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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 34869-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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RALPH A. RIDDELL, Trustee of the GEORGE X. RIDDELL and  
IRENE A. RIDDELL TESTAMENTARY TRUST and THE GEORGE X.  
RIDDELL LIFE INSURANCE TRUST,

Appellant.

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	
I. ASSIGNMENTS OF ERROR .....	1
1. The trial court erred in denying the Trustee's petition for entry of an order amending the consolidated Trust to provide that any distribution made to a severely disabled remainder beneficiary be subject to the terms and conditions of a special needs trust.....	1
2. The trial court erred in applying the equitable deviation doctrine when, in analyzing the purpose of the trust and the intent of the Trustor, it failed to consider what the Settlor's intent probably would have been had unforeseen circumstances been anticipated.....	1
3. The trial court erred in concluding that amending the consolidated Trust due to unforeseen circumstances, under the doctrine of equitable deviation set forth in the Restatement (Third) of Trusts §66, would be inconsistent with the purpose of the Trust. ....	1
4. The trial court erred in concluding that the court did not have authority, under RCW11.96A.020 (TEDRA), to modify the Trust. ....	1

II.	ISSUES.....	1
	1. Did the trial court’s failure to consider what the Settlor’s intent probably would have been had unforeseen circumstances been anticipated ignore the objective of the equitable deviation doctrine? [Assignment of Error #1,2,3].....	1
	2. Does trust language giving the Trustee sole discretion to determine whether or not trust principal should be used to pay for basic needs show that the purpose of the trust was not to pay extraordinary medical expenses that could be paid from other sources? [Assignment of Error # 1,2,3,4]. ....	1
	3. Did the trial court have additional authority to modify the consolidated Trust pursuant to the plenary power granted to the court in RCW11.96A.020? [Assignment of Error #4]. ....	1
III.	STATEMENT OF THE CASE .....	2
	(A) Overview of Case .....	2
	(B) Statement of Facts .....	2
	(C) Procedural History .....	5
IV.	STANDARD OF REVIEW .....	6

V.	ARGUMENT .....	7
A.	In failing to consider what the Settlor’s intent probably would have been had unforeseen circumstances been anticipated, the trial court ignored the objective of the equitable deviation doctrine. ....	7
	1. The trial court failed to consider what the Settlor’s intent probably would have been had unforeseen circumstances been anticipated. ....	9
	2. The Settlers’ intent probably would have been to incorporate special needs trust language into the Trusts if the unforeseen circumstance of Nancy’s severe mental illness had been anticipated. ....	10
B.	Trust language giving the Trustee sole discretion to determine use of trust principal shows that the purpose of the Trust was not to pay extraordinary medical expenses that could be paid from other sources.....	13
	1. The Trustee has sole discretion whether or not to pay medical costs from the Trust assets. ....	13
	2. By denying the Trustee’s petition to amend the consolidated Trust; the court imposes a potential burden,	

which could not be imposed on the Settlers if they were living, to pay for an extraordinary debt of another person. ....

14

C. In addition to the authority for a court to modify a trust under the equitable deviation doctrine, the trial court had the authority to modify the consolidated Trust pursuant to the plenary power granted to the court in RCW11.96A.020. ....

15

VI CONCLUSION .....

17

VII. APPENDIX "1" [RCW 11.96A.030].....

18

TABLE OF AUTHORITIES

	Page(s)
<u>Washington Cases:</u>	
<u>In Re Estate of Bowers</u> , 132 Wn.App. 334, 131 P.3d 916 (2006), reconsideration denied (May 1, 2006) .....	7
<u>In Re Estate of Nelson</u> , 85 Wn.2d. 602, 537 P.2d 765 (1975) ....	6
<u>Niemann v. Vaughn</u> , 154 Wn.2d 365, 113 P.3d 463 (2005) .....	8,9,10
 <u>Other State Cases:</u>	
<u>In the Matter of the Testamentary Trust of Harrell</u> , 104 Or.App. 332, 801 P.2d 852 (1990). .....	8
 <u>Rules:</u>	
RCW 11.96A.020 .....	15
RCW 11.96A.030(1)(d) .....	16
 <u>Other Authorities:</u>	
Restatement (Third) of Trusts §66 (2003) .....	7,8
Restatement (Third) of Trusts §66, cmt. a (2003) .....	9,10

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying the Trustee's petition for entry of an order amending the consolidated Trust to provide that any distribution made to a severely disabled remainder beneficiary be subject to the terms of a special needs trust.
2. The trial court erred in applying the equitable deviation doctrine when, in analyzing the purpose of the trust and the intent of the Trustor, it failed to consider what the Settlor's intent probably would have been had unforeseen circumstances been anticipated.
3. The trial court erred in concluding that amending the consolidated Trust due to unforeseen circumstances, under the doctrine of equitable deviation set forth in the Restatement (Third) of Trusts §66, would be inconsistent with the purpose of the Trust.
4. The trial court erred in concluding that the court did not have authority, under RCW11.96A.020 (TEDRA), to modify the trust.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court's failure to consider what the Settlor's intent probably would have been had unforeseen circumstances been anticipated ignore the objective of the equitable deviation doctrine? [Assignment of Error #1,2,3].
2. Does trust language giving the Trustee sole discretion to determine whether or not trust principal should be used to pay for basic needs show that the purpose of the trust was not to pay extraordinary medical expenses that could be paid from other sources? [Assignment of Error # 1,2,3,4].
3. Did the trial court have additional authority to modify the consolidated Trust pursuant to the plenary power granted to the court in RCW11.96A.020? [Assignment of Error #4].

### III. STATEMENT OF THE CASE

#### (A) Overview of Case

The Trustee of several trusts, with similar distributive provisions and beneficiaries, sought court approval to consolidate the trusts and to amend the consolidated trust to provide for the creation a special needs trust for a severely disabled remainder beneficiary. [CP 1, 3, 4]. The trial court allowed the petition, in part; and denied the petition, in part. [CP 49, 50]. The trial court allowed consolidation of the trusts, but denied the request to amend the trust by creating a special needs trust. [CP 49, 50].

#### (B) Statement of Facts

George X. Riddell and Irene A. Riddell were husband and wife. [CP 1]. They had one child, the Appellant/Trustee, Ralph A. Riddell. [CP 1].

George Riddell left the residue of his estate in trust for the benefit of his wife, son, and grandchildren. [CP 16-17]. The terms and conditions of the trust (Testamentary Trust) are set out in his Last Will and Testament. [CP 16]. George Riddell died on January 9, 1976. [CP 2].

George Riddell created an additional trust (Life Insurance Trust) to be the owner of eight policies of insurance upon his life. [CP 2, 22]. The trust was executed on or about November 20, 1962. [CP 28].

George Riddell died on January 9, 1976. [CP 2].

Irene Riddell left the residue of her estate in trust for the benefit of her son, her daughter-in-law, and her grandchildren. [CP 1, 9, 10]. The terms and conditions of the trust (Testamentary Trust) were set out in her Last Will and Testament. [CP 9, 10, 11].

Irene M. Riddell died on April 13, 1986. [CP 2].

At the time the Petition for Orders Amending and Consolidating Trusts was presented to the trial court, the Trusts were being administered separately. [CP 2]. The Testamentary Trust assets had a value of 1.2 million dollars, and the Life Insurance Trust assets had a value of \$135,000.00. [CP 2].

The Trusts provide that the net trust income is to be distributed to Ralph A. Riddell (and, under the Irene Riddell Trust, his wife) for their lives, and then to their children until they attain thirty-five years of age. [CP 2-3, 9, 17-18, 25-26]. Upon the deaths of Ralph (and, under the Irene Riddell Trust, his wife), with their children having attained thirty-five years of age, the corpus of the trusts is to be distributed to such children,

or if they predecease, their issue, free of the trust. [CP 2-3, 9, 17-18, 25-26].

Ralph and Beverly Riddell have two children: Donald Hayes Riddell and Nancy Irene Dexter. [CP 3]. Donald and Nancy are both over thirty-five years of age. [CP 3]. Nancy is fifty two [CP 41]. Donald has two children, [CP3]. Nancy has an adult son. [CP 36].

Donald, an attorney, is well able to handle his own financial affairs. [CP 3].

Nancy suffers from debilitating mental health issues. [CP 3, 35-40]. She developed increasing symptoms of mental illness over time until, by 1991, she required extensive outpatient care, and in 1997 she was voluntarily committed to Western State Hospital, where she was still residing at time this matter was presented to the trial court.<sup>1</sup> [CP 3]. Nancy's current diagnosis is Schizoaffective Disorder and Borderline Personality Disorder. [CP 37]. There is no expectation that she will be able to live independently. [CP 3].

Upon the death of her parents, Ralph and Beverly Riddell, Nancy would receive one-half of the remaining Trust assets; which are currently 1.335 million dollars, or approximately \$667,500.00. [CP 3]. Nancy's

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<sup>1</sup> On November 15, 2005, after the trial court's initial denial of Trustee's petition to amend; Nancy relocated from Western State Hospital to a group home under the direction of Highline Mental Health Services.

lack of judgment and mental illness make it highly unlikely that the funds will be preserved and properly managed for her benefit and the benefit of her son. [CP 3-4].

(C) Procedural History

Trustee Ralph Riddell, through his attorney, petitioned the trial court praying for entry of an order consolidating the Testamentary and Insurance Trusts, [CP 1, 21], and amending the consolidated Trust to provide that any distributions made to Nancy Dexter be subject to the terms and conditions of a Special Needs Trust. [CP1, 4]. There is no opposing party in this matter. [CP 1].

The trial court appointed a Guardian ad Litem to represent Nancy's best interest. [CP 32-33]. The Guardian ad Litem's report recommended that the Trusts be amended to provide that any distributions to Nancy be subject to the terms and conditions of a Special Needs Trust. [CP 37].

After hearing oral argument on the petition, the trial court took the matter under advisement. [CP 44]. Prior to the court's ruling, the Trustee's attorney provided the trial court with additional authority regarding the matter. [CP 46-47].

On July 22, 2005, the trial court issued an oral ruling allowing consolidation of the Testamentary and Insurance Trusts but denying the

Trustee's petition to amend the Trusts. [CP 45]. A final order was entered on November 18, 2005. [CP 48, 49-50].

On November 28, 2005, the Trustee timely filed a Motion for Reconsideration of the trial court's partial denial of the petition. [CP 58]. After reviewing the Trustee's memorandum supporting reconsideration and hearing Trustee's attorney's oral argument, the court issued an oral ruling denying the Motion for Reconsideration. [CP 94]. A final order denying Reconsideration was entered on April 21, 2006. [CP 96-97].

This appeal was commenced by filing a Notice of Appeal on May 19, 2006.

#### **IV. STANDARD OF REVIEW**

The standard of review in this case is de novo. The trial court's decision to deny the Trustee's petition to amend the consolidated Trust was based on the written record. Decisions based on declarations, affidavits, and written documents are reviewed de novo. *In re Estate of Nelson*, 85 Wn.2d 602, 605-606, 537 P.2d 765 (1975) (where the trial court did not have an "opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony," appellate review of factual findings and legal conclusions is de novo).

Courts have also recognized that probate proceedings are equitable in nature and review de novo on the entire record. *In re Estate of Bowers*, 132 Wn.App. 334, 339, 131 P.3d 916 (2006), reconsideration denied (May 1, 2006).

## V. ARGUMENT

- A. In failing to consider what the Settlor's intent probably would have been had unforeseen circumstances been anticipated, the trial court ignored the objective of the equitable deviation doctrine.

In failing to consider what the Settlor's intent probably would have been had unforeseen circumstances been anticipated, the trial court ignored the objective of the equitable deviation doctrine.

The equitable deviation doctrine, set out in the Restatement (Third) of Trust §66, allows the court to modify a distributive provision of a trust if, due to unforeseen circumstances, modification will further the purposes of the trust:

### § 66. Power of Court to Modify: Unanticipated Circumstances

- (1) The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by

the settlor the modification or deviation will further the purposes of the trust.

(2) If a trustee knows or should know of circumstances that justify judicial action under Subsection (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.

#### Restatement (Third) of Trusts §66

The Washington State Supreme Court adopted §66 of the Restatement (Third) in *Niemann v. Vaughn* in 2005. *Niemann v. Vaughn*, 154 Wn.2d 365, 382, 113 P.3d 463 (2005). The Restatement (Third) requires a lower threshold finding for equitable relief than did the prior Restatement (Second), which required a showing that compliance with existing trust terms would defeat or substantially impair the trust's primary purpose. <sup>2</sup> *Niemann v. Vaughn*, 154 Wn.2d at 381, 113 P.3d 463 (2005). By requiring a lower threshold finding for equitable relief in Restatement (Third), the standard gives courts broader discretion in permitting deviation. *Id.*

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<sup>2</sup> In the trial court's original oral ruling denying the Trustee's petition to amend the consolidated Trust, the court relied on an Oregon case, *In the Matter of the Testamentary Trust of Harrell*, 104 Or.App. 332, 801 P.2d 852 (1990), to deny the Trustee's petition. [RP, July 22, 2005, page 4]. The analysis in the Oregon case was based on the Restatement (Second) of Trusts. At oral argument on the Motion for Reconsideration, the trial court acknowledged that Washington had adopted Restatement (Third) of Trusts. [RP, January 6, 2006, pages 9-10].

The objective of the equitable deviation doctrine is not to disregard the intention of the settlor, but to give effect to what a settlor's intent probably would have been had the circumstances in question been anticipated. Restatement (Third) of Trusts §66, cmt. a.; *Niemann v. Vaughn*, 154 Wn.2d at 382, 113 P.3d 463 (2005).

1. The trial court failed to consider what the Settlor's intent probably would have been had unforeseen circumstances been anticipated.

In the trial court's second oral ruling denying the Trustee's petition to amend the consolidated Trust, the court failed to consider what the Settlor's intent probably would have been had unforeseen circumstances been anticipated. Instead, the court focused on the existing Trust language and the intent of the Settlers when the Trusts were executed:

THE COURT: I believe that there is a showing here that there is a circumstance that was, perhaps, not anticipated by the original settler [sic]; however, the purpose of the trust is to provide for the general support and medical needs of the beneficiaries. I think that modifying the trust in a fashion that makes some of those assets less available for that purpose than they would be under the express language of the trust presently is not consistent with the purpose of the trust.

So I will deny the motion for modification and reconsideration.

[RP, January 6, 2006, page 10].

The court's focus on the existing Trust language ignored the objective of the equitable deviation doctrine, which is to give effect to what a settlor's intent probably would have been had the circumstances in question been anticipated.

2. The Settlers' intent probably would have been to incorporate special needs trust language into the Trusts if the unforeseen circumstance of Nancy's severe mental illness had been anticipated.

The objective of the equitable deviation doctrine is to give effect to what a settlor's intent probably would have been had the circumstances in question been anticipated. Restatement (Third) of Trusts §66, cmt. a; *Niemann v. Vaughn*, 154 Wn.2d at 382, 113 P.3d 463 (2005).

It is very highly probable that, had the original Settlers (George and Irene Riddell) anticipated that their granddaughter Nancy would suffer debilitating mental illness requiring extraordinary levels of care, and cost that could potentially deplete all distributed assets over the course of a few years, the Settlers would not have left a substantial outright distribution to her. They would have sought to amend the Trust.

It is very highly probable that, had the Settlers anticipated that Nancy would require years of hospitalization at Western State Hospital and lifetime supervision by mental health agencies in group home settings

following periods of institutionalization, the Settlers would not have left a substantial outright distribution to her. They would have sought to amend the Trust.

It is very highly probable that, had the Settlers known that, at age 52, Nancy would be incapable of managing her money due to her mental health issues, the Settlers would not have left a substantial outright distribution to her. They would have sought to amend the Trust.

It is very highly probable that, had the Settlers known of Nancy's mental health issues at the time they drafted the trusts and had the option special needs trust language existed at that time, that the Settlers would have chosen to incorporate a special needs trust language to protect Nancy and the trust assets instead of leaving a substantial outright distribution to her.

Settlers George and Irene Riddell were sophisticated business persons, competent investors, and prudent estate planners. [CP 4]. They utilized the Helsell law firm to minimize their estate tax liability and were prudent enough to specify that their grandchildren would not receive their inheritance, by way of the Testamentary Trusts and a Life Insurance Trust, until they had attained thirty-five years of age. [CP 4, 9, 17, 26].

Certainly, these Settlers would have intended that special needs trust language be incorporated into the trust both for Nancy's benefit and

to preserve the trust estate, if such language had been option when the trusts were drafted. Conditioning the outright distribution of assets to Nancy and her brother on their being at least thirty-five years of age [CP 2-3, 9, 17-18, 25-26] demonstrates that the Settlers intended that Nancy obtain a level of maturity and stability as well as fiscal responsibility prior to receiving an outright distribution from the Trust. As reported by the Guardian ad Litem, Nancy herself acknowledges that she is “terrible with money,” [CP 36], and the Guardian ad Litem concluded that it was highly unlikely that Nancy could manage assets due to her mental illness and lack of judgment. [CP 37]. Clearly, in light of the unforeseen circumstance of Nancy’s mental illness; an outright distribution of assets to Nancy would not further the intent of the Settlers or the Trust purpose.

In failing to consider what the Settlor’s intent probably would have been had unforeseen circumstances been anticipated, the trial court ignored the objective of the equitable deviation doctrine. Based on the facts of this case, it is clear that the Settlor’s would have intended that the consolidated Trust be modified to include special needs trust language in order to protect Nancy, her son, and the Trust estate.

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- B. Trust language giving the Trustee sole discretion to determine use of trust principal shows that the purpose of the Trust was not to pay extraordinary medical expenses that could be paid from other sources.

Trust language giving the Trustee sole discretion to determine use of trust principal shows that the purpose of the Trust was not to pay extraordinary medical expenses that could be paid from other sources.

- 1. The Trustee has sole discretion whether or not to pay medical costs from the Trust assets.

The Testamentary Trusts and the Insurance Trust contain similar language regarding the Trustee's authority to distribute principal in order to pay for a beneficiary's support, education, maintenance, and medical/health care, [CP 10, 17, 26], there is no mandatory language in any of the trusts requiring the Trustee to make such distributions, it is up to the discretion of the Trustee. [CP 10, 17, 26].

It is highly unlikely that the Settlers would have intended that the Trustee pay the extraordinary costs of mental health care and housing for Nancy in light of the fact that they gave the Trustee discretion to decide what support needs to pay based on circumstances at the time needs arise. In fact, it is highly likely that the Settlers would have intended that the Trustee not pay such costs in light of the fact that the costs were extraordinarily high and in light of the fact that state would pay the costs.

2. By denying the Trustee's petition to amend the consolidated Trust; the court imposes a potential burden, which could not be imposed on the Settlers if they were living, to pay for an extraordinary debt of another person.

By denying the Trustee's petition to amend the consolidated Trust; the court unjustifiably imposed a potential burden, which it could not impose on the Settlers if they were living, to pay the extraordinary debts of another person.

When the petition initially went before the trial court, the court stated that it had concerns about signing the order because doing so would permit the family to immunize itself financially from reimbursing the State for Nancy's costs of care. [RP, July 1, 2005, page 4]. Nancy's family has no legal liability or responsibility to reimburse the State for care, whether or not there is a Trust.

The Settlers had no obligation to support their adult granddaughter. There is no authority to impress on a testamentary Trust a greater obligation that the Settlers would have, if they were alive.

Trust language giving the Trustee sole discretion to determine use of trust principal shows that the purpose of the Trust was not to pay

extraordinary medical expenses that could be paid from other sources as there is no requirement for the Trustee to do so.

- C. In addition to the authority for a court to modify a trust under the equitable deviation doctrine, the trial court had the authority to modify the consolidated Trust pursuant to the plenary power granted to the court in RCW11.96A.020.

In addition to the authority for a court to modify a trust under the equitable deviation doctrine, the trial court had the authority to modify the consolidated Trust pursuant to the plenary power granted to the court in RCW11.96A.020.

RCW 11.96A.020 sets out the intent of the legislature that courts shall have full and ample power and authority under 11.96A (TEDRA) to administer and settle all trust matters:

(1) It is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle:

(a) All matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this title; and

(b) All trusts and trust matters.

(2) If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the

matters listed in subsection (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.

RCW 11.96A.020.

TEDRA defines “matter” to include any issue, question, or dispute involving the grant to a trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law. RCW 11.96A.030(1)(d).

The court has plenary power, under RCW 11.96A.020, to approve modification of the consolidated Trust, and has authority under RCW 11.96A.030(1)(d), to grant the Trustee the power to modify the trust.

In oral argument on the motion for reconsideration, the trial court seemed to agree that it had authority to modify the Trust under TEDRA, but then stated that it could not do so in a way that violates the substantive law:

THE COURT: Well you know in your memorandum of authorities you argue that TEDRA gives the Courts authority to modify the trust on a preliminary basis, and

that makes this situation different than the Oregon case that I cited in my original decision.

On one level that's true. The Court would have authority under TEDRA to modify the trust, but TEDRA - - I can't modify the trust in a way that violates the substantive law. And substantive law isn't in TEDRA agents in common law and restatements, in my view.

[RP, July 6, 2006]

The proceeding before the court was equitable in nature, and the trial court's broad power, under TEDRA, should was sufficient for the court to decide the matter on equitable grounds.

## **VI. CONCLUSION**

Appellant seeks entry of an order amending the consolidated Trust. Appellant requests that the Court of Appeals remand for entry of an order amending the consolidated Trust to provide that any distribution made to Nancy Dexter be subject to the terms and conditions of a special needs trust.

DATED: September 28, 2006.

  
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## APPENDIX "1"

### **RCW 11.96A.030 Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Matter" includes any issue, question, or dispute involving:
  - (a) The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death;
  - (b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;
  - (c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee;
  - (d) The grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law;
  - (e) The amendment, reformation, or conformation of a will or a trust instrument to comply with statutes and regulations of the United States internal revenue service in order to achieve qualification for deductions, elections, and other tax requirements, including the qualification of any gift thereunder for the benefit of a surviving spouse who is not a citizen of the United States for the estate tax marital deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the internal revenue code, the qualification of any gift thereunder as a qualified conservation easement as permitted by federal law, or the qualification of any gift for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust; and
  - (f) With respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, including joint tenancy property, property subject to a community property agreement, or assets subject to a pay on death or transfer on death designation:
    - (i) The ascertaining of any class of creditors or others for purposes of chapter 11.18 or 11.42 RCW;
    - (ii) The ordering of a qualified person, the notice agent, or resident agent, as those terms are defined in chapter 11.42 RCW, or any combination of them, to do or abstain from doing any particular act with respect to a nonprobate asset;

(iii) The ordering of a custodian of any of the decedent's records relating to a nonprobate asset to do or abstain from doing any particular act with respect to those records;

(iv) The determination of any question arising in the administration under chapter 11.18 or 11.42 RCW of a nonprobate asset;

(v) The determination of any questions relating to the abatement, rights of creditors, or other matter relating to the administration, settlement, or final disposition of a nonprobate asset under this title;

(vi) The resolution of any matter referencing this chapter, including a determination of any questions relating to the ownership or distribution of an individual retirement account on the death of the spouse of the account holder as contemplated by RCW 6.15.020(6);

(vii) The resolution of any other matter that could affect the nonprobate asset.

(2) "Notice agent" has the meanings given in RCW 11.42.010.

(3) "Nonprobate assets" has the meaning given in RCW 11.02.005.

(4) "Party" or "parties" means each of the following persons who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner:

(a) The trustor if living;

(b) The trustee;

(c) The personal representative;

(d) An heir;

(e) A beneficiary, including devisees, legatees, and trust beneficiaries;

(f) The surviving spouse of a decedent with respect to his or her interest in the decedent's property;

(g) A guardian ad litem;

(h) A creditor;

(i) Any other person who has an interest in the subject of the particular proceeding;

(j) The attorney general if required under RCW 11.110.120;

(k) Any duly appointed and acting legal representative of a party such as a guardian, special representative, or attorney in fact;

(l) Where applicable, the virtual representative of any person described in this subsection the giving of notice to whom would meet notice requirements as provided in RCW 11.96A.120;

(m) Any notice agent, resident agent, or a qualified person, as those terms are defined

in chapter 11.42 RCW; and

(n) The owner or the personal representative of the estate of the deceased owner of the nonprobate asset that is the subject of the particular proceeding, if the subject of the particular proceeding relates to the beneficiary's liability to a decedent's estate or creditors under RCW 11.18.200.

(5) "Persons interested in the estate or trust" means the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust.

(6) "Principal place of administration of the trust" means 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 the trustee has no such place of business.

(7) The "situs" of a trust means the place where the principal place of administration of the trust is located, unless otherwise provided in the instrument creating the trust.

(8) "Trustee" means any acting and qualified trustee of the trust.

(9) "Representative" and other similar terms refer to a person who virtually represents another under RCW 11.96A.120.

(10) "Citation" or "cite" and other similar terms, when required of a person interested in the estate or trust or a party to a petition, means to give notice as required under RCW 11.96A.100. "Citation" or "cite" and other similar terms, when required of the court, means to order, as authorized under RCW 11.96A.020 and 11.96A.060, and as authorized by law.

[2006 c 360 § 10; 2002 c 66 § 2; 1999 c 42 § 104.]

**Notes:**

**Clarification of laws -- Enforceability of act -- Severability -- 2006 c 360:** See notes following RCW 11.108.070.