
SUBSTITUTE SENATE BILL 5066

State of Washington

53rd Legislature

1993 Regular Session

By Senate Committee on Law & Justice (originally sponsored by Senators A. Smith, McCaslin and Nelson)

Read first time 01/28/93.

1 AN ACT Relating to limiting the powers of a trustee; amending RCW
2 11.97.010; adding new sections to chapter 11.98 RCW; and adding new
3 sections to chapter 11.95 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 11.97.010 and 1985 c 30 s 38 are each amended to read
6 as follows:

7 The trustor of a trust may by the provisions of the trust relieve
8 the trustee from any or all of the duties, restrictions, and
9 liabilities which would otherwise be imposed by chapters 11.95, 11.98,
10 11.100, and 11.104 RCW and RCW 11.106.020, or may alter or deny any or
11 all of the privileges and powers conferred by those provisions; or may
12 add duties, restrictions, liabilities, privileges, or powers to those
13 imposed or granted by those provisions. If any specific provision of
14 those chapters is in conflict with the provisions of a trust, the
15 provisions of the trust control whether or not specific reference is
16 made in the trust to any of those chapters, except as provided in
17 sections 2 through 12 of this act. In no event may a trustee be
18 relieved of the duty to act in good faith and with honest judgment.

1 NEW SECTION. **Sec. 2.** Due to the inherent conflict of interest
2 that exists between a trustee and a beneficiary of a trust, unless the
3 terms of a trust refer specifically to sections 2 through 6 of this act
4 and provide expressly to the contrary, the powers conferred upon a
5 trustee who is a beneficiary of the trust, other than the trustor as a
6 trustee, and other than the decedent's spouse or the testator's spouse
7 where the spouse is the trustee of a trust for which a marital
8 deduction is or was otherwise allowed or allowable, whether or not an
9 appropriate marital deduction election was in fact made, cannot be
10 exercised by the trustee to make:

11 (1) Discretionary distributions of either principal or income to or
12 for the benefit of the trustee, except to provide for the trustee's
13 health, education, maintenance, or support as described under section
14 2041 or 2514 of the Internal Revenue Code and the applicable
15 regulations adopted under that section;

16 (2) Discretionary allocations of receipts or expenses as between
17 principal and income, unless the trustee acts in a fiduciary capacity
18 whereby the trustee has no power to enlarge or shift a beneficial
19 interest except as an incidental consequence of the discharge of the
20 trustee's fiduciary duties; or

21 (3) Discretionary distributions of either principal or income to
22 satisfy a legal support obligation of the trustee.

23 A proscribed power under this section that is conferred upon two or
24 more trustees may be exercised by the trustees that are not
25 disqualified under this section. If there is no trustee qualified to
26 exercise a power proscribed under this section, a person described in
27 RCW 11.96.070 who is entitled to seek judicial proceedings with respect
28 to a trust may apply to a court of competent jurisdiction to appoint
29 another trustee who would not be disqualified, and the power may be
30 exercised by another trustee appointed by the court. Alternatively,
31 another trustee who would not be disqualified may be appointed in
32 accordance with the provisions of the trust instrument if the
33 procedures are provided, or as set forth in RCW 11.98.039 as if the
34 office of trustee were vacant, or by a nonjudicial dispute resolution
35 agreement under RCW 11.96.170.

36 NEW SECTION. **Sec. 3.** If a trustee is a beneficiary of the trust
37 and the trust instrument confers the power to make distributions of
38 principal or income for the trustee's health, education, support, or

1 maintenance as described in section 2041 or 2514 of the Internal
2 Revenue Code and the applicable regulations adopted under that section,
3 then a trust provision purporting to confer "absolute," "sole,"
4 "complete," "conclusive," or a similar discretion relating to the
5 exercise of such trustee powers shall be disregarded in the exercise of
6 the power, and the power may then only be exercised reasonably and in
7 accordance with the ascertainable standard as set forth in section 2 of
8 this act and this section. A person who has the right to remove or to
9 replace a trustee does not possess nor may the person be deemed to
10 possess by virtue of having that right the powers of the trustee who is
11 subject to removal or replacement.

12 NEW SECTION. **Sec. 4.** Sections 2 through 6 of this act do not
13 raise any inference that the law of this state prior to the effective
14 date of this act was different than under sections 2 through 6 of this
15 act. Further, sections 2 through 6 of this act do not raise an
16 inference that prior to the effective date of this act a trustee's
17 exercise or failure to exercise a power described in sections 2 through
18 6 of this act was not subject to review by a court of competent
19 jurisdiction for abuse of discretion or breach of fiduciary duty under
20 chapter 11.96 RCW or other applicable law. Following the effective
21 date of this act the power of judicial review continues to apply.

22 NEW SECTION. **Sec. 5.** Notwithstanding any provision of sections 2
23 through 6 of this act seemingly to the contrary, sections 2 through 6
24 of this act do not limit or restrict the distribution of income of a
25 trust that qualifies or that otherwise could have qualified for the
26 marital deduction under section 2056 or 2523 of the Internal Revenue
27 Code, those Internal Revenue Code sections requiring that all income be
28 distributed to the spouse of the decedent or of the trustor at least
29 annually, whether or not an election was in fact made under section
30 2056(b)(7) or 2523(f) of the Internal Revenue Code. Further, sections
31 2 through 6 of this act do not limit or restrict the power of a spouse
32 of the trustor or the spouse of the decedent to exercise a power of
33 appointment described in section 2056(b)(5) or 2523(e) of the Internal
34 Revenue Code with respect to that portion of the trust that could
35 otherwise qualify for the marital deduction under either of those
36 Internal Revenue Code sections.

1 NEW SECTION. **Sec. 6.** (1)(a)(i) Sections 2 and 3 of this act
2 respectively apply to a trust established under a will, codicil, trust
3 agreement, declaration of trust, deed, or other instrument executed
4 after the effective date of this act, unless the instrument's terms
5 refer specifically to section 2 or 3 of this act respectively and
6 provide expressly to the contrary.

7 (ii) Notwithstanding (a)(i) of this subsection, for the purposes of
8 this subsection a codicil to a will or an amendment to a trust does not
9 cause that instrument to be executed after the aforementioned date
10 unless the codicil or amendment clearly shows an intent to have section
11 2 or 3 of this act apply.

12 (b) Notwithstanding (a) of this subsection, sections 2 and 3 of
13 this act respectively apply to a trust established under a will or
14 codicil of a decedent dying on or after the effective date of this act,
15 and to an inter vivos trust to which the trustor had on or after the
16 effective date of this act the power to terminate, revoke, amend, or
17 modify, unless:

18 (i) The terms of the instrument specifically refer to section 2 or
19 3 of this act respectively and provide expressly to the contrary; or

20 (ii) The decedent or the trustor was not competent, on the
21 effective date of this act, to change the disposition of his or her
22 property, or to terminate, revoke, amend, or modify the trust, and did
23 not regain his or her competence to dispose, terminate, revoke, amend,
24 or modify before the date of the decedent's death or before the trust
25 could not otherwise be revoked, terminated, amended, or modified by the
26 decedent or trustor.

27 (2) Section 2 of this act neither creates a new cause of action nor
28 impairs an existing cause of action that, in either case, relates to a
29 power proscribed under section 2 of this act that was exercised before
30 the effective date of this act. Section 3 of this act neither creates
31 a new cause of action nor impairs an existing cause of action that, in
32 either case, relates to a power proscribed, limited, or qualified under
33 section 3 of this act.

34 NEW SECTION. **Sec. 7.** If the standard governing the exercise of a
35 lifetime or a testamentary power of appointment does not clearly
36 indicate that a broader or more restrictive power of appointment is
37 intended, the holder of the power of appointment may exercise it in his
38 or her favor only for his or her health, education, support, or

1 maintenance as described in section 2041 or 2514 of the Internal
2 Revenue Code and the applicable regulations adopted under the section.

3 NEW SECTION. **Sec. 8.** If the holder of a lifetime or testamentary
4 power of appointment may exercise the power in his or her own favor
5 only for his or her health, education, support, or maintenance as
6 described in section 2041 or 2514 of the Internal Revenue Code and the
7 applicable regulations adopted under that section, then a provision of
8 the instrument creating the power of appointment that purports to
9 confer "absolute," "sole," "complete," "conclusive," or a similar
10 discretion shall be disregarded in the exercise of that power in favor
11 of the holder, and that power may then only be exercised reasonably and
12 in accordance with the ascertainable standards set forth in section 7
13 of this act and this section. A person who has the right to remove or
14 replace a trustee does not possess nor may the person be deemed to
15 possess, by virtue of having that right, the power of the trustee who
16 is subject to removal or to replacement.

17 NEW SECTION. **Sec. 9.** Notwithstanding any provision of sections 7
18 through 12 of this act seemingly to the contrary, sections 7 through 12
19 of this act do not limit or restrict the distribution of income of a
20 trust that qualifies or that otherwise could have qualified for the
21 marital deduction under section 2056 or 2523 of the Internal Revenue
22 Code, those Internal Revenue Code sections requiring that all income be
23 distributed to the spouse of the decedent or of the trustor at least
24 annually, whether or not an election was in fact made under section
25 2056(b)(7) or 2523(f) of the Internal Revenue Code. Further, sections
26 7 through 12 of this act do not limit or restrict the power of a spouse
27 of the trustor or the spouse of the decedent to exercise a power of
28 appointment described in section 2056(b)(5) or 2523(e) of the Internal
29 Revenue Code with respect to that portion of the trust that could
30 otherwise qualify for the marital deduction under either of those
31 Internal Revenue Code sections.

32 NEW SECTION. **Sec. 10.** Sections 7 through 12 of this act do not
33 raise an inference that the law of this state prior to the effective
34 date of this act was different than contained in sections 7 through 12
35 of this act.

1 NEW SECTION. **Sec. 11.** (1)(a) Sections 7 and 8 of this act
2 respectively apply to a power of appointment created under a will,
3 codicil, trust agreement, or declaration of trust, deed, power of
4 attorney, or other instrument executed after the effective date of this
5 act, unless the terms of the instrument refer specifically to section
6 7 or 8 of this act respectively and provide expressly to the contrary.

7 (b) Notwithstanding (a) of this subsection, for the purposes of
8 this section a codicil to a will, an amendment to a trust, or an
9 amendment to another instrument that created the power of appointment
10 in question shall not be deemed to cause that instrument to be executed
11 after the effective date of this act unless the codicil, amendment, or
12 other instrument clearly shows an intent to have section 7 or 8 of this
13 act apply.

14 (2) Notwithstanding subsection (1) of this section, sections 7
15 through 12 of this act shall apply to a power of appointment created
16 under a will, codicil, trust agreement, or declaration of trust, deed,
17 power of attorney, or other instrument executed prior to the effective
18 date of this act, if the person who created the power of appointment
19 had on the effective date of this act the power to revoke, amend, or
20 modify the instrument creating the power of appointment, unless:

21 (a) The terms of the instrument specifically refer to section 7 or
22 8 of this act respectively and provide expressly to the contrary; or

23 (b) The person creating the power of appointment was not competent,
24 on the effective date of this act, to revoke, amend, or modify the
25 instrument creating the power of appointment and did not regain his or
26 her competence to revoke, amend, or modify the instrument creating the
27 power of appointment on or before his or her death or before the time
28 at which the instrument could no longer be revoked, amended, or
29 modified by the person.

30 NEW SECTION. **Sec. 12.** Sections 7 through 11 of this act neither
31 create a new cause of action nor impair an existing cause of action
32 that, in either case, relates to a power that was exercised before the
33 effective date of this act. Sections 7 through 11 of this act neither
34 create a new cause of action nor impair an existing cause of action
35 that in either case relates to a power proscribed, limited, or
36 qualified under sections 7 through 11 of this act.

1 NEW SECTION. **Sec. 13.** (1) Sections 2 through 6 of this act are
2 each added to chapter 11.98 RCW.

3 (2) Sections 7 through 12 of this act are each added to chapter
4 11.95 RCW.

5 NEW SECTION. **Sec. 14.** If any provision of this act or its
6 application to any person or circumstance is held invalid, the
7 remainder of the act or the application of the provision to other
8 persons or circumstances is not affected.

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