

# Real Property, Probate & Trust



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## An Introduction to Water Law

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### I. Introduction

Municipal planning, land development, and basic real estate transactions have become increasingly reliant on understanding available water supply. The availability of water has legal, technical, and policy elements that are hard to predict, despite the fact that water law is one of the oldest established legal subjects. Water law has developed and continued to adapt to current political and social values. See Bates, Getches, MacDonnell and Wilkinson, *Searching Out the Headwaters: Change and Rediscovery in Western Water Policy* (1993).

The perceived uncertainty of water rights has both frustrated and fascinated attorneys and officials who have had to struggle with water law issues in real estate transactions and planning. While an owner in fee simple of land may believe that he or she possesses and can freely alienate every resource on the land, this is not true with regard to water that flows through or under the land. For example, the owner may own the beds of a nonnavigable stream but be unable to claim ownership of the water flowing in the stream, or to deny another person's right to float on the stream across the property.

To know whether one owns a water right regarding a particular use of water on a parcel of land, one should consider two basic questions: (1) is the water use authorized by a water right permit or certificate, and if not, is it a "precode" water right represented by a "claim" filed with the state; and (2) has the water right holder continued to beneficially use the water, or was the right lost for nonuse? If no water right exists, the property owner must seek a water right by application to the state or by purchase and transfer of another's water right.

### II. The Right to Use Water

The waters within the state belong to the public, or *publici juris*. The waters are not subject to private ownership. *State Dept. of Ecology v. United States Bureau of Reclamation*, 118 Wn.2d 761, 827 P.2d 275 (1992).

A person may obtain a "right to use" the water, but this right does not vest the person with an ownership interest in the water. The person obtains an interest known as a "usufructuary right," which is simply the right to use the water. *Bureau of Reclamation, supra*, at 761; 1 Wiel, *Water Rights in the Western States*, Section 18 at 18, 20 (3<sup>rd</sup> ed. 1911). Therefore, one who diverts or withdraws water takes no title to the water but only obtains a personal property interest in "molecules" of water which the person has under his or her "control and possession." *Bureau of Reclamation, supra*, at 767. If the person does not exercise the right to use the water, the water remains in the stream to be available to satisfy other rights. See *Miller v. Wheeler*, 54 Wash. 429, 103 P. 641 (1909); *Elgin v. Weatherstone*, 123 Wash. 429, 212 P. 562 (1923).

These fundamental principles are the foundation for the allocation and use of water. Under these principles, one cannot assume a stream flowing through his or her land or the water beneath such land can be withdrawn and used as a source of supply by the land owner. In fact, there may be a right of an adjacent landowner to divert water from a river or ground water well on another's property.

In an effort to determine if there is a water right on a particular parcel of land, one will find that there are several types of water rights. The state of Washington recognizes two doctrines created in common law that are the basis for obtaining a state right

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to use water. These are the riparian doctrine and the prior appropriation doctrine. The elements of each of these doctrines are very different. The riparian doctrine is based on the element of ownership of land adjacent to a water source. A landowner may make “reasonable” use of water on land that is riparian to a stream or lake. The prior appropriation doctrine is based on the element of actual use of the water; it is not dependent on ownership of riparian land. A person may appropriate water if the water is applied to a beneficial use.

The state of Washington has adopted the prior appropriation doctrine as the law of this state for the administration and regulation of water rights. *In re Alpowa Creek*, 129 Wash. 9, 13, 224 P. 29 (1924). However, riparian water rights created before the adoption of the 1917 water code, Ch. 90.03 (discussed in Part III.B *infra*), are still recognized if they have been exercised continuously since 1932. *In re Deadman Creek*, 103 Wn.2d 686, 694 P.2d 1071 (1985). Because the riparian doctrine has less significance now in this state, this article will not include further analysis of this doctrine.

The basic elements that create a right under the prior appropriation doctrine are: (1) commencing the necessary work to develop the use of the water; (2) diligently developing the full use of the water within a reasonable period of time; and (3) thereafter continuously using the water.<sup>1</sup> The water right is conditioned. It authorizes the right to water from a specific source of water for a specific purpose at a specified location. Except for limited reasons, these basic elements of a water right are conditions of using the water and can be changed only upon application and approval by the state Department of Ecology (“Ecology”). (See Section IV below.)

### **III. Obtaining and Owning a Water Right**

There are several ways to own a water right. Generally water rights exist either under the common law by the use of water prior to the adoption of the water code, or by approval of an application for a water permit under the statutory permit process.

#### **A. Common-Law Pre-Code Rights**

The common-law right is often referred to as a pre-code “vested” right. Under the common-law appropriation doctrine, summarized above, a water right was established when a person had the intent to divert water for beneficial use, and exercised due diligence in constructing the diversionary works and applying the water to a beneficial use. *Thompson v. Short*, 6 Wn.2d 71, 106 P.2d 720 (1940); *Madison v. McNeil*, 171 Wash. 669, 19 P.2d 97 (1933); Tarlock, *Law of Water Rights & Resources*, § 5.10, at 5-54 (July 2003).

Once an appropriation was complete by the application of water to a beneficial use, the right “related back” to the date one showed the necessary intent to use the water. *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 565, 250 P. 41 (1926); Tarlock, *supra*, § 5.14(2), at 5-69. This date is called the priority date for

that right, and in times of water shortages it allows the user to continue to withdraw water to the detriment of all those who have later priority dates (“junior rights”). In turn, the junior user must cease withdrawing water if it will impair the use of water by those who have earlier priority dates (“senior rights”). *Id.* These concepts carried over into the adoption of the 1917 water code.

These pre-code water rights must be memorialized in a “claim” filed with the state. In 1969, the state Legislature passed the Registration Act, codified in Ch. 90.14 RCW. Under this Act, all persons who claimed a right to use a pre-code water right to divert or withdraw water had to file a “claim” with the state. The Legislature has “recognized” this registration period several times since 1971. If a claim was not filed, the pre-code water right was forfeited and was no longer valid. RCW 90.14.071. *In re Chumstick Drainage*, 103 Wn.2d 698, 694 P.2d 1065 (1985). Claims did not have to be filed for nondiversionary water rights or for rights authorized under the statutory permit process described in the next part.

#### **B. Statutory Permit Process**

In 1917, the state Legislature enacted the first comprehensive water code that prescribes a permit process to obtain a right to use surface water. Ch. 90.03 RCW (the “Water Code”). In 1945, the same permit process was required for the right to use groundwater. Ch. 90.44 RCW (the “Groundwater Act”). The codes recognized and protected the existing rights with priority dates that were before the adoption of the codes—1917 for surface water and 1945 for groundwater.

Under the Water Code, a person who wants the right to use water must file an application with Ecology. RCW 90.03.250. Ecology must investigate and determine: (1) whether the proposed use is a beneficial use of water; (2) whether water is available for the use; (3) whether the use of water will injure existing rights to the use of water; and (4) whether the use will be in the public interest. RCW 90.03.290. A permit is issued only if Ecology answers all of these questions in the affirmative. This is often referred to as the “4-part test.” *Id.*; *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 508 P.2d 166 (1973). Ecology’s decision to issue a permit is a discretionary act. *Schuh v. Dept. of Ecology*, 110 Wn.2d 180, 667 P.2d 64 (1983); *Peterson v. Dept. of Ecology*, 92 Wn.2d 306, 596 P.2d 285 (1979).

A water permit states a period of time in which the water must be put to actual use. This is the due diligence period. During this time, prior to actual use of the water, the right is considered “inchoate.” The Water Code provides Ecology with the discretion to determine the periods of time for the diligent construction of a project and the application of water to beneficial use. RCW 90.03.320.<sup>2</sup> The permit is cancelled for the quantity of water not used within the prescribed time period. *Id.* However, Ecology may extend the time period to put the water to use “for good cause.” *Id.* The permit is owned by the named permittee

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regardless of who owns the land where the water is used, and the permit can only be cancelled if the permittee is given notice. The permit can be assigned to another person by filing an assignment with Ecology. RCW 90.03.310.

Applying the water that is subject to a permit to use with diligence is based on the policy adopted in the appropriation doctrine that water should not be wasted—if one does not need the water and is unable to develop it within a reasonable time, the right to the water must be made available to the next person ready and able to put the water to use. *Id.*; see also *Coffin v. The Left Hand Ditch Co.*, 6 Colo. 443 (1882). In turn, a person cannot appropriate water for speculative purposes and must use the water or lose the right to such water (aka: “use or lose it”). *Id.*; see *Okanogan Wilderness League (OWL) v. Dept. of Ecology and City of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997).

A certificate will issue for the water put to use under the conditions of the permit. RCW 90.03.330. The certificate represents the perfected water right for the quantities of water that have been applied to beneficial use as authorized under the permit. Issuance of a certificate is not an adjudication or final determination of the water right. *Mack v. Eldorado Water District*, 56 Wn.2d 584, 354 P.2d 917 (1960); *Madison, supra*, at 680.<sup>3</sup> When the right is acquired by the appropriation of water, the right relates back to the date the application was filed with Ecology. RCW 90.03.340 (codifying the “relation-back” doctrine).

A water right becomes appurtenant to the land and vests into a perfected right when the water is put to beneficial use<sup>4</sup> and a water right certificate is issued. A “vested” water right is a term of art, defining a water right as a real property interest. See *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993); *Dept. of Ecology v. Grimes*, 121 Wn.2d 459, 474, 852 P.2d 1044 (1993).

Ecology has in the past exercised its discretion to issue certificates for quantities of water that were not used or were still inchoate in nature. This has created a great deal of confusion regarding the status of a water right certificate when the water has not yet been applied to actual use. In *Theodoratus v. Dept. of Ecology*, 135 Wn.2d 582, 957 P.2d 1241 (1998), the Washington State Supreme Court held that Ecology acted beyond its authority in issuing these certificates for inchoate water. The Court did not find that the rights represented by the certificates were void, but the decision created even greater anxiety among these certificate holders. The 2003 state legislature passed legislation attempting to provide certainty to the certificate holders. E2SHB 1338. The legislation states that these “water rights” are in good standing. It is unknown how Ecology or the courts will interpret “good standing.”

### C. Groundwater Permit Exemption

When the Groundwater Act was passed in 1945, Ch. 90.44 RCW, it exempted from the permitting process small withdrawals, including water for stock, for noncommercial irrigation not exceeding 1/2 acre, for domestic use, and for industrial use not to exceed 5,000 gallons per day. Under the state Department of Health’s general standards of 800 gallons per home per day, the exemption would allow a development of six homes to withdraw groundwater without having to apply for or receive a water permit from the state.

Recently, the courts have had an opportunity to review the applicability of groundwater exemptions. In *Dept. of Ecology v. Campbell and Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002), the Washington State Supreme Court held that a residential development must be considered as a single project in determining whether the permit exemption applies. If the project as a whole requires more than 5,000 gallons per day, the exemption cannot apply and the developer must obtain a water permit. The court’s opinion should be fully read to understand the nuances of and possible exceptions to this interpretation. In *Kim v. PCHB*, 115 Wash. App. 157, \_\_\_\_ P.3d \_\_\_\_ (2003), the Washington State Court of Appeals held that a greenhouse operation is an industrial use and not subject to the one-half acre limitation under the exemption for irrigation.

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### **IV. Water Right Transfers**

If a development or any parcel of land does not have an available water source either under an individual water right or from a public water-supply system, the land owner or developer can apply for a new water right or seek to transfer an existing water right from another parcel of land. Obtaining a new water right is very difficult for two primary reasons. First, Ecology has been denying most new applications because the water sources have been fully appropriated and there is no longer any new water available for appropriations. Second, Ecology is not able to process these applications within the period of time that developers usually require. It can be several years before a final decision is made. Water rights have therefore been obtained through the transfer process, in which a person has purchases a water right and seeks through the application process with Ecology to change and transfer the water right to another parcel of land for similar or different purposes.

Generally, a water right can be changed regarding the purpose of the water use, the place of use, and the point of withdrawal (groundwater) or point of diversion (surface water). Many water-right transfer applications request that a water right issued for a farm for irrigation purposes be changed to allow year-round multiple domestic or municipal purposes. RCW 90.03.380 and 90.44.100.<sup>5</sup>

When analyzing an application to change a water right, Ecology must evaluate whether the water right remains valid by virtue of the full and continuous beneficial use of water. Only that quantity of water that has initially been put to full beneficial use and not otherwise relinquished by nonuse can be transferred. *See OWL v. Ecology and Twisp, supra*. Second, Ecology must evaluate whether the change will impair any other existing water rights. *Id.* A water right cannot be changed such that it would impair any other water rights whether junior or senior to the water right being transferred.

In evaluating a proposed change of a groundwater right with respect to the place of use or the point of withdrawal, the analysis is slightly different. The Washington State Supreme Court has held that in changing these elements of a groundwater right, the water right need not have been fully beneficially used. *See R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 969 P.2d 458 (1999). The court explained that the Groundwater Act, RCW 90.44.100, allows the change of a place of use and point of withdrawal (*i.e.*, the well site) to be changed for water rights that have not yet been fully used. *Id.* In other words, a groundwater permit can be changed for the place of use and point of withdrawal. Ecology will still consider whether or not the change will impair other existing water rights. Further, under the Groundwater Act, Ecology considers whether the change will meet the standards for issuing a new water right, which includes an analysis of whether the new place of use or point of withdrawal will be in the public interest. *Id.*

### **V. Loss of Water Rights**

A water right may be lost for nonuse of the water. Water rights may be lost under common-law abandonment or under the statutory relinquishment laws of Ch. 90.14 RCW. *See OWL v. Ecology and Twisp, supra*.

The legal concepts of a water right as a usufructuary right subject to beneficial use are based on the policy that one will have a right to use the water if he or she needs it; otherwise, the right to use the water is lost and the water becomes available for others. In common law, water rights were abandoned by an appropriator's decision to stop using the water and intending not to continue use. *OWL v. Ecology and Twisp, supra*. The loss by common-law abandonment requires a party to show the appropriator intended to abandon the right. This is a heavy burden. However, the court has held that many years of nonuse creates a presumption of such intent, and it is the appropriator's burden to show acceptable reasons for the nonuse. *Id.*

The Water Code also provides a statutory relinquishment for surface and groundwater rights. RCW 90.14.130-210. If the water right was not continuously used for five consecutive years "without sufficient cause," the water right is relinquished. *Id.* The Water Code defines the "sufficient causes" as a list of reasons for nonuse of water, including drought, crop rotation, and military duty. RCW 90.14.140. Developers commonly assert either of two exceptions from relinquishment in seeking to establish water rights. They argue that the water they claim is to be used for "municipal water supply purposes" or for "determined future development." *See R.D. Merrill, supra*.

### **VI. Growth Management Act**

There has been increasing discussion of how the fundamental principles of water law fit within the demands for growth and the requirements of the Growth Management Act, Ch. 36.70A RCW ("GMA"). The debate appears to center on the question of whether the requirements of developing a plan under the GMA dictate when and where water will be made available, or whether such planning efforts and land use decisions should be based upon and directed by the availability of water. Neither the GMA, adopted in 1990, nor the Water Resources Act, adopted in 1971 (and discussed in the next part), explicitly requires that growth must occur when and where water is both legally and physically available. However, specific sections in the GMA, the 1971 Water Resources Act, and the 1917 Water Code provide some guidance, and indicate that water availability should be a fundamental element in land use planning.

#### **A. 1971 Water Resources Act, Ch. 90.54 RCW**

The stated purpose of the 1971 Water Resources Act is to allow for comprehensive water resource planning to assist both state and local governments in water management. Ch. 90.54 RCW. All local governments, including counties and municipal

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and public corporations, must carry out their duties and obligations in a manner consistent with the provisions of the Act. RCW 90.54.090. Ecology may also recommend land use management policy modifications to other agencies, including local governments' water systems, for the protection of ground and surface water resources. RCW 90.54.130.

Upholding Ecology's regulatory authority under the Water Resources Act, the Pollution Control Hearings Board has affirmed Ecology's denial of an application to withdraw groundwater to serve a large subdivision in the urban growth area of Sequim. *Cascade Investment Properties, et al. v. Dept. of Ecology and City of Sequim*, PCHB 97-47 and 97-48 (1997). The denial was based on Ecology's finding that the permit would be detrimental to the public interest because the subdivision could be served by the City of Sequim's municipal water system. This is consistent with the goals of RCW 90.54.020 and the GMA. This decision has been appealed to the Superior Court.

### **B. 1917 Water Code, Ch. 90.03 RCW, as Amended in 1997**

Once the Department of Ecology has made a decision to issue a water permit, Ecology must use growth planning and related demand projections under the GMA, Ch. 36.70A RCW, to prescribe the period of time for completion of a project for municipal water supply purposes.

In fixing construction schedules and the time ... for application of water to beneficial use for municipal water supply purposes, the Department shall also take into consideration ... the supply needs of the public water system service area, consistent with an approved comprehensive plan under 36.70A RCW, or in absence of such plan, a county approved comprehensive plan under 36.70 RCW or a plan approved under ch. 35.63 RCW, and related water demand projections prepared by public water systems in accordance with state law. An existing comprehensive plan under ch. 36.70A RCW, plan under ch. 35.63 RCW, or demand projection may be used. RCW 90.03.320.

### **C. Water Availability Requirements**

Under the GMA, the legislature imposed a duty on local governments to consider water availability when approving subdivisions and building permits. Local governments cannot approve a subdivision proposal unless appropriate provisions are made for potable water supplies. RCW 58.17.110. Under RCW 19.27.097, a local government cannot issue a building permit unless and until it finds there is an adequate water supply necessary for the intended use of the building. See AGO 1992 No. 17. A local building department must satisfy itself that the source of water, whether permitted or under an applicable exemption from permitting (*see* Part III.C *supra*), will provide a

reliable water supply in sufficient quantity and quality for a reasonable period of time. *Id.* at 11-12.

Under the planning goals of RCW 36.70A.020(10) and (12), there is a recognition that water resources should be considered in planning. The goals guide the development and adoption of comprehensive plans and development regulations. The GMA also provides that the land use element of a comprehensive plan must protect the water quality and quantity of groundwater used for public water supplies. RCW 36.70A.070(1). The capital facilities element of a comprehensive plan requires a forecast of the future capital facilities necessary for the land use element. RCW 36.70A.070(3). And the rural element of a comprehensive plan requires provisions for essential public facilities, and the protection of surface and groundwater resources. RCW 36.70A.070(5)(b) and (c)(iv).

While the language in the GMA does not explicitly require a local government to find that a water right exists to satisfy planned growth, Growth Boards have recognized that ensuring adequate water systems was consistent with and supported by the requirement that local governments make determinations of adequate water supplies when reviewing plat applications, and building permit applications, codified in RCW 58.17.110 and RCW 19.27.097, respectively. *See Taxpayers for Responsible Government v. City of Oak Harbor*, Western Washington Growth Management Hearings Board, No. 96-2-0002, Final Decision and Order (7/16/96). As stated above, a determination of adequate water supply must be based on the state Department of Health's water quality standards and a valid water right. *See* AGO 1992, No. 17. These standards are also provided for in WAC 365-195-825.

In *Loomis v. Jefferson County & Pope Resources*, No. 95-2-0066, Final Decision and Order (9/16/95), the Growth Board found that the planning analysis for a proposed Port Ludlow Interim Urban Growth Area (IUGA) had to define specifically and clearly the quantity of water to be supplied. The Board recognized that water rights are a concern in the local government's approval of plat applications. In its final ruling, the Board held that the ordinance at issue was flawed for several reasons, including lack of proper review of the adequacy of water availability for the urban community.

## **VII. Conclusion**

Ecology's Water Resources Program has records of all water rights and claims. The records can be found by searching by the legal description of the land or by name. However, water rights represented by certificates may be under the name of a person long deceased and whose family sold the property where the water right was used. Therefore, searching by legal description of the land is more efficient and reliable.

To determine if the water right remains valid, one should have documentation of the historical water use. Unless the water

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# Talking About Charitable Giving: Conversations with Practitioners

by Cynthia Flash, LEAVE A LEGACY® of Western Washington

## Introduction

When helping clients develop an estate plan, the issue of charitable giving is one area that some lawyers routinely raise and others feel less comfortable addressing. Yet the subject is not difficult to broach. Many times clients are happy to discuss it and often it leads to charitable gifts that may not have been made otherwise. Below, we talk to six lawyers who routinely help their clients with charitable estate planning. Some handle large estates – those of \$20 million to \$100 million – for large law firms. Others are independent practitioners or work for smaller firms and handle small estates, or even non-taxable estates. When discussing charitable estate planning, some are very direct with their clients, others more subtle. Regardless of the size of their clients' estates – or their personal approach in discussing charitable giving – all of these lawyers share a passion for charitable estate planning and try to help their clients fulfill their charitable goals. By reading the interviews below, you will see how each of them handles this issue and you will hopefully gain some knowledge for your own estate planning practice.

## The Participants

We spoke with these six attorneys:

- *Bruce Flynn*. Bruce has been an estate planning lawyer for 30 years. In practice with Perkins Coie LLP in Seattle, he has a broad mix of clients – individuals, family groups, business owners and company executives who are trying to pass their taxable estates on to their families.
- *Tim Friedrichsen*. Tim incorporates an accounting background into his estate planning practice at Amicus Law Group in Seattle by employing two CPAs who do tax returns

to coordinate legal and tax issues with clients. His clients are primarily owners of family-owned, closely held companies. Often the assets in the business are a key asset in an individual's overall net worth and the issue of estate planning comes up as they discuss transitioning their business to key employees or family members.

- *Wendy Goffe*. Wendy has been an estate planning lawyer for 11 years. At Graham & Dunn in Seattle, she works with non-profit organizations. As part of her estate planning practice she works with families and individuals who want to form their own foundations. She works with mainly high net-worth clients.
- *T. Randall Grove*. Randy's practice focuses on trust and estate matters, often involving tax planning. He is a principal in Landerholm, Memovich, Lansverk & Whitesides, P.S. in Vancouver.
- *Walter Krueger*. Walter is a sole practitioner who focuses on estate planning, probate and trust. Based in Kirkland, his clients include a wide range of people, from those who have few assets to those with more significant estates.
- *George Velikanje*. George has spent the past 20 of his 38 years as a lawyer working on estates and trusts for clients in the Yakima Valley. Most of the people he represents through his law firm, Velikanje, Moore & Shore, P.S., have estates valued at \$500,000 to \$3 million.

We asked each of these practitioners a common set of questions, sometimes with individual follow-on inquiries. Their

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user had sufficient cause or was otherwise exempt from relinquishment, the water right would be lost if the water was not used for five consecutive years. Documentation of use may include declaration by the owners of the property, meter records, electrical records, and aerial photographs.

To obtain a water right, one may file an application for a new water right or seek to transfer an existing right. Transfers are more common because there is less and less opportunity to obtain a new right and it could take many years to process a new application. Transferring a new right requires finding a right that is valid, and can be changed to the new purpose and/or place of use without impairment to the other right.

1 The prior appropriation doctrine was first developed in the gold mining days in California. *Irwin v. Phillips*, 5 Cal. 140, 147 (1855). It evolved out of the custom of water use in the arid West, where water has been and increasingly continues to be considered a scarce commodity. Tarlock, *Law of Water Rights & Resources*, § 5.02(1) at 5-5 (July 2003).

- 2 The individual project will dictate what period of time is required to establish diligence. The immediate use of water is not required; common sense applies in determining diligence for putting water to use. *Morris, supra*, at 247; *In re Alpowa Creek, supra*. This time period may be extended because of delays caused by matters "incidental to the enterprise." *Grant Realty Co. v. Ham, Yearsley & Ryrie*, 96 Wash. 616, 624, 165 P. 495 (1917). Personal matters such as lack of financial ability or illness are not excuses for delay in the use of water. *Id.* Whether the enterprise is for agricultural purposes or for growth of a city, this case-by-case analysis applies. *See State v. Crider*, 431 P.2d 45 (N.M. 1967). RCW 90.03.320 was amended in 1997 to provide additional criteria for permits issued for municipal water supply purposes.
- 3 Only a superior court has the authority in a general adjudication to determine the absolute validity of a vested right. *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993).
- 4 Beneficial use is a term of art in water law, Tarlock, *supra*, § 5.16, p. 5-84. It is the actual use of water which defines basis, the measure, and the limit of a water right. *Grimes, supra*, at 468; *Wiel, supra*, § 478, at 504. The beneficial use is a condition of use that both requires the water be used for a beneficial use as defined in the code, *see* RCW 90.54.020, and is a measure limiting the right to only that quantity of water put to use in a reasonable and non-wasteful manner. *Grimes, supra*.
- 5 The 2003 legislation allows for changes to municipal water rights without approval by Ecology. *See* E2SHB 1338.

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## Talking About Charitable Giving: Conversations with Practitioners

answers appear below. Where participants offered substantially similar answers to a question, we have included only one representative response.

### QUESTIONS AND ANSWERS ABOUT CHARITABLE GIVING

**Q: If you're helping a client with a will and the client doesn't bring up charitable giving, do you generally bring it up anyway? How?**

*Flynn:* Almost always. I usually suggest that it's the one time in their lifetime that they can do some charitable gift-making where it will have a relatively small impact on their family and will provide a dollar for dollar charitable deduction. I find that more than half name a charity as a beneficiary in some context. Sometimes it's a contingent beneficiary.

*Friedrichsen:* Yes, we always inquire – either in the context of what happens to assets if all heirs predecease the client, or more often, the discussion comes up around whether the clients want their children to have everything. Partly that's a marketing-driven function. We see clients with significant assets and wonder if anyone has done any estate planning for them. It's part of our job to ask whether they've thought about it and whether they want to think about it.

*[Follow-up question for Friedrichsen: When you see clients each year for tax purposes, do you raise the issue of estate planning and find that nothing happens?]* The people we talk to every year about income tax returns include those who we typically have done wills for in the last few years, or their wills are current. We revisit it every year and ask whether the changes in the tax laws encourage us to make changes. At one point estate planning was something you did once, and when the kids grew up you did it again. Now we're telling people that every two to three years you need to come back because changes are occurring frequently in the law and it's important to see what your plan looks like in relation to the changed laws.]

*Goffe:* I bring up charitable giving with every client. If they don't offer it as something they're interested in I definitely ask them. It's in their questionnaire. A lot of times the answer is "I hadn't really thought of that, or thanks for reminding me, or we don't know who to give it to, we're thinking about it." I ask them who they give to currently as kind of a guide to where they're at. When you're meeting with someone to do estate planning, you're asking so many personal questions, this isn't one that's that difficult. By bringing it up, people decide to make charitable gifts that they hadn't thought about because no one thought to ask.

*Grove:* Yes, but I bring it up in an indirect manner. If they don't bring it up when I ask them how they want distributions made from their estate, I'll say something like "if you have any further thoughts about making distributions to other individuals

or charitable organizations, please let me know." That kind of a statement is a low-key reminder and sometimes I receive a response from clients who say "I haven't really thought previously about that." Other times they explain that they make charitable contributions on an ongoing basis.

*[Follow-up question for Grove: If they say they give to charities on an ongoing basis, do you go on to suggest that they give in their estate plan?]* It depends on whether their overall plan can be improved by utilizing a charitable giving strategy, such as a charitable lead trust. If they are already giving a significant amount (e.g., \$50,000 a year), or they have more income than is needed for ongoing expenses (including family gifts), a charitable lead trust is a good approach. Recently, fewer clients have interest in charitable lead trusts because of the drop in the stock market and lower rates of return from fixed income investments. When stock values are high, they feel more confident and they think of larger income tax deductions and avoidance of capital gains when making gifts to charities. When asset values are low, clients think of preserving their financial security.

If a client already has a pattern of giving, I ask the client whether he or she would like to utilize those significant annual gifts in a manner that gives additional income tax benefits and additional estate tax benefits for their children and family members. Most charitable lead trusts that I advise are based upon a current significant giving pattern of the client. It is important for the attorney to "ask the question" because a client won't necessarily inquire about additional planning unless the opportunity is specifically presented.]

*Krueger:* I have a questionnaire that asks "Are you planning to make charitable gifts? Yes or No." I also mail the LEAVE A LEGACY® of Western Washington<sup>1</sup> brochure to every potential client and a syllabus on estate planning, which discusses the gift, estate and income tax aspects of charitable giving. As in all marketing, it takes time. You have to plant the gift seeds and they need to grow over time. Maybe clients will make a gift on this visit, maybe not. If a client answers "no" on the form, I don't bring up the topic.

*Velikanje:* No. Generally I do not, and the reason is when you have three or four kids and are trying to divide \$1.5 million or \$2 million among them, there's not enough room for charitable giving. I would bring up charitable giving if I have a client who comes in with no children, or if it is someone whose kids make more than they need, but it would be on a case-by-case basis.

*[Follow-up question for Velikanje: How do you bring up the subject?]* I ask, "Are you interested in doing something

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for charity?" Usually they'll say no. Once in a while they'll have a particular charity they favor or will ask if there are any tax benefits associated with charitable giving.]

### **Q: Is it your job to help a client identify his or her values to help them determine who to give to?**

*Flynn:* I ask clients to focus on their objectives and what they want to accomplish by their estate plan. I usually ask, "How do you want to leave your estate to your family? In trust? Outright? Or a finite amount and the rest to charity?"

*Friedrichsen:* I think it is – and clients tend to really appreciate the discussion. The key is to ask and understand what their values are and not to judge them on their values. If we understand their values, it will help us craft an estate plan that will be satisfying to them and their families. A flaw of a lot of attorneys is we're comfortable with the technical concepts and the technical tools and often times we go straight to the answers and the tools instead of listening to what clients want to accomplish, what are their values. A lot of times you can glean that giving back to the community is important to people, they just don't know how.

[*Follow-up question for Friedrichsen: Are clients ever put off by that question?* Not really, but sometimes they won't really go there with you. I find that almost invariably they appreciate the question because it hits issues they've been thinking about. Sometimes they don't really know where they're at, but talking out loud forces people to understand themselves a little better.]

*Goffe:* I ask clients to think about a mission statement, to think about what kind of "capital," not just financial, but educational and social capital, they have. I can't do this every time because some people come in and it's very clear they just want me to crank out documents and they don't want to chat. [This is based on a concept from Scott C. Fithian, "Values-Based Estate Planning: A Step-by-Step Approach to Wealth Transfer for Professional Advisors."<sup>22</sup>]

*Grove:* It's my job to assist my client in clarifying their objectives, so I can design and implement the best estate plan for them.

[*Follow-up question for Grove: How do you figure out those objectives?* Listen to them. I sometimes ask them if they have any front-burner issues that they want to ask about or explain to me. It's important to understand what is important to a client not just from the direct statements they make. Often, I need to ask questions about the client's family and assets. For some clients, a particular parcel of property is an investment to be maximized for financial purposes. For another client, a parcel of property may be like an heirloom – to be passed down in the family. Same with a closely held business. For some it may be an investment, for others it may have much greater significance

than just its economic value. Clients may give conflicting signals. Some objectives become readily apparent. Other objectives surface only if the attorney listens carefully and "reads between the lines." This type of situation may occur when a client is determining the portion of the estate that should go to children, grandchildren and charities.]

*Krueger:* Yes. For gifting, it depends on the size of the estate and of course, the person's situation as well. As a general rule, the clients who are disposed to give to charity already know who they want to give to. Occasionally I will be asked for input, but that is rare.

*Velikanje:* No. I perceive my job as telling them what their options are. A lot of people become upset with me because I won't tell them what to do. I feel more comfortable saying you have six options; which one do you like?

### **Q: How do you help your clients evaluate how much to leave to their children in their estate plan?**

*Flynn:* I suggest to clients that they develop a philosophy about how they want to benefit their family. Some clients have firm views on that subject and others don't. Some clients want to leave their children a set dollar amount with the remainder passing to a charitable component, like their own foundation, a donor advised fund or to a select group of charities. Others have firm views that their children and their descendants should be the only heirs. I also find that many clients with significant estates are worried about leaving too much to their children and destroying their incentive to become productive people. This normally arises when their children are 16 to 24 years old – the so-called transitional years.

*Friedrichsen:* We talk about what kind of people their kids are, how they are doing financially, the concern about the balance between leaving them enough and too much. It's not a science, it's really just a feeling of what's right for each person. Warren Buffett says you want to leave your children enough money to be comfortable, but not so much so that it destroys their incentive to work. Most parents can get on board with that concept, but that number is completely variable. It depends upon what each child is like, what age they are, what stage in life they're at, their educational level, their relationship with their parents. There is no single answer to that question.

We encourage them to talk to their kids about it. One of the problems parents have is they're not willing to share with their kids what their financial situation is and I think that's a mistake. We talk about using the family partnership for tax planning and as a mechanism to have financial discussions with your kids. Call a family partnership meeting and start the discussion on a practical level and use the family meeting as a starting point about sharing the parents' values with their kids, sharing their knowledge about business, explaining asset growth to their kids and look at

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whether the kids care. I've also seen people who have a family foundation set aside \$1,000 and let the kids research who they'll give it to and why. I think it's great because all of a sudden you've got a topic for parents and children to have a conversation around. Values come through indirectly and the lessons can be passed on indirectly.

*Goffe:* There are lots of different theories for that. Lee Hausner, author of "Children of Paradise: Successful Parenting for Prosperous Families,"<sup>33</sup> talks about the magic number being \$7.5 million per child, based on a down payment on a first house and vacation home and enough money to pay for health and education and enough money that your kids have to work, but not to save. I always use that as a starting point and say "it's Los Angeles, but apply as many zeros as relative to your situation."

It's pretty hard to figure out dollar numbers, but if you give people some benchmarks, they can fill it in from there. It also depends on how old their kids are, whether they have special needs, and what their lifestyle is. For people at that level of wealth, I work in a team with their investment advisors and accountant. I find it's more useful to bring in other peoples' disciplines and the client feels less like they're stabbing in the dark.

*Grove:* You need to pick a starting point to address this issue. I ask my client about the purpose for the inheritance for children. Sometimes clients will say, "I want to pass as much wealth as possible to my children." That's not the most common response. The more common response is, "I want to give my children certain opportunities" or "I want to give them a head start on their long-term planning for their retirement and I want to make sure my grandchildren are educated. However, I don't want to spoil my children with extra money." Or, "I don't want the corrosive effect of inherited wealth to damage the lives of my children." I often explain three different approaches:

- a. The "just let them have it" approach when children reach a certain age.
- b. The "fine-tuning" approach, where the client will condition distribution upon certain performance or make distribution for certain purposes, such as education, a first home, or prudent business investments. The fine-tuning approach is often used during the formative years of a beneficiary, up through age 25. Most clients use a combination of the "fine-tuned" approach for their children up to a certain age and then provide for mandatory distribution(s).
- c. The "safety net" approach where the client wants to make sure that assets are available for long-term purposes, including retirement of children.

Once the client has identified the approach(es) to be utilized, then the issue is "how much is needed to satisfy the objective?" There's no magic formula. If a client is confident that his/her

objectives for children will be achieved, then the client will be more interested in making a provision for charity. I do have a certain percentage of clients who want to provide for charities as the residual beneficiary of the estate. More commonly, my clients are interested in accomplishing a particular purpose with their charitable gifts, and it may be easier to "solve" for the amount that is needed in order to achieve the charitable goal, rather than deciding how much to give to each child.

*Krueger:* I find that people who have children will give their entire estate to their children. In a very large estate, where there are significant estate tax problems, we can talk about the charitable aspects of how to reduce the estate tax. I'm not sure I give them too much input along those lines. They make the decisions.

I'm working on an estate right now where the children received a specific amount on the death of the father, and the rest went into a charitable lead trust for 20 years. The father did not want his children to be too spoiled with money and required them to survive for 20 years. In this case, the charitable lead trust was a good way to reduce the estate tax and also achieve the desire and goal or requiring some independence of his kids.

*Velikanje:* I usually don't get into that. Ninety percent of the time they either want to treat their children equally; or conversely, they hate one child so much they don't give them anything. It's usually pretty cut and dried when they come in.

In this geographic area [the Yakima Valley] there are a large number of farms. While the estate may be large, the assets are not liquid or easily divisible. When there is one son that stays on the farm and a daughter who moves to Seattle to marry a doctor, how do you treat them fairly and equitably? That usually creates a discussion. We talk about what they can or what shouldn't they do. I ask them whether they want to set up a long-term lease so the son knows what he'll be paying his sister for the rest of her life, or we will explore a buy-sell agreement. I've seen the other side of it, where there's no planning, which is horrible. An example is a son who works for his parents for a number of years and no one talks about him buying or inheriting the business. When there is no liquidity, the question isn't so much how much to leave to children, but how to avoid problems in allocating the estate among the children.

### Q: What are some of the most important *inter vivos* gifting techniques being considered right now?

*Flynn:* People are using grantor-retained annuity trusts (GRATs). These plans permit clients to transfer property in trust and retain an annuity for a set term of years after which the asset belongs to the children. Because of the low current federal rates those are very good plans right now if the client owns the right kind of assets. Charitable lead annuity trusts (CLATs) are also very attractive planning options now, but are less frequently used. Other options include the designation of charities as

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beneficiaries of IRAs and qualified retirement plans to satisfy the charitable component of a client's estate plan.

*Friedrichsen:* Gift annuities, retained life estates, charitable remainder trusts, private foundations, donor advised funds. Gift annuities are popular for folks in their 60s on up because gift annuity rates rise as the person gets older. Income is important for older clients and a gift annuity can pay them between 7 percent and 9 percent return on their money, depending on their age, which is far better than anything they can get in the market right now. They're simple to understand because they give away an asset and will get a stream of money back for the rest of their life.

Other options include retained life estates, where people donate their house to charity and get an immediate income tax deduction, recognition from the charity, and can still stay in their home until they die. Charitable Remainder Trusts are popular and still the best method to avoid capital gains on property. CRT donors get an immediate income tax deduction, plus an income stream from non-income producing property like growth stocks or land.

[*Follow-up question for Friedrichsen: Do you see much interest in charitable lead trusts these days?* Surprisingly, no. The low interest rates make lead trusts incredible vehicles right now, but I just don't see people being very interested.]

*Goffe:* For straight charitable giving, there is the concept of programmed investments, which is like making micro loans to a charity, where you don't necessarily charge any interest. Private foundations are also making loans. Using charitable entities as a way of educating your children about your values is starting to catch on in more than just with the Vanderbilts and Rockefellers. Some people can have a tzedakah box (box for charities) and sit down at the end of the year and decide what to do with it and do site visits. Just apply as many zeros that is appropriate to you and use charitable giving as an educational tool. Their kids are going to have a great deal of wealth and they need to teach their kids how to handle it. Using your charitable giving as a teaching tool is phenomenal. For some of these larger family foundations, their money managers will come in and do a foundation meeting.

A lot of people have a great deal of wealth, but it's illiquid, like they own their own company worth \$300 million and aren't in a position to give away stock in the company. They make a pledge that at their death or when the company is sold, whichever happens first, they will make a gift of \$X million, and in the meantime they pay the interest. If the University of Washington, for example, knows it will get a \$50 million gift from me down the line, and the endowment fund makes 3 percent a year, I just pay 3 percent of interest and it's no different than them having the \$50 million in the endowment.

*Grove:* It depends on the nature of the clients' assets. If the assets are real estate or a closely held business, then it may be

most effective to establish an entity and make gifts of non-controlling interests in that entity, such as an LLC or family limited partnership. This area (making gifts of entity interests) has been significantly affected by recent cases.<sup>4</sup> The non-tax aspects of establishing an entity and giving an interest in the entity are as important as the tax aspects. If a person owns marketable securities or cash, the full array of *inter vivos* gifting techniques are available.

[*Follow-up question for Grove: Are there any resources in the area of charitable estate planning that are particularly valuable in your practice?* I recommend the Planned Giving Design Center Web site, <http://www.pgdc.net/pub/>. For any attorney who addresses charitable gifting issues, it's a gold mine.]

*Velikanje:* [There are two types [to consider] – the people who can afford to do it and want to avoid taxes. They are gifting assets as quickly as they can. The others are people who don't have much money and are anticipating a long-term nursing home stay so they're trying to reduce the amount of their estate to qualify for Medicaid. The people in the middle are probably doing nothing.]

The wealthy clients have irrevocable life insurance trusts and make gifts to the trust to make the life insurance premium payments. Other wealthy clients have qualified personal residence trusts for summer homes and cabins. A number of clients are establishing LLCs, or limited family partnerships, in an effort to retain control and at the same time, transfer ownership to a younger generation. The number of people who sit down and write \$11,000 checks every year are rarer than those who are trying to do something creative.

**Q: Do the forms you use to gather information from the client include a question as to whether they would like to consider some charitable gifts as part of their estate plan? If yes, what is the language used in these forms?**

*Flynn:* Yes, we use forms that ask about charitable gifts. The language is, "Are you interested in making charitable gifts?" Sometimes they'll put "no," and other times they put down a private foundation, or they name the charity they'd like to give to or say they're on the board of a non-profit organization.

*Friedrichsen:* Not really – we just address it in our meetings. Once we've gone through it in the initial meeting – and charitable giving is almost always brought up as an option to consider because we feel strongly about it – if people are interested in it, we might use a questionnaire for the husband and wife to complete independently because it explores how strong their interest is in non-profit, charitable giving and giving back to the community.

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[Follow-up question for Friedrichsen: **Is a form better than discussing it?** We give them something to go home with and sit and ponder. We'll have times where you put the husband and wife's answers side by side and they're different.]

*Velikanje:* We have a form with a question that asks: "Are you interested in charitable giving? Yes or No?" If the answer is "yes," the discussion proceeds from that point.

### **Q: Are there any recent legal developments in the area of charitable estate planning that have changed the way you talk to your clients or that have changed your strategies?**

*Flynn:* The recent lowering of the capital gains rate may have some impact on the use of charitable remainder trusts. Because the capital gains tax rate has shifted from 20 percent to 15 percent this year, it may deter those who wished to use charitable remainder trusts solely to defer capital gains tax.

Another thing I find to be problematic in charitable planning is the phase-out of itemized deductions, which can have the effect of limiting charitable deductions by up to 20 percent.<sup>5</sup> High net-worth donors need to evaluate the impact of this rule before making large charitable gifts. In addition, more flexibility has been given to owners of qualified retirement plans and IRAs who want to name charitable organizations as beneficiaries.

*Friedrichsen:* Sure, the change in the estate tax laws. Eliminate the estate tax and a lot of charitable gifts never happen. Also, most people aren't aware that Washington has not changed its law to mirror the federal law and people are surprised there's an issue there. The complicating discussion will come if the estate tax is completely repealed. If the estate tax is repealed, the step-up in basis will likely go away, which will be very complex to talk to clients about and a nightmare from an accounting and records standpoint.

*Goffe:* The 2001 Tax Act<sup>6</sup> has had a huge impact. People are saying, "Why do I need to do an estate tax? I'm going to live beyond 2010." They're coming around now. If the estate tax goes away, there will be the carry over capital gain instead. So taxes never really go away. The hardest thing we have to talk about is the Washington state estate tax issue because it's hard to explain to people who don't talk about tax all the time. It's made it hard to talk to people and a little harder to plan. Right now the differential isn't that great, but if it keeps going, it will be a big chunk of change.

*Krueger:* The phase in or phase out of the estate tax. I think a lot of people – not that they buy the fact that the estate tax will go away for good – have this expectation that they're going to get a \$2 million to \$2.5 million per person exemption. This does affect their giving, plus it requires a lot more flexibility in the planning we do for them at this point because the amount keeps changing and most of us think the law will change well before

2011. For many of my married clients, if they get a \$2.5 million to \$3 million per person exemption, they can pass a \$5 million to \$6 million estate without estate taxes with proper planning. That may relieve the bulk of the clients out there.

*Velikanje:* The lowering of the capital gains tax rate and lower interest rates make Charitable Remainder Trusts less attractive. If a client wants a 7 percent or 8 percent return, economically it may not be available. A lot of people are saying they'll wait until interest rates go up again before they make a decision.

### **Q: What are some ethical issues that you have to be aware of or careful of? What, if any, pitfalls should lawyers watch out for so they don't trip across the code of professional conduct?**

*Flynn:* If you represent a charity or serve on the board of a charity you have to be careful to disclose that to your client and not promote or sell that organization to the client as the recipient of a charitable gift.

*Friedrichsen:* The biggest issue for me is when clients have some interest in charitable giving, but don't have any relationship with charities, and ask me to make suggestions. I represent charitable organizations and am involved with other ones, so that's a pretty direct conflict if I want to suggest them. We have the values discussion. What's important to them? Once you know what's important to them, you can give them organizations in the area of their interest. I say, "Here's an organization I know and I'm fond of, but there's others out there." The key is giving them a starting point for them to go investigate.

*Goffe:* I serve on boards [of charities] and sometimes other people on the board want me to do estate planning for them and it's really not appropriate for me to recommend giving money to a particular charity. I don't want people to see my service on a board as a way for me to get clients. My role on the board is to tell them how to get new donors. I will usually refer board member elsewhere [for estate planning work]. If I'm on a board and people want to do estate planning and in their will they name another charity, are they going to feel funny?

*Grove:* One ethical issue is the duty to communicate with the client the relevant considerations involved in a strategy so that an "informed decision" can be made. The client needs to understand how the charitable giving strategy fits into their overall plan, including the bottom line results of distributions. I try to confirm the decisions of the client (and the rationale) in writing.

### **Q: What other estate planning professionals do you consult with when helping your clients engage in charitable estate planning? Do you have any advice in working with these professionals?**

*All:* Insurance advisors, financial consultants, private bankers, CPAs, trust officers, money managers, brokers.

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## Practical Practice Tips: Charitable Giving

by N. Elizabeth McCaw, Williams, Kastner & Gibbs PLLC, Seattle

It is common to discuss charitable giving with clients as an “either-or” proposition – “You may either leave your money to your children and grandchildren or you may leave it to charity.” Clients quickly understand that making a significant bequest to charity or establishing a charitable trust or family foundation means that their family members will receive less cash in hand. However, it also is possible to discuss charitable giving as a means of creating a more meaningful inheritance for future generations.

It should not be forgotten that families with significant philanthropic dollars to give attain a certain social standing and prominence as a result of the wealth under their control. Their capacity to make meaningful investments in the welfare of our community gives them a strong voice in social, economic and political decision-making.

Thus, thoughtful, planned charitable giving may be presented to clients as a way to create an estate plan with twice as many benefits for children and grandchildren – “You may leave money to your children and grandchildren *and* you may create a vehicle by which your children and grandchildren will have a significant voice in and impact on the affairs of your community.” Depending upon the charitable vehicle chosen, clients also may achieve tax savings, convert illiquid assets into cash for retirement years, and diversify concentrated stock holdings to better protect the family fortune from market fluctuations.

Published on the next page of this newsletter is a short checklist to assist practitioners in discussing charitable giving with their clients. The first part of the checklist, or portions thereof, may be incorporated into any basic estate planning evaluation form provided to clients for planning purposes. The second part of the checklist includes certain questions that a careful practitioner will consider when assisting a client with

making a planned gift. The checklist is intended to be used as a guide only and is not meant to be a substitute for legal advice.

Practitioners wishing to learn more about charitable planned giving may wish to contact the Planned Giving Officer or Director of Development at a local charity. Many charitable organizations provide free high-quality resources that may be used by practitioners and clients.

For example, the Seattle Foundation hosts the Planned Giving Design Center, a free online resource, which may be accessed through the Foundation’s Web site ([www.seattlefoundation.org](http://www.seattlefoundation.org) or <http://www.pgdc.net/TSF>). PGDC offers sample gift documents, checklists, and other resources for implementing planned giving, case studies and computer illustrations, and planned giving articles. Subscribers to the PGDC receive email news alerts regarding new IRS announcements, judicial decisions and legislation affecting charitable giving. The Seattle Foundation also publishes a number of brochures about planned giving that are available without charge to practitioners.

Other organizations that promote philanthropy through planned giving include LEAVE A LEGACY® of Western Washington and LEAVE A LEGACY® Oregon Statewide/SW Washington. LEAVE A LEGACY® is a public awareness campaign that seeks to educate and motivate individuals to plan their estates in a legally correct manner that reflects their values, benefits those they care about, and supports those charities that are important in their lives. There are a number of free resources available on the organizations’ Web sites ([www.leavelegacy.org](http://www.leavelegacy.org) and [www.leavelegacyoregon.org](http://www.leavelegacyoregon.org)). LALWW also has an active volunteer speakers’ bureau that regularly speaks to community groups and clubs about the importance and benefits of including charitable giving in estate planning. *continued on next page*

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### Talking About Charitable Giving: Conversations with Practitioners

*Flynn:* The clients receive the best advice when they have a team of people serving different roles. The person who spearheads the plan should be the person who has the most contact with the client – the lawyer, CPA, or financial advisor. There isn’t any one person who should assume that role always.

*Friedrichsen:* The key is for professionals to be willing to not have to control the client and the plan. We all need to check our egos at the door and focus on the best result for the client.

*Krueger:* [Who takes the lead] depends on the clients. In some cases it’s the CPA who has finally gotten them off their duff and ready to move. The CPA has done the tax planning for them and has run the numbers. If it’s me, I like to have the accountants involved because they often have knowledge the clients forget to give you. It’s good to communicate with any of the professionals they’re working with.

*Velikanje:* Some of them I’d rather not work with, but when that is the referring source, I have no choice. Often these referring sources are selling products that may not be appropriate for the client. A great deal of diplomacy is required to suggest an outcome that is not favorable to the referring source.

- 1 Available at [www.leavelegacy.com](http://www.leavelegacy.com).
- 2 John Wiley & Sons; (March 2000) <http://www.amazon.com/exec/obidos/ASIN/0471380407/qid%3D1058194974/sr%3D11-1/ref%3Dsr%5F11%5F1/002-7646411-8911238>.
- 3 <http://www.amazon.com/exec/obidos/ASIN/0874775914/qid%3D1057706415/sr%3D11-1/ref%3Dsr%5F11%5F1/002-3986485-1461617>.
- 4 Strangi II (IRC Section 2036(a)) and Hackl (IRC Section 2503(b) – present interests.
- 5 Internal Revenue Code, Section 68.
- 6 The Economic Growth and Tax Reconciliation Act of 2001, H.R. 1836.

## Charitable Planned Giving Checklist

### I. Questions for the Client

1. Please identify the charitable organizations and issues that you and your family currently support.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
2. Please identify the charitable organizations and issues that you and your family wish to continue supporting even after your death.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
3. Do you wish to include bequests to any of these organizations in your Will? If yes, which ones?  
 \_\_\_\_\_  
 \_\_\_\_\_
4. Should your gift be designated for a particular program or use in a specific locale?  
 \_\_\_\_\_  
 \_\_\_\_\_
5. Do you wish to place any restrictions on any of these gifts or require that they be used for a specific purpose (such as to endow a scholarship)?  
 \_\_\_\_\_  
 \_\_\_\_\_
6. Would you like to discuss ways in which to preserve your philanthropic dollars for distribution by family members to your favorite charitable organizations and causes after your death?
7. Would you like to discuss any of the following:
  - Charitable Gifts That Save Income Taxes
  - Charitable Gifts That Save Estate Taxes
  - Charitable Gifts That Eliminate Capital Gains Taxes
  - Charitable Gifts That Provide You With Income for Life
  - Charitable Gifts That Provide Family Members With Income for Life
  - Charitable Gifts That Convert Illiquid or Low- or No-Income Producing Assets Into Cash-Producing Assets Without Capital Gains Taxes
  - Charitable Gifts That Supplement Retirement Income
  - Charitable Gifts That Convert Concentrated Blocks of Investments Into a Diversified Portfolio Without Capital Gains Taxes
  - Family Foundations
  - Charitable Trusts
  - Scholarship Funds
  - Other: \_\_\_\_\_

### II. Questions for Practitioner

*(Complete for each designated charitable beneficiary)*

1. Correct legal name  
 Verified by  
 Representative of Organization  
 Web site of Organization  
 IRS Publication 78, Cumulative List of Organization  
 Other Written Documentation
2. Current mailing address  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
3. Tax identification number (EIN)  
 Verified by  
 Representative of Organization  
 Web site of Organization  
 IRS Publication 78, Cumulative List of Organization  
 Other Written Documentation
4. Contact person \_\_\_\_\_
5. Tax-Exempt Status  501(c)(3)  Other: \_\_\_\_\_  
 Verified by  
 Representative of Organization  
 Web site of Organization  
 IRS Publication 78, Cumulative List of Organization  
 Other Written Documentation
6. If the organization is not a 501(c)(3) publicly supported organization, is there an affiliated 501(c)(3) supported organization to which the gift may be made instead?  
 \_\_\_\_\_
7. Does the organization require that additional documentation (such as a donor advised fund agreement, an endowed fund agreement, etc.) be signed by the client prior to the gift's being accepted?  
 Yes  
 signed copy in attorney file;  
 signed copy or  original delivered to client;  
 signed copy or  original delivered to organization  
 No

## Recent Developments

# Real Property

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

*No man's life, liberty or property is safe  
while the legislature is in session.*

– Mark Twain (*Samuel Langhorne Clemens*) - 1866

The 2003 legislative session was not particularly active in the area of changes to laws affecting real estate transactions. There were a few measures, however, that will have some impact on practitioners.

**Substitute House Bill 2039** Laws of 2003, Chapter 80: **Adding a New Section to RCW 4.16:** Last year, Division I of the Court of Appeals in *Architectonics Construction v. Khorram*, 111 Wn.App. 725 (2002); *rev. den.* 148 Wn.2d 1005 (2003), applied the discovery rule to determine the commencement of the statute of limitations for an action alleging breach of a construction contract. This was a departure from what most practitioners assumed the law to be, namely that a breach of a construction warranty occurs when the faulty work was performed, rather than when the faulty work could be reasonably discovered. This also was a departure from the Court of Appeals' prior consideration of this matter in which the Court expressly declined to rule on the issue. *See North Coast v. Factoria Partnership*, 94 Wn. App. 855 (1999).

The *Architectonics*, *supra*, case was beginning to have a significant impact on construction contract cases after it was decided. Two unpublished opinions (*Graoch Assocs. # 5 v. Purcell*, 2003 Wash. App. LEXIS 124, decided without published opinion at 115 Wn. App. 1021, 2003 Wash. App. LEXIS 569 (2003) and *Tahoma School Dist #409 v. Burr Lawrence*, 2002 Wash. App. 1483 (2002)) and two published opinions (*Parkridge Assocs. V. Ledcor Indus.*, 113 Wn.App. 592 (2002) and *Urban Dev. v. Evergreen Bldg. Prods*, 114 Wn.App. 639 (2002), cited the case in ruling on whether construction claims were barred under the statute of limitations and statute of repose (RCW 4.16.310).

The implications of *Architectonics* for the construction industry, and insurers issuing builders' risk policies, were significant. In essence, an industry that had assumed that it could rely on an absolute bar on claims after six years following completion of a project (*see* RCW 4.16.310) was now faced with at least a doubling of the time period for exposure. As summarized in the House Bill Report to the legislature:

Recent court of appeals decisions have applied the "discovery" rule to cases involving alleged breaches of construction contracts. That is, the cause of action does not necessarily accrue at the breach of the contract, but rather only when the breach is discovered or reasonably should have been discovered. The accrual, and therefore the

discovery, must still occur within the six-year statute of repose, but:

- Without the discovery rule, the breach and therefore accrual would occur at the time of completion of construction; i.e., presumably nearer the beginning of the statute of repose - giving a builder a total period of exposure to liability that tends to be closer to six years.
- With the discovery rule, the discovery of the breach and therefore accrual might occur at the end of the statute of repose - giving a total period of builder exposure to liability that tends to be closer to 12 years.

Realizing that it may be easier to have the Legislature change the law, rather than convince the courts to change their interpretation, the construction industry, with testimony from representatives of the Building Industry Association of Washington and the Associated General Contractors, prevailed upon the Legislature to amend Ch. 4.16 RCW to reverse the *Architectonics* holding by adding the following:

In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later.

Even a representative from the Washington Trial Lawyers testified in favor of this amendment, presumably mollified by a proviso in the Bill preserving a potentially longer limitation period for personal injury claims: "This section does not apply to any civil action in tort alleging personal injury or wrongful death to a person or persons resulting from a construction defect."

A more problematic portion of the Bill attempted to address concerns of the construction industry over litigation over the past several years arising from construction defect claims in multi-family projects, including condominiums. The Bill creates "affirmative defenses" to construction contract claims:

Persons engaged in any activity defined in RCW 4.16.300 may be excused, in whole or in part, from any obligation, damage, loss, or liability for those defined activities under the principles of comparative fault for the following affirmative defenses:

- (a) To the extent it is caused by an unforeseen act of nature that caused, prevented, or precluded the activities defined in RCW 4.16.300 from meeting the applicable building codes, regulations, and ordinances in effect at

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### Recent Developments: Real Property

the commencement of construction. For purposes of this section an "unforeseen act of nature" means any weather condition, earthquake, or manmade event such as war, terrorism, or vandalism;

- (b) To the extent it is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this section. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim;
- (c) To the extent it is caused by the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder's or manufacturer's maintenance recommendations, or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a builder's recommended maintenance schedule, the builder shall show that the homeowner had written notice of the schedule, the schedule was reasonable at the time it was issued, and the homeowner failed to substantially comply with the written schedule;
- (d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose;
- (e) As to a particular violation for which the builder has obtained a valid release;
- (f) To the extent that the builder's repair corrected the alleged violation or defect;
- (g) To the extent that a cause of action does not accrue within the statute of repose pursuant to RCW 4.16.310 or that an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations.

The effect of these statutory "affirmative defenses" and the introduction of the concept of "comparative fault" in determining liability for contract claims present some interesting issues that will probably occupy the attention of the courts for some time (yet another reason for lawyer support). This statute does nothing to clarify the line between contract and tort, which the courts seem to be increasingly willing to mash together in the interest of fashioning appropriate remedies.

It appears, however, that every construction contract in Washington now has a statutory *force majeure* clause, and every suit alleging a construction defect will be met with a series of

affirmative defenses based on the language in the Bill. As to the effect of some of these provisions, the best that can be said is that they are probably duplicative of the general category of defenses that arise for failure to mitigate damages or related to the appropriate measure of contract damages.

**Substitute House Bill 1634** 2003 Laws, Chapter 200: **Amending Real Estate Disclosure Form, RCW 64.06.020.** The form of disclosure promulgated by RCW 64.060.020 was amended. According to the House Bill Report, the measure was intended to clarify the language in the disclosure form and provide additional information to prospective purchasers:

There are numerous changes to the wording of the Statement to make it easier to read and understand and to make terminology usage consistent with that used by other state agencies.

Information on the following must be disclosed, whether apparent or not:

- the ownership of the well or water system;
- the source of the water for any irrigation systems;
- any on-site sewer system maintenance more frequent than once a year;
- any sewer costs beyond regular monthly bills;
- any basement leaking or flooding;
- any defects in the siding;
- any radio towers that may cause interference with telephone reception;
- any leased equipment or systems, such as a security system or satellite dish; and
- any alterations made to a manufactured home.

Information on the following is no longer required to be disclosed:

- any prior home inspections conducted; and
- any problems with standing water on the property.

Testimony in favor of the measure was provided by representatives from the Building Industry of Washington and the Washington Association of Realtors. The interest of the real estate brokerage community in the amendment may also have been prompted by other provisions of the Bill that change the name of the form to the "Seller's Disclosure Form" (presumably an attempt to direct attention to inaccuracies to the seller and not the sales agent) and that provide "the disclosures set forth in this statement and in any amendments to this statement are made only by the seller and not by any real estate licensee or other party."

This last provision appears to be in response to decisions such as *Svensden v. Stock*, 143 Wn.2d 546 (2001), which have

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## Recent Developments

# Probate and Trust

by Colonel F. Betz, Perkins Coie LLP, Seattle

### WASHINGTON COURT OF APPEALS, DIVISION III

*In re Estate of Black*, 116 Wn.App. 476 (Div. III 2003)

**Summary:** A will, the original of which is missing, can be admitted to probate when the evidentiary requirements of RCW 11.20.070 are met. However, summary judgment is inappropriate when attempting to admit a lost will if the facts regarding its execution are in dispute.

**Facts:** Margaret Black died on October 11, 2000. Her will, dated December 10, 1992 (the "first will"), was admitted to probate the next day. The first will left all of the decedent's property to her legal guardian, her niece and her church. The first will intentionally omitted Ms. Black's daughter, Myrna Lou Black.

On February 8, 2001, Myrna Black contested the first will and petitioned for the admission of a second will, allegedly dated on August 14, 1993 (the "second will"). The second will left the decedent's entire estate to Myrna Black. The personal representative and beneficiaries of the first will objected to the admission of the second will.

Paul Blauert, a retired attorney, testified by affidavit that he drafted a will for the decedent at Myrna Black's request and that he received back the will from Myrna, signed by the testatrix and two witnesses. Mr. Blauert could not find the original second will but produced a duplicate unsigned copy from a computer disc. One witness, an attorney, testified by affidavit that he reviewed the second will with the decedent and that the decedent signed in his presence and in the presence of the second witness. The

second witness testified that she did not recall witnessing the will, but she acknowledged notarizing a durable power of attorney for the decedent on the same date.

The probate court found Mr. Blauert's affidavit irrefutable. Relying on it and on the testimony of two witnesses, the court found that Myrna Black had satisfied the technical statutory requirements to establish the lost will sufficiently to admit it to probate. The probate court found the circumstances highly suspicious, but ruled that any reservations went to the weight, not admissibility, of the evidence and would be resolved in future will contest proceedings. The court entered an order of summary judgment on Myrna Black's motion admitting the second will into probate.

The court also awarded Mr. Burns his attorney fees from the estate and denied Myrna Black's motion for her own fees from the estate, but offered to revisit the issue of her fees after the impending will contest was resolved. The beneficiaries of the first will appealed the summary admission to probate of the second will, and Myrna Black cross-appealed the award of attorney fees to Mr. Burns from estate funds and the denial of her own fees from the estate.

**Discussion:** Whenever a decedent's will has been admitted to probate and a later will is offered, the petition to probate the later will should not be granted "except upon the clearest evidence." The proponent of the later will must prove that the will was in  
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## Recent Developments: Real Property

resulted in liability imposed on real estate agents arising out of erroneous statements contained in the disclosure form. It remains to be seen, however, to what degree real estate professionals can insulate themselves from liability if they assist in the preparation of the disclosure form that is incorrect. As the *Svendsen, supra*, opinion points out, the knowledge of the agent of facts that are incorrectly stated in the disclosure form provides an independent cause of action against the agent unrelated to the form itself.

In other measures that may have an effect on real estate transactions:

*Substitute House Bill 1081*, 2003 Laws, Chapter 289: Provides for a two dollar surcharge to be imposed by county auditors upon recording residential first mortgages. The funds are to be used in the prosecution of mortgage lending fraud.

*Substitute House Bill 1442*, 2003 Laws, Chapter 348: Adds

a new section to Ch. 64.36 RCW relating to the timing of solicitations to purchaser timeshare units.

*House Bill 1786*, 2003 Laws, Chapter 127: Amends various sections of Ch. 59.20 RCW (Mobile Home Landlord Tenant Act) in various respects, including references to the requirement that units comply with applicable fire codes and making it clear that the Act controls the eviction of units from mobile home parks.

*Substitute Senate Bill 5044*, 2003 Laws, Chapter 7: Amends Ch. 58.18 RCW relating to the notice necessary for a member of the active armed services to terminate a tenancy.

*Senate Bill 5477*, 2003 Laws, Chapter 239: Amends RCW 65.04.090 allowing electronic return of documents by the county recording officer.

All of these measures took effect July 27, 2003.

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## **Recent Developments: Probate and Trust**

existence at the time of the testator's death and that it was properly executed. The evidence must consist "at least in part of a witness to either its contents or the authenticity of a copy of the will." RCW 11.20.070(2).

The Court of Appeals found that Myrna Black produced the evidence required by RCW 11.20.070 in the form of the affidavits of Mr. Blauert and Mr. Reiter and that there was nothing in the record upon which the probate court could base a rejection of the second will. Thus, the probate court correctly concluded that Myrna Black had met the statutory requirements for admitting a lost will to probate.

However, the Court of Appeals concluded that summary judgment was inappropriate. Since the facts and circumstances were in dispute, an order of summary judgment would have the unintended consequence of rendering the unresolved factual disputes over the second will's technical validity and contents *res judicata* in subsequent contest proceedings, contrary to the probate statutory scheme.

The probate court assumed that the credibility of Myrna Black's witnesses and other facts surrounding the execution of the second will would remain open to further development in the contest proceedings to be held after the second will was probated. But the Court of Appeals noted, "summary judgement is by definition *res judicata* as to those issues actually adjudicated or which might have been adjudicated."

The Court of Appeals also addressed the award of Mr. Burns' fees and the denial of Myrna Black's fees. When all the beneficiaries of two competing wills are involved, the court may award fees from the estate to both sides because the litigation resolves the rights of all. Noting that Mr. Burns, arguably, acted in the interest of the estate by bringing all the potential beneficiaries before the court, the Court of Appeals reasoned that the judge might well have been within his discretion for awarding fees. However the Court of Appeals reversed the fee award on equitable grounds, since the probate court offered no explanation for its decision to award Mr. Burns fees from the estate but to deny Myrna Black any fee award until after the litigation. The Court of Appeals ruled that this conclusion was an abuse of discretion. "The court should have either awarded both Mr. Burns and Ms. Black their fees from the estate, or awarded neither their fees."

On the basis of the foregoing, the Court of Appeals reversed the order admitting the second will to probate, reversed the orders awarding Mr. Burns's fees and denying Ms. Black's fees, and remanded the cause for further proceedings.

***In re Estate of Black***, 116 Wn. App. 492 (Div.III 2003)

**Summary:** The filing of a will contest does not commence a new "proceeding" so as to reestablish the right to file an affidavit of prejudice against the judge who admitted the will to probate.

**Facts:** The facts of this case are the same as described above, *In re Estate of Black*, 116 Wn.App 476. However, Myrna Black also filed a motion and affidavit of prejudice to remove the probate court judge from the will contest issue. Myrna Black contended that the probate proceedings had terminated and the filing of the contest petition commenced a new cause of action. In a single order, the probate court denied Myrna Black's request for fees from the estate and denied her motion to remove the judge in the contest action.

**Discussion:** In Washington, proceedings before the probate court determining the status of a will are not "separate proceedings." They are related to the same subject matter, i.e., the estate of the deceased. The probate statute contains no provisions for removal of a judge between probate and contest.

The Court of Appeals reasoned that the combination of admitting a will to probate by means of an order of summary judgment followed by removal of the judge from subsequent contest proceedings would divest the probate court of the plenary power conferred upon it by the legislature. The court is charged with resolving all issues attending the probate of any given will.

Myrna Black cited RCW 11.96A.090 to support her position that the regular civil rules may be freely imported into the probate statute. In reviewing RCW 11.96.090, the Court of Appeals agreed that the plain language of RCW 11.96A.090(2) leaves it to the contesting party — here the parties contesting the admission of the second will — to elect whether to commence a new action or to file the petition incidental to the ongoing proceedings. RCW 11.96A.090(3) provides for any party, for example Myrna Black, to convert the contest to a separate action, "for good cause shown." The Court of Appeals concluded that the probate system simply does not provide for Myrna Black as the responding party to convert the contest into a new proceeding by declaration. Apparently, Myrna Black did not show good cause as to why the action should be converted. In addition, the Court of Appeals reasoned that probate proceedings are *in rem* and not *in personam*. The contesting parties properly filed their will contest under the same cause number as the ongoing proceedings as an action incidental to the existing probate proceedings.

The beneficiaries of the first will contested the probate of the second will proffered by Myrna Black. Myrna Black was not the contesting party and thus, was unable to convert the contest into a new proceeding. The Court of Appeals found that it is the right of the decedent, Margaret Black, that the probate court is called upon to uphold. To do so, the court must retain the full range of its powers under the probate statutes to order the proceedings and determine all matters relative to the status of the will in the manner the court deems most likely to accomplish the testamentary wishes of the decedent.

## Technology for Lawyers: Paper-Reduction Possibilities

by Brian J. Danzig, Lane Powell Spears Lubersky, LLP, Seattle<sup>1</sup> and  
Jody M. McCormick, Witherspoon, Kelley, Davenport & Toole, P.S., Spokane

As transactional attorneys, we face mountains of paperwork. Correspondence, drafts, final documents and even printing out emails for posterity all contribute to the mountains of paper on our desks. This month, we feature three technology tips to help turn mountains of paper into minor hills.

**1. Send digital versions of documents, drafts and printed materials.** Saving data in a digital format allows a lot of paperwork to be saved in a small computer file. Using digital files can provide a secure and reliable means to distribute and exchange via email or on a website, electronic documents, forms and other printed material.

Simply save a document (or scan it to your computer's hard drive using a scanner) using your preferred digital format, attach that digital file to an email and send it along to the email recipient. To create digital versions of maps, surveys, charts, etc., on your computer, you will need to buy a scanner. Documents or other printed materials are then scanned into your computer (much like making a copy of the document) in a digital file format. These scanned files can also be sent via email.

Perhaps the most popular software used to create and view digital image files of documents and printed materials is made by Adobe. "Adobe Acrobat" can be used to create, compress and send documents and electronic files stored on your computer in the proprietary Portable Document Format (.pdf). PDF files preserve the fonts, formatting and layout of any document, regardless of the application and platform (PC or Mac) used to create it. One nice feature of Adobe's PDF files is that virtually anyone with a computer can download *free* Adobe Reader software and open and read a PDF file. Some scanners use Adobe Acrobat as their designated software, so the scanned documents can be read as PDFs on the free Adobe Reader software. Tagged Image File Format (.tif) and Bitmap Format (.bmp, a Microsoft format) are used to store documents and printed materials in digital image form (like a snapshot of a document). TIF and BMP files can be read with MS editor or MS paint (included when you buy a Microsoft operating system for your computer).

**2. Store final document closing transcripts as digital data files instead of keeping paper copies.** We are often called upon to create closing transcripts for a variety of transactions including real property purchase and sale transactions, lending transactions and similar matters. Of course, most of us would never think of creating and sending out such volumes of paper unless we also kept at least one copy in the file! Alas, more paper.

Electronic data files can provide an effective alternative. Just as you can send and receive documents and other printed materials as digital files, you can also store such files using a variety of media. By storing these files electronically, you can eliminate the need for printed copies of everything that crosses your desk. Even better — documents stored as digital files can be navigated and searched electronically, which makes future research into a particular issue within a document much more

efficient than dealing with the paper copies. And digital files of fully signed documents can be "locked," allowing the recipient to read, navigate and search the document, but prohibiting any revisions.

PDFs, TIFs and BMPs can be stored onto a hard drive, a back up hard drive (like a "Zip" drive) or a CD ROM. However, new research shows that CD ROMs may degrade over time, making the data unreadable. A longer-term backup solution (such as a Zip file or another backup of your hard drive) would likely be a more conservative long-term storage approach. Also, multiple backups are suggested for long term storage solutions.

**3. Preserve your emails as PST files.** Many of our colleagues print out emails to read them later or to insure that emails pertaining to a particular matter are kept together in one place. This practice creates another "paper tiger."

Many of us use Microsoft Outlook for our email program. By setting up subfolders within your Inbox, you can segregate emails and keep together only those that belong in the same folder. To create subfolders in your Inbox, select the Inbox (click it once) and go to "File"->"New" and select "Folder." Name the folder and insure that Inbox is selected as the destination for the new folder. Then you can simply select and drag *from* your Inbox *into* the newly created subfolder, all emails that belong together in one place.

For long-term storage, these email subfolders can be converted into Personal Folder Storage files (known as PSTs). The software capability for creating PST files is proprietary to Microsoft. Similar to digitizing documents and printed materials, creating a PST will store a subfolder full of emails as a single data file. To create a PST file, highlight the subfolder you want to save, select "File"->"Import/Export"->"Export to a File" then "Personal File Folder". Select the location on your computer where the PST will be kept (i.e., on the "Desktop" or in "My Documents") and give the new PST file a name. Select "Finish" and now all those emails are stored as a single digital file. These PST files can also be searched electronically and stored long term on any electronic media (such as a hard drive backup or CD Rom), allowing you to free up storage space on your computer.

Flatten out your mountain of paper by trying one or more of these electronic solutions to the paper chase.

1 With thanks to Daniel Lancaster of Lane Powell Spears Lubersky's Information Technology Department.

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## Notes from the Chair

by Thomas M. Culbertson, Lukins & Annis, PS, Spokane – Chair, Real Property, Probate & Trust Section

This past June at the Section's midyear meeting in Yakima, Warren Koons handed me the gavel (both literally and figuratively) and turned over the leadership of the Section. Filling Warren's shoes will be an intimidating task. His many contributions to the Section will be enjoyed for years to come, and he served as Chair with incredible dedication, wisdom and wit. As to the latter, simply ask Barbara Sherland why she is now affectionately known as "Nimcrut"! Speaking of Barbara, the midyear meeting marked the end of her many years of service as a Section Executive Committee member, and she will be greatly missed. Fortunately she continues to work on several Section projects, and it appears that we will be the beneficiary of her generosity, skills and talents for some time to come. Also leaving the Ex Comm are Maren Gaylor, Scott Cambell and Jim Flaggert – thank you for your many hours of hard work.

While we always hate to see good people move on, it does give us the opportunity to bring new people on board. This year we are very excited to welcome Virginia Pedreira (Stoel Reeves, Seattle) and Jody McCormick (Witherspoon Kelly, Spokane) to the Real Property Council and Ken Kilbreath (Inslee Best, Bellevue) to the position of Assistant Editor of the newsletter. Alan Kane (Preston Gates, Seattle), who filled a vacancy on the Executive Committee last year (and whose name was inadvertently dropped from the masthead of the last issue of the newsletter), has agreed to stay on for a full term. Beth McCaw (Williams Kastner, Seattle) begins a term on the Ex Comm after a doing a fabulous job as Editor of our newsletter. And new this year we had added an ex-officio position of Emeritus Member, to be filled on an annual basis by a former Chair of the Section. Ellen Dial (Perkins Coie, Seattle) has graciously agreed to come back and share her wisdom and experience for another year. Welcome to you all!

By the time you read this planning will be well underway for the 2004 midyear meeting and CLE seminar, to be held June 4<sup>th</sup> through 6<sup>th</sup> at the Skamania Lodge in the spectacular Columbia Gorge. Skamania is always a popular location, and you'll want to

get those dates on your calendar. My home town of Spokane is looking like a leading contender for the 2005 midyear, giving those of us in Eastern Washington a chance to show off our half of the state.

In addition to its full plate of CLE activities, the Section is actively involved in putting together a probate and estate planning deskbook. Barbara Sherland is busy getting commitments from some "big name" co-editors and putting together an editorial board for this massive project. If you have an interest in participating, contact Barbara.

On the legislative front, the Section will undoubtedly be actively involved in the political struggles which have surrounded efforts to revise the condominium statute. As always, the Section strives to avoid taking sides while assisting the warring factions in crafting legislation which is workable and won't have unintended consequences. Other task forces sponsored or cosponsored by the Section will (i) consider extending the termination age for UTMA accounts, (ii) review the Uniform Trust Act, (iii) look at whether the *Bachmeier* decision should be legislatively overruled, and (iv) prepare legislation to implement a repository for original wills.

Finally, from time to time the Ex Comm is asked to file an amicus brief in a pending appeal, a request which for a variety of reasons is almost always turned down. Recently, however, we agreed to file a brief in the appeal from *In re Jones*, 116 Wn. App. 353 (2003), which overturned a trial court's removal of a personal representative in a non-intervention probate. There is a delicate balance, we believe, between the efficiency of a non-judicial probate process and the availability of the court's intervention if necessary to protect heirs from malfeasant personal representatives. We are concerned that this decision upsets that delicate balance to the detriment of heirs in those unusual cases in which the court's protection is needed. Mike Cohen and Mike King (Lane Powell, Seattle) are leading the team working on the brief.

## Notes from the Chair-Elect

by William H. Reetz, LandAmerica Financial Group, Seattle

### Condominium Construction Defect Bill Task Force Created

Last year's Legislature saw several bills introduced which attempted to address problems associated with condominium construction defect litigation and the Washington Condominium Act ("WCA"). The ultimate survivor of the process became ESSB 5536. The RPP&T Section formed an Ad Hoc 2003 Condominium Act Task Force and opposed passage of this bill because of various technical defects relating to other provisions of the WCA. The bill died in committee.

Through the efforts of Gail Stone, WSBA lobbyist, the RPP&T Section agreed to participate in a larger effort to develop a workable solution to the perceived legislative need. Participating

in this effort are David Rockwell, former Chair of the RPP&T Section, Gary Ackerman, both of whom participated in the original drafting and passage of the WCA, and Vince DePillis. At this writing, a rough draft of the bill has been referred to the House Judiciary Committee Chair for further review by the larger task force which is expected to include representatives of the insurance industry, ADR Section, litigation bar, and various representatives. It is expected that legislation will be offered this next session.

### Mortgage Elimination Scheme Observed

A "loan elimination program" or mortgage avoidance scheme has been observed to be operating in several counties throughout

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### Notes from the Chair-Elect

Washington, particularly in the Seattle metropolitan area, and other areas across the country. Those members who subscribe to DIRT may have noticed e-mail inquiries regarding this scheme.

The scheme involves several differing methods but all appear to be based upon the belief that the national banking system (i.e., Federal Reserve) is corrupt and that no "money" was loaned at the time the mortgage was granted, notwithstanding the fact that prior mortgages may have been paid and released. The different schemes follow two predominant patterns:

**Pattern A:** A Bill of Exchange ("BOE") is recorded in which a third party promises to pay lender the same amount as the amount of borrowers' original mortgage debt. The BOE references the secured property. A demand is sent to the lender demanding reconveyance based upon payment by the BOE. Lender (for obvious reasons) declines. The borrower executes and records an appointment of successor trustee appointing a corporate trustee affiliated to the scheme. Appointed trustee records a notice of trustee's sale. The "default" is described as the lender's failure to reconvey. The "debt" is described as the payments made by the borrower. A "trustee's sale" occurs 30-40 days later with affiliated person appearing as successful bidder. Deed is issued to "bidder" and recorded. Subsequent "sale" occurs to affiliated trust. Purchase money deed of trust is given back.

**Pattern B:** A certain Washington notary serves and later records a "Notice of Notarial Service" upon the current designated trustee in which the notice states that the borrower has served upon lender an appointment of successor trustee

and reconveyance of deed. Notice further requires response with a specified period and, if no response, consent is deemed to have been given. The documents are multi-purpose and include a "reconveyance."

Variations of these schemes have appeared and are similarly based upon the rationale that the national banking system is a fraud. This writer can attest to the fact that some efforts have been made to assign the "purchase money deeds of trusts" or create new loans. Underlying lenders whose loans have been "eliminated" are beginning to foreclose. How this all plays out remains to be seen.

### Notes from the Webmaster

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

We upgraded our discussion lists on October 4. At that time we moved our section lists (wsbap and wsbapt) from Topica to a new environment that supports full listserv functionality. Why? To enhance the list and to make it available to everyone. On October 4 we automatically moved all existing members to the new list – you do not have to resubscribe. After the move all e-mails should be sent to wsbap or wsbapt @lists.wsbappt.com. We will be provide you with more information on how you can manage your account.

We hope that you will find this change to be beneficial to your practice!

## HOW TO REACH US

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