Real Property, Probate & Trust

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Washington's New Receivership Act*

by Marc L. Barreca, Preston Gates & Ellis LLP, Seattle

I. Introduction

On March 26, 2004, then-Governor Gary Locke signed into law Substitute Senate Bill 6189, an Act relating to Receiverships ("the Act"), substantially replacing the current receivership statute, Chapter 7.60 RCW and the current assignment for benefit of creditors ("ABC") statute, Chapter 7.08 RCW. The intent was to provide a comprehensive receivership statute giving greater guidance to the bench and bar on the powers and duties of a receiver, in some cases codifying existing receivership case law, and in other cases expanding or modifying current law. The Act also substantially amends the state's ABC statute, replacing out-of-date and confusing provisions, establishing a more usable standard notice of assignment, and providing the assignee with the powers of a receiver for administration of assets and resolution of claims.

This article summarizes the Act's major provisions and provides comparisons (where applicable) to analogous provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*) and the Federal Rules of Bankruptcy Procedure. For purposes of this summary, the person as to whose property the receiver is appointed will be referred to as "debtor," although receivers are appointed in various settings, not necessarily involving insolvency.

II. Receiverships

A. Types of Receivers

RCW 7.60.015 now provides a distinction between two types of receiverships – a general receivership and a custodial receivership. A general receiver is appointed to take possession and control of "substantially all of a person's property with authority to liquidate that property." A custodial receiver is "appointed to take charge of limited or specific property of a person or is not given authority to liquidate property." Receivership appointments made solely to collect rents during the pendency of a judicial or non-judicial real property foreclosure are expressly designated as custodial receiverships. As various provisions of the Act only apply in general receiverships, the court is required to specify in the appointment order whether a receiver is a general or custodial receiver but may later convert one type of receivership to the other.

B. Appointment of Receiver

RCW 7.60.025(1)(a)-(nn) enumerates in one location the various statutory grounds for appointment of a receiver previously scattered throughout the Revised Code of Washington.[1] It also clarifies that, except where a receiver's appointment is expressly mandated by statute or is made in connection with a real property foreclosure to enforce an assignment of rents, a receiver shall only be appointed if the court finds that the appointment is "reasonably necessary" and that other available remedies are inadequate. A seven-day notice requirement for receivership applications is established, but may be shortened or expanded for good cause shown.

Receiver eligibility requirements are set forth in RCW 7.60.035 and preclude appointment of a convicted felon, a party to the receivership action, certain insiders, as defined, and parties

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having a materially adverse interest to persons affected by the receivership.

RCW 7.60.045 requires a receivership bond (or cash deposit in lieu of bond) except where expressly provided by statute or court rule but does not require a minimum amount.

C. Turnover of Property

RCW 7.60.070 provides that a receiver, by motion, may seek to compel turnover of receivership estate property from any person unless the receiver's interest in the property is in bona fide dispute, in which case a lawsuit by the receiver is required.

D. Schedules of Property and Liabilities; Inventory of Property, Appraisals

RCW 7.60.090 requires the completion of a schedule of assets and liabilities on a prescribed form. For ABCs (*see* Part III below), the schedules are to be annexed to the assignment document. In the case of a general receivership, the schedules are to be filed by the receiver within twenty days of the general receiver's appointment. The person making an assignment for benefit of creditors is required to verify the schedules. Under RCW 7.60.080, the debtor has the duty to cooperate with the receiver, provide information necessary for completion of the schedules, deliver control of property and records to the receiver, and submit to an examination by the receiver (equivalent to an examination under Bankruptcy Rule 2004).

E. Automatic Stay of Certain Proceedings

RCW 7.60.110 provides a limited automatic stay of certain proceedings. Unless otherwise ordered by the court, entry of an order appointing a general receiver or a custodial receiver with respect to all of a person's property (i.e., like a general receiver but without the power to liquidate) creates a stay of actions against the debtor or actions to obtain possession of receivership property. The stay automatically expires as to most litigation matters 60 days after the appointment unless continued for good cause shown. The 60-day stay expiration does not modify the stay of foreclosures, other actions regarding possession of receivership assets, or actions to perfect security interests.

Affected parties may move for relief from or modification of the stay. The stay does not prevent prosecution of criminal proceedings, proceedings regarding support obligations, regulatory actions, or issuance of a notice of tax deficiency.

Although the automatic stay is a substantial new addition to the state's receivership law, assets of the receivership's stay are already considered to be in the *custodia legis* of the receivership court and not generally subject to new liens or transfer other than after order of the receivership court. No specificity is given for grounds for relief from the stay or grounds for continuation of the stay past the initial 60-day period. The Act is also indefinite as to who, other than parties to the receivership action, are required to receive notice of motions for relief from stay or motions to continue the stay. Presumably parties will argue by analogy to bankruptcy case law as to grounds for relief from the automatic stay.

F. Utility Services

RCW 7.60.120 provides restrictions on discontinuance of utility service. These are not as extensive as the utility provisions of Bankruptcy Code Section 366. RCW 7.60.050(14) defines "utility" as "a person providing any service regulated by the Utilities and Transportation Commission." This is more specific and presumably more narrow than the equivalent term used in Bankruptcy Code Section 366. RCW 7.60.120 is also more limited than Bankruptcy Code Section 366. It prohibits a utility from discontinuing service without providing the receiver at least 15 days notice of default. RCW 7.60.120 stops short of enjoining utilities from termination of service, but instead states "[t]his section does not prohibit the court, upon motion by the receiver, to prohibit the alteration or cessation of utility service if the receiver can furnish adequate assurance of payment (for service to be provided after entry of the order appointing the receiver)." RCW 7.60.120 applies to any utility providing service to receivership estate property regardless of whether it is a general or custodial receivership.

G. Executory Contracts and Unexpired Leases

RCW 7.60.130 codifies, clarifies, and amends the common law power of a receiver to assume or reject executory contracts and unexpired leases. This section only applies to a general receiver. RCW 7.60.130 allows a general receiver to assume or reject contracts after notice and opportunity for hearing. To assume a contract, as in bankruptcy, the receiver must cure defaults but does not have to cure financial condition or "ipso facto" clause violations. A receiver may assign executory contracts or unexpired leases after assuming them, but has no express power to override anti-assignment provisions. Additionally, contracts that are inherently non-assignable (such as personal service contracts, certain intellectual property license agreements, and certain governmental contracts), remain non-assignable in receiverships, absent the counterparty's consent.

As in Bankruptcy Code Section 365, the counterparties to certain kinds of executory contracts or unexpired leases are provided special protections in the event of contract rejection. These include buyers of real property in possession of the real property, timeshare buyers, intellectual property licensees, and real property lessees. The protected parties are allowed to retain the benefits of their contracts, but must continue paying rent, royalties, or performing other obligations arising after rejection and may offset against such payments damages occurring as a result of rejection.

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H. Receivership Financing

RCW 7.60.140 clarifies that a receiver operating a business or managing a person's property may obtain unsecured credit in the ordinary course of business without order of the court and may otherwise be authorized by court order to incur indebtedness on a secured or unsecured basis. There are no provisions authorizing priming of existing security interests by lenders to the receivership.

I. Abandonment of Property

RCW 7.60.150 allows a receiver (whether a general or custodial receiver) to, after notice and hearing, abandon estate property that is burdensome or of inconsequential value. A receiver may not abandon property that is a hazard or potential hazard to the public in contravention of state statute. This is similar to the restriction on abandonment under Bankruptcy Code Section 554, following the Supreme Court's *Midlantic Bank* decision. *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*,106 S.Ct. 775 (1986).

J. Personal Liability of Receiver

RCW 7.60.170 clarifies the standard for liability of a receiver. A receiver will only be liable if loss or damage is caused by a failure of the receiver to follow a court order or by an act or omission that would expose a member of a board of directors to liability, assuming such director's liability is limited to the maximum extent permitted under RCW 23B.08.320. The range of persons to whom the receiver may be personally liable is also limited. Only the debtor or persons who would otherwise have valid claims against officers of a business corporation organized under the laws of the State of Washington under the same circumstances will have potential personal claims against the receiver. A receiver will have no personal liability to any person for acts or omissions specifically contemplated by an order of the court.

K. Employment and Compensation of Professionals

RCW 7.60.180 specifically provides for appointment of professionals by the receiver after court approval. Such professionals must not "hold or represent an interest adverse to the estate" but are not disqualified by representation of or relationship with a creditor or other party in interest if the relationship is disclosed in the application and the court determines that there is no actual conflict of interest or inappropriate appearance of conflict. RCW 7.60.180 also provides for notice and opportunity for hearing as to payment of the professionals' bills. Fee applications must provide an itemized billing including the rates of persons performing the work to be compensated. In a custodial receivership in aid of foreclosure, the fees and expenses may be allowed by stipulation of the secured creditor affected by the appointment. If objections are filed, the receiver or professional seeking compensation may request a hearing on at least five days' notice to persons having filed the objections.

L. Participation of Creditors and Parties in Interest in Receivership Proceeding; Effect of Court Orders on Non-Parties

RCW 7.60.190 clarifies that a creditor or certain other parties in interest may participate in the receivership proceeding without formally joining as a party. Orders regarding sale free and clear of liens or other matters affecting real property are effective as to persons having actual knowledge of receivership whether or not they appear and participate in the receivership. RCW 7.60.190 also provides certain notice periods, including a 10-day notice for receiver's examination of the debtor referred to above and

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a 30-day notice regarding claims allowance, abandonment, creditor distributions, dispositions of estate property, compromises, or settlements that may affect distributions to creditors, compensation of receivers and professionals, or applications for termination of the receivership or discharge of the receiver.

M. Submission of Claims in General Receiverships

RCW 7.60.210 provides that, in a general receivership, creditors must file claims to receive a distribution. A general receiver must provide at least 30 days' notice to creditors of a claims bar date except in the case of state agencies. State agencies must receive at least 180 days' notice, equivalent to that required in the Bankruptcy Rules.

N. Priorities

RCW 7.60.230 provides that claims in a general receivership shall receive distributions in a set priority generally equivalent to that under the Bankruptcy Code. Secured creditors are to be paid from the proceeds of their collateral, after payment of the "reasonable necessary expenses of preserving, protecting or disposing of the property to the extent of any benefit to the creditors." This is a receiver's equivalent of a bankruptcy trustee's right to surcharge collateral under Bankruptcy Code Section 506(c). The under-secured portion of a creditor's claim is treated as an unsecured claim. Salary claims within ninety days of the appointment of the receiver or cessation of business are limited in priority to $2,000. Consumer deposit claims are limited in priority to $900. Support obligations, as defined in RCW 74.20A.020(10), receive a priority below wage and consumer deposit claims but above tax claims of governmental units. The priority for governmental unit tax claims is not limited as to the type of tax but is limited to unsecured claims.

O. Secured Claims Against After-Acquired Property

RCW 7.60.240 clarifies that prepetition security interests, which include an after-acquired property clause will attach to after-acquired property of the receivership. This is significantly different than the limitation on after-acquired property provided in Bankruptcy Code Section 552.

P. Receiver's Disposition of Property; Sales Free and Clear

RCW 7.60.260 codifies the receiver's common law right to sell assets of the receivership free and clear of liens. The court may authorize a general receiver to sell estate property free and clear of liens and rights of redemption whether or not sale proceeds would be sufficient to satisfy all secured claims. Sale notices require 30 days' notice under RCW 7.60.190(4). Absent consent of the owner, farm property and homestead property may not be sold by the receiver. Additionally, if the owner or a creditor secured by an interest in the property objects to the sale, the court must determine that "the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale." Secured creditors are allowed to bid their debt but must provide for payment of senior secured creditors. This is the equivalent of Bankruptcy Code Section 365(k).

The receiver is given the right as a co-owner to seek partition of property to the extent provided under applicable state or federal law but is not given the equivalent of a trustee's right to force the sale of both a debtor and non-debtor's jointly owned property as provided under Bankruptcy Code Section 363(h). RCW 7.60.260 also provides protection to a good faith buyer from reversal or modification on appeal of the order of sale equivalent to that provided in Bankruptcy Code Section 363(m).

III. Assignments for the Benefit of Creditors

The Act substantially replaced RCW Chapter 7.08 regarding assignments for the benefit of creditors. RCW 7.08.010 provides that general assignments of the property of a person who is insolvent or "in contemplation of insolvency" for the benefit of the creditors must be for the benefit of all of the assignor creditors in proportion to their claims. RCW 7.08.030 provides that assignments must be in substantially the form provided which includes an articulation of the duties of an assignee to take possession of and administer estate assets, liquidate assets, and pay, to the extent of available funds, the costs of administration and debts due from the debtor/assignor. Through the assignment form, the assignor declares under penalty of perjury that the list of creditors and property is true and correct to the best of the assignor's knowledge and the assignee accepts the assets in trust and agrees to faithfully carry out the assignee's duties.

RCW 7.08.030(3) provides that the assignee shall be appointed as a general receiver with respect to the assignor's property by the superior court upon the filing of a petition by the assignor, assignee, or any creditor of the assignor with the clerk of the superior court. Venue is provided for in the county of the assignor's residence or, for non-individual assignors, the assignor's principal place of business or registered office within the state. In effect, all ABCs must now be converted after the execution of the assignment into receivership actions. This also provides a clear avenue for debtors to initiate receiverships.

Once such an order is entered, the assignment proceeding is, in effect, converted to a general receivership. Two or more creditors may file a motion within 30 days of the mailing of a notice of assignment for benefit of creditors, directing the clerk of court to order a meeting of creditors to determine whether the assignee should be appointed as general receiver or whether an alternative party should be appointed as general receiver. These

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provisions are generally equivalent to those providing for election of trustees in bankruptcy.

IV. Repealers; Elimination of Preference Statute

Various inconsistent or redundant provisions are repealed. Additionally, the state's corporate voidable preference law found at RCW 23.72.030 is repealed. This will eliminate the use of RCW 23.72.030 in Washington corporate bankruptcies.

Section 47 of the Act provided for the repeal of three portions of the Non-Profit Corporations Act having to do with foreign corporations. These proposed repealers were in error (the intent was to repeal RCW 24.06.310, 315, and 320, which reference receiverships, instead of RCW 24.03.310, 315 and 320 referenced in SSB 6189). This mistake was noticed after approval of the bill by the House and Senate but fortunately was corrected by Governor Locke's use of the line item veto.

V. Federal Preemption — New Federalism Concerns

The Ninth Circuit Court of Appeals has recently created uncertainty about the reach of state court insolvency proceedings. *See Sherwood Partners Inc. v. Lycos Inc.*, 394 F.3d 1198 (9th Cir. 2005). The *Sherwood Partners* case involved a preference action brought in state court by the assignee of International Thinklink Corporation under California's ABC statute. The matter was removed to U.S. District Court. The preference defendant Lycos moved to dismiss on grounds that federal bankruptcy law preempted the state law preference statutes in which an assignee, rather than creditors, was allowed to sue to recover preferences. The District Court denied dismissal, but the Ninth Circuit reversed and granted dismissal based on its analysis of federal preemption precedents, including the 1929 Supreme Court case striking down state court granted discharges of debt in ABC cases, *International Shoe v. Pinkers*, 278 US 261, 49 S. Ct. 108, 73 L.Ed. 318 (1929). The Ninth Circuit ruled that "federal preemption" implicated federal bankruptcy law when a state attempts to achieve the bankruptcy goal of equitable distribution to creditors in a "collective procedure." It is unclear if the Ninth Circuit would expand this preemption logic to other insolvency related state laws such as Washington's receivership provisions for automatic stay, sales free and clear of liens or rejection of executory contracts.

VI. Conclusion

The Act was intended to make it easier for practitioners to utilize receiverships and provide greater certainty in judicial application. This greater clarity should make both judicial receiverships more attractive than prior law as an alternative to bankruptcy liquidations in appropriate circumstances. The changes to the ABC laws also should make the hybrid ABC/receivership procedure a viable alternative to bankruptcy liquidation, depending on the ultimate effect of the preemption analysis articulated in the Ninth Circuit's *Sherwood Partners* decision.

* Editor's Note: This article is an updated version of the article that appeared in the summer 2004 edition of the Creditor-Debtor Law Section newsletter.

1 Note that, pursuant to RCW 7.60.300, Chapter 7.60 is inapplicable to insurance under receiverships initiated under RCW Title 48.

Nominations for Executive Committee Membership

Pursuant to the Bylaws of the Real Property, Probate & Trust Section, the Nominating Committee, currently composed of Barbara C. Sherland of Stoel Rives LLP (Seattle), Warren Koons of Davis Wright Tremaine LLP (Bellevue), and Thomas M. Culbertson of Lukins & Annis, P.S. (Spokane), has recommended the nomination and election of the following persons to the offices indicated for the 2006-2007 term of the Real Property, Probate & Trust Section:

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Timothy C. Burkart - Garvey Schubert & Barer (Seattle)

Probate & Trust Council

Ann T. Wilson – Law Offices of Ann T. Wilson (Seattle)
Pamela McClaran – Foster Pepper PLLC (Seattle)

Real Property Council

Allen R. Sakai - Jeppesen Gray Sakai PS (Bellevue)
Charles E. Shigley – Alston, Courtnage & Bassetti LLP (Seattle)

Pursuant to the Bylaws, Stephen R. Crossland of Crossland Law Office (Cashmere) will become chair of the Section for the 2006-2007 term, and Alfred M. Falk of Harlow & Falk LLP (Tacoma) will become chair-elect.

Any additional nominations should be received by the current chair, Lora L. Brown of Stokes Lawrence, P.S., 800 Fifth Avenue, Suite 4000, Seattle, WA 98104-3179, no later than 20 days before the annual meeting, which will be held during the Real Property, Probate & Trust Section midyear meeting scheduled for June 9, 10, and 11, 2006, at the Skamania Lodge, in Stevenson, Washington. Nominations must include the name of the person being nominated and a written endorsement of five members of the Real Property, Probate & Trust Section.

Unless additional nominations are received, the persons nominated by the Nominating Committee shall be deemed elected.

Health Care Planning Part II: Durable Health Care Powers of Attorney and Other Related Documents

A continuation of the discussion regarding how incapacity planning and health care documents have been changed by federal law and the Schiavo case

by Margaret Madison Phelan[1]

Durable powers of attorney and durable health care powers of attorney were discussed in the fall 2005 Real Property, Probate & Trust Section newsletter. Discussed were the importance of updating the documents to comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the impacts of the circumstances surrounding the death of Terry Schiavo in 2005. In addition, the author discussed and recommended the use of the "Five Wishes" tool to facilitate discussion regarding end-of-life health care decisions. This article discusses the two commonly used documents to memorialize those wishes in Washington state: the Health Care Directive and Physicians Orders on Life Sustaining Treatment (POLST).

In addition, the Mental Health Advance Directive, a tool for person concerned about mental-health issues, and a HIPPA Patient Authorization a tool for those who may not have capacity to update their HIPPA; are discussed.

I. Health Care Directive

A "living will" is a document that specifies whether a person wishes to receive life-sustaining treatment in the event of a terminal condition, and but for that life sustaining treatment the person might die naturally. The term "living will" can give rise to confusion because of the similarity of the name to a last will and testament or a living trust. To avoid confusion, the Washington Legislature named Washington's version of a living will a "Directive to Physicians" when enacted in 1979. In 1992, when the statute was amended, the Legislature renamed the document s a "Health Care Directive," because the document was meant to provide instructions not only to the physician but to other health-care professionals as well.

In Washington, the Legislature has specified a form in the Natural Death Act that may be used.[2] However, the form is not mandatory, and the statute specifically states that an individual may include other instructions and must comply with the terms of RCW 70.122. The Washington Health Care Directive is to be signed by the principal as an expression of intent and preference or a statement of an advance wish as to use of life-sustaining treatment. The document does not become effective until two physicians determine that the principal is in a medical condition that causes the Directive to be placed into effect. At that time the attending physician enters an appropriate order on the principal's chart.[3]

The purpose of Washington's Health Care Directive was to allow the principal the fundamental right to decide, in advance, to refuse medical treatment in the event he or she was in a terminal condition, permanent unconscious condition, or persistent vegetative state. The Legislature specifically noted that "modern medical technology has made possible the artificial prolongation of human life beyond natural limits."[4] Accordingly, the Legislature found the execution of a Health Care Directive necessary to protect individual autonomy.[5] Thus, the physician is really the one who determines when and how a principal's Health Care Directive is activated. The Natural Death Act instructs the physician that the document is effective if the principal is expected to die within a reasonable period of time and within reasonable medical judgment. There is the possibility for confusion and conflict due to the lack of specific guidelines in the statute.

Accordingly, it is of utmost importance for the principal also to have delegated consistent authority to an attorney in fact under a Durable Health Care Power of Attorney. Such delegation was recognized by the Legislature in the Natural Death Act.[6] The attorney in fact should be that person or persons the principal trusts to advocate for his or her wishes. Often this means the attorney in fact will have to make difficult decisions when the principal is unable to assist in decision making. These decisions will need to be expressed consistently to physicians as well as other health-care professionals including skilled nursing facilities, hospitals, adult family homes, emergency medical technicians, and others.

As a routine practice, this author has clients consider a Health Care Directive each time they sign or update a General Durable Power of Attorney or Durable Health Care Power of Attorney.[7] Not all clients want to execute a Health Care Directive. By considering both documents at the same time in every delegation of decision-making authority, no inconsistent decisions or delegations are made, and there is no confusion by medical personnel as to why an expression of wishes as to life sustaining treatment was made or not made.

II. POLST

A unique document, the Physicians Orders for Life-Sustaining Treatment (POLST), is not authorized by the Washington Legislature but is used daily in Washington state by medical professionals. Washington's POLST is modeled after Oregon's POLST. Like Oregon, Washington's POLST came about through a consortium of health-care professionals wishing for a consistent methodology for memorializing physician's orders as to life-sustaining treatment. Neither Washington nor Oregon's POLST was part of the legislative process. In Washington, in August 2000, a consortium of health-care professionals developed the POLST as a way of summarizing wishes of an individual regarding life-sustaining treatment.

The POLST facilitates the process of translating end-of-life discussions with patients into actual treatment decisions and provides security for the individual and physician that the

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Durable Health Care Powers of Attorney and Other Related Documents

expressed wishes will be carried out.[8] The form provides instructions on care, including cardio-pulmonary resuscitation (CPR); medical interventions (when a person has a pulse and is breathing) such as comfort measures; limited measures, or full treatment; use of antibiotics; and artificially administered nutrition. It accomplishes two major purposes: (1) it is portable from one care setting to another; and (2) it translates wishes of an individual into actual physician orders. The attending physician, nurse practitioner, or physician's assistant completes the document with the patient and must sign the form and assume full responsibility for its accuracy. Washington's POLST is printed on terra green card stock so that it brightly stands out in a patients chart. The original green form must be transferred with the individual to be valid. A medical institution may wish to keep a copy in the permanent medical record upon discharge.

In November 2004, the POLST was revised to be more user friendly. Among some of the changes: orders for IV fluids are no longer grouped together with orders for artificial nutrition; individuals are allowed to make separate decisions about long-term use of feeding tubes and short-term use of IVs for dehydration; a resident can request limited interventions when he or she would want a few days of IV fluids for an episode of dehydration, but can also indicate that he or she did not want placement of a permanent feeding tube.

III. Mental Health Advance Directives

In 2003, the Washington Legislature also implemented a legal tool for persons who are concerned they may be subject to involuntary psychiatric commitment or treatment[9] called an Advance Directive for Mental Health.[10] Washington law provides that it "shall be in substantially" the form set forth in RCW 71.32.260. When a person has the capacity to make good choices for themselves they may, with the help of a doctor or a lawyer, make out a directive which states their choices about mental-health treatment. They can use the directive to tell a doctor, institution, or judge the types of confinement and treatment that they do or do not want. They can write in detail what approaches or medicines work best for them, and those that do not. They also can appoint an attorney in fact to make health care decisions for them if they become unable to make the decisions for themselves.

One unique aspect of the Mental Health Advance Directive is a feature often referred to as its "Ulysses" clause. This name originated from the mythical Greek hero, Ulysses, who knew that the lure of the beautiful Sirens was so powerful that he would be compelled to sail his ship towards the rocks they were sitting on, thereby destroying it. To prevent this, he ordered his subordinates to bind him to the mast of the ship and to keep the ship sailing straight, no matter how strongly he argued to the contrary. A Ulysses clause in a mental-health advance directive instructs treatment providers about specific treatment preferences and explains that any statements made refusing treatment during periods of incapacity should be ignored.

IV. HIPAA Release

Immediately following the HIPAA legislation in 2003 most health-care providers implemented procedures designed to protect patients' privacy rights. Under HIPAA, most health-care providers recognize patients' rights to sign documents allowing family members, friends and loved ones access to information about health care and health status. When a person has capacity to sign a health care provider's release form no problems should occur. However, the privacy protections may be a major impediment for family members, attorneys in fact, and guardians in trying to access information to make medical decisions for their loved ones or wards who no longer have the capacity to execute releases.

One solution has been suggested by NAELA[11]. A sample Patient Authorization form is available on its website for reprint and use by the public.[12] The Patient Authorization specifies permitted use and disclosure of protected health information by a named health organization to specified persons, for specified purposes, and for a specified period of time. The authorization can be signed by the patient or by an authorized representative of the patient such as a guardian, attorney in fact, or family members where authority is authorized by statute.

Shortly after enactment of HIPAA most health-care professionals were extremely cautious in releasing information, and anecdotal information was routinely denied to persons who most likely were duly authorized by delegation, court appointment, or statute. In recent years, most health-care professionals have come to recognize that guardians, attorneys in fact, and certain family members are authorized as "personal representatives" of patients. Upon presentation of appropriate authority and a signed patient authorization, information is no longer being withheld. However, all delegations of authority in Durable Health Care Powers of Attorney executed after HIPAA should have language authorizing release of information to the attorney in fact as well as authorizing the attorney in fact to execute patient authorizations.

V. Conclusion

Health Care Powers of Attorney are powerful documents that can delegate authority in the event a patient is unable to make health-care decisions. Other legal tools are also important including a Health Care Directive specifying ones wishes as to life sustaining treatment and a Mental Health Advance Directive specifying ones wishes as to involuntary psychiatric commitment or treatment in the future. When a patient has appropriate medical conditions they or their health-care representative should discuss life sustaining treatments with their physician and request that a POLST be entered. Powers of attorney for health care should include specific authorizations for release of health care information. In the event a principal can not update their power of attorney and/or execute a release, a patient authorization

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Recent Developments

Probate and Trust

by Brinette C. Bobb, Perkins Coie LLP, Seattle

Olver v. Fowler, 131 Wash.App 135 (Division One, 2006)

Summary:

Courts are required to make a just and equitable division of property acquired during a meretricious relationship when one or both of the partners in the relationship dies, not just when such relationship ends during lifetime, in order to avoid unjust enrichment to one partner.

Facts:

Cung Ho and Thuy Ho, who were in a fifteen-year committed relationship, died together in a tragic car accident. Cung and Thuy lived together for fifteen years and had a religious wedding ceremony but never legally married. They raised children together, established a business together, and jointly listed each other on their automobile insurance policies. Neither owned substantial property prior to their fifteen-year relationship, but they acquired substantial assets during their relationship, including a business, a home, and three rental properties, which were all titled in Cung's name. Because all of the assets were titled in Cung's name, they were initially all inventoried in his estate.

The trial court held that Cung and Thuy shared a meretricious relationship for the fifteen years they were together, and, as such, all of their property should be equitably divided analogous to the way community property would be divided in the estates of spouses who died simultaneously. The administrator of Cung's estate did not challenge the finding of a meretricious relationship. Rather, he argued that the doctrine permitting the equitable division of property of those in a meretricious relationship does not apply where the relationship ends with death. Alternatively, he argued, that even if the doctrine applies at one of the partner's deaths, it does not apply in a simultaneous death situation because the doctrine's purpose is personal to the partners, and, as such, its benefits must be personally claimed by a partner during his or her lifetime.

Discussion:

Washington courts equitably divide property acquired by unmarried persons in a committed relationship when the relationship ends by making a "just and equitable" division of such property that is analogous to Washington's community property laws, commonly referred to as the "meretricious relationship doctrine." In making such division, all property acquired during the relationship is presumed to be owned by both parties. To date, the cases applying this doctrine have only dealt with relationships that have ended during the lifetime of the partners, not by death. Although two justices in a recent Washington Supreme Court case argued that the doctrine should not apply after death of one partner, the majority did not make such a determination. See *Vasquez v. Hawthorne*, 145 Wn.2d 103, 108-09, 33 P.3d 735 (2001). Furthermore, upon the court's review of all of the previous cases applying the doctrine, they noted that none of these cases limited the application of the doctrine to only a lifetime separation of the partners.

The court went even further back in case history, prior to the establishment of the meretricious relationship doctrine, to cases where Washington first recognized a nontitleholder's rights in property acquired by the joint efforts of two people in a relationship. These were the "innocent spouse" cases where at least one partner believed they were legally married. In one such case, the Washington Supreme Court held that this type of equitable division of property should be available not only to living partners, but also in the situation where one partner died. *In re Brenchley's Estate*, 96 Wash. 223, 226, 164 P. 913 (1917).

The court also distinguished between a meretricious relationship partner asserting a right to inherit under his or her partner's intestate estate and a partner's equitable ownership in part of the decedent's property. The fact that a partner in a meretricious relationship does not have rights to an inheritance under Washington's intestacy statute does not negate his or her right to the equitable division of property upon the intestate death of one of the partners. The meretricious relationship doctrine closely parallels Washington's community property laws, under which one spouse is automatically vested in his or her one-half interest in the community property upon death. This vesting of community property occurs regardless of whether the deceased spouse died intestate.

The court also readily dismissed the argument that the doctrine cannot apply when both partners die because the policy behind the doctrine is personal to the partners, and, therefore, the benefits must be claimed by them personally, not by a beneficiary or administrator of their estate. In dismissing this argument, the court stated that the doctrine does not operate to *alter* property ownership at the moment the relationship ends; rather, it operates to *recognize* ownership rights acquired during the relationship, and these ownership rights do not disappear just because the partners die without them being judicially recognized during their lifetimes. Furthermore, when one considers that the basic purpose of the doctrine is rooted in fairness and to avoid unjust enrichment of one partner at the expense of the other, it is illogical to say that the goal of fairness ends at death.

In sum, through its analysis, the court specifically answered the question of whether the meretricious relationship doctrine applies in the situation where one or both of the partners die in the affirmative.

Recent Developments

Real Property

by Scott B. Osborne, Preston Gates & Ellis LLP, Seattle

Since the Supreme Court decision in *Kelo v. City New London,* 545 U.S. ____, 125 S.Ct. 2655, 162 L.Ed.2d 439, (2005), there has been a renewed interest in the exercise of the power of eminent domain by governmental authorities. Various state legislatures have considered placing limits on the exercise of the power of eminent domain, encouraged by talk-radio hosts and the comment by Justice Stevens in the opinion:

> In affirming the City's authority to take petitioner's properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. ***We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.*** Indeed, many States already impose "public use" requirements that are stricter that the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. [Emphasis added.]

The Washington State Legislature considered at least three bills during the short 2006 session on this topic:

2SHB 3017: Prohibiting the use of condemnation to acquire property purely for economic development, which means the acquisition or use of property to increase tax revenue, the tax base, employment or economic health.

HB 3264: Requiring the condemning authority to consider alternatives to condemnation and expanding the expenses that can be recovered by the owner of the condemned property; and

SB 6807: Prohibiting the condemnation of non-blighted property for any private use.

None of these bills passed, but the policy issues surrounding the use of condemnation by public authorities continue to be widely debated. Washington, with the prohibition in Article I, Section 16 of the Washington Constitution against taking private property for private use, is generally considered to be one of the states that is relatively restrictive in granting the power of eminent domain to governmental entities. Two recent Washington Supreme Court cases deal with the general topic of the power of governmental authorities to take private property. The deference shown by the Court to governmental authorities in these cases raises some question as to whether there is any meaningful restriction on the exercise of the power of eminent domain by municipal authorities in Washington.

HTK Management, L.L.C. v. Seattle Popular Monorail Auth., 155 Wn.2d 612 (2005).

As part of the recently deceased Seattle monorail project, the Seattle Popular Monorail Authority, a.k.a. Seattle Monorail Project (SMP) planned to locate a station at Second and Yessler in Seattle. The site was improved as a parking garage, which is affectionately known as the "sinking ship garage" and was owned by HTK Management L.L.C. (HTK), subject to a long term lease in favor of the garage operator.

SMP decided that the site would "provide an intermodal transportation function with connections to the ferry system, the waterfront street car, busses, and light rail." Although the final design for the station had not been finalized, SMP authorized the acquisition of the site, and filed a petition in condemnation in April 2004. Various alternative station plans for the site utilized varying amounts of the property.

Ultimately, HTK challenged the authority of SMP to condemn the property and contended that the acquisition of the entire site was not a "public use." The trial court rejected these claims, and the matter was appealed to the Supreme Court for accelerated review.

The Court first considered the power of SMP to condemn the property. HTK contended that although SMP had the authority to condemn under RCW 35.95A.050(1), the statute failed to describe the procedure to be followed. The Court distinguished the SMP authority from that considered in *State ex rel. Mower v. Superior Court,* 43 Wn.2d 123 (1953), which held that a park district could not condemn property in the absence of a specific statutory procedure. After reviewing subsequent case law and the enabling statute for SMP, the Court concluded that SMP's authority to condemn the property was reasonably "inferred from the authorizing statute or from other statues."

In order for the property to be condemned, it was necessary to establish "that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose." *HTK Management, L.L.C. v. Seattle Popular Monorail Auth.,* 155 Wn.2d 612, 629 (2005). The Court noted that although "public use" and "public necessity" were somewhat overlapping in definition, the standard of review of the agency determination differed:

> In contrast, the question of necessity, and thus the standard of judicial review, of a declaration of public necessity, differs from that applied to a declaration of public use.

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> [Citation Omitted] A declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.

Id.

After a somewhat extended review of the public interest in helping to remedy traffic problems in the City of Seattle, and noting that the parties stipulated to the public use of the property as a transportation stated, the Court concluded that there was no issue as to whether the proposed monorail station was a public use.

The Court then turned to SMP's decision to condemn the entire site, even though various development schemes showed that the station required only a portion of the property. Some of the development proposals considered by SMP involved selling or leasing the surplus property to private developers. The Court concluded that the decision to condemn the entire property was in fact a legislative decision, and the necessity of the taking of the entire site had to be reviewed under:

> … the general rule that if a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for the facts and circumstances, that action will not be considered arbitrary and capricious, even though there be room for a difference of opinion upon the course to follow or a belief by the reviewing authority that an erroneous conclusion has been reached. Courts will consider costs of the project as a relevant factor.

Id., at 635-36.

Finding no fraud in the SMP proceedings and concluding that its actions could be justified on an economic basis given the length of time that the entire site might be utilized for construction staging, the Court affirmed the trial court in the dismissal of HTK's claims.

> This division provides deference to local governments to determine what property is necessary to implement projects that a court has determined are for a public use. This court is both preserving important property ownership rights and ensuring that when a municipal authority condemns property for a public project, such project is truly for the "public use" within the meaning of the Washington State Constitution. Unlike in the recent United States Supreme Court case, *Kelo*, this case involves one of the most fundamental public uses for which property can be condemned – public transportation. Accordingly, the trial court's finding of public use and necessity is affirmed.

Id., at 639.

For Washington, it appears that once the Court determines that a public use is involved, the condemning authority more or less has free reign to structure its taking to maximize its economic advantage, even if that involves taking more property than is really required for the ultimate public improvement.

***Central Puget Sound Regional Transit Authority v. Miller*, 2006 Wash. LEXIS 180 (February 16, 2006).**

Sound Transit is the other major transportation project that has been initiated for the Puget Sound area. Unlike the Seattle monorail, Sound Transit continues with its development, which has included the acquisition of substantial amounts of property through condemnation. The *Miller* case involved the notice required to be given to a land owner prior to the commencement of condemnation proceedings.

Sound Transit had narrowed its search for a station in the south Tacoma area to three different locations in 2001. The Miller property was one of the sites, and Miller initially cooperated with Sound Transit in its investigations, allowing soil samples to be taken and a survey to be made. Sound Transit scheduled a meeting to consider the various sites, and posted notices of the hearings on its website. The owners of the property being discussed were not individually notified, because it was considered "unseemly to notify property owners individually that a state agency is considering condemning their property before a decision had been made."

Sound Transit concluded that the Miller property was the most desirable, and in August 2004, condemnation proceedings were commenced. Miller resisted the action, claiming that the property was not necessary for Sound Transit's project and that improper notice of the meeting that considered the sites was given, leading Sound Transit to reject other alternatives that did not involve condemnation of the Miller property. The trial court rejected all of these arguments, and specifically rejected the claim that the condemnation was the product of fraud and arbitrary and capricious action.

On appeal, the Supreme Court affirmed the dismissal of Miller's claims. As to the notice claim, the Court noted that Miller was never able to convincingly argue that he did not receive actual notice of the hearing that considered condemning the property. Notice of the meeting was given and the posting on the Sound Transit website adequate.

On the issue of necessity, the Court recited the same general rules as set forth in *Seattle Monorail*, and refused to reconsider the decision to condemn the property. In considering the various factors that Miller raised in opposition to Sound Transit's determination, the Court concluded that these had been considered by the condemning authority, and none of them justified overturning the decision. Finding no fraud or arbitrary action on the part of Sound Transit, the decision was affirmed.

The dissents in *Miller* emphasized the lack of notice to the individual property owner. The dissent also indicated a greater willingness to examine the correctness of the underlying decision

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Recent Developments: Real Property

made by Sound Transit based on the record presented at the meeting that considered the condemnation, which would make reviews of public-necessity decisions closer to a review of judicial, rather than legislative, proceedings.

It is somewhat anomalous that the Court in *Miller*¸ in reviewing the procedures utilized in proceedings that the Court has concluded are the most important to protect private property, concluded that actual notice to a potentially affected property notice is not required. The decision emphasizes again the deference Washington courts will provide to municipal bodies in their pursuit of admittedly public uses.

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For further information contact Sharlene Steele, WSBA Access to Justice Liaison, at 206-727-8262 or *sharlene@wsba.org*.

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Durable Health Care Powers of Attorney and Other Related Documents

should be executed by a guardian or attorney in fact releasing appropriate health care information as necessary to family and loved ones.

1 Margaret Madison Phelan practices in Vancouver, Washington. Her practice focuses on elder law, probate, guardianship, and the special needs of retirees and persons with disabilities. Ms. Phelan is a past president of the Washington Chapter of the National Academy of Elder Law Attorneys, having been named its most valuable member in 2003.

2 RCW 70.122.

3 See discussion below regarding use of a POLST for this purpose.

4 RCW 70.122.010.

5 *Id.*

6 *Id.*

7 Many practitioners such as the author generally combine financial, general welfare, and health-care powers of attorney into one document naming the same or different attorneys in fact for the different delegations of authority. These practitioners do so as clients seem less confused when there is one document for incapacity planning. Others recommend two separate documents: Durable Power of Attorney for financial and general welfare matters and a separate Durable Health Care Power of Attorney. These practitioners prepare separate documents as the person best suited to make financial decisions may or may not be the best person to make health-care decisions. Either is acceptable practice in Washington state.

8 The POLST form can be found by searching through any major web browser for "WASHINGTON POLST." The Washington State Medical Association has the form posted for review and printing by health care professionals. Also provided on the WSMA website is ordering information and specifications on the type and color of paper it is to be printed upon.

9 Substitute Senate Bill 5223 of the 2003 Regular Session of the Washington Legislature.

10 RCW 71.32

11 The National Academy of Elder Law Attorneys, Inc. is a non-profit association that assists lawyers, bar organizations, and others who work with older clients and their families. Established in 1987, it is composed of approximately 5,000 members. The Academy provides a resource of information, education, networking, and assistance to those who deal with the many specialized issues involved with legal services to the elderly and people with special needs.

12 The Patient Authorization can be found by visiting the www.naela.org home page, scrolling to the bottom of the page and clicking on the link to ARCHIVES. The Patient Authorization was posted on April 9, 2003.

Article Ideas?

Please contact Chuck Shigley if you are interested in writing an article for the newsletter or if you have ideas for article topics. Chuck's phone number is 206-623-7600 and his email is *cshigley@alcourt.com.*

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