

1986

# Marlin L. Stewart and Candice Stewart v. Aldine J. Coffman Jr. : Brief of Respondent

Utah Court of Appeals

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Tim Dalton Dunn; Hanson, Dunn, Epperson & Smith; Attorneys for Respondent.

Paul W. Mortensen; Attorney for Appellant.

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**MARLIN L. STEWART and  
CANDICE STEWART, Husband  
and Wife,**

**Plaintiffs-Appellants,**

**VS.**

**Case No. 860167**

ALDINE J. COFFMAN, JR.,  
PENELOPE DALTON COFFMAN,  
COFFMAN, COFFMAN AND WOODS,  
a professional corporation,  
a/k/a COFFMAN and COFFMAN,  
ANTHONY M. THURBER, and  
KENNETH A. OKAZAKI,  
jointly and severally,

**Defendants,**

(Penelope Dalton Coffman,  
Defendant-Respondent)

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT OF  
GRAND COUNTY, STATE OF UTAH  
HONORABLE BOYD BUNNELL  
District Judge

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**Attorney for Appellant**

FILED

Clerk, Supreme Court, Utah

### LIST OF PARTIES

At the time of preparation of this brief the parties to this action are the same as those listed in the caption, except that Kenneth A. Okazaki has been voluntarily dismissed from the action. This appeal only directly involves the Plaintiffs and the Defendant Penelope Dalton Coffman who was dismissed from the action over the Plaintiffs' objection.

The Defendants Aldine J. Coffman, Jr. and Coffman, Coffman and Woods, a professional corporation, who are not parties to this appeal, are respresented by Tim Dalton Dunn and Anne Swensen who also represent the Defendant-Respondent Penelop Dalton Coffman in this appeal.

The Defendant Anthony M. Thurber, who is not a party to this appeal, is represented by Thomas L. Kay; P.O. Box 45385; Salt Lake City, Utah 84145-0385, (801) 532-1500.

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

MARLIN L. STEWART and  
CANDICE STEWART, Husband  
and Wife,

Plaintiffs-Appellants,

vs.

Case No. 860167

ALDINE J. COFFMAN, JR.,  
PENELOPE DALTON COFFMAN,  
COFFMAN, COFFMAN AND WOODS,  
a professional corporation,  
a/k/a COFFMAN and COFFMAN,  
ANTHONY M. THURBER, and  
KENNETH A. OKAZAKI,  
jointly and severally,

Defendants,

(Penelope Dalton Coffman,  
Defendant-Respondent)

---

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE PRESENTED ON APPEAL

The issue presented on appeal is whether the lower court abused its discretion by failing to hold a shareholder in a professional corporation vicariously liable for the alleged malpractice of another member of the firm.

### STATEMENT OF FACTS

Defendant-Respondent adopts and incorporates herein the appellants' statement of facts with the exception of the facts referred to on page 3 of appellants' brief pertaining to the dismissal of Penelope Dalton Coffman from the underlying action.

The dismissal was entered based on the lower court's evaluation of the memoranda and the affidavit submitted by the parties. There is no memorandum decision and the ruling simply states that the court concludes as a matter of law that there is no cause of action against Penelope D. Coffman. (See ruling on Motion to Reconsider Motion to Dismiss, attached.)

### SUMMARY OF ARGUMENT

Defendant-respondent Penelope D. Coffman did not at any time engage in the representation of the appellants and under the Utah Professional Corporation Act defendant-respondent cannot be held vicariously liable for the alleged malpractice of another member of the corporation. Therefore, the lower court was correct in dismissing her as a defendant.

### ARGUMENT

THE UTAH PROFESSIONAL CORPORATION ACT CONTAINS NO PROVISION FOR VICARIOUS LIABILITY AND NO MEMBER OF A CORPORATION CAN BE CHARGED WITH LIABILITY FOR THE ACTS OF ANOTHER MEMBER OF THE CORPORATION ABSENT PERSONAL INVOLVEMENT IN THE REPRESENTATION OF A CLIENT.

Penelope D. Coffman and Aldine J. Coffman, Jr. are both members of the defendant law firm Coffman, Coffman and Woods, a professional corporation. Aldine J. Coffman has rendered services to the Appellants. Penelope D. Coffman has rendered no services to Appellants; nor has she been in anyway involved in the services rendered by Aldine J. Coffman.

The laws governing the members of a professional corporation are found in the Utah Professional Corporation Act, Utah Code Ann. section 16-11-1 to 16-11-15 (1978). The Utah General Partnership Act is not applicable to a professional corporation.

Appellants cite section 16-11-3 and 16-11-10 from the Professional Corporation Act allowing professionals the use of the corporation form for business purposes, while not altering the professional relationship between the professional and his client. The language of the Statute, however, specifically states that the act "does not alter any law applicable to the



relationship between a person rendering professional services and a person receiving such services, including liability arising out of such professional services." (emphasis added) There is no mention of a relationship with or liability of, other members of a corporation. The emphasis is on liability of a person rendering professional services to a person that receives such services.

In a case dealing with the issue of vicarious liability among members of a professional corporation, the Nevada Supreme Court stated:

A member of professional legal corporation in Nevada is not individually liable for the tortious acts of other members of that professional legal corporation unless he/she personally participated in those tortious acts. Grayson v. Jones, 710 P.2d 76 (Nev. 1985)

It is a fact of this case that Penelope D. Coffman did not in any sense of the definition personally participate in the representation of the appellants. 18 AM JUR 2d §§37 and 18 AM JUR 2d §§854 affirm the law that while the liability between an attorney and his client remains the same in a professional corporation, vicarious liability is not imposed on a shareholder.

Section 16-11-5 of the Professional Corporation Act reads as follows:

The Utah Business Corporation Act shall be applicable to professional corporations, and they shall enjoy the

powers and privileges and be subject to the duties, restrictions and liabilities of other corporations, except where inconsistent with this act.

The Utah Business Corporations Act, which is applicable to the Utah Professional Corporation Act, provides that shareholders are under no obligation to the corporation or its creditors other than the obligation to pay full consideration for shares issued. Utah Code Ann. §16-10-23 (1978). The Colorado Supreme Court has ruled accordingly in giving a professional corporation the same powers and privileges that a business corporation enjoys. The court states "a professional service corporation enjoys all powers and privileges of other corporations, under Colorado law." Network Affiliates v. Robert E. Schack, P.A., 682 P.2d 1244, 1246 (Colo. App. 1984).

The general law of corporations provides that corporate officers are jointly and severally liable only when two or more join or participate in a wrongful act. Directors are not liable for the wrongful acts of their co-directors if they do not connive with them, nor are the executive officers responsible for the neglect of duty, negligence, or misconduct of each other in their official relations, without proof of joint participation. 18B AL JUR 2d §§1719, 1720.

CONCLUSION

Members of a professional corporation are not vicariously liable for the acts or omissions of other members of the corporation without joint participation or personal involvement in the rendering of service. Therefore, we respectfully submit that the judgment of the court below should be affirmed.

DATED this \_\_\_\_\_ day of August, 1986.

\_\_\_\_\_  
TIM DALTON DUNN  
ANNE SWENSEN  
Attorneys for Aldine J. Coffman,  
Penelope Dalton Coffman and  
Coffman, Coffman & Woods

CERTIFICATE OF SERVICE

Served the foregoing Brief this \_\_\_\_\_ day of August, 198  
by mailing four copies thereof, postage prepaid, to the followin

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IN THE SEVENTH JUDICIAL DISTRICT COURT FOR GRAND COUNTY,  
STATE OF UTAH

---

MARLIN L. STEWART and	)	
CANDICE STEWART, husband	)	RULING ON MOTION TO
and wife,	)	RECONSIDER MOTION
Plaintiffs,	)	TO DISMISS
vs.	)	
	)	Civil No. 5370
ALDINE J. COFFMAN, JR.,	)	
ET AL.,	)	
Defendants.	)	

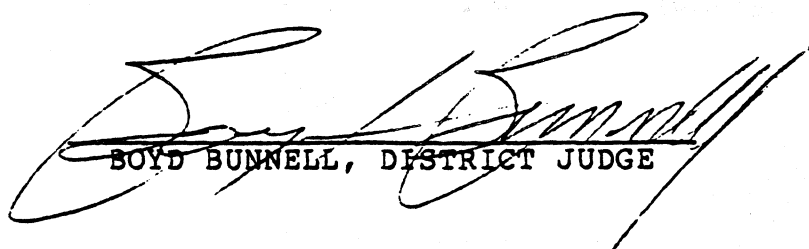
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The defendant, Penelope Dalton Coffman, has previously filed a motion to dismiss the complaint as to her, and the Court ruled on the motion the same day that a reply to the response of the plaintiff resisting the motion was mailed to the Court. Because of the uncertainty of time deliveries of the U.S. Postal Department, the Court will reconsider its prior ruling based upon the matters contained in defendant's reply memorandum.

The undisputed facts show that Coffman, Coffman and Woods was a professional corporation and that although the defendant, Penelope Coffman, is a member of that corporation, she had no personal professional involvement in the matters alleged in plaintiffs' complaint. The Court concludes as a matter of law from those undisputed facts that there is no cause of action against this defendant.

THEREFORE, the motion to dismiss this action as to Penelope Dalton Coffman is granted and the attorney for her is directed to prepare a formal order in accordance with this decision.

DATED this 27 day of January, 1986.



BOYD BUNNELL, DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed true and correct copies of the foregoing RULING ON MOTION TO RECONSIDER MOTION TO DISMISS by depositing the same in the United States Mail, postage prepaid, to the following:

TIM DALTON DUNN  
HANSON, DUNN EPPERSON & SMITH  
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Salt Lake City, Utah 84101

Paul W. Mortensen  
Attorney at Law  
131 East 100 South  
Post Office Box 339  
Moab, Utah 84532

Dated this 27<sup>th</sup> day of January, 1986.

  
\_\_\_\_\_  
Secretary

rights, to receive dividends thereon, and to participate in any of the assets of the corporation in the event of liquidation. The board of directors may cause such scrip to be issued subject to the condition that it shall become void if not exchanged for certificates representing full shares before a specified date, or subject to the condition that shares for which such scrip is exchangeable may be sold by the corporation and the proceeds thereof distributed to the holders of such scrip, or subject to any other conditions which the board of directors may deem advisable.

History: L. 1961, ch. 23, § 22.

**16-10-23. Liability of subscribers and shareholders.**—A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued.

Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall not be personally liable to the corporation.

An executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver shall not be personally liable to the corporation as a holder of or subscriber to shares of a corporation but the estate and funds in his hands shall be so liable.

No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder.

History: L. 1961, ch. 23, § 23.

#### Cross-References.

Liability of stockholders in banking corporations, Const. Art. XII, § 18.

Limitation of action against corporate stockholders or directors, 78-12-27.

#### Collateral References.

Corporations—175.

18 C.J.S. Corporations § 486.

Added liability of holders of corporate stock the issue of which was ultra vires, invalid, or irregular, 86 A. L. R. 816.

Agreement absolving one, in whole or in part, from liability on subscription to corporate stock, validity and effect of, 81 A. L. R. 198.

Applicability of constitutional or statutory provisions relating to added liability of stockholders to holders of stock issued, or stockholders of corporations organized, before their enactment, 72 A. L. R. 1252.

Assignment or sale of stockholders' statutory liability, 82 A. L. R. 1285, 159 A. L. R. 1114.

Change in or renewal of corporation's obligation as affecting liability of stockholder of bank or other corporation, 97 A. L. R. 630.

Conveyance or transfer by stockholder as fraudulent as regards his liability as stockholder to creditors of corporation, 89 A. L. R. 751.

Creditor's knowledge that stock is unpaid as affecting stockholder's liability, 7 A. L. R. 972, 69 A. L. R. 881.

Death of stockholder as affecting statutory added liability, 79 A. L. R. 1537, 96 A. L. R. 1466.

Dominant shareholder's accountability to minority for profit, bonus, or the like received from sale of stock to outsiders, 38 A. L. R. 3d 738.

Enforcement during liquidation or receivership, of unpaid stock subscriptions, to equalize loss among stockholders, 35 A. L. R. 493.

Forfeiture of stock for nonpayment of assessments, as affecting liability to creditors of stockholder, 19 A. L. R. 1096.

Infant, his estate or property held in trust for him, as subject to statutory added liability of stockholder, 78 A. L. R. 431, 120 A. L. R. 956.

Liability of officers, directors or members of defectively organized corporation to one of their number for advancements or commissions, 115 A. L. R. 658.

Liability of stockholder as affected by business of corporation being turned over



## CHAPTER 11

## PROFESSIONAL CORPORATION ACT

Section 16-11-1.	Short title.
16-11-2.	Definitions.
16-11-3.	Purpose of act.
16-11-4.	Incorporators—Articles of incorporation.
16-11-5.	Application of Utah Business Corporation Act—Conflicts.
16-11-6.	Purpose of professional corporation—Power to own property and invest funds.
16-11-7.	Issuance of shares of capital stock—Restrictions.
16-11-8.	Officer, director or shareholder must be licensed professional—Non-licensed person as secretary or treasurer.
16-11-9.	Licensed persons to render professional services.
16-11-10.	Laws as to professional relationships not altered.
16-11-11.	Authority of regulating boards not restricted or limited.
16-11-12.	Prohibited acts of professional corporations.
16-11-13.	Purchase or redemption of shares of deceased or disqualified shareholder.
16-11-14.	Annual certificate—Filing—Contents—Filing fee.
16-11-15.	Incorporation under Utah Business Corporation Act permitted—Existing corporations may come under Professional Corporation Act.

**16-11-1. Short title.**—This act shall be known and may be cited as the "Professional Corporation Act."

**History:** L. 1963, ch. 20, § 1.

**Title of Act.**

An act relating to the incorporation of persons rendering professional services; defining what persons may so incorporate; providing for the method by which such

persons can incorporate a professional corporation; prescribing the manner in which such corporations may operate; providing for applicability of the Utah Business Corporation Act and requiring annual certificates for continuation of any professional corporation.

**16-11-2. Definitions.**—As used in this act:

(1) "Professional Corporation" means a corporation organized under this act.

(2) "Professional Service" means the personal service rendered by:

(a) A physician, surgeon or doctor of medicine holding a license under chapter 12 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of medicine.

(b) A doctor of dentistry holding a license under chapter 7 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of dentistry.

(c) An osteopathic physician or surgeon holding a license under chapter 12 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of osteopathy.

(d) A chiropractor holding a license under chapter 12 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of chiropractic.

(e) A chiropodist-podiatrist holding a license under chapter 5 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of chiropody.

(f) An optometrist holding a license under chapter 16 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of optometry.

(g) A veterinarian holding a license under chapter 21 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of veterinary medicine.

(h) An architect holding a license under chapter 3 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of architecture.

(i) A public accountant holding a license under chapter 2 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of public accounting.

(j) A naturopath holding a license under chapter 12 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of naturopathy.

(k) A pharmacist holding a license under chapter 17 of Title 58, Utah Code Annotated 1953, and any subsequent laws regulating the practice of pharmacy.

(l) An attorney granted the authority to practice law by the Supreme Court of the state of Utah, as provided in chapter 51 of Title 78, Utah Code Annotated 1953.

(3) "Regulating board" means the board which is charged with the licensing and regulation of the practice of the profession which the professional corporation is organized to render. The definitions of the Utah Business Corporation Act shall apply to this act unless the context clearly indicates that a different meaning is intended.

**History:** L. 1963, ch. 20, § 2.

**Compiler's Notes.**

Chapters 2 and 21 of Title 58, regulating the practice of public accountants and

veterinarians respectively, were repealed and the laws regulating these professions are now contained in chapters 26 and 28 of Title 58.

**16-11-3. Purpose of act.**—This act shall be so construed as to effectuate its general purpose of making available to professional persons the benefits of the corporate form for the business aspects of their practices while preserving the established professional aspects of the personal relationship between the professional person and those he serves.

**History:** L. 1963, ch. 20, § 3.

**16-11-4. Incorporators—Articles of incorporation.**—Three or more individuals, each of whom is licensed to render a professional service, may incorporate a professional corporation by filing articles of incorporation with the secretary of state. Such articles of incorporation shall meet the requirements of the Utah Business Corporation Act and in addition thereto contain the following:

(1) The profession to be practiced through the professional corporation.

(2) The names and residence addresses of all of the original shareholders, directors and officers of the professional corporation.

History: L. 1963, ch. 20, § 4.

**16-11-5. Application of Utah Business Corporation Act—Conflicts.—**The Utah Business Corporation Act shall be applicable to professional corporations, and they shall enjoy the powers and privileges and be subject to the duties, restrictions and liabilities of other corporations, except where inconsistent with this act. This act shall take precedence in the event of any conflict with provisions of the Utah Business Corporation Act or other laws.

History: L. 1963, ch. 20, § 5.

**16-11-6. Purpose of professional corporation—Power to own property and invest funds.—**A professional corporation may be organized pursuant to the provisions of this act only for the purpose of rendering one specific type of professional service and services ancillary thereto and shall not engage in any business other than rendering the professional service which it was organized to render and services ancillary thereto; provided, however, that a professional corporation may own real and personal property necessary or appropriate for rendering the type of professional service it was organized to render and may invest its funds in real estate, mortgages, stocks, bonds and any other type of investments.

History: L. 1963, ch. 20, § 6.

**16-11-7. Issuance of shares of capital stock—Restrictions.—**A professional corporation may issue the shares of its capital stock only to persons who are duly licensed to render the same specific professional services as those for which the corporation was organized. A shareholder may voluntarily transfer his shares in a professional corporation only to a person who is duly licensed to render the same specific professional services as those for which the corporation was organized. Any shares issued in violation of this section are void.

History: L. 1963, ch. 20, § 7.

**16-11-8. Officer, director or shareholder must be licensed professional—Nonlicensed person as secretary or treasurer.—**No person may be an officer, director, or shareholder of a professional corporation who is not an individual duly licensed to render the same specific professional services as those for which the corporation was organized; provided, however, a nonlicensed person may serve as secretary or treasurer.

History: L. 1963, ch. 20, § 8.

**16-11-9. Licensed persons to render professional services.—**A professional corporation may render professional services only through its officers, employees and agents who are duly licensed to render such professional services.

**History:** L. 1963, ch. 20, § 9. Architecture, corporation's practice of, 56 A. L. R. 2d 726.  
**Collateral References.** Practice by attorneys and physicians as corporate entities under professional service corporation statutes, 4 A. L. R. 3d 383.  
 Corporations—377½.  
 19 C.J.S. Corporations § 956.  
 Powers of corporations, 19 Am. Jur. 2d 507, Corporations § 1052.

**16-11-10. Laws as to professional relationships not altered.**—This act does not alter any law applicable to the relationship between a person rendering professional services and a person receiving such services, including liability arising out of such professional services.

**History:** L. 1963, ch. 20, § 10.

**16-11-11. Authority of regulating boards not restricted or limited.**—Nothing in this act shall restrict or limit in any manner the authority and duty of the regulating board for the licensing of individual persons rendering professional services or the practice of the profession which is within the jurisdiction of such regulating board, notwithstanding that such person is an officer, director, shareholder or employee of a professional corporation and rendering such professional services or engaging in the practice of such profession through such professional corporation.

**History:** L. 1963, ch. 20, § 11.

**16-11-12. Prohibited acts of professional corporations.**—No professional corporation may do any act which is prohibited to be done by individual persons licensed to practice the profession which the professional corporation is organized to render.

**History:** L. 1963, ch. 20, § 12.

**16-11-13. Purchase or redemption of shares of deceased or disqualified shareholder.**—The articles of incorporation may provide for the purchase or redemption of the shares of any shareholder upon the death or disqualification of such shareholder, or the same may be provided in the bylaws or by private agreement. In the absence of such a provision in the articles of incorporation, the bylaws, or by private agreement, the professional corporation shall purchase the shares of a deceased shareholder or a shareholder no longer qualified to own shares in such corporation within 90 days after the death of the shareholder or disqualification of the shareholder, as the case may be. The price for such shares shall be their reasonable fair value as of the date of death or disqualification of the shareholder. If the corporation shall fail to purchase said shares by the end of said 90 days, then the executor or administrator or other personal representative of a deceased shareholder or any disqualified shareholder may bring an action in the district court of the county in which the principal office or place of practice of the professional corporation is located for the enforcement of this provision. The court shall have power to award the plaintiff the reasonable fair value of his shares, or within its jurisdiction, may order the liquidation of the corporation. Further, if the plaintiff is successful in such action, he shall be entitled to recover a reasonable attorney's fee

and costs. The professional corporation shall repurchase such shares without regard to restrictions upon the repurchase of shares provided by the Utah Business Corporation Act.

**History:** L. 1963, ch. 20, § 13.

**16-11-14. Annual certificate—Filing—Contents—Filing fee.** — Between the first day of January and the last day of February of each year, each professional corporation shall file with the secretary of state a certificate giving the names and residence addresses of all shareholders of such professional corporation as of the 31st day of December next preceding, and certifying that all of such shareholders are duly licensed to render the same specific professional services as those for which the corporation was organized. This certificate is made on such form as shall be prescribed and furnished by the secretary of state, shall be signed by the president or vice-president and attested by the secretary or assistant secretary of the professional corporation, and acknowledged and sworn to before a notary public by the persons executing the certificate. A filing fee of \$10 shall be paid to the secretary of state with the filing of each such certificate, and no other fees shall be charged therefor. A duplicate original copy of such annual certificate shall be filed at the same time with the regulatory board which licenses the shareholders described in the certificates. No filing fee shall be charged by the regulatory board for such filing.

**History:** L. 1963, ch. 20, § 14.

**16-11-15. Incorporation under Utah Business Corporation Act permitted—Existing corporations may come under Professional Corporation Act.**—This act shall not preclude incorporation by professional persons under the Utah Business Corporation Act, where such persons would be permitted to organize a corporation and perform professional services by means of such corporation in the absence of this act. This act shall not apply to any corporation organized by such persons prior to the passage of this act, but any such persons or any such corporation may bring themselves and such corporation within the provisions of this act by amending the articles of incorporation in such a manner as to be consistent with all of the provisions of this act and by affirmatively stating in the amended articles of incorporation that the shareholders have elected to bring the corporation within the provisions of this act.

**History:** L. 1963, ch. 20, § 15.

**Separability Clause.**

Section 16 of Laws 1963, ch. 20, provided: "If any provision of this act or the application thereof to any person or

circumstance is held to be invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable."

## CHAPTER 12

### REAL ESTATE INVESTMENT TRUST ACT

**Section 16-12-1. Short title.**

**16-12-2. Definition of real estate investment trust.**

**16-12-3. Declaration of trust—Filing with secretary of state—Fee.**