

HOUSE BILL REPORT

SHB 2270

As Amended by Senate

Title: An act relating to probate and trust matters.

Brief Description: Revising provisions about probate and trust matters.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Johanson, Padden and Appelwick).

Brief History:

Reported by House Committee on:
Judiciary, January 26, 1994, DPS;
Passed House, February 8, 1994, 94-0;
Amended by Senate.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 15 members: Representatives Appelwick, Chair; Johanson, Vice Chair; Padden, Ranking Minority Member; Ballasiotes, Assistant Ranking Minority Member; Campbell; Chappell; Eide; Forner; J. Kohl; Long; Morris; H. Myers; Scott; Tate and Wineberry.

Staff: Bill Perry (786-7123).

Background: The law on probates and trusts governs the disposition of property upon a person's death and also controls the operation of living trusts. The last major amendments to the law on probates and trusts were enacted in 1984. Since that time, a number of issues have arisen regarding the application of this law. The state bar association is proposing amendments to address issues in the following areas.

Jurisdiction and Proceedings. Provisions added by the 1984 amendments include special procedures for resolving disputes over the probate of wills and the administration of trusts and estates. Appellate court interpretation of these procedures may not have allowed as much flexibility for a trial court to tailor dispute resolutions as was intended by the amendments. In addition, the procedures do not expressly cover the disposition of estates containing

nonprobate assets. Nonprobate assets are rights and interests that pass at a person's death, but by virtue of specified instruments other than a will. Those instruments that create nonprobate assets include:

1. A payable-on-death provision of a life insurance policy, employee benefit plan, annuity or similar contract, or individual retirement account;
2. A payable-on-death, trust, or joint with right of survivorship bank account;
3. A trust of which the person is a grantor and that becomes effective or irrevocable only upon the person's death; or
4. A transfer on death beneficiary designation of a transfer on death or pay on death security, if the instrument is authorized under Washington law.

Creditors' Claims. Under current law, only probate assets are clearly subject to creditors' claims. Ambiguity exists as to whether nonprobate assets are subject to such claims. This ambiguity may lead to inequitable or unintended results by denying nonprobate assets the protections of the statute, or by causing creditors' claims against an estate to be charged against probate assets to the point of exhaustion before nonprobate assets are affected.

The Rule in Shelley's Case. Under the common law doctrine known as the rule in Shelley's case, whenever an instrument gave a remainder interest to an "heir," it was possible that the person receiving the preceding life estate, or other temporary interest would be considered to have received an absolute ownership interest that defeated the remainder interest, regardless of the transferor's intent. The Legislature abolished this doctrine with respect to wills, but not with respect to nontestamentary instruments such as trusts. The majority of states have explicitly abolished the doctrine with respect to trusts as well as wills.

The Doctrine of Worthier Title. Another common law doctrine entitles the grantor of a trust to the return or "reversion" of property upon the death of a person receiving a temporary interest in the property, if the remainder is to pass to the grantor's "heirs." The operation of this doctrine is relatively rare, but can result in the inadvertent creation of a reversionary interest in the grantor that can cause adverse estate tax results.

Wills. The last general update of the wills portion of the probate and trust code was done in 1965. Many other states

have adopted more modern provisions regarding wills, especially with respect to codicils, revocations, gifts to witnesses, proof of lost wills, and will contests.

Omitted Child or Spouse. Existing law requires that a child not named or provided for in a will, must receive a share of the estate equal to the share he or she would have received had there been no will, i.e., an intestate share. A similar rule applies to a spouse not named or provided for if the marriage occurred following the execution of the will.

Abatement of Probate and Nonprobate Assets. The problem of abatement arises if the decedent's assets are insufficient to fund fully all of the dispositions that are supposed to be made. A reduction in some or all of the dispositions is necessary to accommodate the shortage of available assets. Under the common law, all of the decedent's probate assets may be exhausted before any of the nonprobate assets are abated.

Lapsed Gifts. Several different sections of the current law deal with the question of lapsed gifts. A lapse occurs when a person who is to receive a gift under a will only if the person survives the testator, dies before the testator.

Summary of Bill: The bar association proposals regarding probate and trust law are adopted.

Jurisdiction and Proceedings. Any question that arises in the administration of an estate or trust, and not just those issues that have historically been within the jurisdiction of probate courts, may be resolved using the judicial or non-judicial procedures of the probate and trust code. Nonprobate assets are expressly brought within the purview of the provisions relating to the disposition of estates.

Creditors' Claims. New provisions are added to the creditors' claim statute covering nonprobate assets.

The Rule in Shelley's Case. This common law doctrine is abolished with respect to nontestamentary instruments.

The Doctrine of Worthier Title. The doctrine of worthier title is limited to a narrow range of cases. It is to be used only as a rule of construction in cases involving a living trust of real property in which the grantor has made an express reservation to himself or herself and has specifically used certain terms to describe the reversion.

Wills. A "codicil" is defined as a will that modifies or partially revokes an existing will. A codicil need not refer to the prior existing will. Revocation of a will also

revokes all that will's codicils, unless the testator intends otherwise. Provisions in a will are not rendered invalid just because the will is signed by a witness who is interested in the will. Unless there are at least two other noninterested witnesses, however, such a signature creates a rebuttable presumption of invalidity due to undue influence or fraud. The requirement that a lost or destroyed will must have been in existence at the time of the testator's death in order to be proved is removed, as is the alternative requirement of showing that the loss or destruction was the result of fraud, or of a failed attempt to change the will, or of mistake. Instead, a lost or destroyed will may be proved if its loss or destruction does not have the effect of revoking the will. The proof must be by clear, cogent and convincing evidence.

Omitted Children. With respect to an omitted child born after the execution of a will, absent clear and convincing evidence that the omission was intentional, the child is to receive an intestate share. However, the court is given discretion to award less than a full intestate share of the estate. In exercising this discretion the court is to consider factors including the nontestamentary disposition of assets by the deceased. Similar provisions are made for the case of an omitted spouse.

Abatement of Probate and Nonprobate Assets. The common law scheme of abatement is generally codified. Abatement is to occur in the following order:

1. Intestate property;
2. Residuary gifts;
3. General gifts; and
4. Specific gifts.

Nonprobate dispositions are abated ratably with probate assets based upon classification as a residuary, general, or specific gift.

Lapsed Gifts. New provisions are added to deal with the situation of multiple residuary beneficiaries when one or more residuary gifts lapse. A lapsed share in such a situation falls into the residue to be divided proportionately among the other residuary beneficiaries. Various technical and procedural changes are also made.

EFFECT OF SENATE AMENDMENT(S): The Senate striking amendment makes three changes to the substitute bill.

First, an ambiguity is resolved with respect to the definition of "representation" for purposes of determining distribution of an estate of a deceased person. It is

clarified that when a person who would have taken a share of an estate dies before he or she can take the share, it is the descendants of that "deceased" person who will divide the share, and not the descendants of the person whose estate is being distributed.

Second, a bank that is a fiduciary of a trust is not prohibited from investing funds of the trust in an investment company solely because the bank has a relationship with the investment company. The types of relationships covered by this amendment include the bank being paid by the investment company for services such as acting as an investment advisor, custodian, transfer agent, registrar, sponsor, distributor, or manager. Under this provision, a fiduciary may buy or sell investments from or to himself, herself, or itself or any affiliated or subsidiary company.

Third, the definition of "nonprobate asset" is modified to remove life insurance policies, annuities, and employee benefit plans.

Fiscal Note: Not requested.

Effective Date: The bill takes effect January 1, 1995.

Testimony For: The bill modernizes and streamlines the state's probate code. It provides coverage for the increasing use of nontestamentary documents to transfer assets. The bill provides more uniformity with the laws of other states.

Testimony Against: None.

Witnesses: Michael D. Carrico, Washington State Bar Association (pro).

VOTE ON FINAL PASSAGE:

Yeas 94; Excused 4

Excused: Representatives Casada, Reams, Silver, Ebersole