Chapter 11.108 RCW
MISCELLANEOUS PROVISIONS FOR DISTRIBUTIONS MADE BY A GOVERNING INSTRUMENT

(Formerly: Trust gift distribution)

Sections

RCW 11.108.010 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) The term "pecuniary bequest" means a gift in a governing instrument which either is expressly stated as a fixed dollar amount or is a gift of a dollar amount determinable by the governing instrument, and a gift expressed in terms of a "sum" or an "amount," unless the context dictates otherwise, is a gift of a dollar amount.

(2) As the context might require, the term "marital deduction" means either the federal or state estate tax deduction or the federal gift tax deduction allowed for transfers to spouses under the Internal Revenue Code or applicable state law.

(3) The term "maximum marital deduction" means the maximum amount qualifying for the marital deduction.

(4) The term "marital deduction gift" means a gift intended to qualify for the marital deduction as indicated by a preponderance of the evidence including the governing instrument and extrinsic evidence whether or not the governing instrument is found to be ambiguous.

(5) The term "governing instrument" includes, but is not limited to: Will and codicils; revocable trusts and amendments or addenda to revocable trusts; irrevocable trusts; beneficiary designations under life insurance policies, annuities, employee benefit plans, and individual retirement accounts; payable-on-death, trust, or joint with right of survivorship bank or brokerage accounts; transfer on death designations or transfer on death or pay on death securities; and documents exercising powers of appointment.

(6) The term "fiduciary" means trustee or personal representative. Reference to a fiduciary in the singular includes the plural where the context requires.

(7) The term "gift" refers to all gifts, legacies, devises, and bequests made in a governing instrument, whether outright or in trust, and whether made during the life of the transferor or as a result of the transferor's death.

(8) The term "transferor" means the testator, donor, grantor, or other person making a gift.

(9) The term "spouse" includes the transferor's surviving spouse in the case of a deceased transferor. [2006 c 360 s 3; 1997 c 252 s 81; 1993 c 73 s 2; 1990 c 224 s 2; 1988 c 64 s 27; 1985 c 30 s 106. Prior: 1984 c 149 s 140.]

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

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

RCW 11.108.020 Marital deduction gift—Compliance with Internal Revenue Code—Fiduciary powers. (1) If a governing instrument contains a marital deduction gift, the governing instrument shall be construed to comply with the marital deduction provisions of the Internal Revenue Code in every respect.

(2) If a governing instrument contains a marital deduction gift, any fiduciary operating under the governing instrument has all the powers, duties, and discretionary authority necessary to comply with the marital deduction provisions of the Internal Revenue Code. The fiduciary shall not take any action or have any power that may impair that deduction, but this does not require the fiduciary to make the elections under either section 2056(b)(7) or 2523(f) of the Internal Revenue Code that is referred to in RCW 11.108.025. [1997 c 252 s 82; 1993 c 73 s 3; 1988 c 64 s 28; 1985 c 30 s 107. Prior: 1984 c 149 s 141.]

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

RCW 11.108.025 Election to qualify property for the marital deduction—Generation-skipping transfer tax allocations. Unless a governing instrument directs to the contrary:

(1) The fiduciary shall have the power to make elections, in whole or in part, to qualify property for the marital deduction as qualified terminable interest property under section 2056(b)(7) or 2523(f) of the Internal Revenue Code or, if the surviving spouse is not a citizen of the United States, under section 2056A of the Internal Revenue Code. Further, the fiduciary shall have the power to

make generation-skipping transfer tax allocations under section 2632 of the Internal Revenue Code.

(2) The fiduciary making an election under section 2056(b)(7), 2523(f), or 2056A of the Internal Revenue Code or making an allocation under section 2632 of the Internal Revenue Code may benefit personally from the election or allocation, with no duty to reimburse any other person interested in the election or allocation. The fiduciary shall have no duty to make any equitable adjustment and shall have no duty to treat interested persons impartially in respect of the election or allocation.

(3) The fiduciary of a trust, if an election is made under section 2056(b)(7), 2523(f), or 2056A of the Internal Revenue Code, if an allocation is made under section 2632 of the Internal Revenue Code, or if division of a trust is of benefit to the persons interested in the trust, may divide the trust into two or more separate trusts, of equal or unequal value, if:

(a) The terms of the separate trusts which result are substantially identical to the terms of the trust before division;

(b) In the case of a trust otherwise qualifying for the marital deduction under the Internal Revenue Code, the division shall not prevent a separate trust for which the election is made from qualifying for the marital deduction; and

(c) The allocation of assets shall be based upon the fair market value of the assets at the time of the division.

(4) For state and federal estate tax purposes, a fiduciary may make inconsistent elections under section 2056(b)(7) or 2056A of the Internal Revenue Code and under similar provisions of applicable state law. [2006 c 360 s 5; 1997 c 252 s 83; 1993 c 73 s 4; 1991 c 6 s 1; 1990 c 179 s 2; 1988 c 64 s 29.]

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

RCW 11.108.030 Pecuniary bequests—Valuation of assets if distribution other than money. (1) If a governing instrument authorizes the fiduciary to satisfy a pecuniary bequest in whole or in part by distribution of property other than money, the assets selected for that purpose shall be valued at their respective fair market values on the date or dates of distribution, unless the governing instrument expressly provides otherwise. If the governing instrument permits the fiduciary to value the assets selected for the distribution as of a date other than the date or dates of distribution, then, unless the governing instrument expressly provides otherwise, the assets selected by the fiduciary for that purpose shall have an aggregate fair market value on the date or dates of distribution which, when added to any cash distributed, will amount to no less than the amount of that gift as stated in, or determined by, the governing instrument.

(2) A marital deduction gift shall be satisfied only with assets that qualify for those deductions. [1985 c 30 s 108. Prior: 1984 c 149 s 142.]

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

RCW 11.108.040 Construction of certain marital deduction formula bequests. (1) If a testator, under the terms of a governing instrument executed prior to September 12, 1981, leaves outright to or in trust for the benefit of that testator's surviving spouse an amount or fractional share of that testator's estate or a trust estate expressed in terms of one-half of that testator's federal adjusted gross estate, or by any other reference to the maximum estate tax marital deduction allowable under federal law without referring, either in that governing instrument or in any codicil or amendment thereto, specifically to the unlimited federal estate tax marital deduction enacted as part of the economic recovery tax act of 1981, such expression shall, unless subsection (2) or (3) of this section applies, be construed as referring to the unlimited federal estate tax marital deduction, and also as expressing such amount or fractional share, as the case may be, in terms of the minimum amount which will cause the least possible amount of federal estate tax to be payable as a result of the testator's death, taking into account other property passing to the surviving spouse that qualifies for the marital deduction, at the value at which it qualifies, and also taking into account all credits against the federal estate tax, but only to the extent that the use of these credits do not increase the death tax payable.

(2) If this subsection applies to a testator, such expression shall be construed as referring to the estate tax marital deduction allowed by federal law immediately prior to the enactment of the unlimited estate tax marital deduction as a part of the economic recovery tax act of 1981. This subsection applies if subsection (3) of this section does not apply and:

(a) The application of this subsection to the testator will not cause an increase in the federal estate taxes payable as a result of the testator's death over the amount of such taxes which would be payable if subsection (1) of this section applied; or

(b) The testator is survived by a blood or adopted descendant who is not also a blood or adopted descendant of the testator's surviving spouse, unless such person or persons have entered into an agreement under RCW 11.96A.220; or

(c) The testator amended the governing instrument containing such expression after December 31, 1981, without amending such expression to refer expressly to the unlimited federal estate tax marital deduction.

(3) If the governing instrument contains language expressly stating that federal law of a particular time prior to January 1, 1982, is to govern the construction or interpretation of such expression, the expression shall be construed as referring to the marital deduction allowable under federal law in force and effect as of that time.

(4) If subsection (2) or (3) of this section applies to the testator, the expression shall not be construed as referring to any property that the personal representative of the testator's estate or other authorized fiduciary elects to qualify for the federal estate tax marital deduction as qualified terminable interest property. If subsection (1) of this section applies to the testator, any provision

shall be construed as referring to any property that the personal representative of the testator's estate or other authorized fiduciary elects to qualify for the federal estate tax marital deduction as qualified terminable interest property, but only to the extent that such construction does not cause the amount or fractional share left to or for the benefit of the surviving spouse to be reduced below the amount that would pass under subsection (2) or (3) of this section, whichever is applicable.

(5) This section is effective with respect to testators dying after December 31, 1982. [1999 c 42 s 630; 1985 c 30 s 109. Prior: 1984 c 149 s 143.]

Effective date—1999 c 42: See RCW 11.96A.902.

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

RCW 11.108.050 Marital deduction gift in trust. If a governing instrument contains a marital deduction gift in trust, then in addition to the other provisions of this chapter, each of the following applies to the trust to the extent necessary to qualify the gift for the marital deduction:

(1) If the transferor's spouse is a citizen of the United States at the time of the transfer:

(a) The transferor's spouse is entitled to all of the income from the trust, payable annually or at more frequent intervals, during the spouse's life;

(b) During the life of the transferor's spouse, a person may not appoint or distribute any part of the trust property to a person other than the transferor's spouse;

(c) The transferor's spouse may compel the trustee of the trust to make any unproductive property of the trust productive, or to convert the unproductive property into productive property, within a reasonable time; and

(d) The transferor's spouse may, alone and in all events, dispose of all of the trust property, including accrued or undistributed income, remaining after the spouse's death under a testamentary general power of appointment, as defined in section 2041 of the Internal Revenue Code. However, this subsection (1)(d) does not apply to: (i) A marital deduction gift in trust which is described in subsection (2) of this section; (ii) that portion of a marital deduction gift in trust that has qualified for the marital deduction as a result of an election under section 2056(b)(7) or 2523(f) of the Internal Revenue Code; and (iii) that portion of marital deduction gift in trust that would have qualified for the marital deduction but for the fiduciary's decision not to make the election under section 2056(b)(7) or 2523(f) of the Internal Revenue Code;

(2) If the transferor's spouse is not a citizen of the United States at the time of the transfer, then to the extent necessary to qualify the gift for the marital deduction, subsection (1)(a), (b), and (c) of this section and each of the following applies to the trust:

(a) At least one trustee of the trust must be an individual citizen of the United States or a domestic corporation, and a distribution, other than a distribution of income, may not be made from the trust unless a trustee who is an individual citizen of the United States or a domestic corporation has the right to withhold from the distribution the tax imposed under section 2056A of the Internal Revenue Code on the distribution;

(b) The trust must meet such requirements as the secretary of the treasury of the United States by regulations prescribes to ensure collection of estate tax, under section 2056A(b) of the Internal Revenue Code; and

(c) Subsection (2)(a) and (b) of this section no longer apply to the trust if the transferor's spouse becomes a citizen of the United States and: (i) The transferor's spouse was a resident of the United States at all times after the transferor's death and before becoming a citizen; (ii) tax has not been imposed on the trust under section 2056A(b)(1)(A) of the Internal Revenue Code before the transferor's spouse becomes a citizen; or (iii) the transferor's spouse makes an election under section 2056A(b)(12)(C) of the Internal Revenue Code regarding tax imposed on distributions from the trust before becoming a citizen; and

(3) Subsection (1) of this section does not apply to:

(a) A trust: (i) That provides for a life estate or term of years for the exclusive benefit of the transferor's spouse, with the remainder payable to the such spouse's estate; or (ii) created exclusively for the benefit of the estate of the transferor's spouse; and

(b) An interest of the transferor's spouse in a charitable remainder annuity trust or charitable remainder unitrust described in section 664 of the Internal Revenue Code, if the transferor's spouse is the only noncharitable beneficiary. [1997 c 252 s 84; 1993 c 73 s 5; 1990 c 179 s 3; 1985 c 30 s 110. Prior: 1984 c 149 s 144.]

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

RCW 11.108.060 Marital deduction gift—Survivorship requirement—Limits—Property to be held in trust. For an estate that exceeds the amount exempt from state or federal tax by virtue of the credit under section 2010 of the Internal Revenue Code, if taking into account applicable adjusted taxable gifts as defined in section 2001(b) of the Internal Revenue Code, any marital deduction gift that is conditioned upon the transferor's spouse surviving the transferor for a period of more than six months, is governed by the following:

(1) A survivorship requirement expressed in the governing instrument in excess of six months or which may exceed six months, other than survival by a spouse of a common disaster resulting in the death of the transferor, does not apply to property passing under the marital deduction gift, and for the gift, the survivorship requirement may not exceed the period ending six months following the transferor's date of death, as established under section 2056(b)(3) of the Internal Revenue Code.

(2) If the property that is the subject of the marital deduction gift is passing or is to be held in trust, as opposed to passing outright, it must be held in a trust meeting the requirements of section 2056(b)(7) of the Internal Revenue Code the corpus of which must: (a) Pass as though the spouse failed to survive the transferor if the spouse, in fact, fails to survive the term specified in the governing instrument; and (b) pass to the spouse under the terms of the governing instrument if the spouse, in fact, survives the term specified in the governing instrument. [2006 c 360 s 6; 1999 c 44 s 1; 1997 c 252 s 86; 1989 c 35 s 1; 1985 c 30 s 111. Prior: 1984 c 149 s 145.]

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

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

RCW 11.108.070 Presumptions for the interpretation, construction, and administration of governing instrument. (1) The legislature finds that the citizens and residents of the state, and nonresidents of the state having property located in Washington, desire to take full advantage of the exemptions, exclusions, deductions, and credits allowable under the federal estate, gift, income, and generation-skipping transfer taxes, and the Washington counterparts to those taxes, if any, unless the facts and circumstances indicate otherwise, or the transferor has expressed a contrary intent in the governing instrument.

(2) In interpreting, construing, or administering a governing instrument, absent a clear expression of intent by the transferor to the contrary, the following presumptions apply and may only be rebutted by clear, cogent, and convincing evidence to the contrary, but these presumptions of intent do not require the making of any particular voluntary tax election:

(a) The transferor intended to take advantage of the maximum benefit of tax deductions, exemptions, exclusions, or credits;

(b) The transferor intended any gift to a spouse made outright and free of trust is to qualify for the gift or estate tax marital deduction and to be a marital deduction gift; and

(c) If the governing instrument refers to a trust as a marital trust, QTIP trust, or spousal trust, or refers to qualified terminable interest property, QTIP, or QTIP property, sections 2044, 2056, and 2523 of the Internal Revenue Code or similar provisions of applicable state law, the transferor intended the property passing to such a trust and the trust to qualify for the applicable gift or estate tax martial [marital] deduction, and for the gift to qualify for a marital deduction gift.

(3) References in this chapter to provisions of the Internal Revenue Code include references to similar provisions, if any, of applicable state law. [2006 c 360 s 4.]

Clarification of laws—Enforceability of act—2006 c 360: "This act clarifies and declares the existing laws of this state. This act is enforceable as to all persons and all trusts regardless of when the trust was created." [2006 c 360 s 17.]

Severability—2006 c 360: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2006 c 360 s 18.]

RCW 11.108.080 Generation-skipping transfer tax—Federal law application. (1) A will or trust of a decedent who dies after December 31, 2009, and before January 1, 2011, is deemed to refer to the federal estate and generation-skipping transfer tax laws as they applied with respect to estates of decedents dying on December 31, 2009, if the will or trust contains a formula that:

(a) Refers to any of the following: "Unified credit," "estate tax exemption," "applicable exemption amount," "applicable credit amount," "applicable exclusion amount," "generation-skipping transfer tax exemption," "marital deduction," "maximum marital deduction," or "unlimited marital deduction;"

(b) Measures a share of an estate or trust based on the amount that can pass free of federal estate taxes or the amount that can pass free of federal generation-skipping transfer taxes; or

(c) Is otherwise based on a provision of federal estate tax or federal generation-skipping transfer tax law similar to the provisions in (a) or (b) of this subsection.

(2) This section is presumed to not apply with respect to a will or trust that (a) is executed or amended after December 31, 2009, or (b) clearly manifests an intent that a contrary rule applies in cases where the decedent dies on a date on which there is no then-applicable federal estate or federal generation-skipping transfer tax and such tax has been permanently repealed and not merely temporarily repealed for calendar year 2010.

(3) The reference to January 1, 2011, in this section refers, if the federal estate and generation-skipping transfer tax becomes effective before that date, to the first date on which such tax becomes legally effective.

(4) Construction of a will or trust under this section may be confirmed pursuant to the procedures set forth in the trust and estate dispute resolution act in chapter 11.96A RCW. [2010 c 11 s 2.]

Finding—2010 c 11: "The legislature finds in order to carry out the intent of decedents in the construction of wills and trusts, and in order to promote judicial economy in the administration of trusts and estates, that it is necessary to construe certain formula clauses to refer to federal estate and generation-skipping transfer tax rules applicable to estates of decedents dying on December 31, 2009." [2010 c 11 s 1.]

Retroactive application—2010 c 11: "The provisions of this act are effective retroactive to December 31, 2009." [2010 c 11 s 4.]

Application—Construction—2010 c 11: "This act is remedial in nature and must be applied and construed liberally in order to carry out its intent." [2010 c 11 s 5.]

Effective date—2010 c 11: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 10, 2010]." [2010 c 11 s 7.]

RCW 11.108.090 Generation-skipping transfer tax—Dispute resolution of federal law application. The personal representative, trustee, or any affected beneficiary under a will or trust may bring a proceeding under the trust and estate dispute resolution act in chapter 11.96A RCW, to determine whether the decedent intended that the references, presumptions, or rules of construction under RCW 11.108.080 be construed with respect to the federal law as it existed after December 31, 2009, including but not limited to the amendments made to federal law by the federal tax relief, unemployment insurance reauthorization, and job creation act of 2010, federal House Resolution No. 4853, P.L. 111-312. In making such determinations, extrinsic evidence may be considered, whether or not the governing instrument is found to be ambiguous, including but not limited to, information provided by the decedent to the decedent's attorney or personal representative. Such a proceeding must be commenced not later than two years following the death of the testator or grantor, and not thereafter. [2011 c 113 s 2; 2010 c 11 s 3.]

Finding—2011 c 113: "On December 17, 2010, the federal tax relief, unemployment insurance reauthorization, and job creation act of 2010, House Resolution No. 4853, P.L. 111-312, was enacted into law. Federal House Resolution No. 4853 amended the federal gift, estate, and generation-skipping transfer taxes by retroactively reinstating those taxes to January 1, 2010, with an increased applicable exemption amount per taxpayer of five million dollars. House Resolution No. 4853 also extended the time for making certain qualified disclaimers. In light of these changes in federal law, the legislature finds in order: To carry out the intent of decedents and grantors in the construction of wills, trusts, and other dispositive instruments; to continue the uniformity of the Washington disclaimer law with federal law; and to promote judicial economy in the administration of trusts and estates, it is necessary to amend certain time limitations and to clarify procedures to construe certain formula clauses that refer to federal estate, gift, and generation-skipping transfer tax rules applicable to estates of decedents dying after December 31, 2009, and prior to December 18, 2010." [2011 c 113 s 1.]

Retroactive application—2011 c 113: "The provisions of this act are effective retroactive to December 31, 2009, and apply to estates of decedents dying after December 31, 2009, and prior to December 18, 2010. Returns and payments for estate tax imposed under chapter 83.100 RCW will continue to be due and owing as provided in chapter 83.100 RCW and nothing in this act is intended to affect the application of that chapter to any taxpayer." [2011 c 113 s 4.]

Application—2011 c 113: "This act is remedial in nature and must be applied and construed liberally in order to carry out its intent." [2011 c 113 s 5.]

Effective date—2011 c 113: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 18, 2011]." [2011 c 113 s 7.]

Finding—Retroactive application—Application—Construction—Effective date—2010 c 11: See notes following RCW 11.108.080.

RCW 11.108.900 Application of chapter—Application of 2006 c 360. (1) This chapter applies to all estates, trusts, and governing instruments in existence on or any time after March 7, 1984, and to all proceedings with respect thereto after that date, whether the proceedings commenced before or after that date, and including distributions made after that date. This chapter shall not apply to any governing instrument the terms of which expressly or by necessary implication make this chapter inapplicable. The judicial and nonjudicial dispute resolution procedures of chapter 11.96A RCW apply to this chapter.

(2) Sections 3 through 6, chapter 360, Laws of 2006 are remedial in nature and shall be liberally applied in order to achieve the purposes of chapter 360, Laws of 2006. [2006 c 360 s 7; 1999 c 42 s 631; 1985 c 30 s 112. Prior: 1984 c 149 s 146.]

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

Effective date—1999 c 42: See RCW 11.96A.902.

Short title—Application—Purpose—Severability—1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability—Effective dates—1984 c 149: See notes following RCW 11.02.005.

RCW 11.108.901 Construction—Chapter applicable to state registered domestic partnerships—2009 c 521. For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships. [2009 c 521 s 41.]