

# Real Property, Probate & Trust



Vol. 27, Number 3

Published by the Real Property, Probate & Trust Section of the Washington State Bar Association

Fall 1999

## Supreme Court Decision Affects Real Estate Bankruptcies

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On May 3, 1999, the U.S. Supreme Court issued its opinion in *Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 119 S.Ct. 1411 (1999). The Court's ruling is significant because it establishes a guideline for determining when and how the pre-bankruptcy owners of a debtor (and its assets) may continue to own the enterprise following a Chapter 11 reorganization.

Historically, the issue of continued ownership has most frequently arisen in the context of "single asset" real estate cases. In these cases, the pre-bankruptcy equityholders may have any number of motives to maintain their ownership interests in the reorganized debtor, including: the preservation of tax benefits; a conviction that the value of the reorganized enterprise is greater than creditors believe; concerns about personal guaranty liability linked to the continuation of the business; and personal income opportunities from continued employment or management fees. The lender(s) and other creditors in the case, by contrast, may want to liquidate the assets or terminate the old owners' control of the business. In Chapter 11 cases, this tension between old ownership and creditors comes to a head during the plan confirmation process.

**Facts of the Case.** In *Bank of America*, the bank held a claim against the debtor partnership for \$93 million. Unfortunately, the bank's real property collateral, consisting of several floors of a downtown Chicago office building, was only valued at \$54.5 million. Of the \$93 million claim, \$54.5 million was therefore secured by the debtor's real property but the remaining \$38.5 million was unsecured. The Bankruptcy Code allows a debtor's reorganization plan to treat such claims differently. Accordingly,

the debtor's plan provided that the bank would receive payment of the secured portion of its claim between 7 and 10 years after the original repayment date. The bank's \$38.5 million unsecured deficiency claim would receive a dividend of only 16% from future cash flow. Trade claims of \$90,000 would be paid in full. Most significantly, the plan also provided that former partners of the debtor partnership would contribute \$6.125 million in new capital over the course of five years and, in exchange, would retain their ownership of the reorganized debtor going forward.

The bank voted against the plan and objected to confirmation on grounds that the plan had not been accepted by all creditor classes. In response, the debtor sought confirmation of its plan under the "cramdown" procedure of Bankruptcy Code §1129(b). Under §1129(b)(1), the plan could be confirmed over the bank's objection if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." Under the Code, a plan can be "fair and equitable" only if the allowed value of the dissenting creditor's claim is paid in full or, in the alternative, "the holder of any claim or interest that is junior to the claims of such [impaired unsecured creditor] class will not receive or retain under the plan on account of such junior claim or interest any property." This is the so-called "absolute priority rule" of §1129(b)(2)(B)(ii) which means, in effect, that the pre-bankruptcy owners of the debtor cannot continue to own the debtor post-confirmation unless the creditors ahead of them (including unsecured creditors) have been paid in full.

In *Bank of America*, the bank argued that the debtor's plan could not be confirmed because the old equityholders of the

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## Notes from the Chair

*Mark W. Roberts  
Davis Wright Tremaine LLP, Seattle*

As the incoming chairperson of the Real Property, Probate & Trust Section, I am fortunate to have inherited the leadership of a well organized and financially stable Section. Over the next year, I intend to concentrate my efforts as leader of the Executive Committee in doing what we do best: making sure that we have a newsletter with timely and pertinent articles; assuring that the perspective of our members is heard in the legislature when bills affecting real property, probate and trust issues are introduced; organizing useful continuing legal education programs on topics of interest to practitioners; and working to improve our statutes for the benefit of practitioners and the public.

Over the past several years, our Section has budgeted wisely and has been fortunate to accrue a surplus of revenue over expenses of some \$60,000. Although a reasonable surplus equal to perhaps half a year's budget is appropriate and prudent to protect against unexpected financial contingencies, our revenues typically exceed budget and the surpluses continue to grow.

Our circumstances place the Section with an enviable dilemma, but a dilemma nevertheless. Because we are not a profit-making organization, our goal is not to amass surpluses, but provide services to our members. Our challenge going forward will be to responsibly manage our surpluses and revenues and determine how we can provide greater value to our membership. Simply reducing annual dues or the cost of seminars is not the answer. Our Section's dues are already the lowest of any Section of the State Bar,

and the minimum registration fee for a full day continuing legal education seminar is fixed by the Bar. One new area where we expect to devote our energies is in the improvement and enhancement of our recently introduced Section website. We hope to make access to the site more direct and user-friendly and are considering increasing the materials and information available to the membership at our site, including the possible introduction of a list serve, links to other sites, and up-to-date information on matters of interest to Washington practitioners.

Although we wish to explore new ways to make membership in the Section more meaningful to practitioners, we also do not intend to divert our attention from the activities that we already perform well. The columns in this newsletter already perform well. The columns in this newsletter written by Barbara Sherland and Warren Koons will bring you up-to-date on the specific activities of both the Real Property and the Probate and Trust Councils.

One of the benefits of membership in our Section is the ability to communicate and network with other lawyers who share the same professional interests and concerns. If you have ideas or skills you can contribute to the Section, I encourage you to contact me or the chairs of the Real Property Council or Probate and Trust Council. My e-mail address is [markroberts@dwt.com](mailto:markroberts@dwt.com). With a strong base of committed volunteers, we will continue to be able to flourish as a Section well into the next decade.

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Washington State Bar Association  
Real Property, Probate & Trust Section  
2101 Fourth Avenue - Fourth Floor  
Seattle, WA 98121-2330

Printed on recycled paper



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## Supreme Court Decision. . .

debtor would receive property (i.e., ownership of the reorganized debtor and its real property assets), even though the bank's \$38.5 million unsecured deficiency claim would not be paid in full. According to the bank, the plan therefore violated the absolute priority rule. In response, the debtor argued that the plan should be confirmed because it fell within the so-called "new value exception" to the absolute priority rule. Under this judicially created exception—which had been recognized by many but not all bankruptcy courts—the pre-bankruptcy owners of the debtor can continue their ownership post-confirmation if, as part of the plan, they agree to contribute a significant amount of new money to the debtor. Acknowledging this "new value exception," all three lower courts rejected the bank's argument and affirmed confirmation of the LaSalle plan.

The bank appealed and the Supreme Court granted *certiorari*, ostensibly to resolve a split in the Circuits as to whether or not the Bankruptcy Code contained a "new value" exception to the absolute priority rule. Contrast, e.g., *In re Bonner Mall Partnership*, 2 F.3d 899 (9<sup>th</sup> Circuit 1993) and *In re U.S. Truck Co.*, 800 F. 2d 58 (6<sup>th</sup> Cir. 1986) (recognizing new value plans) with *In re Coltex Loop Central Three Partners, L.P.*, 138 F.3d 39 (2d Cir. 1998) and *In re Bryson Properties, XVIII*, 961 F.2d 496 (4<sup>th</sup> Cir. 1992) (declining to approve new value plans). Ultimately, however, the Court concluded that it would "not decide whether the statute includes a new value corollary or exception," ruling instead that the LaSalle plan could not be confirmed "on any reading." 119 S. Ct. at 1417.

In its opinion reversing the lower courts' approval of the LaSalle plan, the Court focused on the effect of a debtor's exclusive right to propose a plan of reorganization. Under Bankruptcy Code §1121, no one but the debtor can propose (and obtain confirmation of) a plan of reorganization during the first 120 days following the filing of the case. Moreover, this 120-day "exclusivity period" can be extended, with court approval, at the debtor's request. As a practical matter, bankruptcy courts routinely extend the debtor's exclusivity period until the debtor has filed its plan of reorganization. As a result, while exclusivity is in place no other creditors can propose a competing plan for disposition of the debtor's assets.

In *Bank of America*, the Court reasoned that the debtor's plan of reorganization was "doomed" for two basic reasons. First, the LaSalle plan vested all equity of the reorganized business in the debtor's old partners without extending an opportunity to anyone else either to compete for that equity or to propose a competing reorganization plan. 119 S. Ct. at 1422. By its own terms, the plan did not allow anyone else to participate in the ownership of the reorganized debtor, and the Code's exclusivity provision prevented anyone else from filing an alternative plan.

Second, the LaSalle plan failed to test the old partners' \$6.1 million purchase price against the "market's scrutiny." The Court emphasized that it would be a "fatal flaw" if old equityholders acquired or retained their property interest without

paying full value. 119 S. Ct. at 1423. But under a plan granting an exclusive purchase right to the old owners and making no provision for competing bids or a competing plan, any determination that the price was "top dollar would necessarily be made by a judge in bankruptcy court, whereas the best way to determine value is exposure to a market." *Id.*

**Effect of the Decision.** The Court's opinion in *Bank of America* warrants a number of conclusions and raises a number of questions:

- The Court specifically rejected the Government's amicus argument that old equity holders should *never* be included among post-confirmation owners of the debtor, if creditors are not paid in full. Accordingly, although not specifically saying so, the *Bank of America* decision obliquely confirms that the "new value" exception to the absolute priority rule does exist as a matter of law. In future cases, old equity can therefore seek to participate in the ownership of a reorganized debtor; however, old ownership cannot use the plan confirmation process to obtain the *exclusive* right to such participation.
- After *Bank of America*, bankruptcy courts simply cannot use the cramdown procedure to confirm a new value plan that is proposed during the exclusivity period, absent the existence of confirmation procedures providing for: (a) the solicitation of competing bids for ownership of the reorganized debtor; and (b) a means for market-testing the adequacy of old equity's bid for that ownership.
- In general, the *Bank of America* Court leaves it to the bankruptcy courts to fashion procedures by which the potential value of a reorganized debtor can be tested in the market. This leaves it unclear what procedures will satisfy the new standard. Is it sufficient that other parties merely have the right to outbid the amount old equityholders propose to pay for the reorganized debtor, or must the debtor's plan also waive exclusivity and allow other parties to file competing plans?
- Only creditors of the debtor can file competing plans. But who should be allowed to bid at an auction? For pre-*Bank of America* real estate cases providing guidance on this issue, see, e.g., *In re Bjolmes Realty Trust*, 134 B.R. 1000 (Bankr. D. Mass. 1991) (sale offered to the debtor's shareholders and any creditor in the case); *In re BMW Group I, Ltd.*, 168 B.R. 731 (Bankr. W.D. Okla. 1994) (sale offered to creditors, other similar businesses, real estate brokers and investors).

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## History and Overview of the Trust and Estate Dispute Resolution Act of 1999

*Douglas C. Lawrence  
Stokes Lawrence, P.S., Seattle*

On April 20, 1999, Governor Gary Locke signed Senate Bill 15196 into law. That bill is commonly referred to as the trust and estate dispute resolution act, or “TEDRA.” The core provisions of TEDRA have been codified in new RCW Chapter 11.96A, replacing former RCW Chapter 11.96.

### I. BRIEF HISTORY

TEDRA is an expansion of prior Washington statutory law. In 1984, Washington passed the Trust Act of 1984. One of the principal achievements of the Trust Act of 1984 was the consolidation of many disparate provisions relating to the judicial resolution of trust and estate disputes. Another was the establishment by statute of a process for the nonjudicial resolution of those disputes. These judicial and nonjudicial resolution provisions were contained in a new chapter of the RCW, RCW Chapter 11.96. RCW 11.96.070, which was an expansion of the prior declaratory judgment statute, provided specific guidance on the types of matters that could be resolved judicially or nonjudicially using the procedures of RCW Chapter 11.96.

New RCW 11.96.110 codified the doctrine of virtual representation. This enactment affirmed that parties can legally represent the interests of minor and unborn parties who may succeed to the representative’s interest in a trust or estate. This significantly streamlined estate proceedings, often eliminating the need to appoint a guardian ad litem.

Other provisions of new RCW Chapter 11.96 established concise notice and procedural rules. With the passage of this Act practitioners could find guidance on how to proceed when dealing with judicial disputes involving trusts and estates.

The nonjudicial process for the resolution of trust and estate disputes was enacted as RCW 11.96.170. This statute provides that if all interested parties come to an agreement, virtually any matter involving a trust or estate can be resolved nonjudicially. All that is required is that all interested parties sign a written document setting out the terms of the agreement. The statute also provides that if the agreement or a memorandum of its terms is filed with the court, the agreement will have the same effect as an order issued by the court. This statute and procedure remains in effect until January 1, 2000.

A key component of the nonjudicial dispute resolution process is the ability to appoint a “special representative” to represent the interests of minor and unborn beneficiaries. Often the doctrine of virtual representation would not be applicable since the interests of the living and competent parties are in conflict with the interests of their successors (e.g., the difference between the interest of a life beneficiary and the interest of a vested remainder beneficiary who is the life beneficiary’s successor). To facilitate the nonjudicial resolution of disputes under RCW 11.96.170, that statute allows the court to appoint a special representative to act on behalf of the incapacitated, minor and unborn beneficiaries. This is in lieu of having to appoint a formal guardian ad litem. The “special representative” was a new concept in the law in 1984. It is now an accepted element of our trust and estate practice in Washington.

In 1992, Bruce P. Flynn (then Washington State Chair of ACTEC) formed a special legislative subcommittee of the Washington chapter of the American College of Trust and Estate Counsel (“ACTEC”). Kenneth L. Schubert, Jr. chaired the

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- With respect to determining the price old equity must pay to preserve its ownership interest going forward, the Court makes it clear that old equity cannot acquire its interest “for less than someone else would have paid.” 119 S.Ct. at 1421. If the price is tested by auction, this implies that old equity must at least match—and probably exceed—the highest bid tendered by any other bidder.
- *Bank of America* clearly gives creditors additional leverage in new value cases. At a minimum, the opinion will likely increase the cost old equity must pay to maintain its ownership interests in the debtor.

**Conclusion.** The Court’s ruling makes it much more difficult for the pre-bankruptcy owners of business debtors to maintain their control of their business or income-producing property by “cramming down” their plan on Chapter 11 creditors. The Court’s decision will have a significant impact on all “new value” cases but will especially affect single asset real estate cases, which have historically generated more new value plans than other types of business reorganizations. In such cases, it now remains for future court decisions to assess the creativity and success of old equityholders in meeting the Court’s new confirmation standard. •••

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## History and Overview. . .

committee. The other committee members were Bruce P. Flynn, Richard A. Klobucher and Douglas C. Lawrence. This committee was formed for the purpose of developing a statute that incorporates the essential elements of Washington's nonjudicial dispute resolution process, and that could be adopted by other states. After two years of work, a proposed national act was completed and the results of the committee's work were presented at the 1994 ACTEC Annual Meeting. A paper describing the proposed act was published in the Fall 1994 edition of ACTEC notes.

In preparing the draft national statute, the committee did a thorough review of RCW Chapter 11.96. In addition, the committee considered trust and estate dispute resolution legislation from several other states. As a result of that review it was determined that Washington's own laws could be enhanced.

The committee was reformed with the addition of Watson B. Blair to work on revising Washington's trust and estate dispute resolution procedures. This group became a special legislative subcommittee of the Real Property, Probate & Trust Section of the Washington State Bar Association. For the next five years this committee worked on streamlining and updating Washington's own laws. The committee's work product was adopted by the legislature during the 1999 legislative session as the Trust and Estate Dispute Resolution Act, and was signed into law by Governor Locke on April 20, 1999.

## II. SUMMARY OF CHANGES

TEDRA streamlines and updates existing procedures, and provides new options that permit more rapid and less costly resolution of trust and estate disputes. This summary briefly describes some of the more significant changes made by TEDRA.

### A. Statutory Organization.

A key objective of TEDRA was to make the RCW's easier to read and understand. RCW Chapter 11.96 contained an array of statutes, all of which involved judicial and nonjudicial dispute resolution procedures. Although all located in a single chapter, those statutes were still somewhat scattered. TEDRA takes this a step further by reorganizing these provisions into five separate sections:

- General Provisions, including definitions applicable to TEDRA (TEDRA §§ 102 -104; RCW 11.96A.010 - .030)
- Jurisdiction, Venue, Situs, and Limitations of Action (TEDRA §§ 201-204; RCW 11.96A.040-070)
- Judicial Dispute Resolution Procedures, including notice and cost provisions (TEDRA §§301-313; RCW 11.96A.080-200)

- Nonjudicial Dispute Resolution Procedures (TEDRA §§401-405; RCW11.96A.210-250)
- Party Initiated Mediation and Arbitration (TEDRA §§501-507 RCW 11.96A.260- 320)

The statutes were reorganized in an effort to make them more understandable for all practitioners, not just those who practice in the trust and estates area on a regular basis. With this new organization any practitioner should be able to find and "walk through" the procedures associated with the various dispute resolution techniques.

### A. Clarification of Procedural Rules.

#### 1. Special Proceedings.

TEDRA makes clear that proceedings under RCW Chapter 11.96A are special proceedings. Accordingly the statutory rules of TEDRA supercede any inconsistent civil rules.

#### 2. Pleadings.

TEDRA outlines how proceedings are to be commenced, how pleadings are to be designated, and the time frames applicable to the proceedings. Definite timelines are now provided for answers, replies, cross-claims and counterclaims.

### B. Venue Provisions.

TEDRA §202 (RCW 11.96A.050) confirms that probate proceedings may be commenced in any county.

### C. Clarification of Role of Virtual Representative.

TEDRA §305 (RCW 11.96A.120) confirms the statutory adoption of the common law doctrine of virtual representation. The provisions of TEDRA further confirm that when a virtual representative signs a nonjudicial dispute resolution agreement, his or her signature binds all parties he or she represents. TEDRA §402 (RCW 11.96A.220).

### D. Costs and Attorneys' Fees.

TEDRA §308 (RCW 11.96A.150) allows the court to award fees and/or costs to a party in any proceeding governed by Title 11 RCW. This provision was strengthened to ensure its broad application.

### E. Statute of Limitations for Special Representatives: Court Approval of Nonjudicial Agreement.

TEDRA §204 (RCW 11.96A.070) now provides for a three-year statute of limitations for actions against a special representative. This period can be shortened if a court approves the special representative's actions. TEDRA §404 (RCW 11.96A.240) now allows a special representative to seek court

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## Estate & Gift Tax Committee Update

*Alan L. Montgomery, Chair  
Montgomery Purdue Blankinship & Austin PLLC, Seattle*

The first meeting of the Estate & Gift Tax Committee for the 1999-2000 fiscal year was Friday, September 17 at 12:00 noon. Watson Blair is the Vice-Chair.

The Estate & Gift Tax Committee meets approximately every six weeks at noon, except in the months of July and August, at multiple locations connected by telephone conference call. The **Seattle** meeting takes place at Graham & James LLP / Ridell Williams, 45<sup>th</sup> Floor, in the Assembly Room (contact person: Leslie Rice at Montgomery, Purdue, Blankinship & Austin, (206) 682-7090), the **Spokane** meeting takes place at Paine, Hamblen, Coffin, Brooke & Miller, 1200 Washington Trust Financial Center (contact person: Sharon Frank at (509) 455-6044 or 455-6000), and the **Wenatchee** meeting takes place at the Speidel Law Firm (contact person: Monica Roberts, (509) 662-1211). The tentative meeting schedule for the Estate & Gift Tax Committee for the 1999-2000 fiscal year is:

December 10  
January 21  
March 10  
April 21  
June 9

Committee meeting notices and minutes of prior meetings may now be viewed on the RPPT Section web page at the following address (and will be available on the Taxation Law Section web page soon): <http://www.wsba.org/sections/rppt/minutes/archive.htm>, or just connect to the WSBA website at [wsba.org](http://www.wsba.org), select "Practice Sections," then RPPT, and then "Meeting Notices & Minutes" under the Administration category.

The Committee approved at its June meeting proposed legislation related to the following subjects: amendments to RCW 83.110 (Uniform Estate Tax Apportionment Act) and other definitional statutes relating to IRC §2057; amendment to the Disclaimer Statute (RCW 11.86) providing that pre-disclaimer

withdrawals from JTROS accounts shall be deemed to come first from the surviving spouse's share of community property income, then from the surviving spouse's share of community property principal. The proposals will be submitted to the Legislative Committee this fall.

The Committee also currently has subcommittees studying the following issues for possible Committee action: repeal of or amendment to the Rule Against Perpetuities (perhaps similar to the Alaska Trust Act); the reported Department of Revenue position that family partnerships and similar entities holding marketable securities are engaged in a financial business subject to B&O tax; the possibility of legislation providing a remedy in some cases that will help to overcome the impact of the ERISA preemption described in the *Boggs* and *Ablamis* cases; unsatisfactory member experiences with the administrators of the Boeing VIP/FSP retirement plans relating to the refusal to accept partial disclaimers and the refusal to honor certain beneficiary designations made by participants; and whether the E&G Committee-sponsored amendment to RCW 6.15.020, effective July 27, 1997, which confirms that the non-participant spouse's interest in an IRA is subject to disposition by Will similar to an interest in an insurance policy, should be changed to provide just the opposite: that the deceased non-participant spouse's interest should be deemed to pass directly to the surviving participant spouse as a non-probate asset rather than by the terms of the Will, and should only pass according to the terms of the Will if the surviving spouse disclaims.

For more information about the Estate & Gift Tax Committee, or if you would like to receive e-mail notification of Committee meetings and developments, contact Chair Al Montgomery, or his secretary, Leslie Rice, at Montgomery Purdue Blankinship & Austin PLLC, at tel: 206-682-7090, fax: 206-625-9534, or e-mail: [monty@mpba.com](mailto:monty@mpba.com). •••

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### *History and Overview. . .*

approval of a nonjudicial dispute resolution agreement. Obtaining the approval of the court will accelerate the running of the statute of limitations for actions to be brought against the special representative, while providing added protection for the represented parties.

#### **F. Mediation and Arbitration.**

TEDRA §§501-507 (RCW 11.96A.260-320) allow any party to a trust or estate dispute to initiate mediation and/or

arbitration proceedings. The purpose for implementing these provisions is to facilitate a more rapid and cost-efficient resolution of disputes. If the parties or the court believe that a traditional judicial resolution will be more effective, that option remains available. The court will be the final arbiter of questions concerning which procedure is to be used.

TEDRA was the subject of a recent CLE sponsored by the WSBA. Written materials are available for purchase. •••

## Recent Developments

### Probate and Trust

*Wendy S. Goffe, Graham & Dunn P.C., Seattle*

*Alice McCarty, University of Washington School of Law (J.D. expected June 1999)*

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#### WASHINGTON COURT OF APPEALS

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***Henley v. Henley, 95 Wn. App. 91, 974 P.2d 362 (Div. II 1999).***

**Summary:** RCW 11.07.010, which provides that a dissolution revokes a spouse's beneficiary designation in connection with a nonprobate asset to the surviving spouse at death, applies only to dissolution decrees entered by a Washington State superior court, and not to foreign dissolution decrees.

**Facts:** Edwin Henley was married three times. His third dissolution was obtained in Hong Kong. Edwin had two life insurance policies at the time of his death. One named his third wife as primary beneficiary and his daughter from his second marriage as secondary beneficiary. The other named his third wife as primary beneficiary and had no secondary beneficiary listed. At his death, his third wife claimed that she was entitled to the proceeds. His children claimed that the daughter named under the first policy is entitled to those proceeds, and the proceeds of the second policy should go to his estate. The trial court granted summary judgment to the third wife, holding that RCW 11.07.010 does not apply where the dissolution decree was entered by a foreign court. The decedent's children appealed. The Court of Appeals upheld the trial court.

**Discussion:** As a general rule, a named beneficiary's right to the proceeds of a life insurance policy on a spouse's life is not affected by dissolution. However, RCW 11.07.010 provides that a dissolution operates to revoke a spouse's beneficiary designation naming the other spouse. But that statute only applies to dissolution decrees entered by a Washington State superior court. The dissolution decree in this case was obtained in Hong Kong. The decedent's third wife argued that as a matter of comity a foreign divorce decree should be recognized in Washington. The Court agreed with this assertion, but reasoned that recognizing a foreign divorce decree as effectively terminating a marriage does not give a foreign divorce legal status equivalent to a decree entered into in Washington. The issue was not whether the foreign divorce was valid in Washington, but whether the foreign divorce triggers the terms of RCW 11.07.010. The Court held that it did not. The Court determined that while it has the power "to do what is just and equitable under the circumstances" in probate matters, it does not have the authority to ignore the express language of the statute, which does not extend to foreign dissolution decrees.

***Pitzer v. Union Bank, 93 Wn. App. 421, 969 P.2d 113 (Div. II 1998), rev. denied, 138 Wn. 2d 1001 (1999).***

**Summary:** Where surviving spouse/personal representative of the decedent's estate knew of decedent's illegitimate children, she had the duty to notify them of the estate's probate, and by failing to notify them, she was unjustly enriched.

**Facts:** Anna and Fisher Allotta had three children, Marie Pitzer, Carolann Guilford and James Alotta (the claimants). Fisher's sister, Rose, was married to Frank Magrini. Rose and Frank had no children.

Frank died in 1965 and he left his entire estate to his wife, Rose. The will named Fisher Allotta, Frank's brother-in-law, as a contingent beneficiary of the trust. The will also provided for nieces and nephews in the residuary of the estate. This list included the claimants. Rose and Frank's attorney served as co-executors of the estate. They filed a declaration of completion of administration of Frank's estate in March 1974; the estate automatically closed 30 days later.

Rose died in December 1995. Immediately preceding her death, Carolann and James visited Rose. Rose recognized James and when he left the room, she took the oxygen mask off of her face and said "Frank's son." Carolann spoke with other relatives about the comment and they confessed that Carolann and her siblings were Frank's children. These relatives indicated that they had known about Frank's paternity of the children for many years, but were sworn to secrecy.

In April 1996, the claimants petitioned to reopen Frank's estate, claiming that they were qualified as heirs under the pretermitted child statute. The claimants also filed as creditors against Rose's estate, claiming that she was unjustly enriched by failing to notify them of their intestate shares of the estate. They also sued Rose's estate to place a constructive trust on the assets equal to their intestate share of Frank's estate. The claimants also sued to establish paternity; however, that action is still pending and is not part of this decision.

The trial court dismissed the claimants' actions. The Court of Appeals reversed and remanded to the trial court for findings consistent with its opinion.

**Discussion:** The Court held that Rose had a duty to give notice to those children she knew, or, through due diligence should have known, were Frank's heirs. Even relying on RCW 11.76.080, which limited the rights of illegitimate children at the time of Frank's probate, the Court found that "a widow-

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## Recent Developments: Probate and Trust

administratrix had a duty to give notice to a possible child of the decedent even though the widow believed her husband was not the father of the child.” *Francon v. Cox*, 38 Wn.2d 530, 539-40, 231 P.2d 265 (1951). The probate court, rather than the widow-administratrix, was the proper authority for this type of decision. *Id.* at 537.

Next, the Court turned to the actual statute limiting the inheritance rights of illegitimate children, which, at the time of Frank’s death, required a written, signed and witnessed acknowledgment of paternity. Without such a writing, all illegitimate children, no matter how strong their proof of their father’s paternity, were excluded from any paternal inheritance. The Court found that former statute RCW 11.76.080 was not substantially related to a legitimate state interest; discriminated against illegitimate children; and violated the equal protection clause of the Constitution. The Court struck down former RCW 11.76.080 as unconstitutional. Therefore, the Court found that the claimants deserve the same consideration as legitimate children and must be considered pretermitted heirs, pending the outcome of the paternity case.

Furthermore, the Court held that the claimants have a right to re-open Frank’s estate because failure to give notice to a person entitled to notice of a probate creates a jurisdictional and due process defect in the final decree of distribution. No statute of limitations exists in finding a defect of this nature. The claimants did not have notice of the probate of Frank’s estate as heirs. Therefore, the improper distribution of Frank’s estate allows claimants the right to have it reopened.

Finally, the Court found that the assets in Rose’s estate would be held in constructive trust if it is determined that she received assets from Frank’s estate to which the claimants were entitled.

### ***Marriage of Zahm*, 138 Wn. 2d 213, 978 P.2d 498 (1999).**

**Summary:** Social security benefits are the separate property of the person entitled to receive them. Nevertheless, in a marital dissolution, the court may consider social security benefits for purposes of making a just and equitable disposition of the parties’ community property.

**Facts:** This case primarily involved the judicial characterization of social security payments when dividing property in a marital dissolution case, along with a number of other assets owned by the parties prior to and during marriage. Mr. and Mrs. Zahm both brought separate property to their marriage. Mrs. Zahm owned a home in Idaho, in which they lived for two years before selling. Mrs. Zahm placed the sale proceeds in a separate bank account, which was characterized as separate property by the trial court in the dissolution proceeding.

Mr. Zahm owned a townhouse in Idaho prior to marriage. During their marriage, Mr. Zahm paid off the balance due on the

townhouse, which he then sold. He placed the proceeds of the sale in a joint First Interstate Bank account in Washington. That bank account had initially been established with money from a jointly-held First Interstate Bank account in Idaho. Mr. Zahm claimed at trial that Mrs. Zahm’s name appeared on the Idaho bank account for estate planning purposes only. Nevertheless, the trial court in the dissolution characterized both bank accounts as community property.

Mr. Zahm received monthly federal social security and other federal retirement benefits, which were deposited into the Idaho First Interstate Bank account. The trial court characterized these benefits as community property, but it neither assigned nor calculated a future value of these benefits as part of the property characterization and distribution.

Mr. Zahm appealed the trial court’s findings. The Court of Appeals agreed with Mr. Zahm that the trial court had improperly characterized his social security benefits, but found the error harmless, and it affirmed the remaining issues appealed by Mr. Zahm as well. Mr. Zahm appealed to the Washington State Supreme Court, which affirmed the lower courts’ rulings.

**Discussion:** The Supreme Court agreed with the Court of Appeals that the social security benefits are separate property, not community, and that the lower court’s error was nevertheless harmless. Social security benefits are not subject to division when allocating marital property. However, a trial court does have the authority to consider all of the circumstances of each spouse when making a fair and equitable division of their marital property. Thus, in this instance, where the court did not order actual distribution of those benefits, the fact that they were improperly characterized as community was harmless error.

With respect to the trial court’s characterization of the Idaho bank account, the Court determined that the law of the state where the couple resided when the property was acquired must be applied to determine its character. The Zahms were domiciled in Idaho at the time the Idaho account was established. Thus, Idaho community property law governs this issue. Under Idaho law, property acquired during a marriage is presumed to be community in nature. This presumption can be rebutted if the petitioner can prove with reasonable certainty and particularly that the account contained commingled, separate property. This law was followed by the trial court. The trial court examined evidence similar to that which it would require in Washington—a record of the transactions into and out of the account—and determined that Mr. Zahm had failed to present sufficient evidence to overcome the presumption that the Idaho First Interstate Account was community property. The Court affirmed the lower courts’ rulings on this issue as well.

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## Recent Developments: Probate and Trust

### **Marriage of Burke, 1999 Wash. App. LEXIS 1294, 980 P.2d 265 (Div. III 1999).**

**Summary:** A clause in a prenuptial agreement that prohibits an award of attorney's fees does not prevent the court from awarding attorney's fees and costs incurred in parenting plan litigation. A bar against such an award is unenforceable; it impacts the interests of children and thus violates public policy.

**Facts:** William and Rebecca Burke executed a prenuptial agreement the day before their marriage. Mr. Burke filed a petition for dissolution almost exactly six months later. The agreement provided that in the event either party petitions for a divorce prior to their tenth wedding anniversary, neither party shall request, nor shall there be, an award of attorney's fees.

The Burkes had a daughter one year after they were married, and both parents wanted custody of the child. They litigated custody, visitation and other matters in connection with their daughter. Ms. Burke did not challenge the validity of the prenuptial agreement, but she did petition the court for attorney's fees based on the parties' disparate financial condition. The court denied the request, ruling that the prenuptial agreement precluded either party from receiving attorney's fees. Ms. Burke appealed that ruling. The Court of Appeals reversed.

**Discussion:** RCW 26.09.140 grants the trial court the discretion to require one party to pay the other party's attorney's fees and costs. In this case, the trial court concluded that it lacked discretion to make an award of attorney's fees because the parties were bound by their prenuptial agreement. However, prenuptial agreements cannot affect the rights of the parties' children. Although the court may consider the terms of an agreement purporting to affect the children's rights, the court is not bound by them.

The Court of Appeals agreed with Ms. Burke's contention that the prenuptial agreement clause prohibiting an award of attorney's fees is unenforceable because it violates public policy. The Court of Appeals indicated that public policy is generally determined by the Legislature, and established through statutory provisions. Thus, in order to determine the public policy applicable in this instance, the relevant legislation must be examined. In this case, the legislation provides that "In any proceeding between parents...the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002. The court examined relevant case law and determined that in fair and fairly entered into marital agreements, parties may waive rights affecting themselves and their property. However, the waiver of rights is not binding upon the courts as it applies to parenting plan issues, because such waivers violate public policy. The state's interest in child welfare requires that the court have the discretion to award attorney's fees, so that the financially disadvantaged parent is not deprived of the opportunity to be heard.

The Court reversed the trial court and remanded to the trial court with instructions that it has the discretion to award attorney's fees under RCW 26.09.140. The Court also granted Ms. Burke's request for attorney's fees on appeal, in an amount to be determined by the trial court.

### **Estate of Ardell, 1999 Wash. App. LEXIS 1072, 980 P.2d 771 (Div. III 1999).**

**Summary:** Where personal representative spent seven years and charged the estate several hundred thousand dollars in personal representative fees, and even where the Court notes that attorney's fees are shocking and indicates doubt that they are justified, the Court has no power to remove the personal representative and appoint a successor without evidence that the personal representative has failed to discharge his duties, wasted, embezzled or mismanaged the estate.

**Facts:** Kenneth Ardell named William Chatham as personal representative of his estate, to serve with nonintervention powers. Mr. Ardell died in 1990 with an estate of approximately \$9 million. Mr. Ardell had two daughters, whom he did not provide for in his Will, as they had each accepted \$350,000 before his death as their share of his estate. However, in late 1990 his daughters filed petitions to interpret or invalidate the Will. The daughters and the estate reached a settlement in 1991, in which they agreed, in part, that the daughters' attorney's fees of \$350,000 would be paid by the estate. Each party agreed to release the others for all claims now or in the future arising out of the facts that were the subjects of the law suit.

In 1992, Mr. Chatham filed a motion for court approval of a payment to himself for \$325,000 for "interim fees" and \$250,000 to his attorneys. The superior court judge responded that he was unwilling to authorize those fees on the basis of an ex parte petition. In the court's written response, it noted that the personal representative fee requested was on its face shocking and that it doubted that the attorney's fees were justified. The court advised Mr. Chatham to appear and present testimony justifying the fees, and Mr. Chatham's attorney "withdrew" the motion.

Seven and one-half years after the will was admitted to probate, one of the estate's beneficiaries filed a petition for orders revoking Mr. Chatham's letters testamentary, and his non-intervention powers, removing him as personal representative, and compelling an accounting. Mr. Chatham filed a declaration of completion of probate the day before the hearing on the petition. The beneficiary's motion was granted and a successor personal representative was appointed. The grounds for removing Mr. Chatham as personal representative included (1) his failure to respond to inquiries from the court concerning fees; and (2) the appearance that he wrongfully neglected the estate in failing to distribute assets, to provide an

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## Recent Developments: Probate and Trust

accounting, and to take any action of record for over five years. He was ordered to prepare a summary of tasks performed on behalf of the estate and to return any fees paid to his, or the estate's, attorneys or accountants. Mr. Chatham moved for reconsideration, which motion was denied. His petition for review was accepted by the Court of Appeals as a matter of right. On appeal, Mr. Chatham contended that the trial court did not have jurisdiction or authority to remove him as personal representative, or to require him to account for all fees. He argued that because this is a nonintervention probate, the court lost jurisdiction over the probate when the order of solvency was entered, and jurisdiction was never regained.

**Discussion:** The Court first determined that, assuming jurisdiction had properly been obtained by the court, Mr. Chatham's last minute attempt to avoid court intervention by filing the declaration of completion one day before the scheduled hearing was inadequate to defeat the Court's jurisdiction.

Next the Court considered its jurisdiction over the issue of fees. The Court conceded that once an order of solvency is entered and the Court has granted nonintervention powers, the personal representative is entitled to administer and close an estate without further court intervention or supervision. Furthermore, a personal representative does not waive his nonintervention powers or invoke the Court's jurisdiction merely by petitioning for an order or decree during the administration of the estate. However, applications for approval or setting of fees, which was done by Mr. Chatham in 1992, generally invest the Court with jurisdiction over that issue.

The Court further determined that it obtained jurisdiction over fees in 1991 when Mr. Chatham agreed in the settlement to obtain court approval of the attorney's fees and costs incurred on behalf of the state. Accordingly, the successor personal representative invoked the Court's jurisdiction over all fees incurred in the probate. However, the Court of Appeals determined that the jurisdiction of the court was limited to fees incurred in connection with the settlement agreement. However, the Court went on to determine that once Mr. Chatham had invoked the trial court's jurisdiction in 1992 by seeking approval of fees, he could not avoid the Court's jurisdiction by withdrawing the petition unilaterally.

Finally, on the subject of jurisdiction, the Court determined that the plaintiff who sought removal of Mr. Chatham had standing as an interested party, even though she had no further interest in the estate at the time she filed her petition, under RCW 11.68.070.

Once the Court established the trial court's jurisdiction and the plaintiff's standing, it next examined the petitioner's case to determine whether there were prima facie grounds for removal of Mr. Chatham as personal representative. The Court acknowledged

that the trial court is authorized to revoke letters testamentary if it has reasons to believe the personal representative wasted, embezzled or mismanaged estate property, or if the Court finds for other reasons that such action is necessary. RCW 11.28.250. In spite of its broad removal powers, the Court determined that the trial court did not have justification for removal of Mr. Chatham. In spite of the fact that he did not respond to a 1992 inquiry by the Court concerning his fees, he had not violated any provision of the decedent's Will, nor had there ever been a determination that the fees charged were excessive or that he failed to execute his trust faithfully. Without such findings, the Court determined that his removal was not supported by the facts in the record, and reversed and dismissed the order removing the personal representative and appointing a successor. Nevertheless, the Court found that the issue of reasonableness of fees in administering the estate, raised by the petitioner/beneficiary, had not been resolved and remanded the case for an evidentiary hearing on that issue.

### ***Estate of Toth, 1999 Wash. LEXIS 529, 981 P.2d 439 (1999).***

**Summary:** Civil Rule 6(e), which permits a 3-day extension of certain limitation periods when service occurs by mail, is inapplicable to will contests.

**Facts:** Bela Toth died testate in 1995. His will was admitted to probate on June 16, 1995. His personal representative, Mr. Cooke, sent notice of probate to Mr. Toth's relatives, including the plaintiffs. On October 19, 1995, the plaintiffs filed a pro se petition in a separate matter, asserting that Mr. Toth was not competent when the will was signed, and that the will was a result of fraud, lack of capacity and undue influence, and therefore, an older will was valid. Mr. Cooke moved to dismiss the petition under CR 12(b)(6). He alleged the petition violated the four-month statute of limitations pursuant to RCW §11.24.010. The trial court granted Mr. Cooke's motion, concluding that the contest was untimely. The plaintiffs appealed the trial court's ruling, and the Court of Appeals reversed. The Court held that the time period for will contests is extended by three days under CR 6(e) when the interested parties receive notice of the will's admission to probate by mail. Cooke filed a petition for discretionary review of the Court of Appeal's opinion. The Supreme Court reversed the Court of Appeals, finding that CR 6(e) does not apply to will contests.

**Discussion:** Any interested person may file a will contest, if the petition is filed within four months of the will being admitted to probate. RCW §11.24.010. The appellants conceded that the four-month period begins to run when the will is filed, not when notice is given. Nevertheless, they argued that because notice was given by mail, the four-month period should be extended under CR 6(e).

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## Recent Developments: Probate and Trust

The Supreme Court determined that the language of CR 6(e) indicates that the rule is inapplicable to will contests. The rule provides three additional days to respond when the response is required “after the service of a notice or other paper upon him.” CR 6(e). This rule operates to toll the response time only in cases in which a party is required to respond within a certain time after being served or notified. However, the rule does not apply when the prescribed period of time in which the parties are required to respond is triggered by an event other than the service of notice upon the party. A will contest does not fall within the meaning of CR 6(e) as a response required within a certain amount of time after the service of notice on an interested party.

While notice must be served to the parties upon admitting a will to probate, the time for filing of a will contest is not connected to the date of service upon the party. Instead, the will contestant’s opportunity to file is tied to the date the will is admitted to probate, regardless of when notice is received.

The Court went on to reason that, in spite of the fact that there is nothing in Washington law specifically indicating that CR 6(e) is inapplicable to will contests, Washington case law supports the dismissal of the petition. The Court held that the policy that the four-month period for will contests is absolute, and that there are no exceptions to the rule and no equitable doctrines to afford any flexibility. The Court has no jurisdiction to hear and determine a contest filed after the expiration of the four-month period.

### ***Estate of Kessler, 95 Wn. App. 358, 977 P.2d 591 (Div. I 1999).***

**Summary:** Whether an unsuccessful will contestant acted with probable cause and good faith does not depend upon the contestant’s ability to prevail on the merits, and where the will contestant does not prevail on the merits, the prevailing party is not necessarily entitled to its attorney’s fees.

**Facts:** Lavina Kessler died at age 99, in 1996. In 1987, 1990, 1993 and 1995, Mrs. Kessler executed four wills. In each of those wills she made substantial bequests to Frances and Thomas Trimm. The Trimms had been friends with Mrs. Kessler for approximately 50 years, and later in life assisted Mrs. Kessler in various matters, especially after she lost her eyesight. In 1993, Mrs. Kessler named Mrs. Trimm as her attorney-in-fact.

In 1995, Mrs. Kessler’s great-nephew, Brian Davis, and his wife, Tami, expressed concern about the way in which the Trimms were handling Mrs. Kessler’s affairs. They contacted her attorney and told him that Mrs. Kessler wanted to revoke her power of attorney, and gradually obtained control of her financial affairs. They contacted a new attorney on behalf of Mrs. Kessler, to revoke her power of attorney and prepare a new one. The new attorney also prepared a will for Mrs. Kessler, which eliminated the Trimms as beneficiaries and for the first time, named Brian and Tami Davis as personal representatives, beneficiaries of real

property and residuary beneficiaries. Mrs. Kessler signed that will on March 22, 1996. Mrs. Kessler died nine weeks later.

The Trimms filed an action contesting the 1996 will, alleging that Mrs. Kessler lacked testamentary capacity when she signed her will, that she was unduly influenced by Tami Davis in making the will, that Tami Davis fraudulently induced the will, and that it was improperly executed. After a two-week trial, the trial court denied the Trimms’ petition to invalidate the will and entered an order awarding costs and attorney’s fees to the estate in the amount of \$346,949.89. The Trimms appealed.

**Discussion:** The Trimms challenged the trial court’s award of costs and attorney fees to the estate based on its conclusion that the Trimms acted in bad faith and without probable cause in contesting the 1996 will. RCW 11.24.050 provides for the assessment of costs and attorney’s fees against will contestants unless the contestants acted with probable cause and in good faith. The trial court determined that whether a contestant acted in good faith and with probable cause is determined by evaluating whether the contestant is able to prevail at trial. The Court of Appeals examined the facts in connection with the claim of lack of testamentary capacity, fraudulent procurement of a will, and undue influence and concluded that, even though the Trimms did not prevail, they raised a number of valid and debatable issues concerning the result in this case. Therefore, the Court declined to award the Davises their attorney’s fees on appeal and, because the Court concluded that the Trimms did not act in bad faith or without probable cause in contesting the 1996 will, it also reversed the trial court’s award of attorney’s fees to the estate.

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## Recent Developments

### Real Estate

*Scott B. Osborne, Graham & Dunn P.C., Seattle*

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#### WASHINGTON COURT OF APPEALS

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**Hayden v. Mut. of Enumclaw Ins. Co., 95 Wn.App. 563 (1999)**

**Facts:** Hayden Farms suffered damages to its crops when Krause failed to properly graft orchard trees. Krause tendered the defense of the claim to his liability insurer. A default judgment was entered against Krause, who then assigned his rights under his insurance policy to Hayden. Hayden then sued the insurer claiming coverage under the policy and bad faith denial of the defense. The trial court dismissed the claim.

**Holding:** The dismissal was affirmed. The failure to provide a specific reference to the policy in the letter denying coverage was not a violation of WAC 284-30-380. The insurer had no duty to defend for acts specifically excluded from the policy. Assuming that Hayden suffered property damage from an occurrence, the claim was clearly excluded by exclusion (h) which provided in part:

This insurance does not apply:

. . .

(h) to loss of use of tangible property which has not been physically injured or destroyed resulting from

- (1) a delay in or lack of performance by or on behalf of the NAMED INSURED of any contract or agreement, or
- (2) the failure of the NAMED INSURED'S PRODUCT or work performed by or on behalf of the NAMED INSURED to meet the level of performance, quality, fitness and durability warranted or represented by the NAMED INSURED . . .

Hayden's damages arose from a claimed delay in having a harvested crop, and the claim was clearly within the exclusion of the policy.

This case points out the possibility of obtaining coverage under the standard Commercial General Liability (CGL) Policy for defects in construction by asserting a claim that the defect resulted in property damage. For a more extensive listing of cases on this subject, see Schultz, Gregory G., "Commercial General

Liability Coverage of Faulty Construction Claims," 33 *Tort & Insurance Law Journal* 257 (No. 1, Fall 1997), and Turner, Scott C., "Insurance Coverage for Incorporation of Defective Construction Work or Products," *The Construction Lawyer*, April 1998, page 29.

**Hanson v. Estell, 95 Wn.App. 642 (1999)**

**Facts:** Hanson built a barn that had one corner which encroached approximately one foot onto the adjoining property. Estell, the adjoining owner, did not object to the encroachment, but did attempt to stop Hanson from crossing Estell's property to gain access to the barn. Ultimately, Hanson obtained a prescriptive easement that allowed the access to continue. Estell then constructed a fence to block the easement. Hanson sought an order of contempt and claimed damages under various theories; Estell counter-claimed for trespass arising from the barn encroachment. The trial court dismissed Hanson's claims and upheld Estell's trespass claim. Another trial resulted in an award of damages to Estell for the trespass, but a dismissal of Estell's claims for forced removal of the barn, malicious prosecution and frivolous lawsuit.

**Holding:** The dismissal of the malicious prosecution and frivolous lawsuit claims was upheld. The normal remedy for encroachment is an injunction which compels the removal of the improvement. This remedy is equitable in nature, and damages can be awarded in cases in which (1) the encroachment was not the result of a calculated risk; (2) the damage to the landowner is slight; (3) there is no real limitation on the right to use the property; (4) it is impractical to remove the encroaching structure; and (5) there is an enormous disparity in the resulting hardships from the forced removal. The trial court did not abuse its discretion in weighing these factors to conclude that a monetary award rather than injunctive relief was appropriate. Because Hanson had made an offer of settlement pursuant to RCW 4.84.280 which was greater than the monetary award, Hanson was properly awarded attorneys' fees.

**Snohomish County v. Postema, 95 Wn.App. 817 (1999)**

**Facts:** Postema filled approximately 1.1 acres of wetlands on property which he owned and installed two drainage ditches to drain the wetlands. Water from the ditches was directed through a swale into a creek. In response to a demand from the Corps of Engineers, Postema removed a portion of the fill. A downstream owner then asserted a claim against Postema alleging that the fill and drainage ditches caused a trout pond to fill with silt. The trial

## Update Published to WSBA's Washington Community Property Deskbook

The Washington State Bar Association is offering the latest developments in Washington community property law – and analysis of their impact — by the experts who teach it at Washington's three law schools. The update to the Washington Community Property Deskbook has just been completed by Thomas R. Andrews, Professor of Law at the University of Washington Law School; William C. Oltman, Professor of Law at Seattle University School of Law; and Gary C. Randall, Professor Emeritus of Law at Gonzaga University School of Law. The 378-page cumulative supplement interleaves with the original deskbook, previously supplemented in 1997, to create an 800-page treatise.

The update features coverage of new developments including: unmarried cohabitants and "pseudo-community property"; new family allowance provisions added by Chapter 11.54 RCW; federal preemption (particularly under ERISA); treatment of disability insurance benefits; conflict of laws issues in characterization of marital property when one spouse abandons the other and takes up a new domicile and a new spouse – without divorcing the first one; and liability of stepparents for non-custodial children.

The Supplement is priced at an affordable \$75 plus tax and shipping. The cost of the 800-page deskbook and supplement set has been reduced from \$150 to \$110 plus tax and shipping. An additional 10% can be saved when buyers sign up to receive and be invoiced for additional updates and new editions automatically. To purchase the book, or for further information, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

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### *Recent Developments: Real Estate*

court dismissed the claim on summary judgment under the "common enemy doctrine."

**Holding:** The judgment was reversed. The common enemy doctrine is applicable only in those instances in which the waters are surface waters. The classification of the waters is a question of fact. Even if the waters involved were surface waters, a question of material fact existed as to whether Postema caused a greater discharge of the water or changed the manner of the discharge. The upland landowner is not permitted to artificially collect and discharge water onto adjoining lands in a greater quantity or in a different manner than would normally occur. There was ample evidence in the record which could support a finding that Postema had trespassed onto the adjacent land by discharging a quantity of water filled with sediment and silt. The Court also rejected a claim that the Postema owned corporation which leased the land shielded Postema from personal liability for the actions taken by Postema.♦♦♦

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We're here to serve you! The mission of the WSBA Service Center is to respond promptly to questions and requests for information from our members and the public. Call us Monday through Friday, from 8:00 a.m. to 5:00 p.m. Or if you find e-mail a convenient way to communicate, send us a message at [questions@wsba.org](mailto:questions@wsba.org). Assistance is only a phone call or an e-mail away.

## PROBATE AND TRUST COUNCIL REPORT

*Barbara C. Sherland, Stoel Rives LLP, Seattle  
Director - Probate and Trust Council*

The Council is considering three legislative proposals of interest to probate and trust practitioners:

1. Rule Against Perpetuities. We plan to recommend revision of the rule against perpetuities to adopt a period of one-hundred years in gross. Polls taken at the Midyear Meeting indicated strong support for reform, but not repeal, of the rule. Thanks go to Mike Carrico for conducting the polls, evaluating the various proposals and agreeing to draft the proposed statute.
2. Powers of Attorney. We are considering revisions to the power of attorney statute that would adopt a statutory power of attorney form. Karen Boxx is heading a task force looking at this.
3. Uniform Principal and Income Act. We have been monitoring the position of other states regarding the

Uniform Principal and Income Act. Tom Culbertson is chairing the subcommittee that will be making recommendations to the Council regarding whether Washington should adopt the Act.

We plan to present the revised rule against perpetuities and the statutory power of attorney statutes during the 2000-2001 legislative session. We welcome input from our members on the proposals (speak now or forever hold your peace). Please direct comments to Mike, Karen, Tom or me.

In addition to legislative activities, the Council is reviewing ways to enhance the Section's web page to make it of better service to members. During the last legislative session, we posted progress of legislation that could affect probate and trust practitioners. We intend to continue that practice this year and are looking at adding other information to the web page that may be of service to members. Your ideas are always welcomed!

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### Join Us Today!

The officers of the Real Property, Probate & Trust Section urge you to become an active member of this important Section. All members of the Washington State Bar Association are eligible. Simply fill out the form below and mail with a check for \$15 to: **Real Property, Probate & Trust Section, Attn: Sheri Borgford, Washington State Bar Association, 2101 Fourth Avenue - Fourth Floor, Seattle, WA 98121-2330**

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## REAL PROPERTY COUNCIL REPORT

*Warren Koons, Davis Wright Tremaine LLP, Bellevue  
Director - Real Property Council*

***“Resolve to be honest at all events; and if in your own judgment you can not be an honest lawyer, resolve to be honest without being a lawyer.” —A. Lincoln***

Just thought I'd start out by sharing one of my favorite Lincoln quotes. When Gordon Tanner called me a few months ago to ask if I would serve as Director of the Real Property Council, I have to admit that my mind went back to that old Woody Allen joke—that he'd never want to join a club that was willing to have him as a member. The Council has had such outstanding leadership over the years, it is truly an honor to be asked to serve. To those who have most recently served on the Council—Serena Schourup, Jane Nelson and Steve Tubbs—many thanks for a job well done.

In taking on this new responsibility, I am greatly comforted by the knowledge that the other Council members are dedicated, capable and wonderful people to work with—Bill Reetz and Bruce Coffey, our carry-over members, and Shannon Skinner and Mike Currin, our two new members. Also, as Past Chair and Chair Elect of the Section, John Riley and Serena Schourup will continue to assist the Council in its work this year. Our Council responsibilities are currently allocated as follows:

**Bill Reetz**—New Legislation

**Bruce Coffey**—RPPT Section Web Page Development

**Shannon Skinner**—CLE Chair

**Mike Currin**—CLE Vice Chair/Representative on Opinion Letter Task Force

The Council met on September 18, 1999, at the RPPT Section Executive Committee Retreat. Some of the main items currently on our agenda:

- Review and respond as needed to a recent Senate Judiciary Committee staff report concerning whether or not there is a need for new adverse possession legislation.
- Review and comment on issues concerning new legislation contemplated by the Durable Power of Attorney Task Force, as well as the proposed comprehensive revision of Article 9 of the Uniform Commercial Code.
- Comment on the report to be issued this Fall by the Opinion Letter Task Force.

- Make significant improvements to the RPPT Section Web Page.
- Consider use of e-mail for transmitting information, announcements and possibly the Newsletter to Section members.
- Plan for upcoming CLEs and Year 2000 Mid-Year Meeting.

We look forward to a productive and exciting year. If you have any suggestions, comments or ideas for the Council, please feel free to e-mail me at: [warrenkoons@dwt.com](mailto:warrenkoons@dwt.com).

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### Upcoming Section CLE Seminars

**TEDRA**

**April 10, 2000**

(Site TBD) Seattle, WA

**April 16, 2000**

(Site TBD) Spokane, WA

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**Real Property, Probate & Trust Section**

**Midyear Conference**

**June 2-4, 2000**

Skamania Lodge

Stevenson, WA

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## HOW TO REACH US!

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#### **Newsletter**

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