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Avoiding County and City Subdivision Rules Through Testamentary Divisions

An Exemption Every Estate Planner, Probate Practitioner, and Real Estate Attorney Should Know and Use

By Evan McCauley — Jeffers, Danielson, Sonn & Aylward, P.S.

Introduction. The subdivision of land (plats, subdivisions and dedications) in Washington is governed by Chapter 58.17 RCW and by city and county ordinances adopted under that chapter's authority. The purpose of the chapter is to regulate the subdivision of land and to promote public health, safety, and general welfare, in addition to creating a uniform manner for subdividing property throughout the state.[1]

RCW 58.17.040 also incorporates various exemptions to the subdivision rules such as divisions approved under a commercial or industrial binding site plan, boundary line adjustments, and divisions for certain types of leases. One notable exemption that is often overlooked is the exemption for divisions of land made by testamentary provisions. This exemption, (hereinafter, referred to as the "Subdivision Exemption"), provides in part:

> "The provisions of this Chapter shall not apply to:
>
> …
>
> (3) Divisions made by testamentary provisions, or the laws of descent."[2]

For many estate planning and probate practitioners, the law of subdivisions is outside their practice scope. Many real estate practitioners do not prepare estate plans or handle probate matters. Regardless of your chosen specialty, the Subdivision Exemption provides an opportunity for estate planners, probate practitioners, and real estate attorneys alike to collaborate and provide opportunities for their clients to do at death what they could not do while living: subdivide land without compliance with the state, county, and local subdivision rules.

This article explores the scope of the Subdivision Exemption, the cases interpreting it, and various ways to incorporate testamentary property division planning into clients' estate plans. The plain language of RCW 58.17.040(3) provides some basis for drafting special provisions into a will to create testamentary property divisions, as it references "testamentary provisions," but such language does not clarify the scope of the Subdivision Exemption, and how it can be used.

Municipal Codes. Most cities and counties throughout the state incorporate the Subdivision Exemption into their municipal codes, though, in some cases, reviewing local rules may not be enough, requiring practitioner knowledge of the underlying RCW code section.

For example, King County subdivision rules include an exemption titled "exemptions – subdivisions and short subdivisions"[3] with no direct reference to the RCW provision regarding the Subdivision Exemption; however, the Subdivision Exemption statute is incorporated by reference in a different section of the county code entitled "review for conformity with other codes, plans and policies."[4] Such provision provides:

> Furthermore, applications for subdivisions, short subdivisions and binding site plans may be approved, approved with conditions or denied in accordance with the following adopted county and state rules, regulations, plans and policies including, but not limited to:
>
> …
>
> B. Chapter 58.17 RCW (Subdivisions).

continued on next page

Table of Contents

continued from previous page

Avoiding County and City Subdivision Rules Through Testamentary Divisions

On the other hand, Chelan County subdivision code expressly clarifies the exemption and provides: "The provisions of this code shall not apply to … '[a]ny division of land made by testamentary provision or the laws of descent, RCW 58.17.040.'" [5]

Regardless of how the local municipal or county codes are written, there is little guidance in the statute and local codes that clarifies the scope of how the Subdivision Exemption can be used; therefore, a review of cases interpreting the Subdivision Exemption is informative. Three published Division I Court of Appeals cases have clarified specific uses and limitations of the Subdivision Exemption.

Case Law

1. ***Estate of Telfer v. Board of County Com'rs of San Juan County*** (1993).[6] In the *Estate of Telfer*, Mr. Telfer's three children were equal beneficiaries of his estate and, under his residuary clause in his will, were to each receive an undivided interest in real property located in San Juan County. Prior to distribution of the property from the estate, Mr. Telford's estate attempted to use the Subdivision Exemption statute to divide the property into three separate parcels. San Juan County Planning Department denied the estate's application, and the estate appealed. The County's decision was affirmed by the Superior Court. On appeal, the sole issue was whether real property passing under a residuary clause in a will could be subdivided without compliance with the County short plat requirements.

The County argued that the Subdivision Exemption required Mr. Telfer's will to specifically divide his property into discreet identifiable parcels. The Division I Court of Appeals disagreed, holding that the estate was entitled to divide the estate's real property into three parcels (as there were three beneficiaries) without compliance with the subdivision requirements. The *Telfer* court rejected the County's argument that testamentary divisions require specific provisions creating the property division and stated "a will need not divide the property into separate parcels, but a division of the property by those taking under the residuary clause may be made without complying with short plat requirements." Otherwise, the Court of Appeals reasoned, the words "or the laws of descent" included the Subdivision Exemption would be rendered meaningless, given that the laws of descent refer to estates passing to family members when someone dies without a will.

The *Telfer* court therefore clarified that this Subdivision Exemption can in fact be used if the decedent did not intentionally plan to divide property at death, so long as there are multiple beneficiaries legally entitled to the decedent's property. The court further clarified, however, that the parcels resulting from the testamentary division are not exempt from any other land use regulations. This issue was reviewed in *Dykstra v. County of Skagit* (1999).[7]

2. ***Toulouse v. Board of Com'rs of Island County*** (1998).[8] In *Toulouse*, the Division I Court of Appeals examined whether the Subdivision Exemption could be applied to a division where the decedent owned a one-quarter undivided interest in a 10-acre parcel of property on Whidbey Island. In this case, decedent's undivided one-quarter interest in the property was left in trust and was to be distributed to her five children when her youngest child turned 30. Before her youngest child turned 30, the children had acquired the remaining interest in the property.

George Toulouse, the trustee of the trust, then attempted to deed the trust's undivided interest in the parcel into five separate lots for each of the children in reliance on the Subdivision Exemption and the *Telfer* case, but the county rejected the deeds. Mr. Toulouse then filed a declaratory judgment action challenging the county's refusal to recognize the Subdivision Exemption. The Court of Appeals affirmed the grant of summary judgment in favor of the county, holding that partial interests in real estate cannot be divided under the Subdivision Exemption, beca use dividing the property took joint action by the co-tenants and was beyond the scope of the exemption. The *Toulouse* court confirmed that, where the entire property is divided by and conveyed through the laws of descent, however accomplished, the property can be divided under the Subdivision Exemption by the heirs and that neither the statute nor the court's opinion in *Telfer* would prevent such a division.

3. ***Dykstra v. County of Skagit*** (1999). In *Dykstra*, the co-trustees completed a testamentary division of a 15-acre parcel of land into seven lots. The co-trustees then sought to develop the lots and applied to the Skagit County Department of Planning and Community Development for a review of soil evaluations and designs for on-site sewage disposal. The Planning Department denied the permit applications because the lots were located in an agricultural district with a minimum lot size of 40 acres. In denying the permits, the county relied upon dicta in *Telfer* that stated: "[W]e emphasize that our holding is not to be understood as intimating the parcels resulting from the division are exempt from any other land use regulations."

The Superior Court affirmed the denial of the permits on summary judgment and the Dykstras appealed on the basis that Skagit County acted arbitrarily and capriciously in refusing to issue permits for development of their substandard lots as a matter of right. They also asserted that the county violated "substantive due process and fair warning" requirements, and "vested rights," by refusing to continue a previous practice of exempting testamentary lots from other requirements of the code. The Division I Court

continued on next page

continued from previous page

Avoiding County and City Subdivision Rules Through Testamentary Divisions

of Appeals found that the Dykstras correctly asserted that their substandard lots need not be aggregated or combined because they were divided by "other legal means." However, the *Dykstra* court rejected the Dykstras' arguments that the substandard lots could then be developed under the county's zoning code. The *Dykstra* court held that the provisions of the county's zoning code did not give the co-trustees the right to develop its testamentary lots because of limitations under the county's zoning code. The court further held that prior grants of building permits to testamentary lots did not create a right for future testamentary lots. So, while the court confirmed that Dykstras' lots were legally created, it found that the lots were non-conforming substandard lots without development rights under the county's zoning code.

To summarize the case law, *Telfer* confirms that specific language in a will is not required to utilize the Subdivision Exemption; a residuary clause allocating a decedent's property among multiple parties allows testamentary division by the number of beneficiaries. *Toulouse* confirms that the Subdivision Exemption does not extend to undivided interests in real property. *Dykstra* clarifies that development rights do not automatically vest in testamentary lots, thus making the Subdivision Exemption less attractive for those looking to create testamentary lots on undeveloped property to avoid local zoning and development rules. The primary value of the Subdivision Exemption thus lies in testamentary divisions of property that is already developed as a means of avoiding compliance with subdivision regulations. For example, the Subdivision Exemption could be used for the division of a non-conforming single parcel of agricultural property that contains multiple residences into separate, stand-alone residential and agricultural lots, which could not otherwise be achieved under the current zoning and / or without substantial expenditures for related infrastructure improvements that the local government would require.

Post-Dykstra Municipal Planning Department Rules. The *Dykstra* holding has allowed county planning departments to clarify their development standards for testamentary lots. Many municipal planning departments have clarified rules related to lots created through the Subdivision Exemption. For example, in 2005 the Skagit County Department of Planning and Development Services adopted Rule 3502, titled "Establishment of Lots Created by Testamentary Provisions or the Laws of Descent." Here, the department rule provides:

> All Divisions of Land made under RCW 58.17.040(3) Exemption Remain Subject to the Normal Land Use, Zoning and Building Requirements, and must comply with the Applicable Regulations which are currently in Effect, or which were in Effect on the Date of the Actual Transfer of Title by Devise or Intestacy.

Similarly, the Snohomish County Planning and Development Services Department provides guidance as to how it interprets "legal lots" for purposes of its development rules in "Assistance Bulletin # 24." This Bulletin provides in part:

> Q: What is a "legal" lot?
>
> A: A legal lot is considered "legal" under Snohomish County Code if it has been legally created and met all zoning and subdivision code requirements in effect at the time of lot creation

continued on next page

continued from previous page

Avoiding County and City Subdivision Rules Through Testamentary Divisions

Q: What if I received a lot through a will?

A: If you received a lot through testamentary provisions, it may be a legal lot if it:

- Meets current lot size requirements or those in effect when the lot was created.
- Meets access requirements in effect when the lot was created. (Contact PDS counter personnel for more information.)

Q: Is my lot eligible for a building permit?

A: Recognition of property as a separate lot does not imply or guarantee the property is buildable nor necessarily entitle an owner to permits for property development. Building and other development permits will be issued dependent on consistency with applicable county codes, regulations, and policies. For example, legal access to a county road must always be provided before a building permit may be issued.[9]

Essentially, local municipalities are incorporating *Dykstra's* holding directly into their local land use rules, so testamentary property divisions are not going to create additional opportunities for development rights. However, there are many situations where property divisions make good sense when there is no intention of the property owner (or his or her heirs) to develop the property.

Practice Tips and Planning Opportunities. With *Dykstra's* clarification of limitations related to development rights for testamentary lots, and the guidance from *Telfer* and *Toulouse*, and the statutory language of the Subdivision Exemption itself, we can incorporate testamentary division planning into our estate planning and probate practices.

1. **Estate Planners**. Estate planning practitioners have the best opportunity to use the Subdivision Exemption by drafting specific property division provisions into a will or trust. This is specifically contemplated as the statute refers to "[d]ivisions made by testamentary provisions." Thus, specific language in a will that instructs the personal representative how they would like to divide their real property can create opportunities for divisions beyond the "residuary clause" division authorized in *Telfer*. However, given the concerns for property owned as "tenants in common" under the *Toulouse* holding, practitioners assisting married couples need to be mindful of how property could be divided upon the death of the first spouse, to avoid the unintentional creation of "tenants-in-common" ownership.

For example, if decedent's will leaves his half community interest in real property into a testamentary trust for the benefit of his surviving spouse rather than outright to the surviving spouse, he is creating a tenants-in-common ownership between the trust and his surviving spouse, unless his spouse and personal representative exchange assets as part of the trust funding. Testamentary division planning can likely be preserved, however, if the drafter includes identical property division language into both spouses' wills effective on the second death.

When discussing how testamentary division planning opportunities may make sense for clients, it is important to find out their long-term goals for their property. For clients looking to maximize the value of their real estate for their children through sale, look for situations where property divisions can increase sale value by selling separate lots. Where clients intend to hold the real estate and pass it on to their children or heirs, testamentary divisions may allow the children to avoid co-ownership of property or may allow parents to equalize the value of their estate's property through divisions without requiring sale.

A common testamentary division plan involves separating a home from an operating orchard or farm. Many farmers own their home located within their orchard or farm. In these more rural settings, zoning codes often have minimum lot sizes of 5, 10, or even 20 acres. Testamentary division planning can provide an opportunity to carve out a separate nonconforming lot for the home, apart from the operating farm. This allows the heirs to sell the home and farm separately, or allows them to sell one without the other and adds flexibility for probate administration. Also, with an existing home as a non-conforming lot, there is less impact or issue with future development limitations for the testamentary lot. The Subdivision Exemption can also successfully be used to complete boundary line adjustments between the decedent's parcels without going through the county approval process, though the authority for this process is not clearly authorized.

In property division estate plans, drafters should expressly refer to RCW 58.17.040(3) in the Will and clarify the testator's intent to complete a testamentary division. It is also helpful to include language instructing the personal representative of the estate to hire a surveyor to establish a separate legal description for the testamentary lot(s). Depending on who will receive the property, the location and dimensions of the new lots create the potential for conflict between heirs, so consider incorporating a map to attach to the will outlining the testator's approximate boundary location, or give the personal representative authority to make the final determination of the lot locations.

2. **Probate Practitioners**. For probate practitioners, post-mortem testamentary division planning is authorized under the *Telfer* authority where the decedent did not incorporate a specific plan in his or her will. Outside of a *Telfer* division, where the personal representative can divide a parcel into as many lots are there are residuary

continued on next page

Mechanics Behind the 1% Washington QTIP Election

By Kirsten L. Ambach — Karr Tuttle Campbell

Estate planning for married Washington state residents is complicated by the disparate federal and state estate tax exemptions and the basis step up currently applied to qualified assets included in the surviving spouse's federal taxable estate. On the one hand, the couple may want to preserve each spouse's Washington estate tax exemption amount (currently $2,129,000) by allocating the deceased spouse's unused Washington exemption amount to a Washington exemption trust. This would avoid the assessment of Washington's estate tax, at rates ranging between 10 percent and 20 percent, on the value of the trust as of the surviving spouse's date of death. On the other hand, if the couple's combined estate will not exceed the surviving spouse's federal estate tax exemption amount, including the deceased spouse's unused exemption amount at the time of the surviving spouse's death, then the couple may also wish to benefit their heirs with a stepped-up basis on the entire estate, including the Washington exemption trust, following the surviving spouse's death. A stepped-up basis on the entire estate would avoid the assessment of federal capital gains tax, generally ranging between 15 percent and 23.8 percent (with the Medicare surtax), on the appreciation of qualified assets up to the surviving spouse's date of death. This article outlines the steps a practitioner may take to give the couple the best of both worlds – the benefit of a basis step up on qualified assets in the Washington exemption trust and the exclusion of the bulk of the trust assets from the surviving spouse's estate for Washington estate tax purposes.

A. The Estate Plan

At a minimum, the couple's estate plan must be structured so that upon the first spouse's death, an amount of assets equal to the decedent's otherwise unused Washington estate tax exemption can be allocated, by direct transfer or disclaimer, to a trust that qualifies for the Qualified Terminable Interest Property ("QTIP") election. In order for a trust to qualify for the QTIP election, all income of the trust must be distributed to the surviving spouse at least annually, and the trust principal may not be distributed to anyone but the surviving spouse during the surviving spouse's lifetime. The executor must also have discretion to make the QTIP election for federal and/or state estate tax purposes. Practically speaking, the deceased spouse's unused Washington estate tax exemption amount is distributable to a trust that serves as an exemption trust for state estate tax purposes and a marital trust for federal estate tax purposes (herein, the "Hybrid Trust").

continued on next page

continued from previous page

Avoiding County and City Subdivision Rules Through Testamentary Divisions

beneficiaries, there is little guidance for such divisions. Thus, the opportunities appear limited to divisions among those named in a residuary clause in a will. Such divisions may be valuable however, in resolving probate disputes, or when equalizing estates between beneficiaries without selling real estate or creating tenants-in-common property ownership among heirs.

From a practical perspective, the estate attorney will need to ensure that any deed that creates a testamentary lot has a sufficient legal description. This will likely require hiring a surveyor. In addition, the estate attorney will need to assist in coordinating the lot creation with the county treasurer, assessor and auditor to establish the new lot created in the deed and ensure it is recorded. Certain county officials will not have experience with the testamentary division statute and may push back on deed recording without being subject to the application process and such communication may allow the client the ability to save time and fees required through the county planning department.

To reduce the likelihood of involving the county planning department, prepare an educational recording cover letter with the deeds that refers to RCW 58.17.040(3) and the corresponding county code section, clarifying the estate's authority for the lot creation, together with a copy of the will and other probate documents.

Conclusion. Testamentary division planning creates opportunities for clients to divide property at death for the benefit of their children and heirs that they could not do during life. Understanding the opportunities and limitations of the Subdivision Exemption will help practitioners better evaluate if testamentary division planning makes sense for their clients.

1 RCW 58.17.010.
2 RCW 58.17.040(3).
3 King County Code Section 19A.08.040.
4 King County Code Section 19A.08.060.
5 Chelan County Code Section 12.02.020(3)(B).
6 71 Wn. App. 833, 862 P.2d 637 (1993).
7 97 Wn. App. 670, 985 P.2d 424 (1999).
8 89 Wn. App. 525, 949 P.2d 829 (1998).
9 https://snohomishcountywa.gov/DocumentCenter/Home/View/8091.

continued from previous page

Mechanics Behind the 1% Washington QTIP Election

B. Upon the First Spouse's Death

Upon the first spouse's death, the Hybrid Trust is funded with the deceased spouse's unused Washington exemption amount, and the executor must timely file a federal Form 706 and Washington estate tax return, even if the returns are not otherwise required because the estate is below the filing thresholds.

1. Federal Form 706

The deceased spouse's estate must timely file a federal estate tax return, Form 706, to elect the federal QTIP of the Hybrid Trust and elect portability of the Deceased Spouse's Unused Exemption ("DSUE") amount. To elect the federal QTIP of the Hybrid Trust, the trust is listed on Schedule M, Section A of Form 706, including the full value of the trust in the amount column. Timely filing Form 706 and not affirmatively electing out will automatically elect portability of the DSUE amount, which includes the value of the Hybrid Trust. Revenue Procedure 2016-49[1] confirms that the IRS will not invalidate a QTIP election in estates in which the executor made a portability election, even if the QTIP election was not necessary to reduce the estate tax liability to zero.

2. The Washington Estate Tax Return

In order to exclude the bulk of the Hybrid Trust from the surviving spouse's Washington estate, the deceased spouse's estate must also timely file a Washington estate tax return and make a minimal QTIP election on the Hybrid Trust, if no other Washington QTIP election is made in the deceased spouse's estate.[2] If no Washington QTIP election is made on the deceased spouse's Washington estate tax return, the full amount of the deceased spouse's federal QTIP property, including the Hybrid Trust, is included in the surviving spouse's Washington taxable estate.[3] If a Washington QTIP election is made as recommended here, however, then RCW 83.100.047 permits a deduction of the federal QTIP amount and the addition of the amount of the Washington QTIP to the surviving spouse's Washington taxable estate.[4] In other words, the deduction of the federal QTIP amount is only available to the surviving spouse's estate if there was a Washington QTIP election made in the deceased spouse's estate.[5] Therefore, for the surviving spouse's estate to both exclude the bulk of the Hybrid Trust assets from the Washington estate tax while also qualifying them for a basis step up at the federal level, the deceased spouse's estate must make a Washington QTIP election, however de minimis, as well as the federal QTIP election.

To make a Washington QTIP election, the Hybrid Trust is listed on the Washington estate tax return Schedule M, Section A, and the executor completes and attaches an Addendum #1. The instructions on the Washington Schedule M specifically provide that if

> the value of the trust (or other property) is entered in whole or in part as a deduction on Schedule M, under Section A, then unless the executor specifically identifies the trust (*all or a fractional portion or percentage*)…to be excluded from the election, the executor shall be deemed to have made an election to have such trust (or other property) treated as QTIP under RCW 83.100.047 (emphasis added).

In other words, by listing some amount of value of the Hybrid Trust on the Schedule M, Section A of the deceased spouse's Washington estate tax return, the surviving spouse's estate becomes subject to RCW 83.100.047, which results in the future deduction of the Hybrid Trust's federal QTIP property from the surviving spouse's estate. Because RCW 83.100.047 includes the Washington QTIP property in the surviving spouse's estate, the smallest possible Washington QTIP election value is recommended. Partial QTIP elections to trusts or other property are allowed, provided that they are made on a fractional or percentage share of the property.[6] A pecuniary amount, such as one dollar, does not qualify. Therefore, the "1% Washington QTIP election" has become the common reference name for the small, partial Washington QTIP election made to the Hybrid Trust.

The instructions on the Washington estate tax return Schedule M further provide

> if less than the entire value of the trust (or other property) that the executor has included in the gross estate is entered as a deduction on Schedule M, the executor shall be considered to have made an election only as to a fraction of the trust (or other property). The numerator of this fraction is equal to the amount of the trust (or other property) deducted on Schedule M. The denominator is equal to the total value of the trust (or other property).

This calculation can be better understood by considering the following example: if $20,000 is listed as the amount of the Hybrid Trust on the Washington Schedule M, Section A, and the total value of the Hybrid Trust is $2,000,000, as determined for the deceased spouse's estate tax purposes, then the Washington QTIP election shall only apply to 1% of the Hybrid Trust (20,000/2,000,000). In addition, to clarify to the Department of Revenue what is being done, it may be prudent to highlight the limited Washington QTIP election of the Hybrid Trust on the deceased spouse's Washington estate tax return by including explanatory language in the

continued on next page

continued from previous page

Mechanics Behind the 1% Washington QTIP Election

description of the trust on the Washington estate tax return Schedule M, Section A. For example:

> *John Doe Hybrid Trust, TIN 99-0000000; the estate hereby makes a partial Washington QTIP election as to 1% of the John Doe Hybrid Trust established under Article III of the decedent's Last Will and Testament (attached as Exhibit A).*

As noted above, the Washington estate tax return also requires a completed Addendum #1 be attached to the return as part of the Washington QTIP election process. It is on this addendum that the separate Washington and federal QTIP elections are highlighted. Specifically, the executor completes Parts 1 and 2 as follows:

- Part 2, Item 1 is checked "No" to indicate that the federal and Washington QTIP elections are different.
- Item 3(a) reports the total value reported on the Washington estate tax return Schedule M, Section A, i.e., the small amount of the Hybrid Trust.
- Item 3(b) reports the total value reported on the federal Schedule M, Section A, i.e., the full amount of the Hybrid Trust.
- For example, for the Hybrid Trust illustrated above, the value reported on Item 3(a) is *$20,000* and the value reported on Item 3(b) is *$2,000,000*.

The executor must also sign and date the completed Addendum #1 and attach it to the deceased spouse's Washington estate tax return.

Because only a small portion of the Hybrid Trust is included on the Washington estate tax return Schedule M, Section A, the trust is also listed on the Washington estate tax return Part 4, Item 5, as a trust receiving benefits of the estate not otherwise subject to a deduction, and the remaining balance of the trust included in the amount column. Continuing the example above, the Hybrid Trust would be identified as the "*John Doe Hybrid Trust*" and the amount is *$1,980,000*.

C. Upon the Surviving Spouse's Death

Upon the surviving spouse's death, if the surviving spouse's gross estate meets the filing thresholds as of the surviving spouse's date of death, the surviving spouse's estate is required to file a federal Form 706 and / or a Washington estate tax return. The surviving spouse's federal gross estate includes the full value of the Hybrid Trust as of the surviving spouse's date of death because the full federal QTIP election was made on the trust. The surviving spouse's Washington gross estate should only include the value of the small fractional share of the Hybrid Trust for which the Washington QTIP was made, valued as of the surviving spouse's date of death. Assuming the tax analysis made at the time of the deceased spouse's death proved accurate and the surviving spouse's estate is less than the surviving spouse's federal estate tax exemption (including the DSUE amount), no federal estate tax return is required for the surviving spouse's estate. If the surviving spouse's gross estate exceeds the Washington filing threshold, then the executor must timely file a Washington estate tax return.

1. The Washington Estate Tax Return

On the surviving spouse's Washington estate tax return, the executor answers "Yes" to question 6 of Part 4 respecting the inclusion of QTIP property in the surviving spouse's estate. The Hybrid Trust is then reported on the Washington Schedule F, and the value included in the surviving spouse's estate is determined by applying the percentage of the Washington QTIP election to the value of the assets of the Hybrid Trust as of the surviving spouse's date of death. Continuing the example above, if the Hybrid Trust appreciated from $2,000,000 to $3,000,000 between the deceased spouse's death and the surviving spouse's death, then *$30,000* (3,000,000 x 1%) is reported as the total value of the Hybrid Trust on the surviving spouse's Washington Schedule F.

Again, in order to clarify to the Department of Revenue what is being done, it may be prudent in the description of the trust on the Washington Schedule F to use clarifying language respecting the partial Washington QTIP election. For example, the trust may be described as,

> *John Doe Hybrid Trust, TIN 99-0000000; a partial Washington QTIP election as to 1% of the John Doe Hybrid Trust was made by the estate of the decedent's predeceased spouse, John Doe.*

In addition, instructions to the Washington estate tax return Schedule F direct that if the estate contains property pursuant to RCW 83.100.047, an Addendum #1 must also be attached to the return. The Hybrid Trust qualifies as such; separate federal and Washington QTIPs were elected on the deceased spouse's Washington estate tax return. As a result, the executor completes Part 1 and Part 3 of the Addendum for the surviving spouse's estate as follows:

- Part 3, Item 1 is answered "No," because the Washington and federal QTIPs of the deceased spouse's estate did not match.
- Part 3, Item 2(a) reports the value of the fractional or percentage interest of the Hybrid Trust for which the Washington QTIP election was made, as determined

continued on next page

Taking TEDRA to Local Jurisdictions

By Sean A. Russel — Stokes Lawrence, P.S.

The Trust and Estate Dispute Resolution Act ("TEDRA") is a set of procedures that applies to judicial and nonjudicial resolution of disputes involving matters within the purview of RCW Title 11. By itself, when used in conjunction with the statewide and local Civil Rules, TEDRA provides a sufficient framework for resolving disputes. Some local jurisdictions, however, have chosen to supplement TEDRA's framework by enacting local rules specifically tailored to TEDRA litigation. This article is intended to identify the extent to which local jurisdictions in Washington have recognized and capitalized on the opportunity created by TEDRA for prompt and efficient resolution of trust and estate disputes.

To prepare these materials, I researched local court rules throughout Washington's 39 counties to identify jurisdictions that have enacted procedures specific to TEDRA matters. When this project started, I was expecting that my research would take weeks, or even months, to dissect all of the local rules across the state and then to distill that information into a concise summary that could be used by TEDRA practitioners. I was surprised to learn that most local jurisdictions have not embraced the unique procedural advantages of TEDRA. In fact, only a few local jurisdictions have enacted rules specifically tailored to address TEDRA matters.

Given the results of my research, my focus changed from summarizing TEDRA-specific local court rules across Washington to bringing awareness to a missed opportunity for local jurisdictions. The missed opportunity is a lack of local court rules that embrace and expand upon the expedited procedures in TEDRA.

This article will first highlight some of the unique benefits of TEDRA, then look at how local jurisdictions have, or, in many cases have not, taken advantage of an opportunity to create an expedited process for resolving trust and estate disputes. This article is also intended to encourage TEDRA practitioners throughout Washington

continued on next page

continued from previous page

Mechanics Behind the 1% Washington QTIP Election

for the surviving spouse's Washington taxable estate (namely, the value of the trust included on the Washington Schedule F).

- Item 2(b) reports the full value of the Hybrid Trust, as determined for the surviving spouse's federal taxable estate.[7]

For example, for the Hybrid Trust illustrated above, the value reported on Item 2(a) is *$30,000* and the value reported on Item 2(b) is *$3,000,000*.

The executor must then sign and date the Addendum #1 and attach it to the surviving spouse's Washington estate tax return.

2. Basis Step Up

Under current federal tax laws, all qualified assets of the Hybrid Trust will receive a basis step up to their value as of the surviving spouse's date of death.[8] This is a terrific result as illustrated by the example above. In exchange for including $30,000 in the surviving spouse's Washington taxable estate, all unrealized gains on the qualified assets of the trust are wiped out and the basis of these assets are reset to their value as of the surviving spouse's date of death. Upon the sale of these assets, the estate or the heirs would benefit from the reduction, even elimination, of associated capital gains tax because their basis was stepped up.

D. Typical Attorney Disclaimer and Other Words of Caution

The Hybrid Trust plan outlined in this article is provided for general information purposes only and is subject to changes in both Washington and federal tax laws, the latter of which may be imminent. In addition, the assets of the Hybrid Trust are not available for lifetime gifting by the surviving spouse. Further, the DSUE amount is vulnerable to the death of a subsequent spouse of the surviving spouse. The process outlined in this article is therefore only one tool in the practitioner's toolbox for pre-and post-death tax planning for a Washington married couple, and may not be applicable or even prudent in all cases.

1 Released in September 2016.

2 This article applies to those estates where the Hybrid Trust is the only trust funded by the deceased spouse's estate and no other Washington QTIP election is made. If a Washington QTIP election is otherwise made on the deceased spouse's estate tax return, then RCW 83.100.047 should be invoked on the death of the surviving spouse with respect to the other Washington QTIP assets, and the Hybrid Trust would presumably not require even a minimal Washington QTIP election to be excluded from the surviving spouse's Washington taxable estate despite its federal QTIP election.

3 RCW 83.100.020(15).

4 RCW 83.100.047(3)(b); WAC 458-57-115(2)(c)(iii)(B).

5 RCW 83.100.047(3)(b); WAC 458-57-115(2)(c)(iii)(B).

6 *See* 26 CFR 20.2056(b)-7(b)(2)(i); WAC 458-57-115(2)(c)(iii)(A).

7 If a federal estate tax return is filed, the value for the Hybrid Trust on Item 2(b) must match the value of the trust reported on the federal Schedule F.

8 IRC Section 1014(b)(10).

continued from previous page

Taking TEDRA to Local Jurisdictions

to advocate for rule change in their home jurisdictions so the benefits of TEDRA can be maximized statewide.

I. TEDRA Overview

The Trust and Estate Dispute Resolution Act (TEDRA) was enacted in 1999 and can be found in RCW Chapter 11.96A. TEDRA is a set of procedures that applies to judicial and nonjudicial resolution of disputes involving matters within the purview of Title 11.[1] As a procedural statute, it does not create new or independent claims or causes of action, and instead, provides mechanisms and standards by which such claims may be presented, heard, and resolved. TEDRA serves as a model and a vehicle for effective resolution of disputes and as a means to address issues as they arise in the course of probate and trust administration. If you are dealing with an issue in a trust or estate that could be or is in dispute, TEDRA more likely than not applies.

Under RCW 11.96A.090, a TEDRA action must be commenced as a new action. Once commenced, the action "may" then be consolidated with an existing action "for good cause shown" by a party on a motion or by the court on its own.[2]

Although there has been recent discussion amongst practitioners regarding the cumbersome nature of the "new action" requirement, to date no legislation to reverse the requirement has been introduced.

Under TEDRA, the "first" or "initial" hearing can be, and sometimes is, the only hearing on the merits and can thereby result in a final order resolving the issue or dispute. Sections 7 through 10 of RCW 11.96A.100 provide:

> (7) Testimony of witnesses may be by affidavit;
>
> (8) Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law;
>
> (9) Any party may move the court for an order relating to a procedural matter, including discovery, and for summary judgment, in the original petition, answer, response, or reply, or in a separate motion, or at any other time; and
>
> (10) If the initial hearing is not a hearing on the merits or does not result in a resolution of all issues of fact and all issues of law, the court may enter any order it deems appropriate, which order may (a) resolve such issues as it deems proper, (b) determine the scope of discovery, and (c) set a schedule for further proceedings for the prompt resolution of the matter.[3]

Contemporaneous analysis by the attorneys who drafted the legislation reflects that these provisions were intended to "clarify that a court may resolve a matter promptly and efficiently at the initial hearing while also providing the court as much discretion and flexibility as possible to establish an appropriate procedure to be followed in any particular proceeding ...."[4] As a practical matter, counsel for the various parties may, and often do, reach agreement on what they would like to have happen (or not happen) at the initial hearing and will jointly present that information to the commissioner or judge. Time limits on oral argument in the ex parte department often result in referral at the initial hearing to the presiding department for assignment to a trial judge for hearing at a date and time subsequent to that set by the petitioner in his or her notice.

The authority for conducting discovery under TEDRA can be found in RCW 11.96A.115, which was added in 2006 to address discovery and to limit discovery to two situations. First, discovery is available in judicial proceedings that have been commenced under RCW 11.96A.100. Second, discovery may be available where the court has ordered discovery with regard to a "matter" for "good cause." In either event, RCW 11.96A.115 provides that "... discovery shall be conducted in accordance with the superior court civil rules and applicable local rules."[5] When discovery has been ordered by the court in a "matter" that is *not* a "judicial proceeding" brought under RCW 11.96A.100, discovery may be "otherwise limited by the court."

Pretrial motion practice[6] under TEDRA is allowed when consistent with TEDRA's goal of prompt resolution of trust and probate disputes.[7] Superior court judges are generally comfortable with applying the civil rules and their local rules to TEDRA proceedings; however, the timing of "prompt" hearings and trials under TEDRA often results in compression of standard pretrial deadlines for summary judgment motions or motions *in limine*. Again, attempting to schedule by agreement, acknowledging which cases warrant specialized briefing schedules, and seeking appropriate orders from the trial court is precisely the sort of flexibility TEDRA authorizes.

Trial under TEDRA is preserved by RCW 11.96A.170 in such cases where the party is otherwise entitled to a trial by jury. RCW 11.96A.170 provides that, in nonjury cases, the court shall "try the issues, and sign and file the decision in writing, as provided for in civil cases."[8]

TEDRA provides a tremendous advantage for practitioners and the court system. For practitioners, TEDRA provides an opportunity for a path to prompt and efficient resolution. Prompt and efficient resolution reduces costs and makes clients happy. For the court system, TEDRA grants broad authority for court commissioners and judges to exercise discretion to resolve disputes. This benefits the

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Taking TEDRA to Local Jurisdictions

court system by reducing the use of scarce resources that could be allocated elsewhere.

II. Local Rules Specific to TEDRA

There are surprisingly very few local jurisdictions in Washington that have embraced the legislative purpose of TEDRA by creating local rules related specifically to resolving trust and estate disputes. Instead, most local jurisdictions throughout Washington treat TEDRA petitions much like common commercial or tort disputes, which limits the benefits of TEDRA. As with most things, however, there are exceptions. King County and Pierce County are examples of local jurisdictions that recognized the opportunity to benefit from the procedures under TEDRA and acted on the opportunity by creating TEDRA-specific local rules.

A. King County, Washington

King County contains far and away the most interesting and useful local rules for TEDRA matters. The King County local rules relating to TEDRA matters should be a model for other local jurisdictions in Washington.

First, King County specifically exempts TEDRA matters from the requirement that a case schedule be issued at the point of filing the TEDRA petition.

King County Local Civil Rule 4 provides:

> **LCR 4. Civil Case Schedule**
>
> **(b) Cases not governed by a Case Schedule**. Unless otherwise ordered by the Court, the following cases will not be issued a Case Schedule on filing:
>
> * * * *
>
> (18) Will Contests, Probate and TEDRA Matters.

King County also has another specific rule, King County Local Civil Rule 98.14, which addresses TEDRA matters, and provides:

> **LCR 98.14 Trust and Estate Dispute Resolution Act and Power of Attorney**
>
> **(a) Applicability**. This rule shall apply to all judicial proceedings under RCW 11.96A.090 or 11.96A.300. All documents filed under this rule shall be captioned as In re Estate of. Documents may be further subcaptioned to identify specific parties as circumstances warrant.
>
> **(b) Hearings**. Judicial proceedings shall be assigned to the Ex Parte and Probate department. Hearings shall be noted at least 14 days in advance and at least 20 days after service and filing of the TEDRA petition. See also LCR 98.04(b)(6). If a need for an extended hearing arises, the matter will be certified for trial. The Clerk's Office will issue a judicial assignment and a trial date.
>
> **(c) Performance requirements**. All issues initiated under TEDRA that pertain to an estate must be resolved before the estate can be closed. If the TEDRA proceeding was filed as an incidental action under a separate cause number, when all issues are resolved and the case is ready to be closed, a document shall be filed in the matter indicating that a complete resolution has been achieved.

In addition to KCLCR 98.14, King County also specifically identifies notice requirements for the parties under Local Civil Rule 98.04, which provides:

> **LCR 98.04 Estates - Probate - Notices**
>
> **(b) Clerk's File and Noticed Hearings Required**. The following matters shall be noted for hearing at least 14 days in advance:
>
> * * * *
>
> (6) Working copies of all documents in contested matters and those matters requiring notice must be submitted to the Ex Parte and Probate Department, hearing judge, or commissioner, not later than seven days preceding the hearing. Response documents including briefs, if any, must be filed with the clerk, copies shall be served on all parties, and working copies shall be submitted to Ex Parte, the hearing judge, or commissioner, no later than noon four court days prior to the hearing time. Documents in strict reply thereto shall be similarly filed and served no later than noon two court days prior to the hearing. Working copies shall be submitted pursuant to the requirements of LCR 7(b) to the extent not inconsistent with this rule.

The primary benefit of the King County Local Civil Rules is that they promote procedural consistency and create a detailed procedure for efficiently resolving trust and estate disputes. Once the TEDRA petition has been filed and served, the "initial hearing" or "first hearing" under RCW 11.96A.100 is automatically set on the 10:30 a.m. ex parte calendar before a court commissioner.

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Taking TEDRA to Local Jurisdictions

TEDRA hearings in King County typically last between 5 minutes and 90 minutes depending on the complexity of the dispute and the court's docket. On average, a typical TEDRA hearing will last between 10 and 20 minutes. The court commissioner will typically not take testimony at the "first" or "initial" hearing.

If there are preliminary matters that need to be addressed at the "first" or "initial" hearing – such as freezing accounts to preserve assets – the court commissioner will typically enter an order resolving the issue. Otherwise, it is common during the "first" or "initial" hearing to have the court commissioner sign an order that sets the TEDRA matter for trial in 90 days. This typically occurs either at the behest of the court commissioner under the authority of the local rules (LCR 98.14(b)), or upon the request of one of the parties under RCW 11.96A.100(8).

Once a 90-day trial order is signed and received by the clerk's office, the clerk will assign a judge, set the matter for trial, and issue a 90-day "trial-only" case schedule that is substantially similar to the form set forth in LCR 4(e)(2).

The King County Local Civil Rules are designed to keep matters moving towards completion. Requiring TEDRA disputes to move first through the court commissioners has resulted in a bench that operates with a high level of familiarity with the law and procedures of TEDRA. This benefits litigants and reduces precious judicial resources.

B. Pierce County, Washington

Pierce County's local rules also provide a good example of an approach that embraces TEDRA and promotes the efficient resolution of trust and estate disputes. One of the main differences between the local rules of King County and Pierce County, however, is that King County initially routes all TEDRA matters through the court commissioners, whereas Pierce County allows for some TEDRA matters to bypass the court commissioners and be heard initially by the superior court department. Pierce County Local Rules provide:

> **PCLR 3 COMMENCEMENT OF ACTION/CASE SCHEDULE**
>
> **(b) Civil (Non-Family) Cases Receiving a Mandatory Court Review Hearing Date upon Filing**. The following case types are ones for which the Clerk shall issue, at the time of filing, or for estate cases when an order appointing personal representative is filed, an Order Assigning Case to Judicial Department and Setting Hearing Date (Form B1, except as to certain estate matters as set forth in section (b)(4) below). The time frame for the Mandatory Court Review Hearings vary depending on the type of matter, as indicated below:
>
> * * * *
>
> **(3)** Case types to be reviewed 12 months after filing:
>
> - Adoption
> - Child Support or Maintenance Modifications
> - Estate / probate if court supervision is required (e.g. bond required, either a guardian or guardian ad litem is appointed to represent a minor or incompetent heir, or estate insolvent) or is otherwise governed by RCW 11.76.010, except any will contest or litigation matter arising in a probate case shall be assigned an Order Setting Case Schedule when the Petition to Contest the Will is filed or the estate is sued.
> - Paternity Parent Determination
> - Trust and Estate Dispute Resolution Act (TEDRA)
>
> * * * *
>
> **PCLR 7 MOTIONS: JUDGES AND COMMISSIONERS**
>
> * * * *
>
> **(b) Commissioners' Motions**
>
> **(1) Civil Divisions A, B, C and Ex Parte**. Court Commissioners hear and decide all matters brought before these divisions as set forth below. There are four civil Court Commissioners in Divisions A, B, C and Ex Parte.
>
> * * * *
>
> **(B) Subject Matter**. The function of these Civil Divisions is to hear applications for show cause orders, motions for temporary orders, petitions to modify child support, initial determination of adequate cause on Petitions to Modify Parenting Plans and Non-parental Custody Petitions, initial relocation hearings, probates, trust and guardianship matters (except for annual periodic reviews and initial hearings under TEDRA if live testimony is to be presented or the hearing will likely last longer than twenty minutes, which are heard by the Superior Court Department assigned on its Friday motion docket), minor settlements, unlawful detainer actions, applications for appointment of a receiver,

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injunctive relief and restraining orders, defaults eligible for presentation in the Ex Parte Department wherein no notice is required, supplemental proceedings, paternity actions, contested show cause proceedings, domestic violence, vulnerable adult protection hearings, sexual assault protection hearings, uncontested/default dissolutions, committed intimate relationships (meretricious relationships), domestic partnerships, and uncontested/default self-represented party dissolutions, and ex parte matters. Court Commissioners do not hear discovery motions.

In practice, most contested TEDRA matters in Pierce County will be heard by the superior court department because they will be expected to last more than 20 minutes. This raises the question of whether the Pierce County local rules add anything beyond the procedures in TEDRA to facilitate an efficient resolution of trust and estate disputes. The fact that TEDRA matters can bypass the court commissioners deprives Pierce County of the opportunity to reap the benefits it might receive if it followed the King County model of first routing all TEDRA matters through the court commissioners.

C. Yakima County, Washington

Although I have litigated cases across Washington, my practice is primarily focused in Yakima County. I have found that Yakima County is similar to most other local jurisdictions in Washington with regard to specific rules addressing TEDRA – there are none. Yakima County's local rules specifically exempt a case scheduling order in probate matters, but they are silent with regard to TEDRA matters.[9]

If King County is one example of a local jurisdiction that has embraced TEDRA and thoughtfully implemented local rules to effectuate the purpose of TEDRA, Yakima County, like so many jurisdictions throughout Washington, is an example of a local jurisdiction that could benefit from new local rules to maximize the benefits of TEDRA. Depending on the unique circumstances of each local jurisdiction, one approach may not necessarily be better than another; however, the differences from jurisdiction to jurisdiction raises the question of whether TEDRA's purpose of prompt and efficient resolution of trust and estate disputes is not being realized by some local jurisdictions.

III. Conclusion

TEDRA is unique to Washington in that it provides a statewide procedural framework for litigating and resolving trust and estate disputes. However, TEDRA does not mandate all of the specific steps necessary to reach maximum efficiency. The gap between TEDRA's procedural framework and local rules creates the potential for TEDRA proceedings to be treated as common commercial or tort disputes, which are slow and costly to resolve. Local jurisdictions can bridge the gap by creating local rules that provide a consistent and efficient process.

For TEDRA practitioners, the goal of trust and estate litigation should be efficient and effective resolution of disputes in the best interest of the client. Unfortunately, the likelihood of achieving this goal throughout Washington currently depends upon the location of the litigation and whether local rules have been adopted to promote an efficient resolution.

The King County Local Civil Rules are a model of what should be considered for implementation by other local jurisdictions. While the King County Local Civil Rules may not provide the perfect approach, the benefits of creating a defined path to resolution, similar to the approach adopted in King County, is certainly better than not having any TEDRA specific local rules to guide TEDRA practitioners.

1 RCW 11.96A.010.
2 RCW 11.96A.090(2) and (3).
3 RCW 11.96A.100.
4 *See* WSBA Real Property, Probate and Trust Section, Comments to the Trust and Estate Dispute Resolution Act Section 303 at 5, S.B. 5196, 56th Leg., Reg. Sess. (1999).
5 RCW 11.96A.115.
6 RCW 11.96A.100.
7 *See, e.g.*, RCW 11.96A.100(9) and (10).
8 RCW 11.96A.170.
9 *See* YCLCR 40(a)(3)(14) and (15) (exempting Guardianship and Probate matters from the Case Scheduling Order requirement).

Recent Developments

Real Property

By Jessica A. Cohen — Ryan Swanson & Cleveland, PLLC

Adverse Possession, Res Judicata, Tribal Sovereign Immunity and CR19

Ofuasia v. Smurr, 198 Wn. App. 133 (2017)

In this case, the Court of Appeals held that the arbitration decision of two neighbors' dispute about use and ownership of an easement did not preclude the plaintiffs from bringing their adverse possession claim in a subsequent lawsuit.

The Ofusias and Smurrs were neighbors in a subdivision, and their properties were located adjacent to a private road running east-west, which was a nonexclusive easement and subject to a road maintenance agreement, that, among other terms, prevented the parties from blocking or interfering unreasonably with the road's use. At the west end of the road was a turnaround area within the easement and that bordered the Ofuasias' property.

The Ofusias purchased their property in July 2005. The prior owner installed a chain link fence that ran along the western boundary and encroached the turnaround part of the easement. The Ofuasias built their house and installed landscaping between their garage and the fence, including placing boulders and arborvitae. Later, they removed the chain link fence, but left the metal posts, and placed a wooden fence inside the prior fence and landscaped up to the area marked by the metal posts.

In April 2013, Smurr claimed the boulders were within the easement's boundaries and the placement of the fence and shrubs in the turnaround violated the road maintenance agreement. Smurr commenced arbitration and the parties arbitrated between three arbitrators without attorneys. The arbitrators did not agree on whether the Ofuasias needed to remove the landscaping and fence. One arbitrator dissented on the basis that the Ofuasias may own the property based on adverse possession as the Ofusias presented evidence that the original fence was erected more than 10 years ago. In an email response sought to clarify their decision, the arbitrators stated that if Smurr obtained the survey, the fence "may have to be removed, but it may also be that adverse possession has occurred."[1]

Smurr ordered a survey, which confirmed that the boulder, fence, and trees were encroaching the easement. Smurr warned the Ofuasias in a letter that if they did not move such encumbrances within 30 days, he would do so himself.

The Ofuasias then hired a lawyer to clarify the arbitrators' decision as to whether or not Smurr had the right to remove their fence and landscaping. They argued they owned the property through adverse possession and that the arbitrators lacked authority to rule on removing the encroaching items because the arbitrators had not yet seen the survey. Via email, the arbitrators stated that "Although the fence may have existed since 2003 the issue of adverse possession was not fully developed," and they "did not intend to foreclose the possibility that Mr. Ofuasia could in a proper forum plead and establish the necessary elements of adverse possession."[2] The Ofuasias sent this letter to Smurr along with their own reply that he would be committing trespass if Smurr damaged, destroyed, or removed the fence. The next week, Smurr removed the fence and cut down the trees.

Four months after arbitration, the Ofuasias filed a lawsuit to quiet title and for statutory and common law trespass. The Ofuasias moved for partial summary judgment on the adverse possession and trespass claims, and the trial court granted their motion on the adverse possession claim but denied it as to the trespass claim. The trial court granted Smurr's motion to dismiss the Ofuasias' trespass claims. The Ofuasias appealed, and Smurr cross appealed.

Smurr argued that the arbitrators' decision was final and binding, and because the Ofuasias did not raise their adverse possession argument during the arbitration, they were prevented, by res judicata,[3] from raising their adverse possession claim in court. The appellate court disagreed, because the arbitrators did not rule on the adverse possession claim and stated that the possibility of such claim did not prevent the Ofuasias from bringing the adverse possession claim action "in a proper forum."

Smurr argued that the Ofuasis did not establish the property through adverse possession because the Ofuasis (1) owned their land for only eight years and did not present any evidence to show "tacking" from the previous owner, (2) for two of the years the Ofuasis rented out their home, and (3) they replaced the fence with 30 feet of arborvitae.

The appellate court rejected Smurr's arguments and found the evidence the Ofuasias presented at summary judgment properly satisfied the elements of adverse possession. To gain title to property through adverse possession, the possession must meet the following elements for a period of 10 years:[4] (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile.[5]

The appellate court found the element of open and notorious was met, which requires evidence that a) the title owner had actual notice of the adverse possession during the 10-year period, or b) the claimants (or previous owners) used the property in such a way that the reasonable person would have thought she owned it.[6] Additionally, the two-year rental period did not destroy adverse possession because the area of the original fence had been

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continued from previous page

Recent Developments: Real Property

continuously maintained. Claimants may "tack" years if "there is a reasonable connection between the successive occupants that will raise their claim of right above the status of wrongdoer or trespasser."[7]

The element of hostility, is met when "the claimant treat[s] the land as his own as against the world, throughout the statutory period." [8] The appeals court found that the arborvitae was a "clear demarcation between the Ofuasias's property and the turnaround area."[9] The appeals court found that both fences and trees are "typical expressions of hostility"[10] as they mark boundaries and act to exclude others and the fence was "prima facie evidence" of hostility. The chain link fence the prior owner installed surrounded three sides of the property and stayed in place until the property was sold to the Ofuasias. The Ofuasias planted arborvitae along the fence which they maintained, and clearly marked their yard and the turnaround area with landscaping up to the line of the original fence. Smurr did not present any evidence showing that the initial chain link fence was not a boundary fence.

Under statutory trespass,[11] one is liable for three types of conduct in entering another's land: "(1) removing valuable property from the land, (2) *wrongfully* causing waste or injury to the land, and (3) *wrongfully* injuring personal property or real estate improvements on the land."[12] To act "wrongfully" means that "the defendant knew or had reason to know that he or she lacked authorization to act."[13] The appeals court also cited the timber statute and a person acts without lawful authority when "a person, with knowledge of a bona fide boundary dispute, intentionally enters the disputed area for purposes of destroying trees and does destroy them ...." The elements of common law trespass are "(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages."[14]

Smurr argued he did not act "wrongfully" because he relied on the arbitrators' statement that he may remove the fence if shown by a survey to encroach. The appellate court agreed with the Ofuasias that the lower court's dismissal of the trespass claims was an error, because genuine issues of material fact existed with respect to whether Smurr acted "wrongfully" and whether he could have reasonably foreseen that he disturbed the Ofuasias' exclusive possession even if Smurr relied on the arbitrators' decision and the survey.

Lundgren v. Upper Skagit Indian Tribe, 187 Wn.2d 857 (2017)

This five to four[15] Washington Supreme Court case examines in rem jurisdiction, Superior Court Civil Rule 19 (CR 19), and sovereign immunity. At issue is whether the lower court erred when it dismissed the Upper Skagit Indian Tribe's (the Tribe) assertion of sovereign immunity in an adjacent neighbor's quiet title action on theory of adverse possession of property on the boundary. In affirming the superior court's denial of the Tribe's motion to dismiss and entering summary judgment in favor of the plaintiffs, the Supreme Court held that because this was an in rem action, the lower court did not require the Tribe's participation in the lawsuit. Civil Rule 19 is a merit-based determination that inquires about the interest to be adversely impacted by the litigation. Because this was an in rem jurisdiction, the Supreme Court found that the Tribe had no interest in the disputed property, and the nonjoinder of the Tribe because of its sovereign immunity did not bar the court's in rem jurisdiction.

In 1981 Sharline and Ray Lundgren (the "Lundgrens") bought 10 acres of property to the south of the disputed property, where a barbed wire fence ran along the southern part of the Tribe's property. Since 1947, the property had been in the Lundgren's family, and evidence established that the same year a fence existed on the disputed property that had been treated as a boundary line. The "disputed property" at issue in this case was land between the fence and the southern border of the Tribe's land.

The Tribe bought their land, to the north of the Lundgrens, in 2013, by statutory warranty deed from three siblings who inherited their land from their mother. The Tribe did not obtain a survey until later that year when they wanted to take the land into Trust. In a letter sent to the Lundgrens in September 2014, the Tribe asserted their ownership over the entire property deeded to them in 2013 and stated that the fence did not represent the boundary. In March 2015 the Lundgrens initiated a quiet title lawsuit in the disputed property. They moved for summary judgment on the theory they owned the disputed property by adverse possession or mutual recognition and acquiescence many years prior to the Tribe's acquisition of the property. The Tribe asserted sovereign immunity and moved to dismiss under CR 12(b)(1) for lack of subject matter jurisdiction and under CR 12(b)(7), which requires joinder of a necessary and indispensable party under CR 19.

The superior court affirmed the Lundgren's summary judgment motion as the Lundgren's had met the elements of adverse possession, and the judge noted the case to be "as clear of a case as I've had on this bench."[16] The superior court ruled that it had in rem jurisdiction, and thus it did not require the Tribe's participation to have jurisdiction and determine ownership of the land. The Tribe argued that the case should be dismissed because i) the superior court did not have jurisdiction due to the Tribe's sovereign immunity, and ii) even if the court had in rem jurisdiction,

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continued from previous page

Recent Developments: Real Property

the Tribe was a necessary and indispensable party under CR 19 that could not be joined based on its sovereign immunity.

While the Lundgrens acknowledged the Tribe's sovereign immunity, they argued that the court's personal jurisdiction over the Tribe was unnecessary and irrelevant given the court had in rem jurisdiction over the property. The Supreme Court agreed.

Washington's superior courts have "original jurisdiction in all cases at law which involve the title or possession of real property."[17] In examining in rem jurisdiction, the Supreme Court found that quiet title actions are in rem proceedings where the court exercises jurisdiction over the property, not over the tribe or Indian people, and, looking at prior case law of the U.S. Supreme Court and the Washington Supreme Court, that a tribe's assertion of its sovereign immunity does not deprive the court of its in rem jurisdiction.[18]

The Supreme Court also found that CR 19 did not require the Tribe's dismissal because the Tribe was not a necessary party and did not satisfy the first requirement in a three-part analysis. Under CR 19, first the court must determine whether absent persons are "necessary." If the party is "necessary," the court must determine whether it is feasible to order the absent party's joinder. If joinder is not feasible, the court considers whether "in equity and good conscience" the action should proceed without the absent parties.[19] The Supreme Court determined that the Tribe was not a necessary party because it did not have a legally protected interest. It reached this conclusion by finding that the Tribe had no interest that would be adversely affected because the Lundgrens would succeed on their adverse possession claim. Viewing the evidence in the light most favorable to the nonmoving party, the Supreme Court found in favor of the Lundgren's adverse possession claim that they met the elements[20] for the statutory period of 10 years. The evidence the court weighed included the following: the disputed property had been in the Lundgren's family since 1947; for decades, a permanent and visible fence of 1,306 feet long existed between the properties; and the Lundgrens exclusively possessed and maintained the disputed property.

The Supreme Court stopped its CR 19 analysis when it found the Tribe was not a necessary party and did not consider whether the Tribe was indispensable. The Supreme Court found that "in this instance, dismissal leads to no justice at all" and emphasized the fact that a survey ordered prior to the Tribe taking title to the property would have revealed the fence and the possibility of a boundary dispute. While the Supreme Court did not want to "minimize the importance of tribal sovereign immunity, allowing the Tribe to employ sovereign immunity in this way runs counter to the equitable purposes underlying compulsory joinder."[21]

The dissent[22] disagreed and noted that while in rem jurisdiction grants courts authority to quiet title to real property without obtaining personal jurisdiction over the parties, CR 19 "counsels against exercising this authority in the face of a valid assertion of sovereign immunity."[23] The dissent found that the majority gave "insufficient weight" to the Tribe's sovereign immunity status, and cited case law that sovereign immunity "comprehensively protects recognized American Indian tribes from suit absent explicit and 'unequivocal' waiver or abrogation."[24]

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1 Ofuasia v. Smurr, 198 Wn. App. 133, 138 (2017).
2 Ofuasia, 198 Wn. App. at 139.
3 To succeed on a res judicata action, the party asserting the defense must initially show the final judgments on the merits in a prior suit, and then require the same subject matter, parties, cause of action.
4 RCW 4.16.020.
5 Ofuasia, 198 Wn. App. at 143, *citing* Nickell v. Southview Homeowners Ass'n, 167 Wn. App. 42, 50, 271 P.3d 973 (2012).
6 *Id*. at 143, *citing* Riley v. Andres, 107 Wn. App. 391, 396, 27 P.3d 618 (2001).
7 *Id*. at 144, *citing* Shelton v. Strickland, 106 Wn. App. 45, 51-52, 21 P.3d 1179 (2001).
8 Nickell, 167 Wn. App. at 50, 271 P.3d 973 (quoting Chaplin v. Sanders, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984)).
9 *Id*. at 146.
10 *Id*. at 143, *citing* Roy v. Cunningham, 46 Wn. App. 409, 413, 731 P.2d 526 (1986).
11 RCW 4.24.630(1)
12 Ofuasia, 198 Wn. App at 147, *citing* Clipse v. Michels Pipeline Constr., Inc., 154 Wn. App. 573, 577-78, 225 P.3d 492 (2010).
13 Clipse, 154 Wn. App. at 579-80.
14 At paragraph 44, *citing* Grundy v. Brack Family Tr. 151 Wn. App. 557, 567, 213 P.3d 619 (2009) (quoting Wallace v. Lewis County, 134 Wn. App. 1, 15, 137 P.3d 101 (2006)).
15 The majority opinion was written by Justin Johnson and concurred in by Justices Owens, Wiggins, González and Yu.
16 Lundgren v. Upper Skagit Indian Tribe, 187 Wn.2d 857, 864 (2017).
17 Article IV, section 6 of the Washington Constitution. See also RCW 2.08.010.
18 See County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wn.2d 862 (1996).
19 Lundgren, 187 Wn.2d at 868, *citing* Auto. United Trades Org. v. State, 175 Wn.2d 214, 222-23, 285 P.3d 52 (2012).
20 To succeed on an adverse possession claim, possession must be: "(1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile." ITT Rayonier Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).
21 Lundgren, 187 Wn.2d at 873
22 Justice Stephens filed the dissenting opinion in which Justices Gordon McCloud, Fairhurst and Madsen joined.
23 Lundgren, 187 Wn.2d at 874.
24 *Id*. at 874, *citing* Wright v. Colville Tribal Enter. Corp, 159 Wn.2d 108, 112, 147 P.3d 1275 (2006).

Recent Developments

Probate & Trust

By Tony Ramsey — Karr Tuttle Campbell

***In re Estate of Johnson*, 2017 WL 2984030 (Ct. App. Div. III July 13, 2017).**

In this unpublished opinion, the Court of Appeals addressed the issue of a trial court's discretion to hold an evidentiary hearing under TEDRA to confirm the authenticity of a will and the scope of Washington's dead man's statute as it applies to testimony regarding execution of a will.

In this case, Colleen Wynecoop brought an action under TEDRA to admit a photocopy of a lost will for the decedent, Willard Johnson. Ms. Wynecoop and the decedent had a romantic relationship and lived together prior to the decedent's death. The decedent became bedridden and Ms. Wynecoop cared for him and arranged for witnesses to visit the decedent to witness the decedent execute a will which he had arranged to be drafted by Leo Daily, an attorney who had assisted him previously with his legal matters. Ms. Wynecoop was not in the room when the will was executed but observed a number of relevant details related to the execution of the will. Shortly after the will's execution, a copy of the will was sent to the decedent by Mr. Daily and the envelope contained a sticky note indicating that the Will was a copy and that the original was in Mr. Daily's vault. The decedent asked Ms. Wynecoop to read the copy of the will, which made some specific bequests but left the remainder to Ms. Wynecoop and made no provision for the decedent's five children. After the decedent's death in 1990, Ms. Wynecoop was able to dispose of most of the decedent's assets without a probate; however, the decedent owned mineral rights which gave rise to the TEDRA petition. The oil company initially accepted a copy of the Will and a Proof of Death and Heirship affidavit which Ms. Wynecoop had filed and recorded in North Dakota after the decedent's death and entered into a lease with Ms. Wynecoop as the decedent's heir, which resulted in a substantial distribution to Ms. Wynecoop in 2011. Several years later, however, the oil company asked Ms. Wynecoop to probate the decedent's estate. Ms. Wynecoop attempted to locate the original will but the drafting attorney had died and the original will had been lost. Ms. Wynecoop brought the TEDRA petition to admit the photocopy of the decedent's Will and the decedent's children were notified of the petition. The trial court issued a letter ruling indicating that satisfactory evidence established that the signatures were genuine and that the will was properly executed, but that an evidentiary proceeding was to be held to establish the authenticity of the photocopy. At the evidentiary hearing, Ms. Wynecoop and an attorney from whom Mr. Daily rented space testified, and the trial court determined the photocopy was authentic and the will was admitted to probate.

The decedent's children appealed, primarily arguing that the trial court erred in holding an evidentiary hearing because RCW 11.96A.100(8) requires that all issues of fact and law be resolved at the initial hearing. They also argued that Ms. Wynecoop was barred from testifying by Washington's dead man's statute. The Court of Appeals ruled that the trial court did not err in holding an evidentiary hearing, citing RCW 11.96A.100(10) for the proposition that the court may enter such orders as it deems appropriate if the initial hearing does not resolve all issues. The Court of Appeals also ruled that the dead man's statute did not bar testimony from Ms. Wynecoop, holding that, though she was an interested party, the dead man's statute only prohibits testimony about words or acts involving a "transaction" between the interested party and the decedent, and that testimony about matters related to the execution of the will did not constitute a transaction between Ms. Wynecoop and the decedent.

While this case is unpublished and may be cited only as nonbinding authority, GR 14.1(a), it may be instructive particularly as to the scope of the dead man's statute. See GR 14.1(a) "unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities … and may be accorded such persuasive value as the court deems appropriate."

Practice Tip

SNDAs Debunked

By Mark C. Pepple — Pepple Cantu Schmidt PLLC

The term "SNDA" should elicit a stronger reaction from a real estate attorney than any four- letter word. They are expensive to negotiate, time-consuming and rarely worth the trouble.

SNDAs Generally. Short for "Subordination, Non-Disturbance, and Attornment Agreement," SNDAs are a common aspect of leasing and loan transactions. An SNDA subordinates a lease to a lender's security instrument, grants the tenant non-disturbance rights, and, through attornment, confirms that the lease will continue after foreclosure. Lenders making real estate loans frequently require that their borrowers obtain SNDAs from commercial tenants and a commercial tenant signing a new lease will often require the landlord obtain an SNDA from its lender.

The Problem. SNDAs are a headache for lender's counsel and tenant's counsel and a migraine for the landlord caught in the middle. The issues involved are complicated and the parties often have different conceptions of what is market standard. When negotiating the SNDA, the lender and tenant each have only an indirect interest in the other's transaction, so neither party has significant leverage to push past those conceptual differences. SNDA negotiations can become long, drawn-out processes resulting in significant expense and delays in closing the lease or loan; a classic example of the sideshow taking over the circus. Lenders and tenants raise many issues in SNDA negotiations, but the most important question is rarely asked: Is the document worth pursuing in the first place?

Subordination. Many lenders seek SNDAs simply because lenders like to be in first lien position. From a practical standpoint, however, the lender gives the benefit of the subordination right back to the tenant in the non-disturbance provisions. Even were that not the case, subordination of leases provides little benefit. When making a loan, a lender will undoubtedly evaluate the existing leases of the property and deem them sufficient to make the loan. The lender should then also include minimum leasing standards in its loan documentation, ensuring that the leases will provide rent sufficient for the borrower to make its payments on the loan. As a result, a loan default will typically occur due to a lack of leasing activity or some unrelated issue rather than an abundance of below-market leases. If a lender elects to foreclose, it will want to keep the existing leases in place, not eliminate the only source of cash flow from the property.

Non-Disturbance. Just as the subordination is of little value to the lender, the non-disturbance rights are of little value to the tenant. If the lease pre-dates the loan, the lease is already prior to the lender's security instrument. If the lease is entered into after the loan and meets the leasing standards in the loan, the risk that the lender will terminate it through foreclosure is remote. The remainder of the SNDA is almost entirely lender protections, so there is even less motivation for a tenant to seek an SNDA than a lender.

Attornment. Attornment is a tenant's agreement to recognize a new party as the landlord under a lease. Attornment is commonly addressed directly in the lease itself and, with the notable exception of automatic cut-off states such as California, is the presumed result of a lender taking title through foreclosure and collecting the rent payable under the lease.

Lender Protections. Lenders also seek SNDAs for protection against issues arising before foreclosure, but again, the risks guarded against in the SNDA are more theoretical than practical. Generally speaking, lenders seek protection against (a) landlord and tenant collusions, such as prepayment of rent and secretive lease amendments, and (b) pre-foreclosure failures of the landlord, such as defaults under the lease giving rise to offset rights. Regarding the former, rarely do unaffiliated, third-party landlords and tenants conspire to collude. They generally have misaligned incentives and in the majority of cases where that collusion has in fact occurred, courts have unwound the collusive actions, deeming them attempts to defraud the lender. With respect to the latter issue, the negotiated SNDA usually just reaffirms what would already occur in the absence of the agreement. For instance, if a tenant negotiated for a significant offset right in its lease, it will undoubtedly refuse to agree to waive it with respect to a foreclosing lender.

SNDA Distilled. The most valuable aspects of SNDAs are the tenant's agreements to (a) provide the lender with notice of landlord defaults under the lease, and (b) pay rent directly to the lender upon notice that the landlord has defaulted on its loan. Those are also the most uncontroversial aspects of the SNDA and, happily, can simply be added to the estoppel certificate. Certainly there are specific situations that can warrant an agreement between a lender and a tenant, but absent a specific issue to be addressed, SNDAs are little more than a time-consuming, and expensive, disturbance.

Legislative Updates – Probate & Trust

By Stephanie Taylor — Randall Danskin PS

I. Washington's Changes to the Filing Requirements for Washington Residents (SB 5358)

A. Introduction

1. On May 16, 2017, the Governor signed SB 5358 into law, to be effective July 23, 2017. The purpose of the bill was to "improve tax and licensing laws administered by the department of revenue."
2. Part 6 of the Act, the *Estate Tax Return Filing Relief*, amends RCW 83.100.050 to provide that Estates do not need to file an estate tax return if the gross estate is equal to or less than the applicable exclusion amount (currently $2,129,000).
3. RCW 83.100.050 was also amended under section (4) to require that all persons required to file a Washington return file "all supporting documentation for completed Washington return schedules, and, if a federal return has been filed, a copy of the federal return."

II. Washington's Uniform Decanting Trust Statute (SSB 5012).

A. Introduction

1. Washington's Uniform Trust Decanting Statute (SSB 5012) was signed into law on April 17, 2017, effective July 23, 2017.
2. Historically, if the Trustee wanted to modify an irrevocable trust, the Trustee would need to utilize Washington's Trust and Estate Dispute Resolution Act ("TEDRA") (RCW 11.96A) to make the changes necessary. TEDRA could be utilized to address any "issue, question or dispute involving…the determination of any question arising in the administration of an estate or trust…" In 2012, RCW 11.96A.125 was amended to provide that if a trust was to be reformed by the judicial procedures authorized under TEDRA, the parties had to establish by clear, cogent, and convincing evidence that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement. The statute was later further amended to provide that this standard would not apply to non-judicial binding agreements ("TEDRA Agreements") under RCW 11.96A.220.
3. Decanting Statutes, Purpose. The stated purpose of the decanting statute is to provide a relatively simple and low-cost procedure for modernizing trust documents, at the same time protecting the interests of beneficiaries. To that effect, the statute allows complete replacement of the original trust document with a new, updated trust document.
4. What Trusts May be Decanted.
   a) Irrevocable, Express Trusts in which the terms of the trust grant the trustee or another fiduciary the discretionary power to make principal distributions.
   b) Does *not* apply to
      (1) Revocable trusts *unless* they are revocable by the settlor only with the consent of the trustee or an adverse party;
      (2) Wholly charitable trusts;
      (3) Trusts in which the fiduciary does not have the authority to make discretionary principal distributions unless the court appoints a special fiduciary. There is an exception wherein the fiduciary may decant to create a special needs trust if the decanting will further the purposes of the first trust.
5. Who May Decant?
   (a) Generally, the power to decant is a fiduciary power exercisable by the fiduciaries of the first trust, to the extent that the fiduciary has some discretionary power of the principal of the trust.
6. Extent of decanting power depends on extent of discretion
   (a) Limited distribution discretion – limited by ascertainable standard (MESH)
      (1) The interests of each beneficiary in the second trust must be substantially similar to such beneficiary's interest in the first trust.
      (2) Administrative modifications, not dispositive provisions.
   (b) Expanded distribution discretion
      (1) May modify beneficial interests, subject to restrictions to protect interests that are current, noncontingent rights or vested remainder interests, to protect qualifications for tax benefits and to protect charitable interests.
7. Fiduciary Power
   (a) No duty to exercise decanting power

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Legislative Updates – Probate & Trust

(b) If exercised, the power must be exercised with the fiduciary duties of the authorized fiduciary
  (1) In good faith,
  (2) In accordance with its terms and purposes, and
  (3) In the interest of the beneficiaries.

(c) The exercise of the decanting statute must be in accordance with the purposes of the first trust and the Trustee may not disregard Settlor's intent, which is wholly different than the requirements under a non-judicial binding agreement. The Decanting Statute specifically provides that the modification must be only to better effectuate the settlor's broader purposes.

(d) As distinguished from a non-judicial binding agreement, the decanting power may be exercised without consent of the beneficiaries or the court; provided, however, that if a conflict of interest applies, consent is required.

8. Notice. Under the Act, "Qualified Beneficiaries," as defined under Washington law, are entitled to notice and may petition the court if they believe the authorized fiduciary has breached its fiduciary duty.
  (a) Any party may petition the court for:
    (1) Instructions;
    (2) Appointment of a special fiduciary;
    (3) Approval of an exercise of decanting power;
    (4) Determination of breach of duty;
    (5) Determination that savings provisions apply; or
    (6) Determination that the decanting is invalid.

III. Uniform Notarial Acts (SSB 5081) (Effective July 1, 2018)

A. Key changes to current law

1. A notary may obtain a license endorsement as an "electronic records notary public" from the Department of Licensing;
2. A notary may note a protest of a negotiable instrument only if the notary is licensed to practice law in this state, acting under the authority of a licensed attorney, or acting under the authority of a financial institution regulated by the state;
3. Notaries may not notarize their own signatures or the signature of in-laws or step-relatives;
4. Notaries must compare the original document being notarized to a copy of the original document;
5. Notary certificates must be in English or in a dual language format with one language being English;
6. The Director of the Department of Licensing does not have authority to invalidate a notarial act; and
7. The Department of Licensing must create and maintain an electronic database of licensed notaries.

IV. Termination of Guardianship (SB 5691) (effective July 23, 2017).

A. *SB 5691* provides that a court must modify or terminate a guardianship when a less restrictive alternative, such as a power of attorney or trust, will adequately provide for the needs of the incapacitated person.

B. The court should consider recent medical reports, testimony of the incapacitated person and the person's relatives, testimony of persons entitled to notice of special proceedings, and needs of the incapacitated person that may be better served in a less restrictive alternative.

V. Association Rights of Incapacitated Persons (HB 1402) (effective July 23, 2017)

A. *HB 1402* requires guardians to assist incapacitated persons in exercising their associational rights described in the Act. Guardians may not restrict associational rights unless allowed by court order, or, in cases of immediate need, for a 14-day period required to file a vulnerable adult protection order.

B. The Act also requires guardians to include any reports from mental health professionals as part of required annual reporting, and to provide persons entitled to notice of the incapacitated person's death, changes in residence over 14 days, or in-patient treatment.

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