

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2011 DEC 22 P 3:08  
BY RONALD R. CARPENTER

CLERK

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Supreme Court No. 86776-3

JEFFREY MANARY,

Respondent,

v.

EDWIN A. ANDERSON,

Appellant.

FILED  
DEC 22 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
aff

ANSWER TO PETITION FOR REVIEW

Attorneys for Appellant

John M. Casey WSBA # 24187  
Andrea L. Schiers WSBA # 38383  
Curran Law Firm P.S.  
555 West Smith Street  
P.O. Box 140  
Kent, Washington 98035-0140  
(253) 852-2345

ORIGINAL

**TABLE OF CONTENTS**

I. IDENTITY OF RESPONDING PARTY..... 1

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW ..... 1

III. RESTATEMENT OF THE CASE ..... 1

    A. The Greene Living Trust..... 1

    B. Eileen Greene passes away. .... 2

    C. Homer Greene amends the Trust and later conveys the Property to Anderson..... 3

    D. The Litigation ..... 4

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED..... 5

    A. The decision of the Court of Appeals is consistent with its earlier case law..... 6

    B. No issue of substantial public interest is implicated here. 11

        1. The Property is a nonprobate asset..... 12

        2. The provisions of Chapter 11.11 RCW designed to protect third parties do not, by their own terms, apply to this situation. .... 15

            a. The notice provisions ..... 15

            b. The limitations period ..... 17

        3. The recent amendments to Title 11 RCW do not affect the ruling of the Court of Appeals..... 18

V. CONCLUSION..... 19

**TABLE OF AUTHORITIES**

**CASES**

*Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4,  
*reconsideration denied* (2002)..... 15

*In re Estate of Furst*, 113 Wn. App. 839, 55 P.3d 664 (2002).....  
..... 1, 6, 7, 8, 9, 11, 20

*In re Estate of Tosh*, 83 Wn.App. 158, (1996), *review denied*, 131 Wn.2d  
1024 (1997)..... 3

*Manary v. Anderson*, 2011WL 5127615, --P.3d-- (Oct. 31, 2011)..... 5

*Matter of Estate of Bergau*, 103 Wn.2d 431, 693 P.2d 703,  
*reconsideration denied* (1985)..... 6

*Sedlacek v. Hillis*, 145 Wn.2d 379, 36 P.3d 1014 (2001)..... 15

*Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117  
P.3d 1117 (2005)..... 14

*State v. Jackson*, 137 Wn.2d 712, 976 P.2d 1229 (1999) ..... 15

*Stroh Brewery Co. v. State, Dept. of Revenue*, 104 Wn. App. 235, 15 P.3d  
692, *review denied*, 144 Wn.2d 1002, 29 P.3d 718 (2001)..... 14

**STATUTES**

RCW 11.02.005(15)..... 12

RCW 11.11.003 ..... 16

RCW 11.11.007 ..... 6

RCW 11.11.010 ..... 12, 13, 16

RCW 11.11.020 .....*passim*

RCW 11.11.040 .....	16, 18
RCW 11.11.070 .....	17, 18
RCW 11.12.230 .....	6
RCW 11.96A.150 .....	19
RCW 11.103 .....	18
Act effective January 1, 2012, 2011 Wash. Legis. Serv. Ch. 327 § 40 (West).....	19

**RULES**

RAP 13.4(b).....	6, 20
RAP 13.4(b)(2) .....	11
RAP 13.4(b)(4) .....	19
RAP 18.1(a) .....	19
RAP 18.1(j).....	19

**SECONDARY SOURCES**

F.B. Rep. on S.H.B.1051, 62 <sup>ND</sup> Leg., Reg. Sess. (WASH. 2011).....	19
F.B. Rep. on S.B. 6181, 55 <sup>TH</sup> Leg., Reg. Sess. (WASH. 1998).....	14

**I. IDENTITY OF RESPONDING PARTY**

The responding party is Edwin Anderson (“Anderson”), the personal representative of the Estate of Homer Greene and the person designated in Homer Greene’s last Will to receive the property at issue. Anderson was the appellant in the Court of Appeals.

**II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW**

- A. Whether the decision of the Court of Appeals conflicts with its decision in *In re Estate of Furst*, 113 Wn. App. 839, 55 P.3d 664 (2002) when the two cases rest on distinct legal theories that the appellate court explained thoroughly?
- B. Whether this case raises an issue of substantial public interest when it involves the straight-forward application of an unambiguous statute and leaves the common law of trusts undisturbed?
- C. Whether Anderson is entitled to attorneys’ fees.

**III. RESTATEMENT OF THE CASE**

A. The Greene Living Trust.

On December 8, 1995, Homer and Eileen Greene, a married couple, executed a revocable living trust (“the Trust”). Clerk’s Papers (“CP”) 44-81. The Trust instrument named Homer and Eileen<sup>1</sup> as Trustors and Co-Trustees. CP 45 at Sections 1.02, 1.03. During both their lifetimes, both Homer and Eileen could amend, modify, or revoke the Trust in whole or in part. CP 46-

---

<sup>1</sup> Because Homer and Eileen shared the same last name, Anderson uses their respective first names only for clarity and intends no disrespect.

47 at Sections 1.05, 1.06. Upon the death of one of them, the survivor, as Trustee, was directed to “divide the Trust into two (2) separate trusts,” to be named the “Family Trust” and the “Survivor’s Trust.” CP 52 at Section 3.02. The Family Trust was to consist of the decedent spouse’s interest in community property and her separate property, and could not be altered, revoked or amended after her death. CP 52 at Section 3.02; CP 47 at Section 1.06(d); CP 59 at Section 5.06.

Meanwhile, the Survivor’s Trust was to consist of the surviving spouse’s interest in community property and his separate property. CP 52 at Section 3.03. The surviving spouse retained the right to revoke, amend, or modify his property subject to the Survivor’s Trust. CP 56 at Section 4.11 (“Survivor shall have, and shall retain, the powers of revocation, withdrawal, amendment, modification, beneficiary change, and the other powers set forth in Article 4 with respect to the Survivor’s Trust”). The original Trust instrument named three beneficiaries. CP 60 at Section 6.03.

The same day they executed the Trust instrument, Homer and Eileen quit claimed their community residence in Renton, Washington (“the Property”) to themselves as Trustees. CP 83. The deed was recorded in the records of King County, Washington. CP 83.

B. Eileen Greene passes away.

Eileen died testate on December 5, 1998. CP 85. Her Will provides

that her estate should pass to the Trustee of the Trust, but in the event that that bequest fails, then to Homer. CP 87-88.

Upon Eileen's death, Homer became the sole Trustee, and was directed by the terms of the Trust to place Eileen's interest in the community property and in her separate property into a "Family Trust" and retain his respective interests in a "Survivor's Trust." CP 52 at Sections 3.02 – 3.04. Homer, however, did not create or fund either trust. CP 41 at ¶ 4.

C. Homer Greene amends the Trust and later conveys the Property to Anderson.

In August 1999, Homer, as the surviving Trustor, amended the Trust to remove the three beneficiaries named in the original Trust instrument, and named Alice Manary, his sister, as the sole beneficiary.<sup>2</sup> CP 94-96.<sup>3</sup>

In or about 2002, Anderson began living at the Property, in a trailer parked in the driveway. CP 41 at ¶ 2. He took care of the Property by doing yard work, and he assisted Homer by running errands for him and helping him with everyday tasks. *Id.* at ¶ 3.

---

<sup>2</sup> Anderson disputes whether this amendment operated to change the beneficiaries of the entire Trust, or only as to Homer's interests in the Trust. However, the parties have not yet litigated this issue in the trial court proceedings below and so it is not before this Court.

<sup>3</sup> This amendment is styled the "Second Amendment" to the Trust. The parties located a document entitled the "First Amendment" to the Trust that purports to remove one of the beneficiaries. The Trust instrument provides it may be amended by a "duly executed instrument filed with the Trustee." CP 46 at Section 1.05. The parties never located a copy of the "First Amendment" document that was in any way initialed, signed, or dated by either Homer or Eileen, indicating that it was "executed." *See In re Estate of Tosh*, 83 Wn.App. 158, 162-63 (1996), *review denied*, 131 Wn.2d 1024 (1997). Without such indications, the

On November 5, 2004, Homer executed a statutory warranty deed conveying a “co-ownership joint occupancy” interest in the Property to Anderson. CP 98-99. That same day, Homer executed a Last Will and Testament (“Will”) that revoked any previous wills and codicils and specifically bequeathed to Anderson the Property and any vehicles registered in Homer’s name. CP 101.

Homer passed away on January 5, 2007. CP 105. Anderson was appointed personal representative of Homer’s estate. CP 107-08.

D. The Litigation.

In October 2008, Alice Manary, as the first successor Trustee of the Trust, sued Anderson to, among other things, quiet title to the Property and eject him from it.<sup>4</sup> CP 7-14. Both parties sought summary judgment as to Anderson’s ownership of the Property.

Anderson primarily argued that Chapter 11.11 RCW (“the Super Will statute”) controlled the issue and Homer’s specific bequest of the Property to him in the Will surmounted the contrary provisions of the Trust. CP 34-37. Manary maintained Homer’s attempted conveyance of the Property to Anderson via the statutory warranty deed and the Will were ineffective because neither sufficiently revoked the Trust. CP 115-21. Manary also

---

purported amendment is invalid. *Id.*

<sup>4</sup> Ms. Manary passed away during the litigation. Her son, Jeffery Manary, was later appointed the second successor Trustee of the Trust. CP 113, lines 15-18.

claimed the Super Will statute did not apply to the case. CP 204-07.

The trial court denied Anderson's motion and granted Manary's. CP 241-245. Specifically, the court found that Homer failed to

either modify the Trust as to the Property or to acknowledge the Trust in either the Warranty Deed or his Will . . . [which] resulted in the Property remaining Trust property. As such, [Homer] had no right, title or interest in the Property to convey to Defendant Anderson in either the Warranty Deed or the Will. Both attempted transfers . . . were invalid.

CP 243.

The court quieted title to the Property in the Trust. CP 244-45. Anderson appealed. The Court of Appeals reversed, finding Homer satisfied the requirements of the Super Will statute and effectively transferred his interest in the Property to Anderson via his Will. *Manary v. Anderson*, 2011WL 5127615, --P.3d-- (Oct. 31, 2011). The appellate court remanded with instructions to enter summary judgment in favor of Anderson. *Id.* Manary now seeks discretionary review by this Court.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

Under Washington law, when the owner of a nonprobate asset specifically refers to an asset in his will, the owner's interest in the asset "belongs to the testamentary beneficiary named to receive the nonprobate asset, notwithstanding the rights of any beneficiary designated before the date of the will." RCW 11.11.020(1). This is entirely consistent with a

Washington court's primary duty in probate proceedings – to effectuate the testator's intent. *See Matter of Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703, *reconsideration denied* (1985); RCW 11.12.230.

The Super Will statute, designed to establish rights to nonprobate assets as between a beneficiary named in a will and a beneficiary otherwise designated to receive them, was designed to address precisely the situation presented here. *See* RCW 11.11.007. Simply put, Homer did in his Will exactly what the Super Will statute requires: he named Anderson to receive a specific nonprobate asset, the Property, “notwithstanding the rights of any beneficiary designated before the date of the will.” RCW 11.11.020(1). Therefore, Anderson is entitled to Homer's interest in the Property.

As before the Court of Appeals, Manary relies on carefully selected excerpts of relevant case law, the Trust instrument, and the Super Will statute to support his positions. When these excerpts are fully examined, however, it is readily apparent that none of the criteria in RAP 13.4(b) are satisfied and that this Court should deny review.

**A. The decision of the Court of Appeals is consistent with its earlier case law.**

Manary claims the Court of Appeals here contradicted its earlier decision in *In re Estate of Furst*, 113 Wn. App. 839, 55 P.3d 664 (2002). A review of the two cases reveals otherwise. While the facts in *Furst* are nearly

identical to those presented here, the decisions rest on different legal principles that the Court of Appeals aptly distinguished.

In *Furst*, the decedent created a revocable living trust into which he transferred all of his assets; he also executed a pour-over will concurrent with the trust. *Furst*, 113 Wn. App. at 840-41. Later, the decedent executed a new will that revoked all former wills, “but did not mention or purport to revoke the trust.” *Id.* at 841. The new will disposed of “the rest, residue and remainder” of the decedent’s estate in a manner that differed substantially from that described in the trust. *Id.*

The Court of Appeals there held that the decedent’s later-executed will did not effectively revoke the trust because the will did not mention the trust or otherwise purport to revoke it. *Id.* at 843. The court also concluded that the later-executed will did not successfully change the beneficiary of the decedent’s trust pursuant to the Super Will statute because the bequest in the will was a *general* residuary gift. *Id.* (citing RCW 11.11.020(2): “A general residuary gift in an owner’s will . . . does not entitle the devisees or legatees to receive nonprobate assets of the owner.”). Finally, the court noted that the statute “directs the manner of changing the beneficiaries of a nonprobate asset”, but that the decedent in *Furst* did not follow that process when he executed his later will. *Id.*

This key fact distinguishes this case: Homer made a *specific* bequest

of a nonprobate asset in his later-executed Will. By so doing, he satisfied the requirements of RCW 11.11.020(1), and properly named Anderson to receive his interest in the Property. This is the basis for the Court of Appeals' decision here. It found the Super Will statute controls this case, and "under the plain language of RCW 11.11.020(1), upon Homer's death, his interest in the property vested in Anderson as a nonprobate asset." *Manary*, 2011 WL 5127615 at \*4.

Despite this holding, Manary seizes the discussion in *Furst* regarding that decedent's attempted revocation of that trust as proof of a purported conflict with this decision. Petition for Review at 12-13. However, Anderson is not arguing Homer's conveyance of the Property to him in Homer's Will operated to revoke the Trust pursuant to the common law requirements of revocation. Instead, Anderson's position is simply that, by operation of the Super Will statute, the specific reference to the Property in Homer's Will supersedes the terms of the Trust as to that particular asset. As such, the analysis in *Furst* on revocation is irrelevant to this case.

The Court of Appeals explained as much in its decision here:

Nothing in the statute requires Homer's will to mention to trust in order for RCW 11.11.020 to be effective. Moreover, there is nothing in the statute that requires a testator or testatrix to acknowledge a previously created trust in the will.

...

Manary argues that, as in *Furst*, Homer's bequest of his interest in the property to Anderson is invalid because the last will neither mentions the trust nor revokes its provisions in accordance with the terms of the trust. But, unlike the *Furst* case, *this case does not involve revocation of the trust by Homer's last will.*

Here, Anderson bases his claim on the provisions of the Act, not on common law principles regarding revocation of prior trusts by a will. Thus, *it is irrelevant that this will neither mentions the prior trust nor purports to revoke it. As we have already explained, unlike Furst, there is full compliance with the relevant provisions of the Act here. Because compliance with the Act is all that is required, Furst does not necessitate any different result here.*

*Manary*, 2011 WL 5127615 at \*4, 6 (emphasis added).

Far from "evading" the *Furst* case, the Court of Appeals' decision clearly considered and distinguished it, and left the common law of revocation undisturbed while effectuating the plain language of the Super Will statute. There is no conflict for this Court to resolve.

Manary further protests that Homer "had to be attempting to revoke the Trust" by leaving the Property to Anderson in his Will and the attempt was unsuccessful because the Trust was not revocable as to the Property. Petition for Review at 14-15. To the contrary, although Manary continues to ignore them, several Trust provisions clearly granted Homer the right to revoke his interest in the Property, even after Eileen's passing:

- Section 1.04: "All property ... conveyed or transferred to the Trustee(s) pursuant to this Declaration, which was community property ... at the time of such conveyance or transfer, shall

retain its character ... as community property ..., during the Trustors' lifetimes." CP 46.

- Section 1.06(c): "Each Trustor's power to amend, modify or revoke this Trust is limited to the extent of such Trustor's community and separate property interests." CP 46.
- Section 1.06(d): "The Survivor's Trust *shall remain revocable by the Survivor*, and as to revocation and amendment, as well as administration, the Survivor's Trust shall be governed by the rules of this Trust as initially established this day." CP 47 (emphasis added).
- Section 1.06(f): "Upon the death or incapacity of *both of the Trustors*, this Agreement shall become irrevocable." CP 47 (emphasis added).
- Section 3.03: "At the Decedent's death, the [T]rustee shall allocate the Survivor's one-half interest in the community property and the Survivor's separate property to the Survivor's Trust." CP 52.
- Section 4.01: "The Trustee shall allocate to the Survivor's Trust the Survivor's interest in community property and the Survivor's interest in separate property ... *The rights of revocation, amendment, modification or withdrawal shall continue to apply to the Survivor with respect to the Survivor's Trust.*" CP 53-54 (emphasis added).
- Section 4.11: "The Survivor shall have, and *shall retain, the powers of revocation, withdrawal, amendment, modification, beneficiary change, and other powers set forth in Article 4 with respect to the Survivor's Trust.*" CP 56 (emphasis added).

Moreover, the Court of Appeals concluded that the Trust remained revocable as to Homer's interest in the Property, even after Eileen's passing: "Homer was one of two grantors under the Greene's 1995 revocable trust.

Upon his death, the trust became irrevocable as to him.” *Manary*, 2011 WL 5127615 at \*4. Manary does not, nor could he, claim this conclusion is inconsistent with the *Furst* decision, which also involved a revocable living trust. *Furst*, 113 Wn. App. at 840.

Next, Manary points to Section 7.06 of the Trust as the sole method of removing the Property from it. Petition for Review at 15. That provision is not so restrictive. It speaks only of tasks the Trustee and Surviving Trustor “may” and are “authorized” to do during the Trustor’s lifetime. It in no way mandates what provisions Homer, who during his lifetime was the Trustee, Surviving Trustor, and Beneficiary of the Trust, could or could not make with respect to his interest in the Property after his death. It simply cannot be read as narrowly as Manary proposes. To do so would render the above-quoted provisions of the Trust nonsensical. And Manary’s argument misses the point that the Court of Appeals underscored: “Compliance with the Act’s express terms permits a testamentary disposition that need not comply with the previous trust’s provisions.” *Manary*, 2011 WL 5127615 at \*6.

There is no conflict between the *Furst* case and this one. The cases rest on distinct theories that the Court of Appeals plainly explained in its decision here. Accordingly, RAP 13.4(b)(2) offers no basis for review.

**B. No issue of substantial public interest is implicated here.**

To convince this Court that this case raises important public policy

issues, Manary merely repeats the bulk of his arguments that the Court of Appeals thoroughly disposed of. They are no more persuasive now.

1. The Property is a nonprobate asset.

Manary's dogged attempt to cast the Property as something other than a nonprobate asset continues to strain credulity. A nonprobate asset "means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will[.]" and includes a "trust of which the person is grantor and that becomes irrevocable only upon the person's death[.]" RCW 11.11.010(7)(a); RCW 11.02.005(15). The Court of Appeals soundly concluded the Property here met both of these definitions:

... Under the express terms of the trust, Homer had a beneficial interest in the residential real property – the asset – during his life. Moreover, the trust also expressly provided that this beneficial interest would pass to the trust's beneficiaries upon his death. Thus, under the plain words of the statute, Homer's interest in the real property is a nonprobate asset.

Furthermore, his interest in the property also qualifies as a nonprobate asset because it falls expressly within the nonexclusive list of examples of such assets. Specifically, his interest in the property is an interest passing under a "trust of which the person is grantor and that becomes effective or irrevocable only upon the person's death..." [RCW 11.02.005(15).] Homer was one of two grantors under the Greenes' 1995 revocable trust. Upon his death, the trust became irrevocable as to him. Therefore, his interest in the property is a nonprobate asset.

*Manary*, 2011 WL 5127615 at \*3-4.

Manary relies on one exclusion from the definition of “nonprobate asset” in the Super Will statute, pertaining to “[a] deed or conveyance for which possession has been postponed until the death of the owner[.]” RCW 11.11.010(7). But again, the Court of Appeals squarely addressed this argument as being “directly at odds with the definition of nonprobate asset” set out above. *Manary*, 2011 WL 5127615 at \*4 (citing RCW 11.020.005(15)). This definition (indeed, the very concept of a nonprobate asset) clearly contemplates that possession of the asset, by anyone, will not occur until the owner dies. That the bequest to Anderson took effect when Homer died does not bring the asset within this exclusion. If it did, *any* nonprobate asset disposed of in a decedent’s will would arguably fall within that exclusion. That scenario would render the entire statute meaningless. Not surprisingly, the Court of Appeals rejected such an interpretation: “The fact that the Greenes funded their trust in 1995 and that Homer’s interest in the house did not pass until his death does not bar classifying it as a nonprobate asset. The statute’s language makes this clear.” *Id.*

Manary offers little to argue that this conclusion was mistaken. He says only that the appellate court improperly expanded the definition of the term as it applies to “a deeded and recorded interest in real property[.]” Petition for Review at 11. To the contrary, the court plainly engaged in a

straightforward statutory construction analysis and rejected an interpretation of the term “nonprobate asset” that would have rendered the Super Will statute meaningless and would have been antithetical to Homer’s last-expressed intent. The court properly refused to “read into the statute what is not there.” *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005); *see also Stroh Brewery Co. v. State, Dept. of Revenue*, 104 Wn. App. 235, 239-40, 15 P.3d 692, *review denied*, 144 Wn.2d 1002, 29 P.3d 718 (2001) (“In interpreting and construing a statute, we must give effect to all of the language, rendering no portion meaningless or superfluous.”).

Further, Manary’s suggestion that this decision undermines the public’s confidence in recorded instruments is overstated. The Court of Appeals simply applied the statute as written. In passing it, the Legislature contemplated that individuals, in their wills, would affect existing provisions in other documents:

... Persons are allowed to designate by will the beneficiaries at death of certain assets that are not otherwise subject to probate proceedings. By writing his or her will, a person can *supersede pre-existing beneficiary designations* on ... certain ... limited assets in order to *enable the terms of his or her will to govern the disposition of all those assets*.

F.B. Rep. on S.B. 6181, at 1, 55th Leg., Reg. Sess. (Wash.1998) (emphasis added).

If this troubles Manary, this Court is not the proper forum to address his concerns; the Legislature is. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 13, n. 1, 43 P.3d 4, *reconsideration denied* (2002); *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001); *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999).

2. The provisions of Chapter 11.11 RCW designed to protect third parties do not, by their own terms, apply to this situation.

Manary again attempts to escape the provision that directly governs this case by relying on, and misleadingly citing to, several other sections of the statute the Legislature specifically intended to protect third parties in possession of assets falling within the Super Will statute. As the Court of Appeals found, those sections patently do not apply here. Manary ignores the plain reading of these provisions, and identifies no issue of substantial public interest arising from them.

- a. *The notice provisions*

A simple reading of the statute's notice provisions swiftly defeats Manary's claim that it required Anderson to notify Manary of Anderson's interest in the Property within either six months of the admission of Homer's Will to probate or one year after Homer's death.

Among other things, the Super Will statute is designed to "[p]rotect any financial institution or other third party having possession or control over

[an asset that passes outside of a will] and transferring it to a beneficiary duly designated by the testator, unless that third party has been provided notice of a testamentary disposition as required by this chapter.” RCW 11.11.003(3).

To facilitate that purpose, RCW 11.11.040 provides, in relevant part, that

*In transferring nonprobate assets*, a personal representative, financial institution, or other third party may rely conclusively and entirely upon the form of the nonprobate asset and terms of the nonprobate asset arrangement in effect on the date of the owner, and a personal representative or third party may rely on information provided by a financial institution or other party who has possession or control of a nonprobate asset concerning the form of the nonprobate asset and the terms of the nonprobate asset arrangement in effect on the date of death of the owner, unless the personal representative, financial institution, or other third party has actual knowledge of the existence of a claim by a testamentary beneficiary.

(emphasis added).

A “third party” is “a person, including a financial institution, having possession or control over a nonprobate asset at the death of the owner[.]” RCW 11.11.010 (11). To ensure the third party having possession of the asset has the “actual knowledge” described above, one must give the notice described in RCW 11.11.050.

These provisions would have applied if, for example, a bank had been holding the Property pursuant to the Trust with instructions to transfer it in accordance with the Trust provisions when Homer died. The bank would have had the right to rely on the terms of the Trust and to transfer the

Property according to its terms *unless* Anderson notified the bank of Homer's alternate disposition of the property in his Will.

That is clearly not the situation here. At Homer's death, no third party was holding, nor ever held, the Property awaiting its transfer to someone. Anderson, the testamentary beneficiary, possessed the Property when Homer died; there was no one for him to give notice to under the statute. Manary essentially argues that Anderson has no right to the Property because he, Anderson, did not deliver notice to himself (as the person in possession of the Property) of the terms of Homer's Will. That position is nonsensical and is, again, contrary to the plain language of the statute.

b. *The limitations period*

Next, Manary tries to apply a specific limitations period to the entire statute. This also fails to withstand the slightest scrutiny, particularly when, as the Court of Appeals noted, the full provision is examined. *Manary*, 2011 WL 5127615 at \*5. Contrary to his repeated selective citation to RCW 11.11.070(3), the Super Will statute allows a testamentary beneficiary "entitled to a nonprobate asset *otherwise transferred to a beneficiary not so entitled*" to seek relief in the superior court. RCW 11.11.070(2) (emphasis added). The testamentary beneficiary must seek relief within six months of the admission of the owner's will to probate or one year from the date of the owner's death, whichever is earlier. RCW 11.11.070(3).

Having read more than the section selected by Manary, the Court of Appeals explained: “it is clear that notice of six months or one-year is only required if the nonprobate asset is held by the original beneficiary and the testamentary beneficiary is entitled to it.” *Manary*, 2011 WL 5127615 at \*5. Further, “there is no evidence that the interest in the real property was held by Manary at any time relevant to this case. Moreover, the will states that Anderson, the testamentary beneficiary, is entitled to the property. Therefore, notice to Manary was not required.” *Id.*

The same is true today. The Property was never transferred to anyone following Homer’s death; it was in the testamentary beneficiary’s (Anderson’s) possession at that time. Thus, the limitations period in this provision does not apply. The section Manary still noticeably fails to cite expressly states as much: “The protection accorded to financial institutions and other third parties under RCW 11.11.040 *has no bearing on the actual rights of ownership of nonprobate assets as between beneficiaries and testamentary beneficiaries[.]*” RCW 11.11.070 (1) (emphasis added).

3. The recent amendments to Title 11 RCW do not affect the ruling of the Court of Appeals.

Finally, Manary suggests that the recent addition of Chapter 11.103 RCW, pertaining to revocable trusts, expresses new public policy that is inconsistent with the Court of Appeals’ decision here. That is not the case.

Instead, the legislative history illustrates that the new chapter “codifies the common law related to amending or revoking revocable living trusts and the limitations of actions on the validity of a revocable living trust.” F.B. Rep. on S. H. B. 1051, 62<sup>nd</sup> Leg., Reg. Sess. (Wash. 2011). That is, the new chapter merely codifies the existing common law of revocation. As described above, the outcome here does not disturb that common law; it only enforces the terms of the Super Will statute. *Manary*, 2011 WL 5127615 at \*6. To the extent that the new chapter may supersede that statute’s provisions as applied to revocable trusts, the chapter does not apply to “judicial proceedings concerning trusts commenced” before January 1, 2012, or to “action taken before” that date. Act effective January 1, 2012, 2011 Wash. Legis. Serv. Ch. 327 § 40 (West) (amending trusts and estates statutes). Accordingly, the new chapter has no effect on the proceedings in this case. RAP 13.4(b)(4) offers no basis for review.

**C. Anderson is entitled to attorneys’ fees.**

RAP 18.1(a) and (j) authorize this Court to award Anderson the attorneys’ fees he incurred to respond to Manary’s petition. He respectfully requests those fees pursuant to RCW 11.96A.150.

**V. CONCLUSION**

The trial court erred as a matter of law when it ruled that Homer’s specific bequest of his interest in the Property to Anderson was ineffective,

despite having satisfied RCW 11.11.020(1). Although the court acknowledged that it ultimately attempts to effectuate the testator's intent "in every instance[,]”<sup>5</sup> it looked only to the terms of the earlier-executed Trust for that intent, at the cost of the specific provision in the Will clearly expressing Homer's later intent. This is precisely what the drafters of the Super Will statute sought to prevent. *See Furst*, 113 Wn. App. at 843-44 ("The statute was intended to reduce or eliminate uncertainty regarding the effect of a subsequent will on the transfer of property pursuant to an inter vivos trust."). The Court of Appeals correctly applied that statute here. Its decision is consistent with the *Furst* case, and does nothing to alter the law of trusts. There is no basis for review under RAP 13.4(b). Accordingly, this Court should deny review and award Anderson the attorneys' fees he incurred in responding to Manary's petition.

Dated this 21<sup>st</sup> day of December 2011.



John M. Casey WSBA # 24187  
Andrea L. Schiers WSBA # 38383  
CURRAN LAW FIRM P.S.  
Attorneys for Appellant  
555 West Smith Street  
Kent, WA 98035  
(253) 852-2345

---

<sup>5</sup> RP May 28, 2010, at 3.

**CERTIFICATE OF SERVICE**

Kristina Church, being first duly sworn, on oath deposes and says:

I am over the age of 18 years and am not a party to the within cause. I am employed by Curran Law Firm P.S. and on this date I caused to be served by ABC Legal Messengers a true and correct copy of the above **Answer to Petition for Review** on the following persons set forth below:

*Counsel for Respondent:*

Thomas G. Burke  
Burke Law Offices Inc., P.S.  
612 South 227<sup>th</sup> Street  
Des Moines, WA 98198

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Kent, Washington, this 21<sup>st</sup> day of December 2011.

  
\_\_\_\_\_  
Kristina Church

**APPENDIX TO ANSWER TO PETITION FOR REVIEW**

1. Act effective January 1, 2012, 2011 Wash. Legis. Serv. Ch. 327 § 40 (West) .....19
2. F.B. Rep. on S.H.B.1051, 62<sup>nd</sup> Leg., Reg. Sess. (Wash. 2011) .....19
3. F.B. Rep. on S.B. 6181, 55th Leg., Reg. Sess. (Wash. 1998).....14

## Editor's and Revisor's Notes (7)

### HISTORICAL AND STATUTORY NOTES

**Application--2011 c 327:** "Except as otherwise provided in this act:

- (1) This act applies to all trusts created before, on, or after January 1, 2012;
- (2) This act applies to all judicial proceedings concerning trusts commenced on or after January 1, 2012;
- (3) Any rule of construction or presumption provided in this act applies to trust instruments executed before January 1, 2012, unless there is a clear indication of a contrary intent in the terms of the trust;
- (4) An action taken before January 1, 2012, is not affected by this act; and
- (5) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before January 1, 2012, that statute continues to apply to the right even if it has been repealed or superseded." [2011 c 327 § 40.]

**Effective date--2011 c 327:** "This act takes effect January 1, 2012." [2011 c 327 § 41.]

# FINAL BILL REPORT

## SHB 1051

---

C 327 L 11

Synopsis as Enacted

**Brief Description:** Amending trusts and estates statutes.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Pedersen, Rodne, Eddy, Goodman, Kelley and Moeller; by request of Washington State Bar Association).

**House Committee on Judiciary**  
**Senate Committee on Judiciary**

### **Background:**

Trusts are a means of transferring property. A trust is created by a trustor, who gives the trustor's property to a trustee. The trustee holds legal title to the property, but only manages the property for the benefit of other individuals specified by the trustor (beneficiaries). The beneficiaries hold equitable title to the property, meaning the beneficiaries enjoy the property, but do not have control over the trustee or how the trustee manages the legal title. Trusts may be made revocable or irrevocable by the trustor. Revocable living trusts are commonly used as an alternative to traditional wills as a way to pass property upon death.

Washington's laws of trusts and estates exist in both statute and common law. Washington statutes govern a range of trust issues, including the authority of trustees, trust administration, distribution of assets, liability issues, and the investment of trust funds. In 1999 the Trust and Estate Dispute Resolution Act was enacted, which updated and revised the laws on resolving trust disputes.

The National Conference of Commissioners on Uniform State Laws has proposed a Uniform Trust Code (UTC) for the purpose of providing a consistent and integrated framework of rules to deal with trusts. The Washington State Bar Association's Executive Committee of the Real Property, Probate and Trust Section appointed a task force to review the official version of the UTC and Washington's current trust laws. The task force recommended several amendments and additions to Washington's trust laws, including amending current sections and adopting new sections to change current law and adopting new sections to codify preexisting common law.

### **Summary:**

---

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Changes are made to many aspects of trust and estate law, and several areas of preexisting common law are codified.

Trust Situs.

The situs of a trust, or its location, is Washington if the trust instrument designates Washington as the situs and the trust has at least one connection to the state. A list of possible connections are set forth. If the trust instrument does not designate Washington as the situs, the trustee may register the trust in the state as long as the trust has a connection to the state. If there is no designation and the trustee does not register the trust, then the trust may qualify as a Washington trust in certain circumstances.

The transfer of the trust situs is permissible if the new jurisdiction has a connection to the trust. The trustee must provide beneficiaries with 60 days advance notice. If the beneficiaries do not object within that period, the trust situs may be transferred, and consent of the beneficiaries is no longer required.

Venue for Proceedings.

Venue for court proceedings is in the county where the beneficiary resides, where the trustee resides or has a place of business, or where the real property of the trust is located. If the trust was created by a will, then venue can be in the county where the will was administered. Venue may be changed by request within four months of a notice of court proceedings. Venue must be changed to the county with the strongest connection to the trust, rather than being determined by the location of the trust situs or of the county where the letters testamentary were granted to a personal representative of an estate subject to a will.

Trustee's Duty to Give Notice.

When a trust becomes irrevocable, the trustee must provide notice to all persons with an interest in the trust regarding the existence of the trust and their right to request information. The trustee must continue to keep all interested persons reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests.

Electronic transmission, or e-mail, is added as an acceptable delivery method for all required notices.

Statute of Limitations.

A beneficiary's claims against a trustee for breach of trust must be commenced within three years from the date the beneficiary was sent a report that adequately disclosed the existence of a potential claim and informed the beneficiary of the time allowed for commencing a proceeding. The criteria for providing adequate disclosure are set forth. If the beneficiary did not receive adequate disclosure, then the proceeding must be commenced within three years from the earlier of: the discharge of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust.

Certification of a Trust.

When a person other than a beneficiary requests information regarding the trust, the trustee may provide the person a certification of trust containing information in accordance with the provided list.

Termination of a Trust.

Before terminating a trust, a trustee may send notice to the beneficiaries of the proposed plan for termination and distribution of the remaining assets. After receiving notice of the plan, the beneficiary has 30 days to object to the distribution.

Virtual Representation.

Virtual representation refers to circumstances where an individual can be represented by a decision-making process without the ability to participate. Virtual representation is extended to apply to notice to fiduciaries where the fiduciary estate is the interested party.

Damages for Breach.

A trustee who commits a breach of trust is liable for the greater of the amount required to restore the value of the property or the profit the trustee made.

Correction of Mistakes.

The courts may change the terms of a trust to conform to the trustor's intent if it is proved by clear, cogent, and convincing evidence that a mistake of fact or law affected both the trustor's intent and the terms of the trust. The courts may also change the terms to conform to the trustor's intent if the parties to a binding nonjudicial agreement agree that there is clear, cogent, and convincing evidence to the same effect.

Noncharitable Trusts Without Beneficiaries.

Noncharitable trusts without ascertainable beneficiaries are enforceable as long as there is a valid purpose and the trust complies with the rule against perpetuities.

Revocable Living Trusts.

A new chapter is created in the code to supplement trust laws for revocable living trusts. The chapter codifies the common law related to amending or revoking revocable living trusts and the limitations of actions on the validity of a revocable living trust.

A beneficiary may commence judicial proceedings to contest the validity of a revocable living trust within the earlier of 24 months after the trustor's death or four months after receiving notice of the trust.

Codifying Areas of Common Law.

Several other areas of the common law on trusts and estates are codified and clarified, including the methods and requirements for creating a trust, trusts in other jurisdictions, the purposes of a trust, oral trusts, trustees' authority and duty of loyalty, the nonliability of third parties acting in good faith, and the cy pres doctrine.

**Votes on Final Passage:**

House	98	0	
Senate	48	0	(Senate amended)
House	96	0	(House concurred)

**Effective:** January 1, 2012

WA F. B. Rep., 1998 Reg. Sess. S.B. 6181  
Washington Final Bill Report, 1998 Regular Session, Senate Bill 6181

April 21, 1998  
Washington Legislature  
Fifty-fifth Legislature, Second Regular Session, 1998

Synopsis as Enacted

Brief Description: Regulating probate, trusts, and estates.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Johnson and Roach).

Senate Committee on Law & Justice

House Committee on Law & Justice

Background: Under current Washington law, it is impossible for a person through a new will to modify nonprobate asset arrangements and to effect an equal division of all assets among his or her heirs, without modifying-presumably closing-these accounts. Nonprobate assets include such things as joint bank accounts with a "payable on death" clause. Although the intent in setting up the account may have been to provide for a source of funds for all heirs, the heir on the account may take all the money regardless of the intent of the will.

Slayer statutes exist to prevent one who kills another from gaining financially from the act. Washington's slayer statute specifically forbids a slayer from acquiring or receiving any property or benefit from the death of the victim. However, this law does not allow taking property away from the slayer which was acquired prior to the killing.

When a slayer and victim are related by marriage or business venture, they often own property jointly. This property is distributed on death to the living partner and the deceased's estate, as it would have been if the death had been accidental.

The Court of Appeals has held that a slayer does not lose his or her right to community property because of the murderous act. In some situations this has meant that the slayer receives his or her share of the state retirement benefits of the victim as well as other property.

Summary: Persons are allowed to designate by will the beneficiaries at death of certain assets that are not otherwise subject to probate proceedings. By writing his or her will, a person can supersede pre-existing beneficiary designations on joint bank accounts with rights of survivorship, transfer on death securities and certain other limited assets in order to enable the terms of his or her will to govern the disposition of all those assets.

A minor technical correction is made to legislation passed by the Legislature in 1997. The primary correction replaces provisions that were prematurely repealed as of July 27, 1997, though their replacement provisions did not take effect until January 1, 1998.

Minor changes to the Uniform Transfers to Minors Act are made to allow an individual to appoint a custodian to hold an asset for the child when a future event actually occurs.

References made in Washington's probate code and estate tax statutes are updated to the current provisions of the Internal Revenue Code to reflect current law.

The slayer's rights to retirement benefits of the victim under the state retirement system are taken away and given to the victim's estate. The Department of Retirement Systems, after notice that a slayer situation exists, determines to whom payment should be made. Any provisions which violated federal law are severable from the remaining provisions.

Votes on Final Passage:

Senate	48	1	
House	98	0	(House amended)
Senate			(Senate refused to concur)

....

{+ Conference Committee +}

House	98	0
Senate	46	0

Effective: April 2, 1998 (Sections 117, 201-205, 301, 401, 501-507, & 604)

June 11, 1998

July 1, 1999 (Sections 101-116 & 118)

End of Document

© 2010 Thomson Reuters. No claim to original U.S. Government Works.