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A Statute of Limitations Defense to Claims of Breach of Warranty in Adverse Possession Claims

by Joseph L. Rockne – Law Office of Joseph L. Rockne, PLLC

I. Introduction

Virtually every real property lawyer will be confronted with an adverse possession lawsuit at some point during his or her career. Parties to such actions are faced with the prospect of incurring significant attorney's fees and costs when prosecuting or defending such claims. To offset those expenses, a party defending against the loss of property to an adverse claimant may look to the warranties contained in the deed which conveyed their property to them for some relief.

In most real property transactions the seller, using a statutory warranty deed, warrants certain aspects of title. In particular, a seller will be obligated to defend title to the property should a third party challenge it. These warranties are known as the covenant of seisin and the covenant of warranty. In many instances the challenge to title does not arise for several months or even years after the conveyance. Does this third party have a defense to the claims being made? The purpose of this article is to argue that a seller does have a viable statute of limitations defense when the challenge to title is based on a claim of adverse possession, provided that the tender is made more than six years after the conveyance.

Statutory warranty deeds obligate sellers to warrant certain aspects of title. Perhaps the most common covenants are those of warranty and seisin. The covenant of warranty will require the grantor to compensate the grantee for any loss that the grantee suffers should there be a failure of title. The covenant of seisin is a guarantee by the grantor against a third party's claim that they have title to the property. Both covenants are implicated in an adverse possession claim. If the claim is successful and the

buyer loses a portion of the warranted property, then the covenant of warranty is breached and the beneficiary of the warranty is entitled to be compensated for the value of the lost property. If the claim is made, there is a duty on the part of the warrantor to provide for the costs of defending the claim.

Title defects do not often surface until many years after a conveyance. The passage of time makes defenses against such claims difficult. In Washington there is a six-year statute of limitations (RCW 4.16.040(1)) for the enforcement of written agreements. In order to assert a statute of limitations defense in an action alleging a breach of the covenant of warranty or title, one must first determine when the term began to run.

A seller breaches the warranty of title at the time he or she conveys the property if title (or a portion of title) has already been lost by adverse possession. If this is the case, then a buyer would have six years from the date of conveyance to bring a claim against the seller for the breach of the covenants of warranty and seisin based on a third party's adverse possession claim.

The following discussion will illustrate the defense.

II. Factual Background

To prevail on a claim of title by adverse possession, a party bears the burden of proving possession of the disputed property that was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for at least ten years. RCW 4.16.020; *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757-59, 774 P.2d 6 (1989). The person claiming adverse possession must have

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exercised dominion over the land consistent with actions a true owner would take. *Id.*

Inherent in the elements of adverse possession is the implication that the true owner is deemed to be on notice regarding the adverse possession. The true owner's failure to take any action for ten years renders the transfer by adverse possession complete. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 376 P.2d 528(1962).

Assuming that a seller had lost a portion of their property by adverse possession prior to the transfer to a new buyer, the seller would have been deemed to have been on notice at the time of the transfer. The idea of notice is critical in the application of adverse possession and in the triggering of the running of the statute of limitations. For if the seller in such a situation is deemed to have notice of the possession, the buyer should also be deemed to have the same knowledge.

In such circumstances, breach of warranty claims are barred by the six-year statute of limitations. RCW4.16.040(1); *Campbell v. Loftus*, 36 Wn.App. 678, 679, 676 P.2d 1025 (1984); and *Whatcom Timber Co. v. Wright*, 102 Wash. 566, 568, 173 P. 724 (1918).

III. Provisions of RCW 64.04.030: The Warranty Deed Statute

RCW 64.04.030 sets forth the prescribed language for warranty deeds and provides:

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns, with covenants on the part of the grantor: (1) that at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same, and such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at full length in such deed.

A. Meaning of Warranty Deed Statute

As provided in RCW 64.04.030, a warranty deed creates, as of the date of delivery, the following statutory warranties in favor of the grantee:

- (1) that the grantor owns an indefeasible estate in fee simple in the land described;
- (2) that the grantor has good right and full power to convey the estate;

- (3) that the estate is free from all encumbrances;
- (4) that the grantee is entitled to quiet and peaceable possession of the premises; and
- (5) that the grantor will defend the title against all persons who may lawfully claim the same. *Wash. Real Property Deskbook* 3d, Vol. II, §32.3(2), p. 32-4 citing RCW 64.04.030.

B. The First Warranty Is One of Seisin and Is Breached at Time of Conveyance

The first warranty that the grantor makes is that he or she was "seised" of an estate in fee simple; this is called the warranty of "seisin." 17 William B. Stoebuck, *Washington Practice: Real Estate: Property Law*, §7.2 at 447 (1995). The covenant of seisin is breached when an adverse possessor physically possesses land at conveyance, regardless of whether the adverse possessor's claim is "rightful or wrongful." *Mastro v. Kumakichi Corp.*, 90 Wn.App. 157, 162-163, 951 P.2d 817, *rev. den.* (1998). The covenant is broken the moment it is made if there can be no seisin by the grantee. *Double L Properties v. Crandall*, 51 Wn.App. 149, 152, 751 P.2d 1208 (1988).

The statute of limitations for the covenant of warranty begins to run from the time it is broken. *Whatcom Timber Co. v. Wright*, 102 Wash. 566, 568, 173 P. 724 (1918).

In *Whatcom Timber*, grantor conveyed land by warranty deed. Eight years later, grantee (purchaser) sued the grantor for breach of the covenants contained in the deed, alleging that grantor did not have title at the time of conveyance. The trial court dismissed the complaint, and the Supreme Court affirmed, with the following reasoning:

[i]f land conveyed by general warranty is in adverse possession under paramount title at the execution of the deed, the grantee's eviction dates, and the statute of limitations against an action for breach of warranty runs, from the date of the deed.

Whatcom Timber Co. v. Wright, 102 Wn. 566, 568.

Under *Whatcom Timber*, if the land, or a portion of the land, conveyed were adversely possessed by another at the time of conveyance, the buyer would be evicted from the strip of land on that date, and the six-year statute of limitations would begin to run on that date.

Buyers may attempt to avoid a statute of limitations argument by citing to *Foley v. Smith*, 14 Wn.App. 285 (1975), and arguing that the seller had a duty to defend title and that the warranty was not breached until the third party filed the complaint to quiet title. *Foley* was, among many other things, a "specific

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performance” lawsuit. The sellers had entered into two purchase and sale agreements. Six years after the original transactions the trial court ordered grantor to convey the land to a prior purchaser, and divested the grantees of their interest. The grantor returned the grantees’ purchase money, but the parties disagreed as to who was entitled to the some additional funds. *Foley* at 288. Ultimately, the divested grantees sued the grantor and alleged breach of warranty.

The Court of Appeals held that the prior purchaser’s decree of specific performance was an eviction, and breached the covenants of warranty and quiet enjoyment in the deed. The grantees’ knowledge of the potentially superior claim to the land did not bar their claim for breach of covenants. The six-year statute of limitations on the covenants did not begin to run until the specific performance decree evicting the grantees became final. *Foley* at 292.

The court held that the covenants of warranty and of quiet enjoyment were not broken until the grantees were evicted by the decree of specific performance. It is the fact of eviction that starts the limitations clock ticking. *Foley* at 291.

The physical occupation necessary for an adverse possession claims distinguishes the case from *Foley*. Physical occupation is an eviction.

Whatcom and *Foley* are, for this reason, not at odds with each other. Critical to the holdings in each case is determining when the act of physical eviction from the property occurred. In an adverse possession case, provided the elements were met prior to the conveyance, that date is the date of conveyance. In a specific performance case the date of physical eviction is the date a court rules against the holder of the property.

IV. Conclusion

Washington law affords purchasers of property broad rights against sellers when the terms of a statutory warfront deed are violated. But the law does not grant buyers the unlimited rights. Buyers are required to bring any claims they have against sellers within six years of the breach.

The essence of adverse possession is *notice* to the title owner that there is a claim being made to their property and that they have to take action to defeat that claim within ten years. The notice that triggers the running of the adverse possession period running also alerts a buyer of the property that there is a claim and that the buyer should proceed against the seller with six years of the transaction or face a statute of limitations defense themselves.

Article Ideas?

Please contact Heidi Orr if you are interested in writing an article for the newsletter or if you have ideas for article topics. Heidi’s phone number is 206-223-7742 and her email is orrh@lanepowell.com.

Form 990 Redesigned

by Katherine A. Walter – Helsell Fetterman

In December 2008, the IRS introduced the “new and improved” Form 990, “Return of Organization Exempt From Income Tax,” an annual information return. The IRS last significantly revised Form 990 in 1979. The revisions are extensive and comprehensive; the form’s format has been significantly redesigned, and the form’s content has been significantly increased. The IRS estimates that preparing the new Form 990 will require 23 hours and 29 minutes, plus one hour and four minutes to copy, assemble, and send the form.

If you advise tax exempt organizations, even if you do not prepare Form 990 for those clients, you will benefit from familiarizing yourself with the requirements of the new Form 990 and so will your clients.

I. Introduction

Form 990, according to the IRS, was redesigned for a number of reasons: (1) exempt organizations have become more sophisticated and complex; (2) exempt organizations have grown significantly; (3) the old Form 990 failed to keep pace with the changing laws that govern tax-exempt organizations over the last 30 years; (4) the old Form 990 is a “hodgepodge” of changes incorporated over the last 30 years; and (5) the old Form 990 fails to serve the IRS’s tax-compliance interests or meet the transparency and accountability needs of the states, general public, and local communities served by the tax-exempt organization.

II. Form 990

The new Form 990 consists of a core form that is applicable to all filers and 16 schedules that are applicable to a small population of filers. An organization will complete only those schedules relevant to it. Larger, more complex organizations, such as hospitals and universities, may have to complete more than 10 of the 16 schedules and should expect to see a considerable increase in the time and effort required to complete the new form.

The new form forces an organization to report detailed information about its compensation and financial arrangements; foreign activities; non-cash contributions; fundraising, gaming, and special events; governing board; and, governance policies and practices.

The following is a brief introduction to the core form and schedules.

A. Core Form

The core form consists of 11 parts and is 11 pages long:

- **Part I**, “Summary.” Provides a snapshot, a “first impression,” of the organization; information in this part comes from somewhere else in the core form and schedules. Part I includes information about the organization’s mission, activities, and finances.
- **Part II**, “Signature Block.” Requires the signature of an organization’s officer and paid preparer, if applicable.

- **Part III**, “Statement of Program Service Accomplishments.” Describes the organization’s mission and reports its exempt purpose achievements and related revenue and expenses.
- **Part IV**, “Checklist of Required Schedules.” Contains 37 questions designed to trigger potential reporting on the 16 schedules.
- **Part V**, “Statement Regarding Other IRS Filings and Tax Compliance.” Reports the organization’s compliance with other federal tax reporting.
- **Part VI**, “Governance, Management, and Disclosure”: Discloses the organization’s governing body and management, policies, and disclosure practices. The organization will be required to describe the process that it uses to review the Form 990. Part VI reports whether the organization has a written conflict of interest policy, written whistleblower policy, written document retention and destruction policy, a written joint venture policy, and a written procedure for compensation of officers and key employees.
- The IRS believes that “well-governed and well-managed organizations are more likely to be transparent with regards to their operations, finances, fundraising practices, and use of assets for exempt and unrelated purposes.” “Good governance and accountability practices provide safeguards to help ensure that the organization’s assets will be used consistently with its exempt purposes.”
- **Part VII**, “Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors.” Reports the compensation paid to such persons. The additional information reported provides a more complete picture regarding the organization’s “compensation and financial arrangements that may raise concerns about private inurement, excess benefit, and private benefit.”

The new Form 990 dramatically changes the reporting of executive compensation paid by an organization. The IRS desires to simplify and obtain more uniform basic compensation reporting from all organizations.

- **Part VIII**, “Statement of Revenue,” **Part IX**, “Statement of Functional Expenses,” and **Part X**, “Balance Sheet.” Capture the organization’s financial information.
- **Part XI**, “Financial Statements and Reporting.” Reports the organization’s accounting method and whether its financial statements were reviewed and audited.

B. Schedules

Part IV, “Checklist of Required Schedules,” of the core form assists the organization in determining what schedules it must complete. The number of schedules increased from two to 16 and replaced the unstructured attachments of the old form.

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- **Schedule A**, “Public Charity Status and Public Support.” A pre-existing schedule that most organizations will submit and that reports whether the organization receives public support and deserves public-charity status.
- **Schedule B**, “Schedule of Contributors.” A pre-existing schedule that reports charitable contributions and grants.
- **Schedule C**, “Political Campaign and Lobbying Activities.” A new schedule that reports political campaign and lobbying activities by the organization.
- **Schedule D**, “Supplemental Financial Statements.” A new schedule that reports supplemental financial information, such as investments, liabilities, trust accounts, and donor-advised funds.
- **Schedule E**, “Schools.” A new schedule that is submitted by tax-exempt private schools and requests information about a private school’s nondiscriminatory practices and policies.
- **Schedule F**, “Statement of Activities Outside the United States.” A new schedule that reports activities outside of the United States, such as program services, grant-making, and fundraising.
- **Schedule G**, “Supplemental Information Regarding Fundraising or Gaming Activities.” A new schedule that reports fundraising activities in which an organization is engaged.
- **Schedule H**, “Hospitals.” A new schedule that is submitted by tax exempt hospitals and reports such information as community building activities, bad debt, collection practices, and facility information.
- **Schedule I**, “Grants and Other Assistance to Organizations, Governments, and Individuals in the U.S.” A new schedule that provides information on an organization’s domestic grant and other assistance programs.
- **Schedule J**, “Compensation Information.” A new schedule that reports supplemental information about compensation.
- **Schedule K**, “Supplemental Information on Tax Exempt Bonds.” A new schedule that reports tax-exempt bond issues and the use of the proceeds.
- **Schedule L**, “Transactions with Interested Persons.” A new schedule that reports excess benefit transactions and loans to and from interested persons.
- **Schedule M**, “Non-cash Contributions.” A new schedule that reports non-cash contributions, such as gifts of art, books, clothing, automobiles, boats, securities, real estate, and intellectual property.
- **Schedule N**, “Liquidation, Termination, Dissolution, or Significant Disposition of Assets.” A new schedule that re-

ports liquidations, terminations, dissolutions, and significant disposition of assets.

- **Schedule O**, “Supplemental Information to Form 990.” A new schedule that provides additional space for reporting information from the core form and schedules.
- **Schedule R**, “Related Organizations and Unrelated Partnerships.” A new schedule that identifies disregarded entities and related tax-exempt organizations.

The table below provides a summary of when a schedule may be required to be submitted:

Schedule	Organizations That Should File the Schedule
A	Organizations claiming public charity status
B	Organizations reporting contributions as revenue
C	Organizations conducting political campaign activities, lobbying activities
D	As needed to supplement balance sheet information; museums; conservation organizations; credit counseling organization
E	Tax-exempt private schools
F	Organizations conducting activities outside the U.S.
G	Organizations that have fundraising expenses, revenue for special events and gaming activities
H	Tax-exempt hospitals
I	Organizations providing grants and other assistance within the U.S.
J	Organizations providing non-fixed payments, housing allowance, club dues, travel, spending account to employees, trustees, officers, directors
K	Organizations with tax exempt bonds, liabilities
L	Organizations conducting transactions with interested persons
M	Organizations that made non-cash contributions
N	Organizations that disposed of assets
O	As needed to report supplemental information on the form or schedules
R	Organizations conducting transactions with disregarded entities, related tax-exempt organizations

To assist an organization in completing the forms and schedules, the instructions for the new Form 990 include a sequencing list.

III. Filing Thresholds

The IRS is phasing in the new Form 990 over a three-year transition period, during which an organization’s annual filing requirement depends upon its financial activity. The table below

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Recent Developments

Probate and Trust

by Kirsten L. Ambach – Karr Tuttle Campbell and Darcy L. Boddy – Lasher Holzapfel Sperry & Ebberson

Does the term “lawful descendants” in a Will demonstrate the intent of the testatrix to limit a class gift to children of married parents? *In re Estate of Wright*, 147 Wash. App. 674, 196 P.3d 1075 (2008).

Judith Patterson claimed she was the daughter of Myron A. Wright, who allegedly had an affair with her mother, Ethel Williams, in 1955. After her birth, Patterson was adopted by Sarah and George Adams. She did not know who her mother was until she was an adult. In an attempt to determine whether her father was one of Williams’ ex-husbands, Patterson contacted Williams who confirmed that she was her mother and that her father was a man named M.A. Wright. Williams did not remember much about the man but told Patterson that he was in the oil business and knew such prominent men as J. Paul Getty and Howard Hughes. In fact, by the time Myron White died, he had served as president and chairman of Exxon Oil Company.

Based on this and other stories, Patterson contacted Myron Wright in 1990. The evidence shows there were numerous calls

made to Wright over the following two years but Wright denied that he was Patterson’s father. In 1992, Wright died and Patterson (aka “Judith Diane Walker”) filed a “Claim on Estate” requesting the court recognize her as a natural heir and award her a “just and equitable division” of his estate. The sole evidence of paternity was the story that Williams had told Patterson.

Myron Wright’s surviving spouse, Josephine Wright, served as executor of her husband’s estate and opposed Patterson’s petition. At some point it was discovered that Patterson’s attorney was not admitted to practice law in Texas. The court struck all her pleadings and Patterson did not obtain further counsel or file additional pleadings.

Twelve years later, Josephine Wright died in Washington State. She left a Will that specifically identified her living issue by name and defined issue as meaning the “lawful descendant or lawful descendants in any degree of the ancestor designated.” The Will differentiated between “issue: and heirs at law.” Finally,

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Form 990 Redesigned

indicates when an exempt organization will be required to file the new Form 990.

Gross Receipts	Tax Year
Gross receipts > \$1 million or Total assets ≥ \$2.5 million	2008 (filed in 2009 or 2010)
Gross receipts > \$500,000 or Total assets ≥ \$1.25 million	2009 (filed in 2010 or 2011)
Gross receipts > \$200,000 or Total assets ≥ \$500,000	2010 (filed in 2011 and later)

Form 990 is due the 15th day of the 5th month after the organization’s accounting period ends. If a calendar tax year is chosen, then Form 990 is due on May 15th. An organization can get an automatic three-month extension of time to file the return by submitting Form 8868, “Application for Extension of Time to File an Exempt Organization Return.”

IV. Penalties

A penalty of \$20 per day is assessed for returns that are filed late. The total penalty is the lesser of \$10,000 or five percent of the gross receipts for the tax year. If annual gross receipts are greater than \$1 million, the penalty is \$100 per day with a maximum of \$50,000 per return.

If an incomplete return is filed or an organization fails to furnish the required information, the IRS will send a letter providing

a fixed time to comply with the request. After that time expires, the person responsible for failing to comply can be assessed a penalty of \$10 per day up to \$5,000. Any organization that fails to meet the annual filing requirement for three consecutive years will have its tax-exempt status revoked.

V. Conclusion

The new Form 990 requires a higher level of accountability and transparency within a tax-exempt organization. Some tax professionals believe that the IRS is being overly intrusive and is attempting to “shame” tax-exempt organizations into adopting its view of best-practice governance policies. Others believe that the new form will create much new law, especially in the area of governance. Many agree that a well-governed organization is less likely to have tax-compliance problems.

Tax-exempt organizations will spend significant time and money creating necessary documents, maintaining records, and properly preparing and timely filing the new Form 990. Familiarizing clients now with the requirements of the new Form 990, and its instructions, will assist them in maintaining their organization’s tax-exempt status.

VI. Resources

The new form, schedules, and instructions are available on the IRS website, under the “Charities and Non-Profits” tab. An additional website sponsored by the IRS Office of Exempt Organizations, www.stayexempt.org, has added several new mini-courses and one virtual workshop on the redesigned Form 990.

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Recent Developments: Probate and Trust

as in both Myron's and Josephine's Will, a provision stated that an adopted child was the "lawful descendant" of the adopting parents.

Josephine's probate was opened in 2004 and in 2007, Patterson filed a Trust and Estate Dispute Resolution Act ("TEDRA") petition claiming that she was entitled to receive under the Will since Josephine's Will devised a portion of her estate to the "lawful descendants" of Myron Wright. At a hearing, the superior court commissioner dismissed Patterson's petition, and after being denied reconsideration, she sought revision by a judge of the superior court. On revision, the superior court considered whether "lawful descendants" should be defined as a class of beneficiaries of equal standing whether they were born to married or unmarried parents, consistent with Washington public policy as reflected in our intestacy statutes, or whether the intestacy statutes are irrelevant because the decedent died with a Will that reflected her intent to apply the term solely to the children of her marriage with Myron. The court determined that the Will, when considered as a whole, manifested Josephine's intent to leave her estate to her identified family exclusively.

In reaching its conclusion, the court considered its highest duty in estate matters, that is, determining and implementing the testator's intent. Every part of the Will is considered and read as a whole. Since no prior Washington court had examined the effect of the modifier "lawful" in relation to "descendants" to determine if it is to mean "children born from a marriage," the court relied on cases from other states. The majority of those states have concluded that when the word is used to modify "children," "issue" or "descendants" in a Will, it is intended to limit the class to those children from legally married parents. The court considered Patterson's argument that it would be against Washington's public policy to exclude her from this class since the intestate statutes make no such distinction. However, the court did not find that public policy had to be considered where the construction of the meaning of the phrase could be determined by the testamentary instrument. Josephine's intent was clearly to exclude any child other than those from her marriage with Myron. Further, there was no extrinsic evidence indicating that between the time her husband died and the twelve years prior to her death, she changed her mind and wanted Patterson to be considered an heir or issue.

Clear and convincing evidence showed that lost or destroyed will did not have effect of revoking it, and will's no contest clause upheld where contestant did not act in good faith. *In the Matter of Estate of Betty Jane Beers*. 2009 Wash. App. LEXIS 212 (Div. I), January 26, 2009. UNPUBLISHED

Betty Jane Beers executed a pour over will and trust in California. She moved to Washington a year before her death to be closer to her sister, Darlene Munroe. Beers' California estate planning attorney mailed her the original will with the

recommendation that she seek Washington counsel for her estate plan. Munroe referred Beers to her own attorney, who reviewed the documents and Beers' current testamentary intentions and determined that no change to the will or trust was necessary. In the presence of Munroe, the Washington attorney explained what would happen if Beers died without a will, namely that Munroe would inherit everything as her sole intestate heir. Beers' stated intention to the California attorney, Washington attorney, a friend in Washington, and to her stepdaughter, Linda Bates, was that she wanted her estate divided three ways among Bates, Munroe, and Beers' sister-in-law. After Beers' death, however, Munroe petitioned to open an intestate probate with herself as personal representative. She provided no notice to any others and claimed the entire estate as Beers' sole surviving blood relative.

Upon discovering the petition, Bates presented a copy of the California will and sought its admission to probate as a lost or destroyed will. Because the original will was authenticated but unavailable, the main issue at trial was whether Beers intended to revoke the will. The California and Washington attorneys, the Washington friend, and Bates all testified that Beers' stated intention up to weeks before her death was that her estate be divided three ways in accordance with her will/trust plan. Munroe testified that Beers wanted to make changes to her will and that Beers said she got rid of it. Munroe testified that she searched for documents and was unable to find any and that she believed Beers did not leave a will. The trial court found the testimony of the attorneys and friend credible that Beers did not destroy nor intend to revoke her will (and that Munroe's was not credible), and concluded that clear, cogent, and convincing evidence established the existence of the last will and testament. The trial court also upheld the will's no-contest clause which disinherited any beneficiary who sought an adjudication to void, nullify, or set aside the provisions of Beers' will and ruled that Munroe was precluded from taking any share.

The Court of Appeals affirmed the trial court's rulings and held that clear, cogent, and convincing evidence established that Beers did not intend to revoke her will. When a will is lost or destroyed, the presumption under common law is that the testator intended to revoke it. In this case, the court determined the presumption of Beers' intent turned entirely on the witness' credibility. Munroe's challenge was grounded in little more than her own testimony whereas all other evidence established Beers' affection for Bates, her intention to provide for Bates, and her intention that her estate be divided three ways. Respecting the no-contest clause, the Court confirmed that they are valid and enforceable unless the clause is brought in good faith and with probable cause. The Court affirmed the trial court's finding that Munroe's testimony was not credible and that her actions did not constitute good faith and upheld the preclusion of Munroe from taking any share pursuant to the will's no-contest clause.

Recent Developments

Real Property

by Scott Osborne, Of Counsel – K&L Gates LLP

Recent cases include two opinions from the Court of Appeals construing restrictive covenants and a Supreme Court case resolving a disputed attempted exercise of an option to purchase a commercial building.

In *Otis Housing Ass'n v. Ha*, 2009 Wash. 75 (Docket No. 80626-8, filed February 5, 2009), the Supreme Court, in a 5 to 4 decision, held that a tenant waived its right to seek arbitration under an option agreement by asserting the existence of the option as a defense in an unlawful detainer action commenced by the property owner-landlord.

Otis Housing Association leased a hotel in Spokane owned by Ha. The lease commenced in 1997, and Otis negotiated an agreement to purchase the property for \$1,300,000. The option was extended various times, but Otis was never able to raise the funds necessary to complete the purchase. The last amendment to the option clearly stated that the option expired at the end of 2004. The option agreement contained an arbitration clause to resolve any disputes between the parties.

On November 30, 2004, Otis stated its intention to exercise the option, but the sale was not completed prior to December 31, 2004. Otis stopped paying rent at the time it announced it was exercising the option. Ha commenced an unlawful detainer action after Otis had failed to pay rent for six months.

Otis asserted the existence of a validly exercised option to purchase the property as a defense to the unlawful detainer action. It was asserted that the exercise of the option created a real estate contract that could only be terminated under the Real Estate Contract Forfeiture Act. Otis did not seek to commence an arbitration at the time of the unlawful detainer. The trial court rejected Otis' argument and awarded possession of the property to Ha.

Following the trial court decision, Otis demanded arbitration pursuant to the option agreement and then commenced an action to compel arbitration. The trial court dismissed this action and cancelled a *lis pendens* that Otis had recorded on the grounds that the right to seek arbitration lapsed upon the expiration of the option without a valid exercise by Otis. The dismissal was affirmed by the Court of Appeals (*State v. Otis Hous. Ass'n*, 140 Wn. App. 470, 164 P.3d 511 (2007)) on the same grounds.

The Supreme Court affirmed the dismissal, but did so on other grounds:

The Has correctly contend, amount other things, that OHA waived arbitration by raising the option as a defense to the unlawful detainer action. While this precise issue has not been raised before in this court, Washington courts have long held that the contractual right to arbitration may be waived if it is not timely invoked.

The Court rejected the argument that the existence of the option was raised only as a defense in a show cause hearing in which the judge did not have the authority to order the parties to arbitrate. Otis, however, submitted the issue of the validity of the option to the trial court in that proceeding, which was inconsistent with its later position seeking to arbitrate. "Simply put, we hold that a party waives its right to arbitrate if it elects to litigate instead of arbitrate."

The dissent in this case argued that the pleadings were not entirely clear that the validity of the exercise of the option was ever submitted to the trial court for resolution, so the waiver found by the majority did not exist. The trial court and the Court of Appeals erroneously based their decision on the conclusion that the option had expired, which was the very issue that was to be resolved by arbitration. In effect, the court came to a decision on the merits and then substituted that decision in place of the arbitration.

Ross v. Bennett, 2008 Wash. App. LEXIS 2958 (Docket No. 61414-2-I, filed December 29, 2008, and amended by order filed February 2, 2009), and *Mack v. Armstrong*, 147 Wn.App. 522, 195 P.3d 1027, 2008 Wash. App. LEXIS 2708 (2008), both involve the interpretation of restrictive covenants encumbering residential property. Both decisions were resolved in a manner that limits the right of neighbors to restrict a homeowner's right to utilize its property.

In *Bennett*, a Division I decision, Ross and Schwartzberg bought a house in 1997 in Cattle Point Estates, a subdivision on San Juan Island. Bennett acquired a house in 2004 in the same subdivision. All of the lots were subject to protective covenants containing two provisions relating to permitted use of property within the subdivision:

Article II, section 2: "[a]ll parcels within said property shall be used for residence purposes only and only one single family residence may be erected on each such parcel."

Article VI, section 3: "[a]ny member may delegate, in accordance with the By-Laws [sic], his right of enjoyment to the common areas and facilities to the members of his family, friends and tenants."

The Owners Association for the subdivision adopted a policy in 2002 that prohibited rentals for periods of less than 30 days. During a two-year period, Bennett rented his house four times for short durations of less than 30 days. Ross and Schwartzberg sued Bennett in 2007 seeking a declaratory judgment that he was prohibited from leasing the house for periods of less than 30 days.

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Recent Developments: Real Property

The trial court found in favor of Ross and Schwartzberg and held that a rental for a period of less than 30 days constituted a business use rather than a residential use. Evidence was presented to the trial court that Bennett had obtained a business license in connection with his rental activity and that he paid excise tax on the rents received as “vacation rentals” rather than long-term residential rents that are exempt from excise taxes.

The Court of Appeals noted that restrictive covenants were in derogation of the common law right to use land for any lawful purpose, and any ambiguity in interpretation should be resolved in favor of the free use of land although disputes between homeowners should also be resolved in a manner that “protects the homeowners’ collective interest.”

The Court then rejected the argument that the tax status and business license had any bearing on the nature of the use of the property.

The owner’s receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant.

The Court also observed that there was no evidence that the drafters of the covenants had relied on the Washington business classifications for tax purposes in choosing the language of the covenants.

Renting the Bennett home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. The transitory or temporary nature of such use by vacation renters does not defeat the residential status. This is consistent both with the evidence of context and with preserving the free use of the land.

The *Armstrong* case, a Division III opinion, reconciled two separate provisions in residential covenants that were designed to regulate development. Mack and Armstrong both owned residences in a 12-lot subdivision in Selah, Washington. The residences constructed on 11 of the lots were oriented to have views of Mount Adams, Mount Rainier and the Cascade mountain range.

The restrictive covenants encumbering the lots had the following provisions:

Paragraph 3 (“Land Use”): “No structure shall be more than thirty (30) feet in height, measured vertically from the highest point of the lot ... without the express written consent of the Architectural Control Committee.”

Paragraph 4 (“Architectural Control Committee”): “the terms ‘building or structure’ shall include, but not be limited to, any building, chimney, pole, antennae or tower, fence,

tennis court, swimming pool, outbuilding, storage shed, dwelling, garage, carport and landscaping. No building or structure shall be built or placed or thereafter altered on any lot, . . . until the details and written plans and specifications thereof disclosing clearing size, materials, location, finish and elevations have been submitted to and approved by the Architectural Control Committee.”

Paragraph 4(1): “The Committee shall consider the orientation and location of the dwellings with the intent of preserving the views from any other dwelling.”

Paragraph 4(3): “The dwellings may be single story or multiple story, provided that multiple story dwellings will not significantly impair the view from any other lot.”

The Armstrongs began to construct a large addition to their house. Several neighbors became concerned that the addition would adversely affect their views. These same individuals were members of the Architectural Control Committee, and the Committee disapproved the plans for the addition. After negotiations failed to resolve the dispute, Mack sued for equitable relief. The trial court found that the addition was within the 30-foot height limit, but that the Committee had the right to demand alterations to the structure. The Armstrongs were ordered to cut off the top four feet of the addition to satisfy the Committee’s demands.

The Court of Appeals, relying on the holding in *Riss v. Angel*, 131 Wn.2d 612 (1997), reversed the trial court.

But if the covenants include both specific restrictions of some aspect of design or construction and a general consent-to-construction provision the specific covenant prevails: “a homeowners association may not impose restrictions under a general consent to construction covenant which are more burdensome than provided for by specific objective restrictive covenants.” [*Riss* at 625-26, 638]. The *Riss* opinion clarified that including a specific restriction in a covenant has the legal effect of signaling the document’s intent “that the specific restriction apply rather than an inconsistent standard under a general consent to construction covenant.” *Id.* at 625-26. *Armstrong, supra* at p. 530.

Since the trial court found that the addition did not violate the specific height restriction contained in the covenants, the neighbors could not rely upon the more generalized approval rights granted to the Committee to impose a more stringent height standard. The Court rejected Mack’s argument that the general intent of the covenants to preserve views required a departure from the application of the *Riss* holding.

Practice Tip: Title Review in 10 Steps

by Jami Kuzaro-Balint – Yarrow Bay Group

Title insurance, unlike a mountain view or granite countertops, is not a high priority for many purchasers of real estate. Even sophisticated clients take for granted the importance of title insurance – until their neighbor shows up on the doorstep with a survey indicating their dream home is located three feet over the property line. Title insurance, however, is a vital element of property ownership, and title review should not be taken lightly. So while your client is evaluating just how many lots he can squeeze onto 3 acres, you should sit down with the title commitment. The following 10 steps are a guide to title review; follow each of them to ensure that your client's investment is protected.

1. Check the Form of Policy

The level of coverage your client receives will depend on the form of policy. The American Land Title Association (ALTA) updated its forms of owners' and lenders' title insurance policies in 2006, and the changes are in the insured's favor. The 2006 policy is not only an improvement on the insurer-friendly 1992 policy but also on the oft preferred 1970 and 1984 policies, as the 2006 policy form offers coverage that was not available in previous forms.

2. Standard or Extended Coverage

Schedule B of the title policy contains the policy-specific items that are not covered. There are two categories of exceptions; general and specific. The general exceptions are standard and the special exceptions are property-specific issues that result from the title company's search of recorded documents. General exceptions A through D are commonly removed when Extended Coverage is purchased, because Extended Coverage requires a survey. Many homeowners opt for the less expensive Standard Coverage, which can prove foolish. Encroachments and boundary line disputes are among the most common property-ownership problems, they are not covered by standard title insurance policies.

3. Check the Legal Description

Review the legal description to determine not only the accuracy but also to make certain it includes any easements that your client will acquire a beneficial interest in. A common oversight is to except reciprocal easements from coverage.

4. Negotiate the Removal of Any Exceptions

Property is unique and a one-size-fits-all approach does not always work with title insurance. Title companies will negotiate with you, so do not hesitate to pick up the phone when a prehistoric right-of-first-refusal, or two-year old lien, is coming between your client and the sale of his property.

5. Ask for Endorsements

Title insurance endorsements provide increased protection for the insured by increasing the liability of the insurer and the underwriter. For an additional fee, endorsements are attachments that give greater policy coverage than offered by a standard or even extended policy. Two handy endorsements are the Survey Endorsement, which is recommended when purchasing extended

coverage, and the Homeowner's Additional Protection, which removes the encroachment exception for residential structures.

6. Order a Survey

A survey is required for extended coverage, but it does not have to be new. A recent survey, less than a year old, will suffice. If you do not have a current survey, order one as soon as possible; a survey may reveal issues that take time to deal with, and you do not want closing delayed while you negotiate a quit claim deed with the neighbor whose fence is six inches over the property line.

7. Review the Special Exceptions and Supporting Documents

Assume the package of supporting documents is incomplete and request that the title company send you documentation of all special exceptions. Review each special exception thoroughly. Often times an easement may contain terms that are disadvantageous to your client, like a requirement that the easement area be conveyed to a city for right of way if and when the city opts to construct a public road. Also, be sure to review latecomer fee ordinances. Latecomer fees can prove quite costly for clients looking to subdivide their land, but such ordinances are only valid for a period of 15 years. Unfortunately, many cities are not diligent about removing latecomer ordinances when they expire. You can save your client thousands, or even tens of thousands of dollars, by performing some simple math.

8. Read the Notes

Be sure to read the notes, as they may contain explanatory or vital substantive information. The notes are usually found at the end of the special exceptions.

9. Check the CC: List

Although your client may never read the title commitment, she should still get a copy. The CC list shows not only who is getting a copy of the commitment but also what information they receive. For example 2/1 means two copies of the report and one copy of the exception documents.

10. Review the Supplemental Commitments

Most sellers of real estate are honest people, some are not. When performing title review assume the seller is dishonest and remember to review the supplemental commitments. The supplemental commitment will put you on notice if the seller burdens the property with any easements or if the legal description changes. Furthermore, although the preliminary commitment obligates the title company to insure in accordance with the terms set forth in it, most preliminary commitments include a general exception for matters arising between the date of the commitment and the issuance of the policy. Because supplemental commitments may contain additional special exceptions, the title company is required to provide you with copies of the changes. When you receive a supplemental commitment you should repeat steps seven through nine.

Notes from the Chair

by Timothy R. Osborn – Microsoft Corporation

It's not too early ... to make reservations for the Real Property, Probate & Trust Mid Year, June 12-14 in Spokane at the Davenport Hotel. Chair Tim Burkart and Co-Chairs Ken Kilbreath and Brian Balch are putting together a very good program, and I urge you all to attend. It's a great opportunity to get together with others in your practice area and accumulate CLE credits.

As of this writing ... former Mariner Ken Griffey, Jr.'s return to Seattle is still uncertain, but we can confirm the return of former RPPT Chair and website superstar Doug Lawrence to the Executive Committee. Doug was key in setting up the Section's website, one of the first in the WSBA, and recently served on the Board of Governors. Doug will again be involved with our website and list serve, working with Brett Sullivan. Many thanks to Jean McCoy and Elizabeth Stephan for their work as webmaster – and it is a lot of work.

In case you missed it ... former section chair, deed of trust act author, and all-around well-known real estate lawyer John Gose won the lottery – \$6.8M, split with a couple buddies (see the February 6, 2009 *The Seattle Times*). Who says lawyers aren't successful investors?

Nominations for Executive Committee Positions

Pursuant to the Bylaws of the Real Property, Probate & Trust Section, Stephen Crossland, a member of the Section's Nominating Committee, is accepting nominations for two positions on the Probate and Trust Council, two positions on the Real Property Council, and the position of Director of the Real Property Council, each for a 2-year term running from June 2009 to June 2011.

Nominations must be received by Steve no later than March 15, 2009. Each nominee must be a current member of the Section. A nomination must set forth the nominee's name and bar number, identify the position for which the nominee is nominated, include a brief statement of the nominee's qualifications for the position, and be accompanied by endorsements from three current members of the Section.

Nominations may be submitted to Stephen Crossland by email at steve@crosslandlaw.net or by mail to Crossland Law Offices, PO Box 566, 305 Aplets Way, Cashmere, WA 98815-0566.

INFORMATION FOR YOUR CLIENTS

Did you know that easy-to-understand pamphlets on a wide variety of legal topics are available from the WSBA? For a very low cost, you can provide your clients with helpful information. Pamphlets cover a wide range of topics:

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To place your order or for more information, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Sales tax is applicable to all in-state orders.

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New Section to Newsletter

A new section is being added to the Newsletter. **The Codicil**, which will consist of articles and practice tips provided by the RPPT Trust and Estate Litigation Subcommittee, will shortly begin appearing in the Newsletter.