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**SUBSTITUTE HOUSE BILL 1135**

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**State of Washington                      57th Legislature                      2001 Regular Session**

**By** House Committee on Judiciary (originally sponsored by Representatives Lantz, Esser and McDermott)

Read first time . Referred to Committee on .

1            AN ACT Relating to powers of attorney; amending RCW 11.94.040,  
2 11.96A.040, 11.96A.050, 11.96A.120, and 11.94.050; and adding new  
3 sections to chapter 11.94 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5            NEW SECTION.    **Sec. 1.**    (1) An appointment of a principal's spouse  
6 as attorney in fact, including appointment as successor or co-attorney  
7 in fact, under a power of attorney shall be revoked upon entry of a  
8 decree of dissolution or legal separation or declaration of invalidity  
9 of the marriage of the principal and the attorney in fact, unless the  
10 power of attorney or the decree provides otherwise. The effect of this  
11 revocation shall be as if the spouse resigned as attorney in fact, or  
12 if named as successor attorney in fact, renounced the appointment, as  
13 of the date of entry of the decree or declaration, and the power of  
14 attorney shall otherwise remain in effect with respect to appointments  
15 of other persons as attorney in fact for the principal or procedures  
16 prescribed in the power of attorney to appoint other persons, and any  
17 terms relating to service by persons as attorney in fact.

1 (2) This section applies to all decrees of dissolution and  
2 declarations of invalidity of marriage entered after the effective date  
3 of this act.

4 **Sec. 2.** RCW 11.94.040 and 1985 c 30 s 28 are each amended to read  
5 as follows:

6 (1) Any person acting without negligence and in good faith in  
7 reasonable reliance on a power of attorney shall not incur any  
8 liability (~~((thereby))~~).

9 (2) If the attorney in fact presents the power of attorney to a  
10 third person and requests the person to accept the attorney in fact's  
11 authority to act for the principal, and also presents to the person an  
12 acknowledged affidavit or declaration signed under penalty of perjury  
13 in the form designated in RCW 9A.72.085, signed and dated  
14 contemporaneously with presenting the power of attorney, which meets  
15 the requirements of subsection (3) of this section, and the person  
16 accepting the power of attorney has examined the power of attorney and  
17 confirmed the identity of the attorney in fact, then the person's  
18 reliance on the power of attorney is presumed to be without negligence  
19 and in good faith in reasonable reliance, which presumption may be  
20 rebutted by clear and convincing evidence that the person accepting the  
21 power of attorney knew or should have known that one or more of the  
22 material statements in the affidavit is untrue. It shall not be found  
23 that an organization knew or should have known of circumstances that  
24 would revoke or terminate the power of attorney or limit or modify the  
25 authority of the attorney in fact, unless the individual accepting the  
26 power of attorney on behalf of the organization knew or should have  
27 known of the circumstances.

28 (3) An affidavit presented pursuant to subsection (2) of this  
29 section shall state that:

30 (a) The person presenting himself or herself as the attorney in  
31 fact and signing the affidavit or declaration is the person so named in  
32 the power of attorney;

33 (b) If the attorney in fact is named in the power of attorney as a  
34 successor attorney in fact, the circumstances or conditions stated in  
35 the power of attorney that would cause that person to become the acting  
36 attorney in fact have occurred;

37 (c) To the best of the attorney in fact's knowledge, the principal  
38 is still alive;

1 (d) To the best of the attorney in fact's knowledge, at the time  
2 the power of attorney was signed, the principal was competent to  
3 execute the document and was not under undue influence to sign the  
4 document;

5 (e) All events necessary to making the power of attorney effective  
6 have occurred;

7 (f) The attorney in fact does not have actual knowledge of the  
8 revocation, termination, limitation, or modification of the power of  
9 attorney or of the attorney in fact's authority;

10 (g) The attorney in fact does not have actual knowledge of the  
11 existence of other circumstances that would limit, modify, revoke, or  
12 terminate the power of attorney or the attorney in fact's authority to  
13 take the proposed action;

14 (h) If the attorney in fact was married to the principal at the  
15 time of execution of the power of attorney, then at the time of signing  
16 the affidavit or declaration, the marriage of the principal and the  
17 attorney in fact has not been dissolved or declared invalid; and

18 (i) The attorney in fact is acting in good faith pursuant to the  
19 authority given under the power of attorney.

20 (4) Unless the document contains a time limit, the length of time  
21 which has elapsed from its date of execution shall not prevent a party  
22 from reasonably relying on the document.

23 (5) Unless the document contains a requirement that it be filed for  
24 record to be effective, a person (~~shall~~) may place reasonable  
25 reliance on it regardless of whether it is so filed.

26 NEW SECTION. Sec. 3. (1) A person designated in section 4 of this  
27 act may file a petition requesting that the court:

28 (a) Determine whether the power of attorney is in effect or has  
29 terminated;

30 (b) Compel the attorney in fact to submit the attorney in fact's  
31 accounts or report the attorney in fact's acts as attorney in fact to  
32 the principal, the spouse of the principal, the guardian of the person  
33 or the estate of the principal, or to any other person required by the  
34 court in its discretion, if the attorney in fact has failed to submit  
35 an accounting or report within sixty days after written request from  
36 the person filing the petition;

37 (c) Ratify past acts or approve proposed acts of the attorney in  
38 fact;

1 (d) Order the attorney in fact to exercise or refrain from  
2 exercising authority in a power of attorney in a particular manner or  
3 for a particular purpose;

4 (e) Modify the authority of an attorney in fact under a power of  
5 attorney;

6 (f) Remove the attorney in fact on a determination by the court of  
7 both of the following:

8 (i) The attorney in fact has violated or is unfit to perform the  
9 fiduciary duties under the power of attorney; and

10 (ii) The removal of the attorney in fact is in the best interest of  
11 the principal;

12 (g) Approve the resignation of the attorney in fact and approve the  
13 final accountings of the resigning attorney in fact if submitted,  
14 subject to any orders the court determines are necessary to protect the  
15 principal's interests;

16 (h) Confirm the authority of a successor attorney in fact to act  
17 under a power of attorney upon removal or resignation of the previous  
18 attorney in fact;

19 (i) Compel a third person to honor the authority of an attorney in  
20 fact, provided that a third person may not be compelled to honor the  
21 agent's authority if the principal could not compel the third person to  
22 act in the same circumstances;

23 (j) Order the attorney in fact to furnish a bond in an amount the  
24 court determines to be appropriate.

25 (2) The petition shall contain a statement identifying the  
26 principal's known immediate family members, and any other persons known  
27 to petitioner to be interested in the principal's welfare or the  
28 principal's estate, stating which of said persons have an interest in  
29 the action requested in the petition and explaining the determination  
30 of who is interested in the petition.

31 NEW SECTION. **Sec. 4.** (1) A petition may be filed under section 3  
32 of this act by any of the following persons:

33 (a) The attorney in fact;

34 (b) The principal;

35 (c) The spouse of the principal;

36 (d) The guardian of the estate or person of the principal; or

37 (e) Any other interested person, as long as the person demonstrates  
38 to the court's satisfaction that the person is interested in the

1 welfare of the principal and has a good faith belief that the court's  
2 intervention is necessary, and that the principal is incapacitated at  
3 the time of filing the petition or otherwise unable to protect his or  
4 her own interests.

5 (2) Notwithstanding section 1 of this act, the principal may  
6 specify in the power of attorney by name certain persons who shall have  
7 no authority to bring a petition under section 3 of this act with  
8 respect to the power of attorney. This provision is enforceable:

9 (a) If the person so named is not at the time of filing the  
10 petition the guardian of the principal;

11 (b) If at the time of signing the power of attorney the principal  
12 was represented by an attorney who advised the principal regarding the  
13 power of attorney and who signed a certificate at the time of execution  
14 of the power of attorney, stating that the attorney has advised the  
15 principal concerning his or her rights, the applicable law, and the  
16 effect and consequences of executing the power of attorney; or

17 (c) If (a) and (b) of this subsection do not apply, unless the  
18 person so named can establish that the principal was unduly influenced  
19 by another or under mistaken beliefs when excluding the person from the  
20 petition process, or unless the person named is a government agency  
21 charged with protection of vulnerable adults.

22 NEW SECTION. **Sec. 5.** In ruling on a petition filed under section  
23 3 of this act and ordering any relief, the court must consider the best  
24 interests of the principal and will order relief that is the least  
25 restrictive to the exercise of the power of attorney while still  
26 adequate in the court's view to serve the principal's best interests.  
27 Upon entry of an order ruling on a petition, the court's oversight of  
28 the attorney in fact's actions and of the operation of the power of  
29 attorney ends unless another petition is filed under this chapter or  
30 unless the order specifies further court involvement that is necessary  
31 for a resolution of the issues raised in the petition.

32 NEW SECTION. **Sec. 6.** In any proceeding commenced by the filing of  
33 a petition under section 3 of this act by a person other than the  
34 attorney in fact, the court may in its discretion award costs,  
35 including reasonable attorneys' fees, to any person participating in  
36 the proceedings from any other person participating in the proceedings,  
37 or from the assets of the principal, as the court determines to be

1 equitable. In determining what is equitable in making the award, the  
2 court must consider whether the petition was filed without reasonable  
3 cause, and order costs and fees paid by the attorney in fact  
4 individually only if the court determines that the attorney in fact has  
5 clearly violated his or her fiduciary duties or has refused without  
6 justification to cooperate with the principal or the principal's  
7 guardian or personal representative. In a proceeding to compel a third  
8 party to accept a power of attorney, the court may order costs,  
9 including reasonable attorneys' fees, to be paid by the third party  
10 only if the court determines that the third party did not have a good  
11 faith concern that the attorney in fact's exercise of authority would  
12 be improper. To the extent this section is inconsistent with RCW  
13 11.96A.150, this section controls the award of costs and attorneys'  
14 fees in proceedings brought under section 3 of this act.

15 NEW SECTION. **Sec. 7.** The provisions of chapter 11.96A RCW, except  
16 for RCW 11.96A.260 through 11.96A.320, are applicable to proceedings  
17 commenced by the filing of a petition under section 3 of this act.

18 NEW SECTION. **Sec. 8.** (1) The following persons are entitled to  
19 notice of hearing on any petition under section 3 of this act:

- 20 (a) The principal;
- 21 (b) The principal's spouse;
- 22 (c) The attorney in fact;
- 23 (d) The guardian of the estate or person of the principal;
- 24 (e) Any other person identified in the petition as being interested  
25 in the action requested in the petition, or identified by the court as  
26 having a right to notice of the hearing. If a person would be excluded  
27 from bringing a petition under section 4(2) of this act, then that  
28 person is not entitled to notice of the hearing.

29 (2) Notwithstanding subsection (1) of this section, if the  
30 whereabouts of the principal are unknown or the principal is otherwise  
31 unavailable to receive notice, the court may waive the requirement of  
32 notice to the principal, and if the principal's spouse is similarly  
33 unavailable to receive notice, the court may waive the requirement of  
34 notice to the principal's spouse.

35 (3) Notice must be given as required under chapter 11.96A RCW,  
36 except that the parties entitled to notice shall be determined under  
37 this section.

1       **Sec. 9.** RCW 11.96A.040 and 1999 c 42 s 201 are each amended to  
2 read as follows:

3       (1) The superior court of every county has original subject matter  
4 jurisdiction over the probate of wills and the administration of  
5 estates of incapacitated, missing, and deceased individuals in all  
6 instances, including without limitation:

7       (a) When a resident of the state dies;

8       (b) When a nonresident of the state dies in the state; or

9       (c) When a nonresident of the state dies outside the state.

10       (2) The superior court of every county has original subject matter  
11 jurisdiction over trusts and all matters relating to trusts.

12       (3) The superior courts may: Probate or refuse to probate wills,  
13 appoint personal representatives, administer and settle the affairs and  
14 the estates of incapacitated, missing, or deceased individuals  
15 including but not limited to decedents' nonprobate assets; administer  
16 and settle matters that relate to nonprobate assets and arise under  
17 chapter 11.18 or 11.42 RCW; administer and settle all matters relating  
18 to trusts; administer and settle matters that relate to powers of  
19 attorney; award processes and cause to come before them all persons  
20 whom the courts deem it necessary to examine; order and cause to be  
21 issued all such writs and any other orders as are proper or necessary;  
22 and do all other things proper or incident to the exercise of  
23 jurisdiction under this section.

24       (4) The subject matter jurisdiction of the superior court applies  
25 without regard to venue. A proceeding or action by or before a  
26 superior court is not defective or invalid because of the selected  
27 venue if the court has jurisdiction of the subject matter of the  
28 action.

29       **Sec. 10.** RCW 11.96A.050 and 1999 c 42 s 202 are each amended to  
30 read as follows:

31       (1) Venue for proceedings pertaining to trusts shall be:

32       (a) For testamentary trusts established under wills probated in the  
33 state of Washington, in the superior court of the county where letters  
34 testamentary were granted to a personal representative of the estate  
35 subject to the will or, in the alternative, the superior court of the  
36 county of the situs of the trust; and

1 (b) For all other trusts, in the superior court of the county in  
2 which the situs of the trust is located, or, if the situs is not  
3 located in the state of Washington, in any county.

4 (2) Venue for proceedings subject to chapter 11.88 or 11.92 RCW  
5 shall be determined under the provisions of those chapters.

6 (3) Venue for proceedings pertaining to the probate of wills, the  
7 administration and disposition of a decedent's property, including  
8 nonprobate assets, and any other matter not identified in subsection  
9 (1) or (2) of this section, may be in any county in the state of  
10 Washington. A party to a proceeding may request that venue be changed  
11 if the request is made within four months of the mailing of the notice  
12 of appointment and pendency of probate required by RCW 11.28.237, and  
13 except for good cause shown, venue must be moved as follows:

14 (a) If the decedent was a resident of the state of Washington at  
15 the time of death, to the county of the decedent's residence; or

16 (b) If the decedent was not a resident of the state of Washington  
17 at the time of death, to any of the following:

18 (i) Any county in which any part of the probate estate might be;

19 (ii) If there are no probate assets, any county where any  
20 nonprobate asset might be; or

21 (iii) The county in which the decedent died.

22 (4) Once letters testamentary or of administration have been  
23 granted in the state of Washington, all orders, settlements, trials,  
24 and other proceedings under this title shall be had or made in the  
25 county in which such letters have been granted unless venue is moved as  
26 provided in subsection (2) of this section.

27 (5) Venue for proceedings pertaining to powers of attorney shall be  
28 in the superior court of the county of the principal's residence,  
29 except for good cause shown.

30 (6) If venue is moved, an action taken before venue is changed is  
31 not invalid because of the venue.

32 (~~(6)~~) (7) Any request to change venue that is made more than four  
33 months after the commencement of the action may be granted in the  
34 discretion of the court.

35 **Sec. 11.** RCW 11.96A.120 and 1999 c 42 s 305 are each amended to  
36 read as follows:

37 (1) This section is intended to adopt the common law concept of  
38 virtual representation. This section supplements the common law



1 relating to the doctrine of virtual representation and shall not be  
2 construed as limiting the application of that common law doctrine.

3 (2) Any notice requirement in this title is satisfied if notice is  
4 given as follows:

5 (a) Where an interest in an estate, trust, or nonprobate asset or  
6 an interest that may be affected by a power of attorney has been given  
7 to persons who comprise a certain class upon the happening of a certain  
8 event, notice may be given to the living persons who would constitute  
9 the class if the event had happened immediately before the commencement  
10 of the proceeding requiring notice, and the persons shall virtually  
11 represent all other members of the class;

12 (b) Where an interest in an estate, trust, or nonprobate asset or  
13 an interest that may be affected by a power of attorney has been given  
14 to a living person, and the same interest, or a share in it, is to pass  
15 to the surviving spouse or to persons who are, or might be, the  
16 distributees, heirs, issue, or other kindred of that living person upon  
17 the happening of a future event, notice may be given to that living  
18 person, and the living person shall virtually represent the surviving  
19 spouse, distributees, heirs, issue, or other kindred of the person; and

20 (c) Except as otherwise provided in this subsection, where an  
21 interest in an estate, trust, or nonprobate asset or an interest that  
22 may be affected by a power of attorney has been given to a person or a  
23 class of persons, or both, upon the happening of any future event, and  
24 the same interest or a share of the interest is to pass to another  
25 person or class of persons, or both, upon the happening of an  
26 additional future event, notice may be given to the living person or  
27 persons who would take the interest upon the happening of the first  
28 event, and the living person or persons shall virtually represent the  
29 persons and classes of persons who might take on the happening of the  
30 additional future event.

31 (3) A party is not virtually represented by a person receiving  
32 notice if a conflict of interest involving the matter is known to exist  
33 between the notified person and the party.

34 (4) An action taken by the court is conclusive and binding upon  
35 each person receiving actual or constructive notice or who is otherwise  
36 virtually represented.

37 **Sec. 12.** RCW 11.94.050 and 1989 c 87 s 1 are each amended to read  
38 as follows:

1 (1) Although a designated attorney in fact or agent has all powers  
2 of absolute ownership of the principal, or the document has language to  
3 indicate that the attorney in fact or agent shall have all the powers  
4 the principal would have if alive and competent, the attorney in fact  
5 or agent shall not have the power to make, amend, alter, or revoke the  
6 principal's wills or codicils, and shall not have the power, unless  
7 specifically provided otherwise in the document: To make, amend,  
8 alter, or revoke any of the principal's ((wills, ~~codicils,~~) life  
9 insurance, annuity, or similar contract beneficiary designations,  
10 employee benefit plan beneficiary designations, trust agreements,  
11 registration of the principal's securities in beneficiary form, payable  
12 on death or transfer on death beneficiary designations, designation of  
13 persons as joint tenants with right of survivorship with the principal  
14 with respect to any of the principal's property, community property  
15 agreements, or any other provisions for nonprobate transfer at death  
16 contained in nontestamentary instruments described in RCW 11.02.091; to  
17 make any gifts of property owned by the principal; to make transfers of  
18 property to any trust (whether or not created by the principal) unless  
19 the trust benefits the principal alone and does not have dispositive  
20 provisions which are different from those which would have governed the  
21 property had it not been transferred into the trust, or to disclaim  
22 property.

23 (2) Nothing in subsection (1) of this section prohibits an attorney  
24 in fact or agent from making any transfer of resources not prohibited  
25 under chapter 74.09 RCW when the transfer is for the purpose of  
26 qualifying the principal for medical assistance or the limited casualty  
27 program for the medically needy.

28 NEW SECTION. Sec. 13. Sections 1 and 3 through 8 of this act are  
29 each added to chapter 11.94 RCW.

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