

NO. 45658-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In the Matter of the Guardianship of: LEON V. JENSEN, deceased,

In re the JENSEN 1980 TRUST AGREEMENT dated July 23, 1980,

JOSEPHINE JENSEN PAPALEO,

Trustee/Appellant,

NOVEMBER PAPALEO, beneficiary,

Appellant,

JODI WICKS, JUDY BARRETT, and CHAD JENSEN, beneficiaries,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS

BRIEF OF APPELLANTS

CARON, COLVEN, ROBISON
& SHAFTON

Ben Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

Attorney for Trustee/Appellant
Josephine Jensen Papaleo

SMITH GOODFRIEND, P.S.

Valerie A. Villacin
1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorney for Appellant
November Papaleo

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR1

II. STATEMENT OF ISSUES1

III. STATEMENT OF THE CASE.....2

 A. The parties are the children and grandchildren of the late Leon Jensen, one of the original Trustees and Co-Trustees of the Trust.2

 B. Leon Jensen and his wife Colleen Jensen established a Trust and executed pour over Wills. The Jensens put some assets in Trust and created pay-on-death assets with Leon’s children and grandchildren as beneficiaries.....3

 C. Colleen died in 2007. By then, Leon, age 87, was suffering from severe cognitive deficits. Leon’s daughter Jo was appointed Trustee. As Trustee, Jo took steps to reduce the estate tax liability anticipated to become due when Leon died.....4

 D. Leon died in 2011. Pursuant to the terms of the Trust, Jo as Trustee paid all of the estate taxes from the Trust.6

IV. ARGUMENT11

 A. Standard of Review.....11

 B. The trial court erred in ordering estate taxes to be ratably apportioned to the beneficiaries of pay-on-death assets, because it undermined the Trustor’s intent to grant the Trustee discretion to pay all taxes from the Trust.12

 1. The statute requires the court to give deference to the Trustor’s intent on apportionment of estate taxes if provision is made in either a will or trust document.13

2.	The Trustor intended to give discretion to the Trustee to pay any federal or state taxes arising from the Trustor’s death, including taxes associated with pay-on-death assets, from the Trust.	14
3.	Under the terms of the Trust, the Trustee had discretion to pay all of the estate taxes from the Trust even if it benefited her.	19
C.	If <i>pro rata</i> apportionment is required, Judy, Jodi, and Chad must contribute <i>pro rata</i> to the payment of estate taxes to the extent they received gifts.....	21
D.	This court should award attorney fees to the appellants.	26
V.	CONCLUSION.....	26

TABLE OF AUTHORITIES

STATE CASES

Advanced Silicon Materials, LLC v. Grant County,
156 Wn.2d 84, 124 P.3d 294 (2005).....12

Austin v. US Bank of Washington, 73 Wn. App. 293,
869 P.2d 404 (1994), *rev. denied*, 124 Wn.2d
1015 (1994)..... 20-21

Cregan v. Fourth Memorial Church, 175 Wn.2d
279, 285 P.3d 860 (2012).....16

Department of Ecology v. Campbell & Gwinn, LLC,
146 Wn.2d 1, 43 P.3d 4 (2002).....11

Estate of Ehlers, 80 Wn. App. 751, 911 P.2d 1017
(1996).....21

Estate of Mumby, 97 Wn. App. 385, 982 P.2d 1219
(1999)..... 17-18

In re Washington Builders Benefit Trust, 173 Wn.
App. 34, 293 P.3d 1206, *rev. denied*, 177 Wn.2d
1018 (2013).....12

*Roe v. TeleTech Customer Care Management
(Colorado) LLC*, 171 Wn.2d 736, 257 P.3d 586
(2011).....25

State v. Davis, 176 Wn. App. 849, 315 P.3d 1105
(2013), *rev. denied*, 179 Wn.2d 1014 (2014).....17

State v. Hughes, 80 Wn. App. 196, 907 P.2d 336
(1995).....25

Tollycraft Yachts Corp. v. McCoy, 122 Wn.2d 426,
858 P.2d 503 (1993).....25

FEDERAL STATUTES

26 U.S.C. § 200123
26 U.S.C. §203123
26 U.S.C. §2032A.....9, 18
26 U.S.C. §2033.....23
26 U.S.C. §6075.....8

STATUTES

RCW 11.96A.150.....26
RCW 83.100.0508
RCW 83.100.0608
RCW 83.110.010 (*former*).....24
RCW 83.110.020 (*former*).....24
RCW 83.110A.010..... 10-11, 14, 23-24
RCW 83.110A.020..... *passim*
RCW 83.110A.030..... *passim*

RULES AND REGULATIONS

26 C.F.R. §20.6151-1.....8
RAP 18.1.....26

OTHER AUTHORITIES

Uniform Estate Tax Apportionment Act (2003).....13, 16

I. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering that “all estate taxes [] be ratably apportioned in accordance with RCW 83.110A.030(1),” and ordering appellant Josephine Papaleo to reimburse \$582,578 to the Trust and appellant November Papaleo to reimburse \$34,457 to the Trust. (CP 396, ¶¶ 3, 4)

2. The trial court erred by entering its Order on Petition for Equitable Allocation of the Estate Tax Burden Among All Beneficiaries Pursuant to RCW 11.96A. (CP 395-97) (Appendix A)

II. STATEMENT OF ISSUES

1. RCW 83.110A.020(1)(a), (b) provides that to the extent that a provision of decedent’s will or a provision of a revocable trust “provides for the apportionment of an estate tax, the tax must be apportioned accordingly.” RCW 83.110A.030 provides that “to the extent that apportionment of an estate tax is not controlled by an instrument [,] the estate tax is apportioned ratably to each party that has an interest in the apportionable estate.” In this case, the Trust directed that the “Trustee in its discretion may first pay out of any principal of the Survivor’s Trust not so appointed [] any federal or state taxes including penalties and interest arising by reason of said Trustor’s death.” (CP 292) In accordance with that provision, the Trustee in its discretion paid all of the estate taxes for

the Trust assets and pay-on-death assets from the Trust. Did the trial court err in concluding that the Trust did not “provide for the apportionment of an estate tax” and ordering “the estate tax [] apportioned ratably to each party that has an interest in the apportionable estate”?

2. If the trial court properly ordered the estate taxes paid ratably among the beneficiaries, should the recipients who received *inter vivos* gifts to avoid Washington estate tax, but whose gifts are included as assets of the decedent for federal estate tax purposes, also contribute *pro rata* to the estate taxes?

III. STATEMENT OF THE CASE

A. The parties are the children and grandchildren of the late Leon Jensen, one of the original Trustors and Co-Trustees of the Trust.

Appellant Josephine Jensen Papaleo (“Jo”/“Trustee”) is daughter of the late Leon Jensen (“Leon”); she is the current Trustee of the Jensen Family Trust (“the Trust”). (CP 330) Appellant November Papaleo is the daughter of Jo and granddaughter of Leon; she is not a beneficiary of the Trust. (CP 330) Respondent Judy Barrett (“Judy”) is another daughter of Leon Jensen; she is a beneficiary of the Trust. (CP 330) Respondent Jodi Wicks (“Jodi”) is the daughter of Judy and granddaughter of Leon; she is a beneficiary of the Trust. (CP 330) Respondent Chad Jensen (“Chad”) is

the grandson of Leon. (CP 330) Chad's father Larry Jensen predeceased Leon; Chad is a beneficiary of the Trust in his father's stead. (RP 348)

B. Leon Jensen and his wife Colleen Jensen established a Trust and executed pour over Wills. The Jensens put some assets in Trust and created pay-on-death assets with Leon's children and grandchildren as beneficiaries.

Leon Jensen was married to Colleen Jensen ("Colleen"), who was not the mother of Leon's children. (See CP 133-34) In July 1980, Leon and Colleen established the Jensen 1980 Trust Agreement ("the 1980 Trust"), which was described as a "typical revocable living trust with 'credit shelter' provisions." (CP 267-303, 345)

The Jensens also executed "pour over" wills. (CP 258-266) The Wills¹ left the residue of the decedent's estate to the 1980 Trust and directed that those assets be "added to, administered and distributed as a part of that Trust, according to the terms of that Trust." (CP 260)

The Jensens named themselves as the original Trustors and original Trustees of the 1980 Trust. (CP 267, 273) On the death of Colleen, Leon would be the sole trustee. (CP 273-74) If Leon died first, Colleen and Leon's eldest daughter Jo would be co-trustees. (CP 273-274)

¹ The record contains only Leon Jensen's Will. (CP 258-60) Colleen Jensen's Will is not relevant to the issues raised in this appeal.

The beneficiaries of the Trust in equal shares were: Leon's children, Jo, Judy, and Larry, and Leon's granddaughter, Jodi. (CP 294-95) By making her a beneficiary of the Trust, the Jensens favored Jodi over November and Chad, Leon's other two grandchildren. However, since Larry predeceased the Jensens in 1982, his share was designated for Chad. (CP 294, 347-48)

The Jensens did not put all of their assets into the Trust. Instead, the Jensens created or acquired bank accounts, brokerage accounts, and United States savings bonds, all with payable on death designations. (CP 345) The Jensens named Leon's children and grandchildren as payable on death beneficiaries or joint owners of these assets. Although the Trust benefited the beneficiaries equally, the Jensens favored Jo, Leon's eldest child, more in the designation of non-probate assets. (See CP 348-49)

C. Colleen died in 2007. By then, Leon, age 87, was suffering from severe cognitive deficits. Leon's daughter Jo was appointed Trustee. As Trustee, Jo took steps to reduce the estate tax liability anticipated to become due when Leon died.

Colleen Jensen died on July 4, 2007. (CP 10) By that time, Leon Jensen was 87 years old and was suffering from severe cognitive deficits. (CP 1, 4) Jo instituted guardianship proceedings for him. (CP 1-3) She was appointed guardian of his estate. She also succeeded him as Trustee. (CP 4-8)

As a result of Colleen's death, the Trust was divided into two trusts: the Jensen Family Trust and the Survivor's Trust. (CP 56-57) The Trustee allocated the survivor/Leon's separate property, his interest in the community property, and "that unlimited amount that will equal the maximum marital deduction allowable" to the Survivor's Trust. (CP 56-57) The balance of the 1980 Trust was then allocated to a separate trust, designated the Jensen Family Trust ("the Trust"). (CP 56-57)

As Trustee, Jo took steps to reduce the Washington State estate tax liability that was anticipated to become due when Leon died. With the assistance of an attorney and approval from the Court, Jo executed a disclaimer that allowed a portion of Colleen's interest in community property to go directly to the beneficiaries of the Trust (Jo, Judy, Jodi, and Chad) rather than to the Survivor's Trust for Leon's benefit. Also with Court approval, Jo made annual gifts within the annual exclusion amount to herself, Judy, Jodi, Chad, and November (the only one who was not a beneficiary of the Trust). (CP 349-51)

In 2011, changes were made to federal gift tax and estate tax. Specifically, the total amount of gifts a person could make during his or her life free of gift tax rose from \$1 million to \$5 million. (CP 86) Jo then petitioned the Court for authority to make additional gifts from the

Trust to Judy, Jodi, Chad, November, and herself. This action avoided Washington estate tax, since Washington does not tax gifts. The Court authorized the gifts to be made but required that the donees receive amounts equivalent to the percentage earmarked for each in the Jensens' estate plan. As a result, it authorized Jo to receive 45.28% of the sums gifted; Judy, Jodi, and Chad each received 17.81%; and November received 1.29%. (CP 243-247)

All these actions allowed assets to pass to the beneficiaries/donees free of Washington estate tax. (CP 349-51) As a result of Jo's proactive efforts, Judy, Jodi, and Chad each received \$884,580 free of Washington estate tax, saving them each over \$200,000. (CP 351) No one has challenged these actions taken by Jo in reducing the estate taxes that would have otherwise been due when Leon died.

D. Leon died in 2011. Pursuant to the terms of the Trust, Jo as Trustee paid all of the estate taxes from the Trust.

Leon Jensen died on December 29, 2011. (CP 248-249) Guardianship proceedings for him were terminated on March 22, 2012. (CP 251-252)

Pursuant to the terms of the Trust, unless Leon directed differently by written instrument, the remaining assets of the Survivor's Trust would be added to the principal of the Jensen Family Trust upon his death. The

Trust then required distribution of one-quarter of the Trust to the each of the Trust beneficiaries—Jo, Judy, Jodi, and Chad, through his deceased father’s interest. (CP 294-297) With the exception of the pay-on-death assets, the Trust held all of Leon’s assets.

The total fair market value of Leon’s assets was \$4,788,403 at the time of his death, including *inter vivo* gifts. The federal estate tax due on Mr. Jensen’s death was \$1,231,788. The amount taxable for federal estate tax purposes was \$8,991,375, together with the recipient of the funds is shown in the following chart:

Beneficiary	Assets	Pay-on-death Assets	<i>Inter Vivos</i> Gifts	Total
TRUST	\$2,927,981	0	0	\$2,927,981
JO	0	\$1,727,074	\$1,697,150	\$3,424,224
CHAD	0	\$31,212	\$821,570	\$853,082
JUDY	0	0	\$821,570	\$821,570
JODI	0	0	\$821,570	\$821,570
NOVEMBER	0	\$102,136	\$40,827	\$142,948
TOTAL				\$8,991,375

(CP 358-359)

The amount due for Washington estate tax, which does not tax gifts, was \$338,058. The following chart shows the taxable amount along with the recipient of the funds:

Beneficiary	Assets	Pay-on-death assets	Total
TRUST	\$2,927,981	0	\$2,927,981
JO	0	\$1,727,074	\$1,727,074
CHAD	0	\$31,212	\$31,212
JUDY	0	0	0
JODI	0	0	0
NOVEMBER	0	\$102,136	\$102,136
TOTAL			\$4,788,403

(CP 359) The total due for both Washington and federal estate tax was \$1,569,782.00. (CP 352)

Jo, as Trustee, was required to file Washington and federal estate tax returns and pay the tax due by nine months after Mr. Jensen's death or by September 29, 2012. 26 U.S.C. §6075(a); 26 C.F.R. §20.6151-1(a); RCW 83.100.050(2)(a); RCW 83.100.060(1). The Trust provided that the Trustee "in its discretion" may "first" pay "any federal or state taxes including penalties and interest arising by reason of said Trustor's death," as well as other expenses, including last illness and funeral expenses, "out of any principal of the Survivor's Trust not so appointed:"

Any of the Survivor's Trust not effectually appointed by the Survivor as set forth above shall be added to the principal of the Family Trust and administered in accordance with the provisions thereof; provided that the Trustee in its discretion may first pay out of any principal of the Survivor's Trust not so appointed (i) any last illness and funeral expenses of the Survivor, (ii) any expenses incurred in the administration of the affairs of said Trustor,

including attorneys' and accountants' fees for general or special services rendered and any other probate fees, and (iii) any federal or state taxes including penalties and interest arising by reason of said Trustor's death. Notwithstanding the foregoing, the Trustee shall pay and charge to, prorata amount and/or recover, to the extent provided by any tax law or other statute, from the persons entitled to the benefits giving rise to such tax, any additional capture tax imposed by Section 2032A of the (Internal Revenue) Code or any generation skipping transfer tax imposed by reason of Chapter 13 of the (Internal Revenue) Code.

(CP 292-293, § 8.04) (emphasis added) (Appendix B) After payment of these expenses, the Trust then discussed distribution upon the death of the survivor:

On the death of the Survivor, any remaining balance of the Family Trust, as augmented by (i) any remaining balance of the Survivor's Trust not effectively appointed pursuant to Section 8.03 and/or (ii) any property included in the Survivor's probate estate, shall be administered as hereinafter provided.

(CP 294, § 10.01)

On September 16, 2012, Jo petitioned the Court to authorize payment of all estate taxes for both Trust assets and non-probate assets (the pay-on-death assets) from the Trust.² (CP 253-311). She also moved for interlocutory relief allowing her to pay the taxes from the Trust pending a final resolution of the issue. (CP 312-314) On September 29,

² Her petition invoked Washington's Trust and Estate Dispute Resolution Act (TEDRA) in RCW 11.96A.

2012, the Trustee paid the federal estate tax in the amount of \$1,231,728, and the Washington estate tax in the amount of \$338,054 from the Trust.³

Judy, Jodi, and Chad (“the respondents”) subsequently filed their own petition on April 30, 2013 asking that the trial court order an “equitable apportionment of the estate tax burden among all beneficiaries of the estate pursuant to RCW 83.110A.010.” (CP 329-343) Despite the fact that the Trust gave the Trustee discretion to pay all estate taxes from the Trust prior to any distribution, the trial court ruled that the language of the Trust was not sufficiently specific to allow all estate taxes to be paid from the Trust, and that the recipients would be required to contribute for payment of the taxes *pro rata* based upon the amount each had received. (RP 21-24) It also ruled that the *pro rata* computation would not include what the recipients had received in gifts during Leon’s lifetime. Finally, it rejected the respondents’ claim that Jo as Trustee breached her fiduciary duty by paying the taxes from the Trust assets. (CP 379, 395-97)

Jo appealed, and November joined in the appeal. The respondents did not cross-appeal.

³ The petition to approve this interim action was not heard because of trial counsel's hospitalization. The trial court recognized that Jo, as Trustee, had to timely pay the taxes, and had reserved the apportionment issue for a later time. (RP 12, 23)

IV. ARGUMENT

A. Standard of Review.

The primary issue on appeal is whether the trial court erred in concluding that the Trust did not “provide for the apportionment of an estate tax” under RCW 83.110A.020 when the Trust directed the “Trustee in its discretion” to “first pay out of any of the principal of the Survivor’s Trust not so appointed [] any federal or state taxes including penalties and interest arising by reason of said Trustor’s death.” (CP 292-93, 395-97) In other words, does the Trust’s provision granting discretion to the Trustee to pay all taxes arising from the Trustor’s death from the Trust prior to its distribution sufficiently “provide for the apportionment of an estate tax” under RCW 83.110A.020 to avoid statutory apportionment under RCW 83.110A.030.

If this court determines that the trial court properly apportioned the estate taxes ratably among the beneficiaries, the secondary issue is should the trial court have ordered that the beneficiaries of *inter vivos* gifts also pay their pro rata share of the estate taxes since *inter vivos* gifts are part of the “gross estate” under RCW 83.110A.010(3).

These are wholly legal questions, as it requires interpretation of statutes and the Trust, that this court should review *de novo*. See *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43

P.3d 4 (2002) (issues of statutory interpretation are reviewed *de novo*); *Advanced Silicon Materials, LLC v. Grant County*, 156 Wn.2d 84, 89, 124 P.3d 294 (2005) (same); *In re Washington Builders Benefit Trust*, 173 Wn. App. 34, 75, ¶ 70, 293 P.3d 1206 (“interpretation of a will or trust instrument is also a question of law that is subject to *de novo* review”), *rev. denied*, 177 Wn.2d 1018 (2013). “In construing the terms of a trust, the settlor's intent controls.” *In re Washington Builders Benefit Trust*, 173 Wn. App. at 75, ¶ 70.

B. The trial court erred in ordering estate taxes to be ratably apportioned to the beneficiaries of pay-on-death assets, because it undermined the Trustor’s intent to grant the Trustee discretion to pay all taxes from the Trust.

The trial court erred in ordering apportionment of estate taxes in a way that undermines the intent of the Trustor, Leon Jensen. The Trust directed the Trustee to pay, “in its discretion,” all federal or state taxes “arising from the Trustor’s death” from the Trust. (CP 26) The estate taxes associated with the pay-on-death assets “arise from the Trustor’s death,” and these taxes should have been allowed to be paid from the Trust, as contemplated by the Trust under RCW 83.110A.020, as intended by the Trustor, and as determined by the Trustee. The trial court erred by resorting to the “statutory apportionment of estate taxes” under RCW

83.110A.030, and ordering the beneficiaries of pay-on-death assets to ratably pay the associated estate taxes.

1. The statute requires the court to give deference to the Trustor's intent on apportionment of estate taxes if provision is made in either a will or trust document.

The underlying policy of the Uniform Estate Tax Apportionment Act (2003), which our State largely adopted, is to allow apportionment of estate tax in accordance with the intentions of testator or trustor:

(a) To the extent that a provision of a decedent's will provides for the apportionment of an estate tax, the tax must be apportioned accordingly.

(b) Any portion of an estate tax not apportioned pursuant to (a) of this subsection must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which provides for the apportionment of an estate tax. . .

RCW 83.110A.020(1)(a) (Appendix C); *See also* Prefatory Note to Uniform Estate Tax Apportionment Act (“The Act continues to advance the principle of the 1964 Act that decedent’s expressed intentions govern apportionment of an estate tax.”) In the absence of any provision addressing the issue, the estate tax is apportioned “ratably:”

To the extent that apportionment of an estate tax is not controlled by an instrument described in RCW 83.110A.020 . . . the following rules apply:

the estate tax is apportioned ratably to each person that has an interest in the apportionable estate.

RCW 83.110A.030 (Appendix D); RCW 83.110A.010(5) (“Ratable” means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied). Under the statute, the direction of the trustor or testator controls.

2. The Trustor intended to give discretion to the Trustee to pay any federal or state taxes arising from the Trustor’s death, including taxes associated with pay-on-death assets, from the Trust.

The language of both the Jensens’ Will and Trust show their intent to burden their estate with any taxes arising from their deaths before distribution to the beneficiaries in the Trustee’s discretion. The Will specifically contains a provision directing “all inheritance, estate, or other death taxes that may, by reason of my death, be attributable to my probate estate or to any other property not a part of my probate estate” be paid from the residue of the probate estate:

All inheritance, estate, or other death taxes that may, by reason of my death, be attributable to my probate estate or to any other property not a part of my probate estate shall be paid by my executor out of the residue of my probate estate provided, however, that to the extent such taxes are attributable to properties which become, prior to my death, a part of the Trust referred in this Will, then such taxes shall be charged to and collected from the Trustee of said Trust.

(CP 260-261) While there were no probate assets, making this provision of the Will moot, it does reflect an intent that the estate, not the

beneficiaries, bear the taxes. Further, this Will provision also requires the Trust to bear any portion of the estate tax attributable to assets within the Trust. (CP 334)

Section 8.04 of the Trust addresses payment of estate taxes by directing the Trustee to, “in its discretion,” first pay “any federal or state taxes including penalties and interest arising by reason of said Trustor’s death” from the Trust before distributing the assets to the beneficiaries:

Any of the Survivor’s Trust not effectually appointed by the Survivor as set forth above shall be added to the principal of the Family Trust and administered in accordance with the provisions thereof; provided that the Trustee in its discretion may first pay out of any principal of the Survivor’s Trust not so appointed (i) any last illness and funeral expenses of the Survivor, (ii) any expenses incurred in the administration of the affairs of said Trustor, including attorneys’ and accountants’ fees for general or special services rendered and any other probate fees, and (iii) any federal or state taxes including penalties and interest arising by reason of said Trustor’s death.

(CP 292-293) (emphasis added) (Appendix B) This language was sufficient to avoid statutory tax apportionment under RCW 83.110A.030, because it contemplates that the Trustee can and will pay all of the estate taxes from the Trust if it determines that it is appropriate. In other words, the Trust “provides for the apportionment of an estate tax” under RCW 83.110A.020.

It is not necessary that a trust set out a specific estate tax apportionment to trigger RCW 83.110A.020. Although our statute is modeled by the Uniform Estate Tax Apportionment Act (2003), the Washington Legislature did not wholly adopt all of its provisions. For instance, the Uniform Act requires a more exacting direction from the testator or trustor than does its Washington equivalent, RCW 83.110A.020. Under the Uniform Act, the decedent “must expressly and unambiguously direct the apportionment of an estate tax”:

To the extent that a provision of a decedent’s will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly.

Any portion of an estate tax not apportioned pursuant to paragraph (1) must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settler which expressly and unambiguously directs the apportionment of an estate tax...

Uniform Estate Tax Apportionment Act (2003) § 3. Thus, while the Uniform Act requires an “express and unambiguous direction” in a will or trust to avoid ratable apportionment, the Washington Act requires only that the instrument “provide” for apportionment.

The question turns on the meaning of the term “provide” in that statute. That term is not defined in RCW ch 83.110A. Therefore, it must be given its plain meaning, which is typically its dictionary definition. *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285, ¶ 10, 285 P.3d

860 (2012); *State v. Davis*, 176 Wn. App. 849, 874, ¶ 55, 315 P.3d 1105 (2013), *rev. denied*, 179 Wn.2d 1014 (2014). In this context, the term “provide” means “to make a stipulation or provision.” *Random House Kernerman Webster’s College Dictionary* (2010). A related term, “provision,” means “a clause in a statute, contract, or other legal instrument” or “a stipulation made beforehand.” *Black’s Law Dictionary* (9th ed. 2009). Under that definition, the Trust clearly “provides” for payment of estate taxes since Section 8.04 discusses its payment out of the Trust, and before the corpus of the Trust is distributed to the beneficiaries. *Estate of Mumby*, 97 Wn. App. 385, 982 P.2d 1219 (1999).

In *Mumby*, the testator had directed the trustee to pay “all estate, inheritance, succession or other death taxes” out of his estate. *Mumby*, 97 Wn. App. at 396. On appeal, this court held that the language of the trust, together with the structure of the trust was sufficient to avoid the application of the apportionment statute, as the trust was structured so that payment of taxes occurred before the trust assets were distributed:

Dr. Mumby specifically directed the trustee to pay “all estate, inheritance, succession or other death taxes imposed upon, or in relation to any property required by any tax law to be included in the gross Estate, and then to distribute the remaining assets in the manner described in the trust.” This is more than a mere statement that Dr. Mumby wanted his taxes paid as in *Henderson*. Dr. Mumby wanted “all estate,

inheritance, succession or other death taxes” paid and then the *remaining* assets distributed.

Mumby, 97 Wn. App. at 399-400.

Likewise here, the structure of the Trust also gives further indication that estate taxes are to be paid from Trust assets. The language discussing payment of the estate taxes (§ 8.04) is before the distributive provisions (§10.02). Consistent with *Mumby*, when the language requiring payment of estate taxes precedes distributive provisions, the will or trust must be construed such that the distributees receive only what is left after estate taxes have been paid.

That it was the Jensens’ intent that any estate taxes be paid from the Trust, including taxes associated with assets outside of the Trust, is also evident by the fact that the Trust only requires the Trustee to collect taxes related to generation skipping transfers and to the special valuation rules contained in 26 U.S.C. §2032A from beneficiaries:

The Trustee shall pay and charge to, prorata amount and/or recover, to the extent provided by any tax law or other statute, from the persons entitled to the benefits giving rise to such tax, any additional capture tax imposed by Section 2032A of the (Internal Revenue) Code or any generation skipping transfer tax imposed by reason of Chapter 13 of the (Internal Revenue) Code.

(CP 292-93) If the Jensens had wanted *pro rata* payment of estate taxes, the Trust would have directed the Trustee to collect shares from beneficiaries.

The language of the Trust allowing the Trustee to pay “any federal or state taxes including penalties and interest arising by reason of said Trustor’s death” from the trust is a provision made for the apportionment of estate taxes and the trial court should have given it deference under RCW 83.110A.020. The trial court’s decision, however, prevents the Trustee from paying estate taxes from the Trust. In other words, while the language of the Trust explicitly and unambiguously tells the Trustee that it can pay estate taxes from the Trust. The trial court’s decision deprives the Trustee of its discretion by telling the Trustee that it cannot pay estate taxes from the Trust. This conclusion cannot be adopted because it is at odds with the underlying intent under our state’s Uniform Estate Tax Apportionment Act — to give effect to the intent of a testator or trustor.

3. Under the terms of the Trust, the Trustee had discretion to pay all of the estate taxes from the Trust even if it benefited her.

It is not disputed that as beneficiaries of the non-Trust assets, the appellants benefit from estate taxes being paid from the Trust. In fact, respondents argued below that such a payment would be a breach of the

Trustee's fiduciary duty to the respondents. But the trial court found that the Trustee did not breach any fiduciary duty (CP 396). Instead, the trial court's ruling was based solely on the fact that the trial court believed that the Trust did not sufficiently provide for the payment of all of the estate taxes from the Trust. (*See* CP 395-97)

The Trustee had discretion to pay all of the estate taxes from the Trust, and the fact that this benefited the Trustee was not an abuse of that discretion. A trustee abuses his or her discretion only when the trustee acts arbitrarily, in bad faith, maliciously, or fraudulently. *Austin v. US Bank of Washington*, 73 Wn. App. 293, 304, 869 P.2d 404 (1994), *rev. denied*, 124 Wn.2d 1015 (1994). None of Jo's actions can fall within that definition.

Jo's actions must be viewed as a whole. She sought permission from the Court to make gifts that had the effect of avoiding Washington estate tax. This benefited Judy, Jodi, and Chad, and herself. Furthermore, the Trust document specifically gave the Trustee authority to pay estate taxes from Trust assets. Jo did exactly what the Trust authorized her to do. A Trustee cannot be held in breach for following the Trust's direction. Jo's attorney had stated that taxes could and should be paid from the Trust. (RP 181-186) Jo is entitled to rely on the advice of

attorneys she chose to assist her in the performance of her duties as long as she used reasonable care in selecting them. *Estate of Ehlers*, 80 Wn. App. 751, 759, 911 P.2d 1017 (1996).

Further, as Trustee, Jo was required to follow the primary rule of trust administration — to carry out the perceived intentions of the trustors. *Austin*, 73 Wn. App. at 304. The Jensens favored Jo in the designation of pay-on-death assets. As Trustors, the Jensens gave the Trustee discretion to favor Jo again by paying all estate taxes from the Trust before paying proceeds over to anyone else, which is exactly what the Trustee did.

Section 8.04 of the Trust granted the Trustee discretion to make the decision of whether to pay estate taxes associated with the pay-on-death taxes from the Trust. Under RCW 83.110A.020, the trial court should have deferred to the Trustor's intent and the Trustee's discretion in making that decision, particularly after it found that the Trustee did not breach any fiduciary duties. This court should reverse.

C. If *pro rata* apportionment is required, Judy, Jodi, and Chad must contribute *pro rata* to the payment of estate taxes to the extent they received gifts.

In the event this court affirms and determines that the trial court properly ruled that estate taxes should be apportioned among all the beneficiaries, it should reverse the trial court's decision to exclude the

inter vivos gifts from that determination. Judy, Jodi, and Chad each received a total of \$821,870.00 in *inter vivos* gifts in 2008 and 2011. These gifts were made to avoid Washington estate tax but with the recognition that the amounts would be included as assets for determining federal estate tax. If *pro rata* apportionment is required — which it should not be — then the sums attributable to Judy, Jodi, and Chad should be included to determine what each much contribute towards the payment of estate taxes.

Under RCW 83.110A.030, estate taxes are apportioned ratably to each person that has an interest in the “apportionable estate” if no other provision is made in a will or trust. The term “apportionable estate” is defined in part as the “gross estate” as determined “for purposes of the estate tax”:

“Apportionable estate” means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned reduced by:

- (a) Any claim or expense allowable as a deduction for purposes of the tax;
- (b) The value of any interest in property that, for purposes of the tax, qualifies for a marital or charitable deduction or otherwise is deductible or is exempt; and
- (c) Any amount added to the decedent's gross estate because of a gift tax on transfers made before death.

RCW 83.110A.010(1).⁴ The key term within that definition is “gross estate,” which “means, with respect to an estate tax, all interests in property subject to the tax.” RCW 83.110A.010(3). Under this definition, the *inter vivo* gifts are part of the “gross estate” because they were included to determine the amount of federal estate tax. Federal estate tax is levied on property that the decedent does not own at the time of his her death — gifts in excess of the annual exemption from gift tax. 26 U.S.C. § 2001(b)(1)(B).

Respondents may argue that the definition of “gross estate” should be identical to that contained in the Internal Revenue Code, which only includes the value of assets owned by decedent at the time of his death:

The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

26 U.S.C. §2031(a).

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

26 U.S.C. §2033.

⁴ Here, nothing was added because of a gift tax on transfers made before death. Therefore, RCW 83.110A.010(1)(c) does not apply.

The definition of “gross estate” in the Internal Revenue Code is not congruent with the same term in RCW ch. 83.110A. The Internal Revenue Code excludes *inter vivos* gifts from the term “gross estate.” RCW 83.110A.010(3) includes all interests in property subject to the tax within the term “gross estate,” including *inter vivos* gifts. As gifts are subject to the federal estate tax, any apportionment of estate taxes must include gifts that a recipient received.

Including the value of gifts in apportioning estate tax has not always been the rule in Washington. Our state’s version of the Uniform Estate Tax Apportionment Act of 2003 succeeded former RCW ch. 83.110. That statute was repealed in 2005 when RCW ch. 83.110A was enacted. Laws of 2005, Chapter 332, § 15. The former statute governing apportionment, (RCW 83.110.020(1) (*former*)), provided that taxes be apportioned among “persons interested in the estate”:

. . . unless the will, trust, or other dispositive instrument otherwise provides, the tax. . . shall be apportioned among all persons interested in the estate. . .the apportionment shall be made in proportion of the value of the interest of each person interested in the estate bears to the total value of interest of all persons interested in the estate. . .

The key definition was “estate,” which means the “gross estate of a decedent as determined for the purposes of federal estate tax and the estate tax payable to this state.” RCW 83.110.010(1) (*former*). Thus, the prior

statute explicitly limited apportionment to what was in the gross estate as defined by the Internal Revenue Code and thus eliminated gifts from the apportionment calculation.

The new enactment changed the definition of the comparable term, “gross estate.” It omits all reference to the similar terms in the Internal Revenue Code. Rather it focuses on the property received upon which the tax is apportioned. Language amending an unambiguous statute is designed to work a change in the law. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 438, 858 P.2d 503 (1993); *Roe v. TeleTech Customer Care Management (Colorado) LLC*, 171 Wn.2d 736, 751, 257 P.3d 586 (2011); *State v. Hughes*, 80 Wn. App. 196, 200, 907 P.2d 336 (1995). Since the legislature adopted a definition of the term “gross estate” that is different from the then existing and comparable term “estate” when it repealed RCW ch. 83.110 and enacted RCW ch. 83.110A, the legislature changed the law concerning those terms. The prior term incorporated the definition in the Internal Revenue Code. The new definition does not. Therefore, the legislature abandoned the Internal Revenue Code definition.

In short, a recipient’s duty to pay estate tax must be reckoned with regard to the non-exempt gifts that the recipient received that are included

for computation of the federal estate tax. The trial court's contrary decision was error.

D. This court should award attorney fees to the appellants.

This court should exercise its discretion and award attorneys' fees to the appellants pursuant to RAP 18.1 and RCW 11.96A.150(1). RCW 11.96A.150(1) provides that "either the trial court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings . . . The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved." Here, this court should award attorney fees to the appellants as this appeal is brought to ensure that the Trustee's intent is carried out by allowing the Trustee to pay all of the estate taxes from the Trust in its discretion.

V. CONCLUSION

The trial court erred by ruling that Section 8.04 of the Trust was not sufficient to allow the Trustee to pay all estate taxes from the Trust. If this court affirms the estate tax apportionment, it should nonetheless

reverse because the trial court erred by failing to require that gifts received by beneficiaries be included in computation of liability for federal estate tax. Jo and November should also be awarded their attorney's fees and costs on appeal.

Dated this 30th day of April, 2014.

CARON, COLVEN
ROBINSON & SHAFTON

By:  _____
Ben Shafton
WSBA No. 6280

SMITH GOODFRIEND, P.S.

By:  _____
Valerie A. Villacin
WSBA No. 34515

Attorneys for Josephine Papaleo

Attorneys for November Papaleo

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 30, 2014, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Ben Shafton Caron, Colven, Robinson & Shafton 900 Washington Street, Suite 1000 Vancouver, WA 98660	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Brian Gerst Marshall Stagg Landerholm, PS 805 Broadway St Ste 1000 Vancouver, WA 98660	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 30th day of April, 2014.



Victoria K. Vigoren

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SCOTT G. WEBER, CLERK
CLARK COUNTY

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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

In the Matter of the Guardianship of:

Case No. 07-4-00558-8

LEON V. JENSEN,
Deceased.

**ORDER ON PETITION FOR
EQUITABLE ALLOCATION OF THE
ESTATE TAX BURDEN AMONG ALL
BENEFICIARIES PURSUANT TO
RCW 11.96A**

In Re the JENSEN 1980 TRUST
AGREEMENT dated July 23, 1980

THIS MATTER having come before the court on the motion of Jodi Wicks, Judy Barrett, and Chad Jensen (hereinafter "Petitioners"), by and through counsel Brian K. Gerst of Landerholm, P.S. , for an Order on the *Petition for Equitable Allocation of the Estate Tax Burden Among all Beneficiaries Pursuant to RCW 11.96A*; and the court having reviewed the Petition, the Response filed herein by Josephine Jensen Papaleo, the Trustee of the Jensen 1980 Trust Agreement, as amended, by and through her attorney, Ben Shafton and Petitioner's Reply Brief, in addition to reviewing the records and files herein, including supplemental briefing from Petitioners and Trustee filed November 4, 2013 and having heard the arguments of counsel, now, therefore, it is:

ORDERED as follows:

1. All necessary parties have received and waived notice of this proceeding as required by law;
2. Each individual party is acting on his or her own behalf, and as virtual representative of his or her respective distributees, heirs, issue and other kindred, pursuant to RCW 11.96A.120; The Trustee is acting as Trustee;

ORDER ON PETITION FOR EQUITABLE ALLOCATION OF
THE ESTATE TAX PURSUANT TO RCW 11.96A - 1
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 **LANDERHOLM**
805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

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HDH

1 3. All estate taxes shall be retroactively apportioned in accordance with RCW
2 83.110A.030(1) consistent with the graph on page 5 of Petitioners' brief and as follows:
3 a. Since Josephine received 37.112% of the assets of the apportionable
4 estate, she shall reimburse \$582,578 to the Trust;
5 b. Since November received 2.195% of the assets of the apportionable
6 estate, she shall reimburse \$34,457 to the Trust; and
7 c. Since Chad received 0.670% of the assets of the apportionable estate,
8 he shall reimburse \$10,517 to the Trust.
9 4. Within 30 days of entry of this Order, the Trustee shall collect
10 the above stated amounts directly from the applicable beneficiaries and Trustee shall
11 deposit said amounts into account(s) titled in the name of the Jensen 1980 Trust.
12 5. Simple Interest shall or shall not be ordered. If simple interest
13 is ordered, Interest shall accrue at the annual rate of 12% and shall accrue from
14 12/7/13 (as to amounts not collected.) *RCW*
15 6. Josephine Jensen Papaleo, the Trustee of the Jensen 1980 Trust Agreement,
16 as amended, has not breached her fiduciary duties to the Trust beneficiaries therefore, she is
17 not discharged as Trustee of the Trust;
18 7. Each party shall pay their own Attorneys' fees and costs associated with the
19 *Petition for Equitable Allocation of the Estate Tax Burden Among all Beneficiaries*
20 *Pursuant to RCW 11.96A*. However, fees incurred to assist the Trustee in this matter are
21 properly paid from Trust Assets.
22 8. Reasonable attorney's fees are granted or not granted in favor
23 of Petitioners for having to brief and argue against Trustee's objections to the entry of
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25 ///
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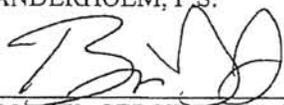
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Petitioners' proposed Orders. Petitioners are entitled to \$ _____ as a reasonable attorney's fee award payable by the Trustee, from Trust assets.

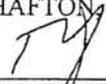
Dated: 11/6/, 2013.


ROBERT A. LEWIS
Clark County Superior Court Judge

Prepared and Submitted by:

LANDERHOLM, P.S.

BRIAN K. GERST, WSBA #33035
MARSHALL K. STAGG, WSBA #38872
Of Attorneys for Petitioners

Approved as to form, Notice of Presentation
waived this 6 day of Nov., 2013

CARON, COLVEN, ROBISON &
SHAFTON, PS

BEN SHAFTON, WSBA #6280
Of Attorneys for Respondent

397

installments but in no event less often than annually, all of the net income of the Survivor's Trust. In addition, the Trustee shall pay to said surviving Trustor such amounts of the principal of the Survivor's Trust up to the whole thereof, as the Survivor may direct from time to time.

Section 8.03. General Power of Appointment.

On the death of the Survivor, the Survivor's Trust shall terminate, and the Trustee shall distribute any remaining balance of the Survivor's Trust to such persons, including the Survivor's estate, as the Survivor shall appoint by a written instrument filed with the Trustee specifically referring to and exercising this general power of appointment.

Section 8.04. Failure to Effectively Appoint.

Any of the Survivor's Trust not effectively appointed by the Survivor as set forth above shall be added to the principal of the Family Trust and administered in accordance with the provisions thereof; provided that the Trustee in its discretion may first pay out of any of the principal of the Survivor's Trust not so appointed (i) any last illness and funeral expenses of the Survivor, (ii) any expenses incurred in the administration of the affairs of said Trustor, including attorneys' and accountants' fees for general or special services rendered and any other probate fees and (iii) any federal or state taxes including penalties and interest arising by reason of said Trustor's death. Notwithstanding the foregoing, the Trustee shall pay and charge to, prorata among, and/or recover, to the

extent provided by any tax law or other statute, from the persons entitled to the benefits giving rise to such tax, any additional recapture tax imposed by reason of Section 2032A of the Code or any generation skipping transfer tax imposed by reason of Chapter 13 of the Code.

ARTICLE 9

ADMINISTRATION OF THE FAMILY TRUST DURING

THE SURVIVOR'S LIFETIME

Section 9.01. The Trust Estate of the Family Trust.

(a) The Family Trust shall be irrevocable on the death of the Decedent and the rights of the Survivor therein shall be limited as hereinafter set forth.

(b) The Family Trust shall consist of that portion of the original Trust Estate not allocated to the Survivor's Trust pursuant to the provisions hereof.

Section 9.02. Payment of Income of the Family Trust.

The Trustee shall pay to or apply for the benefit of the Survivor all of the net income of the Family Trust Estate in quarterly or more frequent installments.

Section 9.03. Payment of Principal of the Family Trust.

In addition to the payment of income as set forth above, the Trustee shall pay to or apply for the benefit of the Survivor such amounts of principal of the Family Trust Estate as may be necessary for his proper health, support and maintenance in accordance with his accustomed manner of living, and

West's Revised Code of Washington Annotated

Title 83. Estate Taxation (Refs & Annos)

Chapter 83.110A. Washington Uniform Estate Tax Apportionment Act (Refs & Annos)

West's RCWA 83.110A.020

83.110A.020. Apportionment by will or other dispositive instrument

Effective: June 7, 2012

Currentness

(1) Except as otherwise provided in subsection (3) of this section, the following rules apply:

(a) To the extent that a provision of a decedent's will provides for the apportionment of an estate tax, the tax must be apportioned accordingly.

(b) Any portion of an estate tax not apportioned pursuant to (a) of this subsection must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which provides for the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this subsection (1)(b):

(i) A trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(ii) The date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

(c) If any portion of an estate tax is not apportioned pursuant to (a) or (b) of this subsection, and a provision in any other dispositive instrument provides that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

(2) Subject to subsection (3) of this section, and unless the decedent provides to the contrary, the following rules apply:

(a) If an apportionment provision provides that a person receiving an interest in property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned to the interest:

(i) The tax attributable to the exonerated interest must be apportioned among the other persons receiving interests passing under the instrument; or

(ii) If the values of the other interests are less than the tax attributable to the exonerated interest, the deficiency must be apportioned ratably among the other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

(b) If an apportionment provision provides that an estate tax is to be apportioned to an interest in property a portion of which qualifies for a marital or charitable deduction, the estate tax must first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient.

(c) Except as otherwise provided in (d) of this subsection, if an apportionment provision provides that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under RCW 83.110A.060, the tax must be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property.

(d) If an apportionment provision provides that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests. No tax shall be paid from a charitable remainder annuity trust or a charitable remainder unitrust described in section 664 of the internal revenue code and created during the decedent's life.

(e) Persons receiving tangible personal property as defined in RCW 11.12.260 by specific gifts pursuant to the provisions of a will or revocable trust or by right of survivorship, are exonerated from apportionment of estate tax up to an aggregate value of property permitted to pass by affidavit for small estates pursuant to RCW 11.62.010(2)(c).

(f) Persons receiving specific pecuniary gifts pursuant to the provisions of a will or revocable trust are exonerated from apportionment of estate tax up to an aggregate amount of money equal to one-half of the value of property permitted to pass by affidavit for small estates pursuant to RCW 11.62.010(2)(c).

(g) If persons receive an aggregate value of tangible personal property or the amount of money in excess of the ceiling allowed to be exonerated for apportionment for estate taxes for that type of property, the portion of each gift to be exonerated is the maximum amount of money or value of tangible personal property that is allowed to be exonerated multiplied by the proportion of money received by each person over the amount of money received by all persons, or the value of tangible personal property received by each person over the value of all tangible personal property received by all persons.

(3) A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent had no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this section, a testamentary power of appointment is a power to transfer the property that is subject to the power.

Credits

[2012 c 97 § 1, eff. June 7, 2012; 2005 c 332 § 3, eff. Jan. 1, 2006.]

West's Revised Code of Washington Annotated
Title 83. Estate Taxation (Refs & Annos)
Chapter 83.110A. Washington Uniform Estate Tax Apportionment Act (Refs & Annos)

West's RCWA 83.110A.030

83.110A.030. Statutory apportionment of estate taxes

Effective: January 1, 2006
Currentness

To the extent that apportionment of an estate tax is not controlled by an instrument described in RCW 83.110A.020 and except as otherwise provided in RCW 83.110A.050 and 83.110A.060, the following rules apply:

- (1) Subject to subsections (2), (3), and (4) of this section, the estate tax is apportioned ratably to each person that has an interest in the apportionable estate.
- (2) A generation-skipping transfer tax incurred on a direct skip taking effect at death is charged to the person to which the interest in property is transferred.
- (3) If property is included in the decedent's gross estate because of section 2044 of the Internal Revenue Code or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate is apportioned ratably among the holders of interests in the property. The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate.
- (4) Except as otherwise provided in RCW 83.110A.020(2)(d) and except as to property to which RCW 83.110A.060 applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property.
- (5) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in this chapter because of special circumstances, it may direct apportionment thereon in the manner it finds equitable.

Credits

[2005 c 332 § 4, eff. Jan. 1, 2006.]

West's RCWA 83.110A.030, WA ST 83.110A.030
Current with 2014 Legislation effective before June 12, 2014, the General Effective Date for the 2014 Regular Session