstance, the trustee shall give the notice called for by Paragraph (3) and may thereafter enter into the significant non-routine transaction without waiting for the expiration of the twenty-day period.

(4) The written notice required by this section shall set forth such material facts as necessary to properly advise the recipient of such notice of the nature and terms of the intended transaction. Such notice shall be given to the trustor, if living, to each person who is 18 years old or older and to whom income is presently payable or for whom income is presently being accumulated for distribution as income and for whom an address is known to the trustee, and to the attorney general if the trust is a charitable trust under RCW 11.110.020. The notice shall be mailed by U.S. certified mail, postage prepaid, return receipt requested, to the recipient's last-known address, or may be personally served, at least 20 days prior to the trustee entering into any binding agreements.

(5) The trustor, if living, or persons entitled to notice under this section may, by written instrument, waive any requirement imposed by this section.

(6) Except as required by this section for non-routine transactions defined in subsection (2) of this section, a trustee shall not be required to notify beneficiaries of a trust of the trustee's intended action, to obtain an independent appraisal, or to sell in an open-market transaction.

(7) Any person dealing with a trustee may rely upon the trustee's written statement that the requirements of this section have been met for a particular transaction. If a trustee gives such a statement, the transaction shall be final unless the party relying on the same has actual knowledge that the requirements of this section have not been met.

(8) The requirements of this section, and any similar requirements imposed by prior case law, shall not apply to personal representatives or to those trusts excluded from the definition of express trusts under RCW 11.98.009.

Comment: This statute is intended to provide trustees with specific statutory guidance concerning the notices and procedures to be followed under certain circumstances. The provision permitting a trustee to enter into a significant non-routine transaction without waiting for expiration of the 20-day period in a compelling circumstance is intended to be available for emergency situations where prompt action is necessary to avoid a loss. The statute was drafted to codify the principles of Allard v. Pacific Bank, 99 Wn.2d 394 (1983), and expressly to supersede that decision so it will have no application, except as codified in this section. The section is intended to supersede and overrule the case because of certain uncertainties it created, and to provide workable rules for the beneficial principles expressed in that case.

This section requires that trustees give beneficiaries prior notice of significant non-routine transactions so the benefi-

ciaries can consider, and if appropriate, seek to prevent the occurrence of the proposed transaction. This section makes clear that it (and the Allard case) do not apply to personal representatives (defined in RCW 11.02.005(1)) since their actions are already adequately regulated by existing probate laws.

The section makes clear that a third party dealing with a trustee may rely on the trustee's written statement that all required notices have been given or that this section has otherwise been complied with.

CHAPTER 11.102

COMMON TRUST FUNDS

- 11.102.010 Funds authorized
- 11.102.020 Accounting
- 11.102.030 Applicability of Chapter
- 11.102.040 Interpretation
- 11.102.050 Chapter designated "Uniform Common Trust Fund Act"

Sec. 115 11.102.010 Funds authorized -- Investment -- Rules and regulations -- "Affiliated" defined. Any bank or trust company qualified to act as fiduciary in this state, or in any other state if affiliated with a bank or trust company qualified to act as fiduciary in this state, may establish common trust funds for the purpose of furnishing investments to itself and its affiliated or related bank or trust company as fiduciary, or to itself and its affiliated or related bank or trust company, and others, as cofiduciaries; and may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciary or cofiduciaries to such investment. ~~That~~ Any bank or trust company qualified to act as fiduciary in the state of its charter, which is not a member of the federal reserve system, shall, in the operation of such common trust fund, comply with the rules and regulations as made from time to time by the supervisor of banking in the state where chartered and in Washington the supervisor is hereby authorized and empowered to make such rules and regulations as he may deem necessary and proper in the premises.

"Affiliated" as used in this section means two or more banks or trust companies;

(1) In which twenty-five percent or more of their voting shares, excluding shares owned by the United States or by any company wholly owned by the United States, are directly or indirectly owned or controlled by a holding company; or

(2) In which the election of a majority of the directors is controlled in any manner by a holding company. [1979 c 105 §1; 1955 c 33 §30.28.010. Prior: 1943 c 55 §1; Rem. Supp. 1943 §3388.]

Comment: Formerly RCW 30.28.010.

Sec. 115 11.102.020 Accounting. Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the superior court, secure approval of such an accounting on such conditions as the court may establish. [1955 c 33 §30.28.020. Prior: 1943 c 55 §2; Rem. Supp. 1943 §3388-1.]

Comment: Formerly RCW 30.28.020.

Sec. 115 11.102.030 Applicability of chapter. This chapter shall apply to fiduciary relationships in existence on June 11, 1943, or thereafter established. [1955 c 33 §30.28.030. Prior: 1943 c 55 §7; Rem. Supp. 1943 §3388-6.]

Comment: Formerly RCW 30.28.030.

Sec. 115 11.102.040 Interpretation. This chapter shall be so interpreted and construed to effectuate its general purpose to make uniform the laws of those states which enact it. [1955 c 33 §30.28.040. Prior: 1943 c 55 §3; Rem. Supp. 1943 §3388-2.]

Comment: Formerly RCW 30.28.040.

Sec. 115 11.102.050 Chapter designated "uniform common trust fund act." This chapter may be cited as the uniform common trust fund act. [1955 c 33 §30.28.050. Prior: 1943 c 55 §4; Rem. Supp. 1943 §3388-3.]

Comment: Formerly RCW 30.28.050.

CHAPTER 11.104

WASHINGTON PRINCIPAL AND INCOME ACT

- 11.104.010 Definitions
- 11.104.020 Duty of trustee as to receipts and expenditures
- 11.104.030 Income -- principal -- charges
- 11.104.04Q When right to income arises -- apportionment of income
- 11.104.050 Income earned during administration of a decedent's estate
- 11.104.060 Corporate distribution
- 11.104.070 Bond premium and discount
- 11.104.080 Trade, business and farming operations
- 11.104.090 Disposition of natural resources
- 11.104.100 Timber
- 11.104.110 Other property subject to depletion
- 11.104.120 Underproductive property
- 11.104.130 Charges against income and principal
- 11.104.900 Application of chapter
- 11.104.910 Short title
- 11.104.920 Severability -- 1971 c 74
- 11.104.930 Section headings not part of law
- 11.104.940 Effective date 1971 c 74

Sec. 116 11.104.010 Definitions. As used in this chapter:

(1) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income;

(2) "Inventory value" means the cost of property purchased by the trustee and the cost or adjusted basis for federal income tax purposes of other property at the time it became subject to the trust, but in the case of a ((testamentary)) trust asset that is included on any death tax return, the trustee may, but need not, use the value finally determined for the purposes of the federal estate tax if applicable, otherwise for another estate or inheritance tax;

(3) "Remainderman" means the person entitled to principal, including income which has been accumulated and added to principal. ~~+~~

~~(4) "Trustee" means an original trustee and any successor or added trustee.~~

Comment: The definition of "inventory value" has been expanded to give a trustee the option of using an asset's death tax value if and when such asset is subjected to a death tax reporting requirement. It is to be emphasized that the use of the death tax value is discretionary. No liability will attach to a failure to use such value, whether or not the failure is intentional.

The additional reference to "another estate or" inheritance tax has been added to reflect the recent changes in the Washington death tax statutes.

The change of "an" to "any" in section (4) was made to clarify that "trustee" includes all original cotrustees.

Sec. 117 11.104.020 Duty of trustee as to receipts and expenditures.

(1) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:

(a) in accordance with the terms of the trust instrument, notwithstanding contrary provisions of this chapter;

(b) in the absence of any contrary terms of the trust instrument, in accordance with the provisions of this chapter; or

(c) if neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which persons ~~((men))~~ of prudence, discretion and intelligence would act in the management of their own affairs.

(2) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact that the trustee has made an allocation consistent with it which is contrary to a provision of this chapter.

Comment: This change is to clarify that a trustee must act either in accord with this chapter or in accord with the trust instrument.

Sec. 118 11.104.030 Income--principal--charges.

(1) Income is the return in money or property derived from the use of principal, including:

(a) rent of real or personal property, including sums received for cancellation or renewal of a lease;

(b) interest on money lent, including sums received as consideration for the privilege of pre-payment of principal except as provided in RCW 11.104.070 on bond premiums and bond discounts;

(c) income earned during administration of a decedent's estate as provided in RCW 11.104.050;

(d) corporate distributions as provided in RCW 11.104.060;

(e) ~~((accrued))~~ increment in value on bonds or other obligations issued at a discount as provided in RCW 11.104.070;

(f) receipts from business and farming operations as provided in RCW 11.104.080;

(g) receipts from disposition of natural resources as provided in RCW 11.104.090 and 11.104.100;

(h) receipts from other principal subject to depletion as provided in RCW 11.104.110; and

(i) receipts from disposition of underproductive property as provided in RCW 11.104.120.

(2) Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman while the

return on or use of the principal is in the meantime taken or received by or held for accumulation for an income beneficiary.

Principal includes:

(a) consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal;

(b) proceeds of property taken on eminent domain proceedings;

(c) proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary;

(d) stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in RCW 11.104.060;

(e) receipts from the disposition of corporate securities, bonds or other obligations for the payment of money as provided in RCW 11.104.070;

(f) royalties and other receipts from disposition of natural resources as provided in RCW 11.104.090 and 11.104.100;

(g) receipts from other principal subject to depletion as provided in RCW 11.104.110;

(h) any profit resulting from any change in the form of principal except as provided in RCW 11.104.120 on underproductive property;

(i) receipts from disposition of underproductive property as provided in RCW 11.104.120; and

(j) any allowances for depreciation established under RCW 11.104.080 and 11.104.130(1)(b).

(3) After determining income and principal in accordance with the terms of the trust instrument or of this act, the trustee shall charge to income or principal expenses and other charges as provided in RCW 11.104.130.

Comment: Changes were made to clarify the language of the statute.

Sec. 119 11.104.040 When right to income arises--apportionment of income.

(1) An income beneficiary is entitled to income from the date specified in the trust instrument, or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

(2) Subject to subparts (a) and (b) below, ~~((1a))~~ in the administration of a decedent's estate or of an asset becoming subject to a trust by reason of a will ~~((+))~~, all receipts paid on or before the date of death of the testator are principal, and all receipts paid after such date are income.

(a) Notwithstanding the foregoing, receipts due but not paid ~~((at))~~ on or before the date of death of the testator are principal; and

(b) receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due ~~((at))~~ on or before the date of death of the testator shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal, and the balance is income.

Comment: Subsection (2) has been changed to clarify the characterization of receipts not specifically enumerated in

subparts (a) and (b). In addition, subparts (a) and (b) have been clarified by referencing receipts received on or before the date of death, instead of receipts received at the date of death. The former reference was ambiguous as to whether or not the phrase "at the date of death" was inclusive or exclusive of the actual day of death. Carl J. Sinder, Revised Uniform Principal and Income Act; progress but not perfection, Law Forum 473, 479 (1963).

(3) In all other cases, any receipt from an income producing asset is income even though the receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.

(4) On the termination of an income beneficiary's income interest, ~~((income earned but not distributed))~~ if such interest was not subject to any discretion to withhold, accumulate, or distribute income to or for any other beneficiary, then income on hand but undistributed shall belong to such income beneficiary or his estate, except that if the income beneficiary is the surviving spouse of the testator or grantor of the trust and the income interest otherwise qualifies for the marital deduction on any federal estate tax return, then all accrued but undistributed income is subject to a power in such surviving spouse, exercisable by will by specifically referring to this statute, to appoint the same to the testator or grantor or his or her estate. All undistributed income not disposed of under the foregoing

provisions of this subsection shall be held and distributed as part of the next eventual interest or estate in accordance with the provisions of the will or trust relating to such next eventual interest or estate. ~~((, except, this shall not apply to any marital deduction income interest as provided in Section 2056 (and as amended or reenacted) of the Internal Revenue Code of the United States.))~~

Comment: The language referring to Section 2056 of the Internal Revenue Code was deleted to avoid the unconstitutional delegation of legislative authority as outlined in the case of State v. Dougall, 89 Wash. 2d 118, 570 P. 2d 135 (1977). It was replaced by language making the proper method of allocating accumulated income dependent on whether the income interest was discretionary or not. With the exception of an Estate Trust, all trusts which qualify for the marital deduction must have non-discretionary income interests in favor of the surviving spouse. Under the proposed change, this will result in the disposition of any interest on hand at the time of termination to either the surviving spouse or his estate, avoiding a disqualification of the interest for marital deduction purposes. Other accrued but undistributed income shall pass to the next succeeding interest, subject to a power of appointment in the surviving spouse. The addition of the power of appointment provision is to protect Qualified Terminable Interest Property Trust interests from disqualification for the marital deduction. This is based on

Treasury Regulation 20.2056(b)-5(f)(8), which provides that accrued but undistributed income at the time of the surviving spouse's death can be passed on to third parties so long as it was subject to a general power of appointment in the surviving spouse. The "QTIP" trust is the only marital deduction trust format (other than an Estate Trust) which does not by its nature have such a power in the surviving spouse. With respect to Estate Trusts, all accrued interest will pass to the surviving spouse's estate under the terms of the trust instrument.

The proposed changes will also prevent an inadvertent application of the grantor trust rules of Internal Revenue Code §677. Under that section, all income which may be accumulated for the benefit of the grantor or his spouse will be currently taxed to him. The normal short term, or Clifford, trust provides that trust assets revert to the grantor upon the trust's termination. Under the present statute, if the instrument does not explicitly state that all undistributed income is to be distributed to a person or entity other than the grantor, such income becomes payable to the grantor, causing an application of §677. The new draft provides that undistributed income belongs to the income beneficiary, alleviating this problem.

Finally, the changes allow the trustee to accumulate income for ultimate passage to successors in interest for practical or tax reasons, if the instrument so allows.

(5) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution, or if no date is fixed, on the date of declaration of the distribution by the corporation.

Sec. 120 11.104.050 Income earned during administration of a decedent's estate.

(1) Unless the will or the court otherwise provides and subject to subsection (2), all expenses incurred in connection with the settlement of a decedent's estate, including debts, funeral expenses, estate taxes, interest due at death and penalties concerning taxes, family allowances, fees of attorneys and personal representatives, and court costs shall be charged against the principal of the estate, except that the principal shall be reimbursed from income for any increase in estate taxes due to the use of administration expenses which were paid from principal as deductions for income tax purposes.

(2) Unless the will or the court otherwise provides, income from the assets of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable to a trust under this act and distributed as follows:

(a) to beneficiaries of any specific bequest, legacy, or devise, ~~specific legatees and devisees,~~ the income from the property bequeathed or devised to them respectively, less taxes, ordinary repairs, and other expenses of management and operation of the property, and appropriate portions of interest accrued since the death of the testator and of taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration; and

(b) subject to subpart (c), to all other beneficiaries, including trusts, legatees and devisees, except legatees of pecuniary bequests not in trust, the balance of the income less the balance of taxes, ordinary repairs, and other expenses of management and operation of all property from which the estate is entitled to income, plus the balance of all interest income accrued since the death of the testator, and less the balance of all taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration, in proportion to their respective interests in the undistributed assets of the estate computed at times of distribution on the basis of the fair value; provided, however, that the amount of such income earned before the date or dates of payment of any estate or inheritance tax shall be distributed to those beneficiaries in proportion to their interests immediately before the making of such payments.

(c) pecuniary bequests not in trust do not receive income, and, subject to the provisions of RCW 11.56.160, all such bequests, are not allocated any share of the expenses identified in subsection (2)(b) of this section.

(3) Any income with respect to which the income taxes have been paid which is payable in whole or in part to one or more charitable or other tax exempt organizations, and for which an income tax charitable deduction was allowable, shall be allocated among the distributees in such manner that the diminution in such taxes resulting from the charitable deduction allowable will

inure to the benefit of the charitable or tax exempt organization giving rise to the deduction.

~~(3)~~ (4) Income received by a trustee under subsection (2) shall be treated as income of the trust.

Comment: This section has been redrafted to allow the reallocation of estate settlement expenses by the court should sound economic, equitable, or tax reasons for doing so be shown. In addition, the proviso of subsection (1) has been added to statutorily provide for the equitable adjustment required by the courts in Estate of Bixby, 295 P.2d 68 (D.C. Cal. 1956), and Estate of Warms, 140 N.Y.S.2d 169 (N.Y. Co. 1955). As with the other allocations provided in subsection (1), this proviso is subject to contrary provision in the will, and contrary order of court.

Subsection (2)(b) was changed by deleting the reference to legatees of pecuniary bequests not in trust, and making this the subject of new subsection (c). This change was made for clarity. In addition, subsection (2)(b) was expanded to clarify the method for allocating the income amongst the general and residuary beneficiaries. The new language makes clear that the allocation is to be made on a ratable basis according to the fair value of each such beneficiary's interest in the estate immediately before the distribution is made. The proviso is designed to ensure that the income interests of beneficiaries that bear a greater share of

death taxes will not be disproportionately reduced. These provisions are based on section 11-3.1(d)(2) of the New York Estates, Powers and Trusts law.

New subsection (3) is based on §15-1-417(5) of the Colorado Revised Statutes. This provision has been added to ensure that the amount of income to be paid to a charitable or other tax exempt organization is not diminished by income taxes if the amount would have been allowable as a charitable deduction on the fiduciary income tax return.

Sec. 121 11.104.060 Corporate Distribution.

(1) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

(2) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the ~~(trustee)~~ stock became a ~~(stockholder)~~ part of the trust corpus or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to:

(a) a call of shares;

(b) a merger, consolidation, reorganization, or other plan by which assets of the corporation are acquired by another corporation; or

(c) a total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.

(3) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are

income. All other distributions made by the company or trust, including distribution from depreciation or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

(4) Except as provided in subsections (1), (2), and (3) of this section, all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. Except as provided in subsections (2) and (3) of this section, if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

(5) The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this act concerning the source or character of dividends or distributions of corporate assets.

Comment: Subsection (2) has been changed to conform to the allocation rules of RCW 11.104.040.

Sec. 122 11.104.070 Bond premium and discount.

(1) Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in subsection (2) for discount bonds. The trustee shall not make provision for amortization of premiums or accumulation of discount except where the trust instrument provides otherwise. If the instrument provides for amortization of premiums or accumulation of discount, but not both, and is silent as to one, it shall be the duty of the trustee to amortize premiums and accumulate discount. The proceeds of sale, redemption or other disposition of the bonds or obligations are principal.

(2) The increment in value of a bond or other obligation for the payment of money bearing no fixed rate of interest or payable at a future time in accordance with a fixed schedule of appreciation in excess of the price at which it was issued is distributable as income. Except as otherwise provided in RCW 11.104.040(4), the increment in value is distributable to the beneficiary who was the income beneficiary at the time of increment from the first principal cash available or, if none is available, when realized by sale, redemption or other disposition. Whenever unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized.

Comment: Subsection (2) has been changed to include obligations which do not bear a fixed rate of interest. As presently

drafted, the rule of subsection (2) would not apply to most short term obligations which do not have a fixed schedule of appreciation. Without the addition of this language it would appear the earnings on such obligations should be allocated to principal under the rule of subsection (1). Carl J. Sinder, Revised Uniform Principal and Income Act; progress but not perfection, Law Forum 473, 485 (1963); George E. Parker, The New Principal and Income Act, 45 Mich.S.B.J. 24, 26 (1966). This change is similar to Florida Statute §738.07.

sec. 123 11.104.080 Trade, business and farming operations. If a trustee uses any part of the principal in the operation of a trade, business or farming operation, the proceeds and losses of the business shall be allocated in accordance with what is reasonable and equitable in view of the interest of those entitled to income as well as those entitled to principal, and in view of the manner in which persons ~~((men))~~ of prudence, discretion and intelligence would act in the management of their own affairs in accordance with RCW 11.104.020. The operation of real estate for rent is considered a business.

Sec. 124 11.104.090 Disposition of natural resources.

(1) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on or under the land, the receipts from taking the natural resources from the land shall be allocated as follows:

(a) if received as rent on a lease or extension payments on a lease, the receipts are income;

(b) if received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the government instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income; and

(c) if received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in the preceding paragraphs of this section shall be apportioned on a yearly basis in accordance with this paragraph whether or not any natural resource was being taken from the land at the time the trust was established. ~~((There-))~~ Receipts shall be ~~((transferred to principal a))~~ allocated to income or apportioned between income and principal in the discretion of the

trustee, but in no event shall principal be allocated more than that portion of the gross receipts ~~((in the amount and to the extent))~~ which is deductible ~~((from federal taxation))~~ for federal income tax purposes during such year. ~~((under taxing laws in existence at the time of receipt.))~~ The balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, is income.

(2) If a trustee, on January 1, 1972, held an item of depletable property of a type specified in this section, ~~he~~ the trustee shall allocate receipts from the property in the manner used before January 1, 1972, but as to all depletable property acquired after January 1, 1972, by an existing or new trust, the method of allocation provided herein shall be used.

(3) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses.

Comment: The language of subsection (1)(c) has been modified to give the trustee greater flexibility in the allocation of receipts from certain natural resources. The former limit on principal allocations has been retained, being dependent on available deductions for income tax purposes. This new rule gives the trustee greater flexibility to weigh the equities of a given situation. The new rule is a variant of California Civil Code §730.09(a)(3).

11.104.100 Timber. If any part of the principal consists of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with RCW 11.104.020.

11.104.110 Other property subject to depletion. Except as provided in RCW 11.104.090 and 11.104.100, if the principal consists of property subject to depletion, including leaseholds, patents, copyrights, royalty rights, and rights to receive payments on a contract for deferred compensation, receipts from the property, not in excess of five percent per year of its inventory value, are income and the balance is principal.

Sec. 125 11.104.120 Underproductive property.

(1) Except as ~~((otherwise provided in this section))~~ provided in subsection (5) below, a portion of the net proceeds of sale of any part of principal which is underproductive ~~((has not produced an average net income of at least one percent per year of its inventory value for more than a year (including as income the value of any beneficial use of the property by the income beneficiary))~~ shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds received, including the value of any property received ~~((in substitution for the property disposed of))~~, less ~~((the))~~ expenses, including any capital gains tax~~((, if any,))~~ incurred in the disposition, and less any carrying charges paid while the property was underproductive.

(2) The sum allocated as delayed income is the difference between the net proceeds and the amount which, had it been invested at simple interest at four percent per year while the property was underproductive, would have produced the net proceeds. This sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property, and less the value of any ~~((beneficial))~~ use of the property by the income beneficiary, is income, and the balance is principal.

(3) Except as otherwise provided in RCW 11.104.040(4) an income beneficiary is entitled to delayed income under this section as if it accrued from day to day during the time he was a beneficiary.

(4) If principal subject to this section is disposed of by conversion into property which cannot be apportioned easily, including land or mortgages (for example, realty acquired by or in lieu of foreclosure), the income beneficiary is entitled to the net income from any property or obligation into which the original principal is converted while the substituted property or obligation is held. If within five years after the conversion the substituted property has not been further converted into easily apportionable property, no allocation as provided in this section shall be made.

(5) This section does not apply to underproductive property which the trustee is authorized to retain by the terms of the controlling document or by law, which is received into or acquired by the trust from any source (excepting property which is purchased by the fiduciary in administering the trust), the retention of which has been authorized in writing by the income beneficiaries, or the retention of which would be considered proper under the standard set forth in RCW 11.100.020.

(6) As used in this section, the term "underproductive property" refers to any property which has not produced an average net income of at least one percent per year (simple interest) of its inventory value for more than a year (including

as income the value of any use of the property by the income beneficiary.)

Comment: The definition of "underproductive property" has been taken from subsection (1) and added as new subsection (6) for clarity. New subsection (5) was added to create an exemption from the application of this section where the trustee is specifically authorized to retain underproductive property, where the property was contributed to the trust in its present form, or where the asset's retention would not be considered imprudent under the standards set out in the trustee's investment statute. This is a variant of the New York common law rule that, when dealing with property which was previously owned by the grantor, there is no right to deferred income on its sale unless the trustee was under a duty to make the property productive. 3 A. Scott, Scott on Trusts, §241.2, p.2079 (3rd. ed. 1967).

The subjective requirement that the value of the income beneficiary's "beneficial" use offset the computation of delayed income has been eliminated. The value of any use by the beneficiary will instead be considered, with its beneficial character being one of the factors in determining its value.

All other changes were made for clarity.

Sec. 126 11.104.130 Charges against income and principal.

(1) the following charges shall be made against income:

(a) Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remaindermen, or trustee, interest paid by the trustee, and ordinary repairs;

(b) if the trustee deems the same to be appropriate under the standards set forth at 11.104.020(1)(c), a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles; ~~but~~ no allowance shall be made for depreciation of that portion of any real property used by a beneficiary as a residence or for depreciation of any property held by the trustee on January 1, 1972 for which the trustee is not then making an allowance for depreciation;

(c) one-half of court costs, attorneys fees, and other fees on period ~~((judicial))~~ accountings, unless the court directs otherwise;

(d) court costs, attorneys fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise;

(e) one-half of the trustee's regular compensation, whether based on a percentage of principal or income; ~~and~~

(f) all expenses reasonably incurred for current management of principal and application of income; and

~~(f)~~ (g) any tax levied upon receipts ~~((defined as))~~ allocated to income under this act or the trust instrument and payable by the trustee.

(2) If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

(3) The following charges shall be made against principal:

(a) trustee's compensation not chargeable to income under subsections (1)(d) and (1)(e), special compensation of trustees, expenses reasonably incurred in connection with principal, court costs and attorneys fees primarily concerning matters of principal, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee;

(b) charges not provided for in subsection (1), including the cost of investing and reinvesting principal, the payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses for preparation of property for rental or sale, and, unless the court directs otherwise, expenses incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title of any trust property;

(c) extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments, but, a trustee may establish an allowance for

depreciation out of income to the extent permitted by subsection (1)(b) and by RCW 11.104.080;

(d) any tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income tax by the tax authority; and

(e) if an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount apportioned to the trust, including interest (whether on account of direct or indirect borrowing for the purpose of paying such taxes) and penalties, even though the income beneficiary also has rights in the principal.

(4) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under RCW 11.104.040.

Comment: Subsection (1)(b) was changed to give the trustee discretion in establishing reserves for depreciation. The common law rule provided that reserves for depreciation were not permitted without specific authority in the trust instrument. Estate of Shea, 69 Wn.2d 534, 408 P.2d 356 (1966). To require the establishment of a reserve account will often defeat the primary intent of the trustor - to provide the maximum possible benefit for the income beneficiary. It is more equitable not to require the establishment of such a reserve, but rather authorize its

establishment if prudent. See George C. Bogert, The Revised Uniform Principal and Income Act, 38 Notre Dame Lawyer 50, 56 (1962); Allison Dunham, et al., Uniform Revised Principal and Income Act, 101 Trusts & Estates 894, 897 (1962).

Subsection (1)(c) has been changed by deleting the requirement that a periodic accounting be part of a judicial proceeding in order for the allocation rules of that subsection to apply. This was done to ensure a like allocation in the event of a non-judicial periodic accounting. Previously such fees and costs were not specifically addressed.

The language of subsection 1(f) was changed to correspond to the language of subsection 3(d).

Subsection (3)(e) was changed to specify that the interest incurred to pay death taxes may be from direct or indirect borrowing. For example, interest from direct borrowing would be interest charged by the taxing authority when the tax is not timely paid, and interest from indirect borrowing would be interest incurred when money is borrowed from a third party and taxes are paid. Under current law a question could arise where an estate borrows money from a third party in order to pay death taxes. Arguably, the interest thus incurred is not interest on the taxes. This modification makes clear that interest incurred on account of such indirect borrowing should be treated as interest on such taxes under the statute.

11.104.900 Application of chapter. Except as specifically provided in the trust instrument or the will or in this chapter, this chapter shall apply to any receipt or expense received or incurred on or after January 1, 1972 by the estate of any decedent dying on or after January 1, 1972 or by any trust whether established before or after January 1, 1972 and whether the asset involved was acquired by the trustee before or after January 1, 1972, or after the effective date of this 1984 Act.

11.104.910 Short title. This chapter may be cited as the Washington Principal and Income Act.

11.104.920 Severability--1971 c 74. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application and to this end the provisions of this act are severable.

11.104.930 Section headings not part of law. Section headings, as found in this ~~1971~~ amendatory 1984 act do not constitute any part of the law.

11.104.940 Effective date 1971 c 74. This chapter shall take effect on January 1, 1972, with the amendments of 1984 c -- to take effect on January 1, 1985.

CHAPTER 11.106

TRUSTEES' ACCOUNTING ACT

- 11.106.010 Scope of chapter -- Exceptions
- 11.106.020 Trustee's annual statement
- 11.106.030 Intermediate and final accounts -- Contents --
Filing
- 11.106.040 Account -- Court may require -- Petition
- 11.106.050 Account filed -- Return day -- Notice
- 11.106.060 Account filed -- Objections -- Representation of
beneficiaries
- 11.106.070 Court to determine accuracy, validity -- Decree
- 11.106.080 Effect of decree
- 11.106.090 Appeal from decree
- 11.106.100 Waiver by beneficiary
- 11.106.110 Waiver -- How constituted

Reviser's note: For prior laws on this subject see: 1941
c 229 §§1-28; Rem. Supp. 1941 §§11548-1 --11548-28; 1943 c 152
§1; Rem. Supp. 1943 §§11548-27.

sec. 128 11.106.010 Scope of chapter -- Exceptions. This chapter
~~shall~~ does not apply to resulting trusts, constructive trusts,
business trusts where certificates of beneficial interest are
issued to the beneficiaries, investment trusts, voting trusts,
insurance trusts prior to the death of the insured, trusts in the
nature of mortgages or pledges, trusts created by judgment or
decree of a federal court or of the superior court when not
sitting in probate, liquidation trusts or trusts for the sole
purpose of paying dividends, interest or interest coupons,
salaries, wages or pensions; nor ~~shall~~ does this chapter apply to
personal representatives. ~~executors, administrators or~~
~~guardians~~. [1955 c 33 §30.30.010. Prior: 1951 c 226 §10.]

Comment: Formerly RCW 30.30.010.

Sec. 129 11.106.020 Trustee's annual statement. The trustee or
trustees appointed by any will, deed or agreement ~~heretofore or~~
~~hereafter executed~~ shall mail or deliver at least annually to
each adult income trust beneficiary a written itemized statement
of all current receipts and disbursements made by the trustee of
the funds of the trust both principal and income, and upon the
request of any such beneficiary shall furnish him an itemized
statement of all property then held by such trustee, and may also
file any such statement in the superior court of the county in
which the trustee or one of the trustees resides. [1955 c 33
§30.30.020. Prior: 1951 c 226 §2.]

Comment: Formerly RCW 30.30.020.

Sec. 130 11.106.030 Intermediate and final accounts -- Contents -- Filing. In addition ~~thereto to the statement required by RCW 11.106.020~~, any such trustee or trustees whenever it or they so desire, may file in the superior court of the county in which the trustees or one of the trustees resides an intermediate account under oath showing:

- (1) The period covered by the account;
 - (2) The total principal with which the trustee is chargeable according to the last preceding account or the inventory if there is no preceding account;
 - (3) An itemized statement of all principal funds received and disbursed during such period;
 - (4) An itemized statement of all income received and disbursed during such period, unless waived;
 - (5) The balance of such principal and income remaining at the close of such period and how invested;
 - (6) The names and addresses of all living beneficiaries, including contingent beneficiaries, of the trust, and a statement as to any such beneficiary known to be under legal disability;
 - (7) A description of any possible unborn or unascertained beneficiary and his interest in the trust fund.
- ~~In addition thereto~~, After the time for termination of the trust ~~shall have~~ has arrived, the trustee or trustees may also

file a final account in similar manner. [1955 c 33 §30.30.030.

Prior: 1951 c 226 §3.]

Comment: Formerly RCW 30.30.030.

Sec. 131 11.106.040 Account -- Court may require -- Petition. Upon the petition under chapter 11.96 RCW of any settlor or of any beneficiary of such a trust after due notice ~~thereof as provided in chapter 11.96 RCW~~ to the trustee the superior court in the county where the trustee or one of the trustees resides may direct the trustee or trustees ~~thereof~~ to file in ~~said the~~ court an account at any time ~~subsequent to~~ after one year from the day on which such a report was last filed, or if none, then after one year from the inception of the trust. [1955 c 33 §30.30.040. Prior: 1951 c 226 §4.]

Comment: Formerly RCW 30.30.040. The changes incorporate the judicial resolution procedures of chapter 11.96 RCW for uniformity of procedures.

Sec. 132 11.106.050 Account filed -- Return day -- Notice. When any ~~such account shall have~~ has been filed pursuant to RCW 11.106.040 the clerk of the court where filed shall fix a return day therefor, and issue a notice as provided in RCW 11.96.090. ~~for herein. If each of the beneficiaries and the guardians and guardians ad litem, if any, appointed pursuant to RCW 30.30.060, is personally served with a copy of the notice, whether within or~~

~~outside the state of Washington, at least twenty-five days prior to the return day, then no publication of the notice shall be required, otherwise the trustees shall cause notice as provided for herein to be given by publishing the same at least once a week for three successive weeks preceding the return day, the first publication to be at least twenty-five days preceding the return day, such publication to be in a newspaper of general circulation in the county, or if none then in an adjoining county. And in any event at least twenty-five days prior to the return day a copy of the notice shall be either served upon each beneficiary not represented by guardian or guardian ad litem or mailed to each such beneficiary not so served at such beneficiary's address last known to the trustee, and shall be either served upon each guardian and guardian ad litem appointed pursuant to RCW 30.30.060, or mailed to each such guardian and guardian ad litem not so served at such guardian or guardian ad litem's address last known to the trustee. Proof of service of the notice may be made by affidavit as provided for service of summons in civil actions, or by written admission of service signed by the person served. The notice shall state the time and place for the return day, the name or names of the trustee or trustees who have filed the account, that the account has been filed, that the court is asked to settle such the account, and that any objections or exceptions thereto to the account must be filed~~

with the clerk of ~~said~~ the court on or before ~~such~~ the return day. [1955 c 33 §30.30.050. Prior: 1951 c 226 §5.]

Comment: Formerly RCW 30.30.050. These changes incorporate the judicial resolution procedures of chapter 11.96 RCW for uniformity of procedures.

Sec. 133 11.106.060 Account filed -- Objections -- Representation of beneficiaries. Upon or before the return day any beneficiary of the trust may file his written objections or exceptions to the account filed or to any action of the trustee or trustees set forth ~~therein~~ in the account. The court shall appoint ~~either the legal~~ guardians ad litem as provided in RCW 11.96.180 and the court may allow representatives to be appointed under RCW 11.96.170 and 11.96.110 to represent the persons listed in those sections. ~~{of a beneficiary, or a guardian ad litem to represent the interests of any such beneficiary who is an infant or incompetent or disabled to such an extent that he or she could not understand the accounting given, or who is yet unborn or unascertained, and such beneficiary shall be bound by any action taken by such representative. Every unborn or unascertained beneficiary shall be concluded by any action taken by the court for or against any living beneficiary of the same class or whose interests are similar to the interests of such unborn or unascertained beneficiary.}~~ [1977 ex.s. c 80 §31; 1955 c 33 §30.30.060. Prior: 1951 c 226 §6.]

Purpose -- Intent -- Severability -- 1977 ex.s. c 80; See notes following RCW 4.16.190.

Comment: Formerly RCW 30.30.060. These changes incorporate the judicial resolution procedures of chapter 11.96 RCW for uniformity of procedures.

Sec. 134 11.106.070 Court to determine accuracy, validity -- Decree. ~~At the same time~~ Upon the return date or at some later date fixed by the court if so requested by one or more of the parties, the court without the intervention of a jury and after hearing all the evidence submitted shall determine the correctness of the account and the validity and propriety of all actions of the trustee or trustees set forth ~~therein~~ in the account including the purchase, retention and disposition of any of the property and funds of the trust, and shall render its decree either approving or disapproving the ~~same~~ account or any part thereof of it, and surcharging the trustee or trustees for all losses, if any, caused by negligent or wilful breaches of trust. [1955 c 33 §30.30.070. Prior: 1951 c 226 §7.]

Comment: Formerly RCW 30.30.070.

Sec. 135 11.106.080 Effect of decree. The decree ~~is~~ rendered under RCW 11.106.070 shall be deemed final, conclusive and binding upon all the parties interested including all incompetent, unborn and unascertained beneficiaries of the trust subject only to the

right of appeal ~~hereinafter stated~~ under RCW 11.101.090. [1955 c 33 §30.30.080. Prior: 1951 c 226 §8.]

Comment: Formerly RCW 30.30.080.

Sec. 136 11.106.090 Appeal from decree. The decree ~~is~~ rendered under RCW 11.106.070 shall be a final order from which any party in interest may appeal as in civil actions to the supreme court or the court of appeals of the state of Washington. [1971 c 81 §80; 1955 c 33 §30.30.090. Prior: 1951 c 226 §9.]

Comment: Formerly RCW 30.30.090.

Sec. 137 11.106.100 ~~Settlor may waive or increase accounting requirements -- Waiver by beneficiary. The settlor of any trust governed by this chapter may waive any or all of the provisions of RCW 30.30.020 requiring periodical statements to beneficiaries, or may add additional duties, in the instrument creating the trust, and Any adult beneficiary entitled to an accounting under either RCW 11.106.020 or 11.106.030 may waive such an accounting by a separate instrument delivered to the trustee.~~ [1955 c 33 §30.30.100. Prior: 1951 c 226 §11.]

Comment: Formerly RCW 30.30.100 and now provided for under new Chapter 11.97.

Sec. 138 11.106.110 Waiver -- How constituted. This chapter is declared to be of similar import to the uniform trustees' accounting act. Any modification under RCW Ch. 11.97 (including a

~~waiver) of the requirements under this chapter, A provision in any will, deed or agreement heretofore or hereafter executed, shall be given effect whether the waiver refers to which provides in substance.~~

~~(1) That the requirements or provisions of the uniform trustees' accounting act whether by name or other reference or to thereto are waived, or that the trustee shall not be required to comply therewith, or~~

~~(2) That the requirements or provisions of any other act of like or similar import, are waived, or that the trustee shall not be required to comply therewith, shall constitute a waiver by the settlor pursuant to RCW 30.30.100. [1955 c 33 §30.30.110.~~

Prior: 1951 c 226 §12.]

Comment: Formerly RCW 30.30.110 reads same as above comment.

CHAPTER 11.108

DISTRIBUTION IN SATISFACTION OF CERTAIN BEQUESTS

11.108.010 Definitions

11.108.020 Marital deduction gift; Compliance with federal law; Intent

11.108.030 Pecuniary bequests; Valuation of assets if distribution other than money

11.108.040 Construction of certain pre-September 12, 1981, marital deduction formula bequests

11.108.050 Marital deduction gift in trust; Application provisions

11.108.060 Marital deduction gift; Six months survivorship requirement

11.108.900 Application of chapter

Sec. 140 11.108.010 Definitions. As used in this chapter:

(1) The term "pecuniary bequest" means a gift in a governing instrument which either is expressly stated as a fixed dollar amount or is a gift of a dollar amount determinable by the provisions of the governing instrument, and a gift expressed in terms of a "sum" or an "amount," unless the context dictates otherwise, shall be deemed to be a gift of a dollar amount.

(2) The term "marital deduction" means the federal estate tax deduction allowed for transfers under Section 2056 of the Internal Revenue Code.

(3) The term "maximum marital deduction" means the maximum amount qualifying for the marital deduction.

(4) The term "marital deduction gift" means a gift intended to qualify for the marital deduction.

(5) The term "governing instrument" includes a will and codicils, irrevocable and revocable trusts.

(6) "Fiduciary" means trustee or personal representative. Reference to a fiduciary in the singular includes the plural where the context requires.

(7) References to the "Internal Revenue Code" are to the United States Internal Revenue Code of 1954, as it is amended from time to time. Each reference to a section of the Internal Revenue Code refers as well to any subsequent provisions of law enacted in its place.

(8) The term "gift" refers to all legacies, devises, and bequests made in a governing instrument.

Comment: In part, from California Probate Code Section 1030.

Sec. 141 11.108.020 Marital deduction gift; Compliance with federal law; Intent. If a governing instrument contains a marital deduction gift, the provisions of the governing instrument, including any power, duty, or discretionary authority given to the fiduciary, shall be construed to comply with the marital deduction provisions of the Internal Revenue Code and the regulations thereunder in order to conform to that intent. Whether the governing instrument contains a marital deduction depends upon the intention of the testator at the time the governing instrument is executed. If the testator has adequately evidenced an intention to make a marital deduction gift, the fiduciary shall not take any action or have any power that may impair that deduction. This section shall neither require nor prohibit a fiduciary making the election referred to in Section 2056(b)(7) of the Internal Revenue Code.

Comment: Essentially from California Probate Code, Section 1032. This provision is designed to permit a fiduciary to construe a gift intended to be a marital deduction gift as fully complying with the provisions of the Internal Revenue Code. The basic focus of this section is that it is the "intent" of the testator as to whether or not there should be a marital deduction.

Sec. 142 11.108.030 Pecuniary bequests; Valuation of assets if distribution other than money.

(1) If a governing instrument authorizes the fiduciary to satisfy a pecuniary bequest wholly or partly by distribution of property other than money, the assets selected for that purpose shall be valued at their respective fair market values on the date or dates of distribution, unless the governing instrument expressly provides otherwise. If the provisions of the governing instrument permit the fiduciary to value the assets selected for such distribution as of a date other than the date or dates of distribution, then, unless the governing instrument expressly provides otherwise, the assets selected by the fiduciary for that purpose shall have an aggregate fair market value on the date or dates of distribution which, when added to any cash distributed, will amount to no less than the amount of such gift as stated in, or determined by, the provisions of the governing instrument.

(2) A marital deduction gift shall be satisfied only with assets which qualify for those deductions.

Comment: Essentially from California Probate Code Section 1033. This section makes it clear that if a governing instrument directs the executor to satisfy a pecuniary bequest from property in kind, the property will be valued as of the date of distribution. The provision goes on to provide that if the governing instrument gives the fiduciary the right to value the assets on a date other than the date of distribution, the fiduciary (unless

the governing instrument provides otherwise) has to value the assets distributed in kind as of their date of distribution value. This section is intended to follow the requirements of Rev. Proc. 64-19 which requires in essence that a pecuniary marital share either (1) receive assets which are fairly representative of all appreciation and depreciation in value prior to the dates of distribution, or (2) be funded with assets having date of distribution values which are at least equal to the amount of the bequest provided for by the instrument.

Sec. 143 11.108.040 Construction of certain pre-September 12, 1981, marital deduction formula bequests.

(1) Whenever a testator, under the terms of a governing instrument executed prior to September 12, 1981, leaves outright to or in trust for the benefit of such testator's surviving spouse an amount or fractional share of such testator's estate or a trust estate expressed in terms of one-half of such testator's Federal adjusted gross estate, or by any other reference to the maximum estate tax marital deduction allowable under Federal law without referring (either in such governing instrument or in any codicil or amendment thereto) specifically to the unlimited Federal estate tax marital deduction enacted as part of the Economic Recovery Tax Act of 1981, such expression shall, unless subsection (1) or (2) applies, be construed as referring to such unlimited Federal estate tax marital deduction, and also as expressing such amount or fractional share, as the case may be, in terms of

the minimum amount which will cause the least possible amount of Federal estate tax to be payable as a result of the testator's death, taking into account other property passing to the surviving spouse which qualifies for such marital deduction (at the value at which it so qualifies), and also taking into account all credits against such Federal estate tax (but only to the extent that the use of such credits does not increase the death tax payable).

(2) If this subsection (2) applies to such testator, such expression shall be construed as referring to the estate tax marital deduction allowed by Federal law immediately prior to the enactment of the unlimited estate tax marital deduction as a part of the Economic Recovery Tax Act of 1981. This subsection (2) shall apply if:

(a) the application of this subsection (2) to the testator will not cause an increase in the Federal estate taxes payable as a result of the testator's death over the amount of such taxes which would be payable if subsection (1) applied; or,

(b) the testator is survived by a descendant (by blood or adoption) who is not also a descendant (by blood or adoption) of the testator's surviving spouse; or

(c) the testator amended the governing instrument containing such expression after December 31, 1981, without

amending such expression to refer expressly to the unlimited Federal estate tax marital deduction; and subsection (3) does not apply.

(3) If the governing instrument contains language expressly stating that Federal law is of a particular time prior to January 1, 1982 is to govern the construction or interpretation of such expression, the expression shall be construed as referring to the marital deduction allowable under Federal law in force and effect as of that time.

(4) If subsection (2) or (3) applies to the testator and if the expression contains any provision reducing the amount or the fractional share left outright to or in trust for the benefit of the surviving spouse by other property passing to the surviving spouse and qualifying for the Federal estate tax marital deduction, the provision shall not be construed as referring to any property which the personal representative of the testator's estate, or other authorized fiduciary, elects to qualify for the Federal estate tax marital deduction as qualified terminable interest property. If subsection (1) applies to the testator, any such provision shall be construed as referring to any property which the personal representative of the testator's estate, or other authorized fiduciary, elects to qualify for the Federal estate tax marital deduction as qualified terminable interest property, but only to the extent that such construction does not cause the amount or fractional share left to or for the

benefit of the surviving spouse to be reduced below that which is specified in subsection (2) or (3), whichever is applicable.

(5) This section shall be effective with respect to testators dying after December 31, 1982.

Comment: From proposed Missouri statute which has not yet been adopted. The statute effectively will do three things:

1. The normal operative rule will be that the formula provision and reference to a maximum marital deduction in a pre-September 12, 1981 will be deemed to refer to the new unlimited marital deduction.

2. Only the amount of property needed to zero out the tax cost will be placed into the marital gift. Thus, other dispositions would not be completely wiped out. An example would be an estate owner who dies in 1982 when the credit shelter is \$225,000 and the will was a pre-1976 will referring to one-half of the adjusted gross estate reduced by other qualifying property. With an estate of \$600,000, the statute would not increase the amount of property passing into the formula provision to \$600,000 reduced by other qualifying property, but would also reflect a "reduction" for the credit shelter amount of \$225,000. See "Practical Drafting," June 18, 1982 by Richard B. Covey.

3. The old maximum marital deduction law will be given effect when there will be (1) no increase in Federal estate taxes as a result of the testator's death, or (2) the testator is survived by a descendant who is not also a

descendant of the surviving spouse of the testator, or (3) the will was amended after December 31, 1981. It is to be noted that this provision cannot operate to reduce the amount of federal estate tax marital deduction to an amount less than the amount allowed as a marital deduction under federal tax law as it existed prior to the effective date of the Economic Recovery Tax Act of 1981.

4. If a will or trust specifically refers to the marital deduction in effect at a particular time, that provision will prevail. Also, when a formula provision requires a reduction for other qualifying property, the reduction does not take into account any property covered by Internal Revenue Code Section 2056(b)(7) election.

Sec. 144 11.108.050 Marital deduction gift in trust; Applicable provisions. If a governing instrument indicates the testator's intention to make a marital deduction gift in trust, in addition to the other provisions of this section, each of the following provisions also applies to the trust;

(1) The only income beneficiary of a marital deduction trust is the testator's surviving spouse.

(2) The income beneficiary is entitled to all of the trust income until the trust terminates.

(3) The trust income shall be payable to the income beneficiary not less frequently than annually.

(4) Except in the case of qualified terminable interest property resulting from an election pursuant to Section 2056(b)(7) of the Internal Revenue Code, upon termination of the trust, all of the remaining trust assets, including accrued or undistributed income, shall pass either to the income beneficiary or pursuant to the exercise of a general power of appointment granted to the income beneficiary in favor of the income beneficiary's estate or to any other person or entity in trust or outright. The general power of appointment shall be exercisable by the income beneficiary alone and in all events and the income beneficiary, or a fiduciary acting in behalf of the income beneficiary if he or she is then a minor or incompetent, may exercise it in a will or an instrument other than a will unless the instrument creating the power specifically directs otherwise.

The exercise of the general power of appointment provided in this section shall be done only by express written reference to this general power of appointment in a will or inter vivos trust instrument executed by the income beneficiary.

Comment: Essentially from California Probate Code Section 1035. The purpose of this section is to provide corrective guidance to a governing instrument that may qualify for the marital deduction but where there may not be precise instructions as to compliance with Section 2056. This statute would also presumably permit the draftsman to incorporate this section by reference in the governing instrument in order to have a marital deduction trust comply with the requirements at Section 2056(b)(7).

Sec. 145 11.108.060 Marital deduction gift; Six months survivorship requirement. If a governing instrument contains a marital deduction gift, whether outright or in trust and whether or not there is a specific reference to this article, any survivorship requirement expressed in the governing instrument in excess of six months shall not apply to property passing under a marital deduction, but shall be limited to a six month period beginning with the testator's death.

Comment: Essentially from California Probate Code Section 1036. This section is designed again to provide corrective situations where a governing instrument may not vest property in a surviving spouse for a period within six months after the date of death as is the requirement in order to obtain the marital deduction under Section 2056.

Sec. 146 11.108.900 Application of chapter. This chapter applies to any distribution made after the effective date of this chapter, whether the testator died before or after that date. This chapter shall not apply to any governing instrument the terms of which expressly or by necessary implication make this chapter inapplicable. The judicial and nonjudicial dispute resolution procedures of Chapter 11-96, RCW are applicable to this chapter.

Comment: In part, from California Probate Code Section 1031. Any issues or disputes arising under or with reference to the matters contained in this chapter may be resolved pursuant to

the judicial or nonjudicial dispute resolution procedures of

Chapter 11.96 RCW.

CHAPTER 11.110

CHARITABLE TRUSTS

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- 11.110.210 Tax Reform Act of 1969, trust instruments, prohibiting provisions
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Sec. 147 11.110.010 Purpose. The purpose of this chapter is to facilitate public supervision over the administration of public charitable trusts and similar relationships and to clarify and implement the powers and duties of the attorney general with relation thereto.

Sec. 147 11.110.020 Definitions. When used in this chapter, unless the context otherwise requires:

"Person" means an individual, organization, group, association, partnership, corporation, or any combination of them.

"Trustee" means (1) any person holding property in trust for a public charitable purpose; except the United States, its states, territories, and possessions, the District of Columbia, Puerto Rico, and their agencies and subdivisions; and (2) a corporation formed for the administration of a charitable trust or holding assets subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes: Provided, that the term "trustee" does not apply to (a) religious corporations duly organized and operated in good faith as religious organizations, which have received a declaration of current tax exempt status from the government of the United States; their duly organized branches or chapters; and charities, agencies, and organizations affiliated with and forming an integral part of said organization, or operated, supervised, or controlled directly by such

religious corporations nor any officer of any such religious organization who holds property for religious purposes: Provided, that if such organization has not received from the United States government a declaration of current tax exempt status prior to the time it receives property under the terms of a charitable trust, this exemption shall be applicable for two years only from the time of receiving such property, or until such tax exempt status is finally declared, whichever is sooner; or (b) an educational institution which is nonprofit and charitable, having a program of primary, secondary, or collegiate instruction comparable in scope to that of any public school or college operated by the state of Washington or any of its school districts.

Sec. 147 11.110.040 Information, documents and reports are public records -- Inspection -- Publication. All information, documents, and reports filed with the attorney general under this chapter are matters of public record and shall be open to public inspection, subject to reasonable regulation: Provided, that the attorney general shall withhold from public inspection any trust instrument so filed whose content is not exclusively for charitable purposes. The attorney general may publish, on a periodic or other basis, such information as may be necessary or appropriate in the public interest concerning the registration, reports, and information filed with him or any other matters relevant to the administration and enforcement of this chapter.

Sec. 149 11.110.050 Register of trustee -- Establishment and maintenance. The attorney general shall establish and maintain a register of trustees as defined in RCW 11.110.020 and, to that end, shall conduct whatever investigation is necessary, and shall obtain from public records, court officers, taxing authorities, trustees, and other sources whatever information, copies of instruments, reports, and records are needed, for the establishment and maintenance of the register.

Sec. 150 11.110.060 Instrument establishing trust, inventory of assets, tax exempt status or claim, tax return to be filed. Every trustee shall file with the attorney general within two months after receiving possession or control of the trust corpus a copy of the instrument establishing his title, powers, or duties, and an inventory of the assets of such charitable trust. In addition, trustees exempted from the provisions of RCW 11.110.070 by RCW 11.110.073 shall file with the attorney general a copy of the declaration of the tax-exempt status or other basis of the claim for such exemption; a copy of the instrument establishing the trustee's title, powers or duties; an inventory of the assets of such trust; and annually, a copy of each publicly available United States tax or information return or report of the trust which the trustee files with the internal revenue service. The trustees of charitable trusts existing at

the time this chapter takes effect or on August 9, 1971 shall comply with this section within six months thereafter.

Sec. 151 11.110.070 Reports of trustee --Filing.-- Rules and regulations. Except as otherwise provided every trustee subject to this chapter shall file with the attorney general annual reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the trustee, in accordance with rules and regulations of the attorney general.

The attorney general shall make rules and regulations as to the time for filing reports, the contents thereof, and the manner of executing and filing them. He may classify trusts and other relationships concerning property held for a charitable purpose as to purpose, nature of assets, duration of the trust or other relationships, amount of assets, amounts to be devoted to charitable purposes, nature of trustee, or otherwise, and may establish different rules for the different classes as to time and nature of the reports required, to the ends (1) that he shall receive reasonably current, periodic reports as to all charitable trusts or other relationships of a similar nature which will enable him to ascertain whether they are being properly administered, and (2) that periodic reports shall not unreasonably add to the expense of the administration of charitable trusts and similar relationships. The attorney general may suspend the filing of reports as to a particular

charitable trust or relationship for a reasonable, specifically designated time upon written application of the trustee filed with the attorney general after the attorney general has filed in the register of charitable trusts a written statement that the interests of the beneficiaries will not be prejudiced thereby and that periodic reports are not required for proper supervision by his office.

A copy of an account filed by the trustee in any court having jurisdiction of the trust or other relationship, if the account substantially complies with the rules and regulations of the attorney general, may be filed as a report required by this section.

The first report for a trust or similar relationship hereafter established, unless the filing thereof is suspended as herein provided, shall be filed not later than one year after any part of the income or principal is authorized or required to be applied to a charitable purpose. If any part of the income or principal of a trust previously established is authorized or required to be applied to a charitable purpose at the time this act takes effect, the first report, unless the filing thereof is suspended, shall be filed within six months after the effective date of this act.

Sec. 153 11.110.073 Reports of trustee -- Trustees exempt from RCW 11.110.070. The following trustees shall be exempt from the

provisions of RCW 11.110.070, but shall file the information required in RCW 11.110.060:

(1) A bank or trust company subject to examination by the supervisor of banking of the state of Washington, the comptroller of the currency of the United States or the board of governors of the federal reserve system; which such bank or trust company is acting as trustee, executor or court-appointed fiduciary: Provided, that a bank or trust company which is a co-fiduciary of a trust shall be deemed to be the sole fiduciary of such trust under this section, if the bank or trust company is custodian of the books and records of the trust and has the responsibility for preparing the reports and returns which are filed with the internal revenue service;

(2) The governing body of a nonprofit community foundation or other nonprofit foundation incorporated for charitable purposes, contributions to which are currently allowed as charitable deductions under the United States income tax laws;

(3) The governing body of a hospital which is nonprofit and charitable, other than a hospital initially formed as a trustee pursuant to or in connection with the terms of a charitable trust.

Sec. 154 11.110.075 Trusts not exclusively for charitable purposes -- Instrument and information not public -- Filings and reporting, when required. A trust is not exclusively for charitable purposes, within the meaning of RCW 11.110.040, when

the instrument creating it contains a trust for several or mixed purposes, and any one or more of such purposes is not charitable within the meaning of RCW 11.110.020, as enacted or hereafter amended. Such instrument shall be withheld from public inspection by the attorney general and no information as to such noncharitable purpose shall be made public.

Annual reporting of such trusts to the attorney general, as required by RCW 11.110.060 or 11.110.070 now or as hereafter amended, shall commence within one year after trust income or principal is authorized or required to be used for a charitable purpose.

When a trust consists of a vested charitable remainder preceded by a life estate, a copy of the instrument shall be filed by the trustee or by the life tenant, within two months after commencement of the life estate.

If the trust instrument contains only contingent gifts or remainders to charitable purposes, no charitable trust shall be deemed created until a charitable gift or remainder is legally vested. The first registration or report of such trust shall be filed within two months after trust income or principal is authorized or required to be used for a charitable purpose.

Sec. 155 11.110.080 Custodian of court records to furnish copies to attorney general -- List of tax exemption applications to be filed. The custodian of the records of a court having jurisdiction of probate matters or of charitable trusts shall

furnish within two months after receiving possession or control thereof such copies of papers, records, and files of his office relating to the subject of this chapter as the attorney general shall require.

Every officer, agency, board or commission of this state receiving applications for exemption from taxation of any charitable trust or similar relationship in which the trustee is subject to this chapter shall annually file with the attorney general a list of all applications received during the year.

Sec. 155 11.110.090 Uniformity of chapter with laws of other states.

It is the purpose of this chapter to make uniform the laws of this and other states on the subject of charitable trusts and similar relationships. Recognizing the necessity for uniform application and enforcement of this chapter, its provisions are hereby declared mandatory and they shall not be superseded by the provisions of any trust instrument or similar instrument to the contrary.

Sec. 155 11.110.100 Investigations by attorney general authorized --

Appearance and production of books, papers, documents, etc., may be required. The attorney general may investigate transactions and relationships of trustees and other persons subject to this chapter for the purpose of determining whether the trust or other relationship is administered according to law and the terms and purposes of the trust, or to determine compliance with this

chapter in any other respect. He may require any officer, agent, trustee, fiduciary, beneficiary, or other person, to appear, at a time and place designated by the attorney general in the county where the person resides or is found, to give information under oath and to produce books, memoranda, papers, documents of title, and evidence of assets, liabilities, receipts, or disbursements in the possession or control of the person ordered to appear.

Sec. 157 11.110.110 Order to appear -- Effect -- Enforcement --

Court review. When the attorney general requires the attendance of any person, as provided in RCW 11.110.100, he shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. Such order shall have the same force and effect as a subpoena, and, upon application of the attorney general, obedience to the order may be enforced by any superior court judge in the county where the person receiving it resides or is found, in the same manner as though the notice were a subpoena. The court, after hearing, for good cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend, or postpone all or any part of its provisions. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in the record, and shall

be subject to review by the supreme court or the court of appeals by certiorari or other appropriate proceeding.

Sec. 158 11.110.120 Proceedings to secure compliance and proper trust administration -- Attorney general to be notified of judicial proceedings involving charitable trust -- Powers and duties additional. The attorney general may institute appropriate proceedings to secure compliance with this chapter and to secure the proper administration of any trust or other relationships to which this chapter applies. He shall be notified of all judicial proceedings involving or affecting the charitable trust or its administration in which, at common law, he is a necessary or proper party as representative of the public beneficiaries. The notification shall be given ~~by registered mail to the attorney general at his office in Olympia at least twenty days prior to hearing thereon, except where shorter periods are prescribed by statute or by rules of court as~~ provided in RCW 11.96.100; provided, this notice requirement may be waived at the discretion of the attorney general. The powers and duties of the attorney general provided in this chapter are in addition to his existing powers and duties, and are not to be construed to limit or to restrict the exercise of the powers or the performance of the duties of the attorney general or of any prosecuting attorney which they may exercise or perform under any other provision of law. Except as provided herein, nothing in

this chapter shall impair or restrict the jurisdiction of any court with respect to any of the matters covered by it.

Comment: See comment at end of chapter.

Sec. 159 11.110.125 Violations -- Refusal to file reports, perform duties, etc. The wilful refusal by a trustee to make or file any report or to perform any other duties expressly required by this chapter, or to comply with any valid rule or regulation promulgated by the attorney general under this chapter, shall constitute a breach of trust and a violation of this chapter.

Sec. 159 11.110.130 violations -- Civil action may be prosecuted. A civil action for a violation of this chapter may be prosecuted by the attorney general or by a prosecuting attorney designated by the attorney general.

Sec. 159 11.110.140 Penalty. Every false statement of material fact knowingly made or caused to be made by any person in any statement or report filed under this chapter and every other violation of this chapter is a gross misdemeanor.

Sec. 161 11.110.200 Tax Reform Act of 1969, state implementation -- Application to trusts. RCW 11.110.200 through 11.110.260 shall apply only to trusts which are "private foundations" as defined in section 509 of the Internal Revenue Code of 1954, "charitable

trusts" as described in section 4947(a)(1) of the Internal Revenue Code of 1954, or "split-interest trusts" as described in section 4947(a)(2) of the Internal Revenue code of 1954. With respect to any such trust created after December 31, 1969, RCW 11.110.200 through 11.110.260 shall apply from such trust's creation. With respect to any such trust created before January 1, 1970, RCW 11.110.200 through 11.110.260 shall apply only to such trust's federal taxable years beginning after December 31, 1971.

Sec. 162 11.110.210 Tax Reform Act of 1969, state implementation -- Trust instruments deemed to contain prohibiting provisions. The trust instrument of each trust to which RCW 11.110.200 through 11.110.260 applies shall be deemed to contain provisions prohibiting the trustee from:

(1) Engaging in any act of "self-dealing" (as defined in section 4941(d) of the Internal Revenue Code of 1954), which would give rise to any liability for the tax imposed by section 4941(a) of the Internal Revenue Code of 1954;

(2) Retaining any "excess business holdings" (as defined in section 4943(c) of the Internal Revenue Code of 1954), which would give rise to any liability for the tax imposed by section 4943(a) of the Internal Revenue Code of 1954;

(3) Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the Internal Revenue Code of 1954,

so as to give rise to any liability for the tax imposed by section 4944(a) of the Internal Revenue Code of 1954; and

(4) Making any "taxable expenditures" (as defined in section 4945(d) of the Internal Revenue Code of 1954), which would give rise to any liability for the tax imposed by section 4945(a) of the Internal Revenue Code of 1954:

Provided, that this section shall not apply either to those split-interest trusts or to amounts thereof which are not subject to the prohibitions applicable to private foundations by reason of the provisions of section 4947 of the Internal Revenue Code of 1954.

Sec. 163 11.110.220 Tax Reform Act of 1969, state implementation -- Trust instruments deemed to contain certain provisions for distribution. The trust instrument of each trust to which RCW 11.110.200 through RCW 11.110.260 applies, except "split-interest" trusts, shall be deemed to contain a provision requiring the trustee to distribute, for the purposes specified in the trust instrument, for each taxable year of the trust, amounts at least sufficient to avoid liability for the tax imposed by section 4942(a) of the Internal Revenue Code of 1954.

Sec. 164 11.110.230 Tax Reform Act of 1969, state implementation -- Rights, powers of courts, attorney general, not impaired. Nothing in RCW 11.110.200 through 11.110.260 shall impair the

rights and powers of the courts or the attorney general of this state with respect to any trust.

Sec. 165 11.110.240 Tax Reform Act of 1969, state implementation -- Construction of references to federal code. All references to sections of the Internal Revenue Code of 1954 shall include all amendments thereto adopted by the Congress of the United States on or before July 10, 1982 the effective date of this amendment. [1982 1st ex.s. c 41 §3; 1971 c 58 §5.]

Sec. 167 11.110.250 Tax Reform Act of 1969, state implementation -- Application to new trust or amendment to existing trust. Nothing in RCW 11.110.200 through 11.110.260 shall limit the power of a person who creates a trust after June 10, 1971 or the power of a person who has retained or has been granted the right to amend a trust created before June 10, 1971, to include a specific provision in the trust instrument or an amendment thereto, as the case may be, which provides that some or all of the provisions of RCW 11.110.200, 11.110.210 and 11.110.220 shall have no application to such trust.

Sec. 168 11.110.260 Tax Reform Act of 1969, state implementation -- Severability -- RCW 11.110.200 through 11.110.260. If any provision of RCW 11.110.200 through 11.110.260 or the application thereof to any trust is held invalid, such invalidity shall not affect the other provisions or applications of RCW 11.110.200

through 11.110.260 which can be given effect without the invalid provision or application, and to this end the provisions of RCW 11.110.200 through 11.110.260 are declared to be severable.

Sec. 169 11.110.270 Tax Reform Act of 1969, state implementation -- Not for profit corporations. See RCW 24.40.010 through 24.40.070.

Sec. 169 11.110.900 Severability -- 1967 ex.s. c 53. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Comment: New Chapter 11.110 is former Chapter RCW 19.10, which has simply been moved from title 19, dealing with various miscellaneous business regulations, to title 11, dealing with probate and trust administration. Except for changes in internal cross references, the only changes are (1) in 11.110.060 where a specific date is now designated in place of "at the time . . . this 1971 amendatory act takes affect," and (2) in 11.110.120 where the notice requirements have been changed to correspond with the notice requirements in RCW 11.96.100 and (3) in 11.110.120 where the attorney general is authorized to waive the notice requirements at his or her discretion.

Sec. 170 18.100.080 Engaging in other business prohibited except acting as trustee or personal representative -- Investments. No professional service corporation organized under this chapter shall engage in any business other than the rendering of the professional services for which it was incorporated or service as a trustee as authorized by RCW 11.36.021 or as a personal representative as authorized by RCW 11.36.010; Provided, That nothing in this chapter or in any other provisions of existing law applicable to corporations shall be interpreted to prohibit such corporation from investing its funds in real estate, personal property, mortgages, stocks, bonds, insurance, or any other type of investments.

Comment: Revised to allow a professional service corporation to serve as trustee in line with the amendment to RCW 11.36.021 (14) and as personal representative as authorized by the 1983 amendments to RCW 11.36.010.

CHAPTER 25.04

GENERAL PARTNERS

- 25.04.020 Definition of Terms
- 25.04.150 Nature of Partner's Liability

Sec. 171 25.04.020. Definition of terms. In this chapter:

"Court" includes every court and judge having jurisdiction in the case;

"Business" includes every trade, occupation, or profession;

"Person" includes individuals, partnerships, corporations and other associations, trustees and personal representatives;

"Bankrupt" includes bankrupt under the federal bankruptcy act or insolvent under any state insolvent act;

"Conveyance" includes every assignment, lease, mortgage, or encumbrance;

"Real property" includes land and any interest or estate in land.

Comment: This section added the terms "trustee" and "personal representatives" within the definition of the word, "person."

Sec. 172 25.04.150. Nature of Partner's Liability. All partners are liable:

(1) Jointly and severally for everything chargeable to the partnership under RCW 25.04.130 and 25.04.140.

(2) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

(3) Except that the liability of a trustee or personal representative acting as a partner is limited as provided in RCW 11.98.110(2).

Comment: The liability of a trustee or personal representative investing in a partnership is limited as provided under RCW 11.98.110(2).

Sec. 174 64.28.040 Joint tenancy interests held by husband and wife.

Joint tenancy interests held in the names of a husband and his wife (whether or not in conjunction with others) are presumed to be their community property, the same as other property held in the name of both husband and wife. Any such interest passes to the survivor of the husband and wife as provided for property held in joint tenancy, but in all other respects the interest is treated as community property.

Comment: The provision is designed to assure the step up basis for both halves of community property upon the death of the first to die of a husband or wife. See Internal Revenue Code §1014(b)(6). In order to insure this treatment, the section provides that joint tenancy interests held by husband and wife (in both names) will be treated as community property in all respects, except that the interest will pass to the survivor as is otherwise the case for joint tenancy property. This would be the result of a specific community property agreement between the husband and wife under RCW 26.16.120 and also avoids the potential risk in creating a form of property interest that is joint tenancy in all respects, except that it is designated "community property." See J. Parks, "Critique of Nevada's New Community Property with Right of Survivorship," 10 Comm. Prop. J. 5 (1983).

The section is based on the policy determination that when husband and wife put property or receive property in joint tenancy form, they intend that it pass to the survivor upon the death of the first to die, but in all other respects consider it

to be community property. The section would not preclude an argument that the joint tenancy interest was not entirely community property, as is the case under present law with property acquired in the name of both husband and wife, depending on separate property contributions by either. However, the section would probably not negate equal ownership treatment for tax purposes under Internal Revenue Code §2040 with respect to joint tenancy property held by husband and wife.

Chapter 108 RCW (§§133-141) shall take effect immediately on passage, the remainder of this 1984 act shall take effect January 1, 1985.

[add emergency clause]

[add severability clause]

sec. 176 11.88.010 Authority to appoint - Definitions - Venue.

(1) The superior court of each county shall have power to appoint guardians for the persons and estates, or either thereof, of incompetent persons, and guardians for the estates of all such persons who are nonresidents of the state but who have property in such county needing care and attention.

An "incompetent" is any person who is either:

(a) Under the age of majority, as defined in RCW 11.92.010, or

(b) Incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his property or caring for himself or both.

(2) The superior court for each county shall have power to appoint limited guardians for the persons and estates, or either thereof, of disabled persons, who by reason of their disability have need for protection and assistance, but who cannot be found to be fully incompetent, upon investigation as provided by RCW 11.88.090 as now or hereafter amended. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and disabilities on a disabled person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance. A person shall not be presumed to be incompetent nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a

limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship. In addition, the court order shall state the period of time for which it shall be applicable.

For the purposes of chapters 11.88 and 11.92 RCW the term "disabled person" means an individual who is in need of protection and assistance by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, but cannot be found to be fully incompetent.

(3) Venue for petitions for guardianship or limited guardianship shall lie in the county wherein the alleged incompetent or disabled person is domiciled, or if such person is a resident of a state institution for developmentally disabled persons, in either the county wherein such institution is located, the county of domicile, or the county wherein a parent of the alleged incompetent or disabled person is domiciled. [1977 ex.s. c 309 § 2; 1975 1st ex.s. c 95 § 2; 1965 c 145 § 11.88.010. Prior: 1917 c 156 § 195; RRS § 1565; prior: Code 1881 § 1604; 1873 p 314 § 299; 1855 p 15 § 1.]

(4) Under RCW 11.94.010, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a

durable power of attorney except for good cause or disqualification.

Comment: This change parallels a similar change in RCW 11.94.010 allowing a principal to designate his or her guardian.

Sec. 177 11.88.040 Notice of hearing, when required - Service - Procedure.

Before appointing a guardian or a limited guardian, notice of a hearing, to be held not less than ten days after service thereof, shall be given personally to the alleged incompetent or disabled person, if over fourteen years of age.

Before appointing a guardian or a limited guardian, notice of a hearing, to be held not less than ten days after service thereof, shall be given by registered or certified mail requesting a return receipt signed by the addressee only or an agent appointed by the addressee, or by personal service in the manner provided for services of summons, to the following:

- (1) The alleged incompetent, disabled person, or minor, if under fourteen years of age;
- (2) A parent, if the alleged incompetent or disabled person is a minor, and the spouse of the alleged incompetent or disabled person if any;
- (3) Any other person who has been appointed as guardian or limited guardian, or the person with whom the alleged incompetent or disabled person resides. No notice need be given to those persons named in subsections (2) and (3) of this section if they

have signed the petition for the appointment of the guardian or limited guardian or have waived notice of the hearing. If the petition is by a parent asking for his appointment as guardian or limited guardian of a minor child under the age of fourteen years, or if the petition be accompanied by the written consent of a minor of the age of fourteen years or upward, consenting to the appointment of the guardian or limited guardian asked for, or if the petition be by a nonresident guardian of any minor or incompetent or disabled person, then the court may appoint the guardian without notice of the hearing. The court for good cause may reduce the number of days of notice, but in every case, at least three days notice shall be given.

The alleged incompetent or disabled person shall be presented in court at the final hearing on the petition: PROVIDED, That this requirement may be waived at the discretion of the court for good cause shown in the report to be provided by the guardian ad litem pursuant to RCW 11.88.090 as now or hereafter amended, or if no guardian ad litem is required to be appointed pursuant to RCW 11.88.090, as now or hereafter amended, at the discretion of the court for good cause shown by a party. Alternatively, the court may remove itself to the place of residence of the alleged incompetent or disabled person and conduct the final hearing in the presence of the alleged incompetent or disabled person. Final hearings on the petition may be held in closed court without admittance of any person other than those necessary to the action or proceeding.

If presence of the alleged incompetent or disabled person is waived and the court does not remove itself to the place of residence of such person, the guardian ad litem shall appear in person at the final hearing on the petition. [1977 ex.s. c 309 § 4; 1975 1st ex.s. c 95 § 5; 1969 c 70 § 1; 1965 c 145 § 11.88.040. Prior: 1927 c 170 § 2; 1923 c 142 § 4; 1917 c 156 § 198; RRS § 1568; prior: 1909 c 118 § 2; 1903 c 130 §§ 2, 3.]

Severability - 1977 ex.s. c 309: See note following RCW 11.88.050.

Waiver of notice: RCW 11.16.083.

Comment: Since the U.S. Post Office no longer has available return receipts with "deliver only to addressee," these changes were made to accord with present rule of the U.S. Post Office.