

RCW 11.107.070 Decanting statute—Specific prohibitions. (1) A trustee may not exercise the decanting power to the extent the first trust instrument expressly prohibits exercise of the decanting power or a power granted by state law to the trustee to modify the trust including, but not limited to, modification pursuant to chapter 11.96A RCW, and any exercise of the decanting power is subject to the prohibition and the prohibition must be included in the second trust instrument or modified first trust instrument. If the first trust instrument contains an express restriction on exercise of the decanting power or such a power to modify the trust, the exercise of the decanting power is subject to the restriction and the restriction must be included in the second trust instrument or modified first trust instrument.

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

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

(ii) The increase is approved by the court.

(b) A change in a trustee's compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the trustee's compensation for purposes of this subsection (2).

(3) Except as otherwise provided in subsection (2) (a) (i) or (ii) or (b) of this section, a second trust instrument may not relieve a trustee from liability for breach of trust to a greater extent than the first trust instrument.

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

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

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

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

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

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

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

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

(a) Diminish the charitable interest;

(b) Diminish the interest of any entity that holds the charitable interest; or

(c) Alter any charitable purpose stated in the first trust instrument.

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

(a) For the purposes of this subsection, "tax benefit" includes any federal or state tax deduction, exemption, exclusion, or other tax benefit under federal or state statute, regulation, or other law, except for the benefit of being a grantor trust other than under Title 26 U.S.C. Sec. 672(f)(2)(A) of the federal internal revenue code, as amended, as of July 23, 2017, including but not limited to the following:

(i) The marital deduction for gift, estate, or inheritance tax purposes, including but not limited to the deductions under Title 26 U.S.C. Sec. 2056 of the federal internal revenue code, as amended, as of July 23, 2017, and RCW 83.100.047;

(ii) The charitable deduction for purposes of the income, gift, or estate tax under the internal revenue code or a state income, gift, estate, or inheritance tax;

(iii) The exclusion from the gift tax described in 26 U.S.C. Sec. 2503(b), including by application of Title 26 U.S.C. Sec. 2503(c) of the internal revenue code, as amended;

(iv) Status as a permitted shareholder in an S corporation, as defined in Title 26 U.S.C. Sec. 1361 of the federal internal revenue code, as amended, as of July 23, 2017, including as a qualified subchapter S trust within the meaning of Title 26 U.S.C. Sec. 1361(c)(2) of the federal internal revenue code;

(v) Qualification for a zero inclusion ratio for purposes of the generation-skipping transfer tax under Title 26 U.S.C. Sec. 2642(c) of the federal internal revenue code, as amended, as of July 23, 2017;

(vi) Meeting required minimum distribution and any similar requirements under Title 26 U.S.C. Sec. 401(a)(9) of the federal internal revenue code, as amended, as of July 23, 2017, and any applicable regulations; or

(vii) Qualification as a grantor trust because of the application of Title 26 U.S.C. Sec. 672(f)(2)(A) of the federal internal revenue code, as amended, as of July 23, 2017.

(b) Subject to (a)(vii) of this subsection, the second trust may be a nongrantor trust, even if the first trust is a grantor trust, and except as otherwise provided in this subsection (7)(b) the second trust may be a grantor trust, even if the first trust is a nongrantor trust. The trustee may not exercise the decanting power if the settlor objects in a written instrument delivered to the trustee within the notice period under RCW 11.107.040(1)(c); and

(i) (A) The first trust and second trust are both grantor trusts, in whole or in part;

(B) The first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust; and

(C) The second trust does not grant an equivalent power to the settlor or other person; or

(ii) The first trust is a nongrantor trust and the second trust is a grantor trust, in whole or in part, with respect to the settlor unless:

(A) The settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(B) The first trust instrument contains a provision granting the settlor or another person the power to cause the first trust to cease to be a grantor trust and the second trust instrument contains the same provision.

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

(9) A general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power. [2017 c 29 s 7.]