

Real Property, Probate & Trust



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Durable Financial Powers of Attorney and Durable Health Care Powers of Attorney

*How These Important Documents Have Been Changed
by Recent Changes in Federal and Washington Law and the Schiavo Case*

by Laura Herpers Zeman, Stoel Rives LLP¹

I. Introduction

The main lesson people have learned from the Terry Schiavo case and the changes in privacy rules of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) is the need to plan for care in advance by creating durable financial powers of attorney and durable powers of attorney for health care.² Clients realize that these documents are an important part of their advanced care planning. As attorneys, we must refocus our attention on what are too often standard form documents. The standard documents need to be further contemplated and updated with clients’ interests in mind to reflect recent changes in Washington law, the HIPAA privacy rules, and the national attention drawn to the Schiavo case.

II. HIPAA and Engrossed Substitute Senate Bill 5158

By now, you have most likely heard about the HIPAA privacy rules. *See* 42 U.S.C. § 1320d; 45 C.F.R. §§ 164.500-534. Changes in the HIPAA privacy rules became effective on April 14, 2003 (the “Privacy Rules”). The primary purposes of the Privacy Rules are to give patients improved access to and control over their own health care information and to restrict how health care information can be released to third parties by health care facilities and providers. The latter purpose directly affects the powers of attorney prepared for clients. Most importantly, the

Privacy Rules affect any standby durable financial power of attorney or standby durable health care power of attorney that is dependent on the incapacity of the principal for the document to “spring” into power. The agent must be able to access the principal’s health care information under the Privacy Rules in order to prove the principal’s incapacity so that the standby durable power of attorney can become effective. As attorneys, you have most likely already dusted off your old forms and added provisions that allow agents to gain access to health care information under the Privacy Rules.³

Once the HIPAA craze swung into motion, Washington State’s own privacy rules became a topic of discussion. Though often ignored, Washington’s privacy rules were more stringent than HIPAA’s rules. Under former RCW 70.02.030, a patient could authorize the release of health care information, but the release was only effective for 90 days. *See former RCW 70.02.030* (2004). Therefore, a standby durable power of attorney granting an agent access to the principal’s health care information would be valid for only 90 days from the execution of the document. The principal needed to execute an additional written authorization for the agent to have access to the same health care information after the 90-day period expired. The 90-day rule posed a problem

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for anyone who held a standby durable power of attorney for health care or otherwise.

In Engrossed Substitute Senate Bill 5158, the Washington legislature addressed the inconsistency between Washington's privacy rules and HIPAA's Privacy Rules. *See* 2005 Laws, chapter 468. Specifically, the legislature changed, among other things, the period of validity of an authorization for release of health care information. Effective July 24, 2005, the amended RCW 70.02.030(3) provides that a written release for health care information must meet the following criteria:

- (3) To be valid, a disclosure authorization to a health care provider or health care facility shall:
 - (a) Be in writing, dated, and signed by the patient;
 - (b) Identify the nature of the information to be disclosed;
 - (c) Identify the name and institutional affiliation of the person or class of persons to whom the information is to be disclosed;
 - (d) Identify the provider or class of providers who are to make the disclosure;
 - (e) Identify the patient; and
 - (f) Contain an expiration date or an expiration event that relates to the patient or the purpose of the use or disclosure.

The crux of the new law is that for an authorization for release of health care information to be valid, it must "[c]ontain an expiration date or an expiration event that relates to the patient or the purpose or use of the disclosure." RCW 70.02.020(3)(f)

The amendments also provide special exceptions to the general expiration rule set forth in RCW 70.02.030(3)(f) for (1) health care researchers, (2) third-party payors, such as employers, to whom health care information is disclosed for payment purposes only, (3) financial institutions, and (4) employers for purposes other than payment. For the first two categories, RCW 70.02.030(4) states that an authorization must specifically grant an expressly stated purpose for the release of health care information to health care researchers and third-party payors to whom information is disclosed for payment purposes only. In addition, RCW 70.02.030(6) states that an authorization to a financial institution or an employer, if not for payment purposes, is only effective for 90 days.

Therefore, durable power of attorney forms need to be revised to take into account the amendments to Washington law provided in Engrossed Substitute Senate Bill 5158. Any durable power of attorney that grants an agent the right to access the principal's health care information, especially a standby durable power of attorney, must meet the requirements of RCW

70.02.030(3) and, specifically, must contain an expiration date or an event of expiration. If a power of attorney does not contain such an expiration event or date, the authorization for release of health care information is invalid.⁴ As a suggestion, a paragraph entitled "Expiration" could be inserted in the durable power of attorney. Examples of expiration events include death of the principal, appointment of a guardian of the principal's person, and dissolution of a marriage if the agent is the principal's spouse. Depending on your client's needs, a date of expiration or other events of termination may be appropriate. Also, special attention must be paid when appointing as agents: (1) health care researchers, (2) third-party payors, (3) financial institutions, and (4) employers for purposes other than payment. Because these individuals and institutions are subject to exceptions to the primary authorization rule set forth in RCW 70.02.030(3), care should be taken to avoid counseling a client to appoint these individuals unless the special rules in RCW 70.02.030 are specifically followed.

III. House Bill 1125: Amendments to the Guardianship Statute and the Power of Attorney Statute

The Washington legislature recently amended the guardianship and power of attorney statutes to address the nomination of a guardian for a minor child when a minor has only one surviving parent or a single parent and when that parent is incapacitated. *See* H.B. 1125, S.B.R 1125. Under prior law, only a surviving parent was allowed to nominate a guardian for minor children in a will. *See* prior RCW 11.88.080 (2004). The law did not mention the ability of a single parent to nominate a guardian in a will, thus leaving single parents technically unable to nominate a guardian in a will. *See id.* Moreover, there was a hole in the law that did not address the nomination of a guardian for a minor child when a surviving or single parent became incapacitated before his or her death and the nomination of a guardian for the minor child in a will would not operate. If the parent was unable to care for the minor child, then the court would have to appoint a guardian without input from the incapacitated surviving or sole parent. The Washington legislature addressed these issues in House Bill 1125, which took effect on July 24, 2005. *See* 2005 Laws, chapter 97. House Bill 1125 amended RCW 11.88.080 and 11.94.010 to (1) allow for a guardianship nomination for a minor child in a durable power of attorney as well as a will, and (2) allow an agent in a durable power of attorney to make health care decisions for a minor child when no guardian is appointed over the minor child.

The amendments to RCW 11.88.080 and 11.94.010 provide for a guardian of a minor child to be nominated by a surviving parent or a single parent of a minor child in a durable power of attorney. *See* RCW 11.88.080 and 11.94.010(5). The amendments to RCW 11.94.010 also state that a durable power of attorney may

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authorize an agent to make health care decisions for a minor child. This authority granted to the agent by a principal is valid only if no other parent or legal representative is available to make health care decisions for the child. *See* RCW 11.94.010(4). Moreover, once a guardian is appointed by the court, the court-appointed guardianship supersedes any authority granted to an agent. *See* RCW 11.94.010(6). If a nomination of a guardian of a minor child under a will conflicts with the nomination of a guardian under a durable power of attorney, the most recent nomination controls. *See* RCW 11.94.010(7).

Durable power of attorney forms may need to be updated to reflect the amendments to RCW 11.88.080 and 11.94.010. However, the provisions in RCW 11.88.080 and 11.94.010 apply only to parents and guardians of minor children and individuals anticipating the imminent arrival of a child through either birth or adoption. For example, a provision in a durable power of attorney could contain a section entitled "Care of Minor Child or Children." The provision might provide, for example, that it would operate only if there is no other parent or legal guardian authorized to care for the minor child in the event the principal is incapacitated. The provision should contain an express nomination of a guardian of a minor child similar to one that would be set forth in a will. In addition, a nomination of an alternate guardian may be added. Moreover, the provision should contain an authorization for an agent or attorney-in-fact to make health care decisions for any child for whom the principal is the legal guardian. This provision can be contained in either a durable financial power of attorney or a durable health care power of attorney, or both, as the statute does not distinguish between them.

IV. The Terry Schiavo Case

Because of the litigation concerning Terry Schiavo, more clients are asking what they can do to ensure that they will not be put in the same position. Advance planning is necessary and important to clients. The bittersweet lesson of the Schiavo case is importance of powers of attorney for health care and directives to physicians in advanced care planning.⁵ If an individual chooses to execute a durable power of attorney for health care, the agent, whether a friend or family member, should be a trusted confidant and should know the principal's values and preferences. Clients are also thinking about what type of care they want under end-of-life circumstances. The following tools can be used to encourage conversation and further exploration about end-of-life decisions for clients considering health care powers of attorney:

- (a) **The "Five Wishes."** The "Five Wishes"⁶ can be used by clients to communicate their wishes concerning end-of-life care to their family, attorney, and physician. Originally published and distributed through a grant by the Robert Wood Johnson Foundation and now distributed through the nonprofit corporation Aging with Dignity, the Five Wishes asks individuals in plain English how they want their end-of-life care to be handled. It provides a person with real-life scenarios to consider. This assists clients in thinking about the issues before they die. It also helps clients choose which types of care they want before executing a health care durable power of attorney.
- (b) **Discussion with the Whole Family About Intent for End-of-Life Care.** A family meeting or a family covenant is a simple way for families and appointed agents to discuss a person's intent about end-of-life care.⁷ A thorough discussion of what type of care the principal envisions is helpful for the agent and the family. It can eliminate misunderstandings and possible challenges when decisions concerning end-of-life care need to be made. Another option is to have the principal take notes

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at this meeting and write an informal letter to his or her agent describing what types of care he or she anticipates needing. The agent can then refer back to the letter when making decisions under possibly stressful circumstances.

- (c) **Meeting with a Patient's Physician.** If end-of-life care is a real or imminent concern for a client, meeting with a physician to discuss the goals and boundaries of end-of-life care with the principal and concerned family members is often a good idea.⁸ The physician can become familiar with the needs and wants of the principal, and the principal can verify that his or her true intentions are expressed in the durable power of attorney for health care. The meeting with the physician should be followed by a meeting with the agent, the principal, and the physician. Questions on future treatment can be identified, values and preferences delineated, and the conversations documented in the medical record.

All of the foregoing tools will assist clients in planning the exact provisions they want in their powers of attorney for health care. The clients are able to take a much closer look at the decisions they are making in a durable power of attorney for health care instead of simply executing a document quickly along with signing their will.

V. Conclusion

Because financial powers of attorney and powers of attorney for health care are becoming more of a focus of clients' planning needs, durable power of attorney forms need to be updated to reflect recent changes in Washington law and the HIPAA Privacy Rules. Reviewing this article and the related checklist makes it easy to update durable power of attorney forms to conform with the HIPAA Privacy Rules and amendments to RCW 70.02.030, 11.88.080, and 11.94.010. Becoming more informed about a client's ideas about advanced care planning is also helpful in light of the public's awareness of Terry Schiavo. Overall, taking the time to update your durable power of attorney forms and being prepared for your client's questions is always important.

- 1 Laura Herpers Zeman is a senior associate at the law firm of Stoel Rives, LLP. She practices in the areas of estate planning, probate administration and family and closely held business planning. She also works in charitable planned giving and advising charitable and not-for-profit entities. Laura was named a "Rising Star" by *Washington Law & Politics* (2004).
- 2 This article will primarily focus on durable financial powers of attorney and durable powers of attorney for health care. However, any mention of concepts and rules relating to durable powers of attorney for health care in this article may also apply to directive to physicians. However, directives to physicians are out of the scope of this article.
- 3 If you have not already addressed the Privacy Rules in your durable power of attorney forms, especially your standby durable power of attorney forms, refer to the suggested language in Stephen Rose's article *Avoiding HIPAA Headaches* on page 14 of the Spring 2004 *Real Property Probate and Trust Newsletter*.
- 4 Note that RCW 70.02.050 and 70.05.090 provide health care providers and health care facilities specific and limited authority to disclose health care information about a patient without a patient's written authorization for release of that information.
- 5 See *supra* at Note 1.
- 6 See www.agingwithdignity.org/5wishes.html. Although the "Five Wishes" can produce an advanced directive, it also can be used as a tool for a client to discuss his or her end-of-life wishes with family, friends, attorneys, and physicians. The Five Wishes are: (1) the person I want to make health care decisions for me when I can't make them; (2) the kind of medical treatment I want or don't want; (3) how comfortable I want to be; (4) how I want people to treat me; and (5) what I want my loved ones to know. The Five Wishes is often used by health care practitioners in Seattle area hospitals. When using this tool, clients should be counseled to use it as a conversational tool only and not as a tool that requires clients to make a ultimate decision about end-of-life care.
- 7 See David John Doukas, "Family" in *Advance Care Planning: The Family Covenant in the Wake of Terry Schiavo*, 33 J.L. Med. & Ethics 372, 373 (2005).
- 8 See *id.* at 373-74.

Article Ideas?

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

Checklist for Updating Your Powers of Attorney

by Laura Herpers Zeman, Stoel Rives LLP

Due to changes in Washington law and federal law, follow these suggestions to prepare for drafting powers of attorney:

I. HIPAA and Engrossed Substitute Senate Bill 5158

- **HIPAA.** Update your durable power of attorney forms, especially your standby durable power of attorney forms, to comply with the Privacy Rules under HIPAA. See Stephen Rose, *Avoiding HIPAA Headaches*, Real Property Probate and Trust Newsletter, Spring 2004, at 14.
- **Engrossed Substitute Senate Bill 5158: Changes to Washington's Privacy Rules after HIPAA**
 - **Comply with the requirements for a written authorization under RCW 70.02.030(3).** Comply with the requirements of a valid written authorization for release of health care information when drafting a durable power of attorney. The test is set forth in subsection 3 of RCW 70.02.030.
 - **Specifically set forth an event of expiration or an expiration date pursuant to RCW 70.02.030(3)(f).** Make sure that the durable power of attorney contains an expiration date or an expiration event that relates to the patient or the purpose or use of the disclosure. For example, the expiration event could be the death of the principal, appointment of a guardian of the principal's person, or dissolution of a marriage if the agent is the principal's spouse.
 - **Avoid certain classes of individuals and institutions as agents.** Clients should avoid appointing as agents any of these: (1) health care researchers; (2) third-party payors, such as employers to whom the health care information is disclosed for payment purposes only; (3) financial institutions; and (4) employers, for purposes other than payment. These individuals and institutions are subject to exceptions to the general authorization rules set forth in RCW 70.02.030(3).

II. House Bill 1125: Changes to the Guardianship Statute and the Power of Attorney Statute

- **Add care of minor children provision.** Add a provision entitled "Care of Minor Child or Children" in a durable power of attorney. The provision should operate only if there is no other parent or legal guardian authorized to care for the minor child in the event the principal is incapacitated.
- **Add nomination of a guardian.** Add language expressly nominating a guardian over a minor child, similar to one that would be set forth in a will. In addition, a nomination of an alternate guardian may be added.
- **Add nomination of an agent to make health care decisions.** Add language authorizing an agent or attorney-in-fact to make health care decisions for any child for whom the principal is the legal guardian.
- **Reminder.** These provisions in a durable power of attorney apply only to parents and guardians of minor children or individuals anticipating the imminent arrival of a child through birth or adoption.

III. The Terry Schiavo Case

In counseling clients on health care powers of attorney, additional care should be taken because of sensitivity surrounding the Schiavo case. Suggested tools to use with your clients are:

- **The "Five Wishes."** The "Five Wishes" can be used by clients to communicate their wishes to their family, attorney, and physician. It provides a person with real-life scenarios to help him or her determine which types of end-of-life care he or she wants.
- **Discussion with the whole family about intent for end-of-life care.** A family meeting or a family covenant is a simple way for families to discuss a person's intent about end-of-life care.
- **Meeting with a patient's physician.** A meeting between a physician and the client to discuss goals and boundaries should be followed by a meeting with the agent, the principal, and the physician. Questions about future treatment can be identified, values and preferences delineated, and the conversations documented in the medical record.

Commercial Real Estate Aspects of the Bankruptcy Code Amendments

by Jane Pearson, Foster Pepper & Shefelman PLLC, Seattle

The bankruptcy reform bill known as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA” or “amendments”) passed by Congress on April 14, 2005, was signed into law on April 20th, and became effective October 17, 2005. BAPCPA was passed in response to Congress’s concerns over alleged abuses committed under the protection of the Bankruptcy Code found in title 11 of the United States Code (the “Bankruptcy Code”). Most of the changes relate to consumer bankruptcy case. However, some of the changes affect the commercial real estate industry, and are discussed below.

I. Assumption or Rejection of Nonresidential Real Property Lease – Section 365(d)(4)

Under the prior version of Bankruptcy Code § 365(d)(4), the trustee (including a debtor in possession in a chapter 11 case), as lessee, had 60 days within which to assume or reject an unexpired lease of nonresidential real property, or such additional time as the court, for cause, within such 60-day period fixed. If the lease was not assumed during such period, it was deemed rejected and the trustee was required immediately to surrender the property to the lessor.

The practice under this section had generally been for the trustee to obtain orders from the bankruptcy court delaying the time of assumption or rejection to the time of plan confirmation so that the estate was not burdened by the economic consequences of a wrong decision either way as the case was reaching success in the form of plan confirmation or failure in the form of inability to confirm a plan. Courts were generally amenable to this approach as long as the trustee kept the obligations under the lease current on a post-petition basis.

Under the amendments, the time period under § 365(d)(4) is changed from 60 days to 120 days, with only one 90-day extension for cause. After that extension, the bankruptcy court cannot further extend the period without the prior written consent of the lessor/landlord.

II. Cure of Nonmonetary Lease Defaults – Section 365(b)(1)

Prior to the amendments, a trustee or chapter 11 debtor that elected to retain leased property had to cure any default, or provide adequate assurance that the defaults would be cured, in order to reinstate the lease. The amendments clarify that the cure requirement applies to nonmonetary as well as monetary defaults. As to real property leases, a debtor must cure all nonmonetary defaults that are capable of cure by performing nonmonetary acts at, and after, assumption. As to nonresidential real property leases only, debtors must cure all nonmonetary defaults arising from the failure to operate in accordance with the leases by performing nonmonetary acts at, and after, assumption. It appears that the amendments do not require a cure of a nonmonetary default that is impossible to cure, such as a going dark clause when a debtor has a going-out-of-business sale but then finds a buyer for the lease. The debtor must first cure any default before

the lease can be assigned. A breach of a going dark clause cannot be cured and the debtor is not required to do so in order to assign the lease.

III. Landlord’s Administrative Claim Lease Rejection Damages – Section 503(b)(7)

As amended by BAPCPA, Bankruptcy Code § 503(b)(7) provides to a landlord of a nonresidential real property lease previously assumed and subsequently rejected, an administrative expensive priority claim for all monetary obligations due under the lease for 2 years after the later of the rejection date or the date the premises are turned over. Offsets or reductions to this claim are limited to sums actually received or to be received by the landlord from an entity other than the debtor. The landlord will have an unsecured nonpriority claim for any remaining sums due under the rejected lease.

IV. Single Asset Real Estate Cases – Section 101(51)(b)

Under the prior version of the Bankruptcy Code, a bankruptcy case involving a single piece of real property (other than residential real property with less than 4 residential units) that generated all of a debtor’s income, on which the debtor conducted “no substantially business” except operating the real property and activities incidental, and had aggregate liquidated secured debt not greater than \$4 million, constituted a single asset real estate case. As a single asset real estate case, it was subject to more stringent rules under the automatic stay provisions of § 362(d)(3), which required, not later than 90 days after the case is filed, that the debtor file a plan with a reasonable possibility of being confirmed or commence monthly payments to creditors secured by real estate in an amount equal to interest at a fair market rate on the value of the creditor’s interest in the real estate. Failing either of these, the secured creditor was entitled to relief from stay upon request and after notice and a hearing. As a practical matter, relatively few cases have fit into the definition of a single asset real estate case.

BAPCPA eliminates the dollar limit of \$4 million (and specifically excludes family farmers). As a result, an increased number of cases will be single asset real estate cases, and the issue of what constitutes “substantial business” activity will likely be more frequently litigated.

V. Ability of Utility Service to Alter, Refuse or Discontinue Service – Section 366(c)

Under the prior version of Bankruptcy Code § 366, a utility provider could not effect a change in the debtor’s utility service if the trustee or the debtor, within 20 days after the order for relief, furnished adequate assurance of payment in the form of a deposit or other security, for post-petition services. The bankruptcy court could order reasonable modification of the amount of the deposit or other security upon request of a party in interest and after

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Commercial Real Estate Aspects of the Bankruptcy Code Amendments

notice and a hearing. In practice, utility companies became aware of what the local practice is in terms of the amount of the deposit or security and this Bankruptcy Code section has generally not been the subject of significant litigation. However, if the parties could not agree on a deposit or other security, both were at risk – the debtor because the utility could terminate service and the utility because the debtor may already have furnished adequate assurance of payment.

BAPCPA amends § 366 to permit utilities to alter, refuse or discontinue utility service in a chapter 11 case, apparently without relief from the automatic stay or court approval, if the debtor has not provided assurance of payment that is satisfactory to the utility within 30 days after the filing of the bankruptcy case. The amendment also clarifies the utility's ability to set off a pre-petition deposit without an order of the bankruptcy court.

VI. Chapter 11 Plan Exclusivity – Section 1121(d)

Under the prior version of Bankruptcy Code § 1121(b), the debtor had the exclusive right to file a plan for 120 days after the case is filed. Under subsection (d), upon request of a party in interest and after notice and a hearing, the bankruptcy court could for cause reduce or increase this period (as well as the 180-day period within which to confirm a plan).

BAPCPA amends Bankruptcy Code § 1121(d) to limit the debtor to a 14-month extension for both the exclusivity and plan solicitation periods. The 120-day period in which the debtor has the exclusive right to submit a plan of reorganization may not be extended beyond a date that is 18 months after the date of the bankruptcy filing. The 180-day period within which the debtor must obtain acceptances to its proposed plan may not be extended beyond a date that is 20 months after the date of the bankruptcy filing.

VII. Creditors Committee Composition – Section 1102(a)

Under the prior version of Bankruptcy Code § 1102(a), the United States trustee appointed a creditors committee and could appoint additional committees as it deemed appropriate. The bankruptcy court could also order the United States trustee to appoint additional committees. Some controversy has existed about whom, as between the bankruptcy court and the United States trustee, had superior authority regarding appointment and composition of official committees.

Under amended § 1102(a), the bankruptcy court is authorized, on request of a party in interest and after notice and a hearing, to order the United States trustee to change the membership (composition) of an official committee to ensure adequate representation of creditors or equity security holders.

VIII. Preference Litigation In Ordinary Course Defense – Section 547(c)

Under the prior version of the Bankruptcy Code, a transfer

of an interest of the debtor in property on account of an antecedent debt made within the 90-day period before a bankruptcy filing was considered preferential unless the recipient could establish one of the statutory defenses. Some courts held that delinquent rent payments were preferential and subject to avoidance. One of the most common difficulties to be overcome by defendants to preference claims has been the establishment of the ordinary course defense, which has required that the payment be in the ordinary course of business or financial affairs of the debtor and the transferee, that the transfer be made in the ordinary course of business or financial affairs of the debtor and the transferee, *and* the transfer be made according to ordinary business terms. As an evidentiary matter, the test was difficult to meet.

Under the amendments, the elements of the ordinary course defense will be disjunctive rather than conjunctive. For example, if a landlord periodically accepts rent payment from a tenant 5 to 7 days late, even though the lease requires the rent to be paid on the first day of the month, the transferee should be able to establish that the payment was made in the ordinary course of business or financial affairs of the debtor and the transferee, and therefore is not a preference.

IX. Monetary Limit and Venue Provisions – § 547(c)(9) and 28 U.S.C. § 1409(b)

One of the most common criticisms of the prior Bankruptcy Code's preference provisions is that they were used by bankruptcy estates in national cases to, in effect, "hold up" transferees located far from the court in which the bankruptcy case was pending by making it more cost-effective for defendants to settle questionable preference claims rather than litigate them. Two amendments to the Bankruptcy Code should change that dynamic. Under Bankruptcy Code § 547(c)(9), a business debtor is precluded from avoiding transfers of less than \$5,000. Under 28 U.S.C. § 1409(b), a preference action for a non-consumer debt of less than \$10,000 can only be commenced in the district in which the noninsider resides.

X. Look-Back Period for Fraudulent Transfers – Section 548(a)(1)

The prior version of Bankruptcy Code § 548(a)(1) provided for avoidance of transfers of a property interest of the debtor, or any obligation incurred by the debtor, made or incurred on or within 1 year before the bankruptcy filing, if the transfer was made or the obligation incurred with actual fraudulent intent or constructive fraud. Under § 548(a)(1)(B), the alternative tests of constructive fraud are receiving less than reasonably equivalent in exchange for the transfer or obligation, or insolvency (balance sheet basis, unreasonably small capital or inability to pay debts as they become due). As amended by BAPCPA, § 548(a)(1) has a 2-year, rather than a 1-year, look-back period.

Recent Developments

Probate and Trust

by Brinette C. Bobb, Perkins Coie LLP, Seattle

***Estate of Kordon v. Duke*, 126 Wash.App. 482 (Division Three, 2005)**

Summary:

When filing a petition contesting the validity of a will, the petitioner must also issue a citation, as prescribed under RCW 11.24.020, within a reasonable time for the probate court to have jurisdiction, thereby avoiding the dismissal of the petition. The Trust and Estate Dispute Resolution Act (“TEDRA”) does not eliminate the citation requirement of RCW 11.24.020.

Facts:

The decedent’s will, which left everything to the named personal representative, was admitted to probate on April 25, 2001. Decedent’s sister, Helen Cleveland, timely filed a petition to set the will aside on August 24, 2001. The petitioner did not, however, issue a citation, as prescribed by RCW 11.24.020. Although there were informal discovery requests and settlement discussions for approximately two years after the petition was filed, on September 15, 2003, the personal representative moved to have the petition dismissed arguing that the court lacked jurisdiction because of the petitioner’s failure to issue the requisite citation.

The petitioner argued that TEDRA eliminates the need to issue a citation under RCW 11.24.020 if the will contest is part of an ongoing probate proceeding. Alternatively, the petitioner argued that, even if the court finds that a citation was required, there is no statutory time limit for the issuance of the citation, and, therefore, the citation she issued on October 9, 2003 is sufficient.

Discussion:

RCW 11.24.020 provides that “[u]pon the filing of the petition referred to in RCW 11.24.010, a citation *shall be issued* to the executors who have taken upon themselves the execution of the will, ... and to all legatees named in the will residing in the state, ... requiring them to appear before the court, on a day therein specified, to show cause why the petition should not be granted.”

TEDRA provides in RCW 11.96A.020(1)(a) that “[i]t is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle all *matters* concerning the estates and assets of ... deceased persons ... in accordance with this title.” What constitutes a *matter* for purposes of this statute, however, is defined in RCW 11.96A.030(1), which does not include will contests. As such, the court held that TEDRA did not change the specific, mandatory requirements of RCW 11.24.020, and, therefore, a citation is required for a will contest.

The question then became, when must a petitioner issue a citation to avoid having the petition dismissed? The court held that, although there is no statutory time limit within which the citation must be issued, it must be issued within a reasonable time. Under the facts of this case, the court concluded that the issuance of a citation over two years after the initial will contest petition was filed was not within a reasonable time, and, therefore, affirmed the trial court’s judgment dismissing the will contest for lack of jurisdiction.

***In the Matter of Barovic v. Pemberton*, 128 Wash.App. 196 (Division Two, 2005)**

Summary:

Once a court approves a trust accounting and the appeal period expires, the decrees become final, conclusive and binding not only as to the accuracy of the trustee’s actions and disposition of trust funds, but also as to any negligent or willful breaches of trust on the trustee’s part.

Facts:

A testamentary trust was created for the benefit of Donald Barovic and others. Tanya Pemberton was appointed by the court to act as Trustee. The trust owned rental apartments, which were encumbered, in part, with a mortgage. The Trustee filed accountings for years 1998 through 2003. In 2004, however, the Trustee realized that her accountings had been incorrect because in calculating the net rental earnings, she included interest and principal payments on the mortgage, but she should have charged the interest payment against the income account and the principal payment against the principal account. She promptly corrected the mistake and reimbursed the income account with \$43,335.04 from the principal account. The trial court approved the intermediate accounting, but ordered that the income account also be credited interest in the amount of \$11,409.04 from the principal account. The Trustee appealed the court’s order regarding the interest payment.

Discussion:

RCW 11.106.070 lays out the ability of the trial court to enter a decree on an accounting and provides, in relevant part, “[t]he court without the intervention of a jury and after hearing all the evidence submitted shall determine the correctness of the account and the validity and propriety of all actions of the trustee or trustees set forth in the account including the disposition of any of the property and funds of the trust, and shall render its decree either approving or disapproving the account or any part of it, and

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Recent Developments

Real Property

by Scott Osborne, Preston Gates & Ellis, LLP

This selection of cases for this issue feature court clarifications of the obscure, the previously decided and the recently enacted.

Execution Sales and Redemptions. RCW 6.23.120 is a statutory provision allowing real estate brokers to sell residential real property previously sold at a sheriff's execution sale. The statute provides that following an execution sale (as opposed to a mortgage or deed of trust foreclosure) involving residential property ("property that a person would be entitled to claim as a homestead"), any real estate broker in the county in which the property is located may list the property for sale during the redemption period. The purchaser of the property at the execution sale must sell the property to any person making a "qualifying offer" through the broker prior to the expiration of the redemption period:

An offer is qualifying if the offer is made during the redemption period through a licensed real estate broker listing the property and is at least equal to the sum of: (a) one hundred twenty percent greater than the redemption amount determined under RCW 6.23.020, and (b) the normal commission of the real estate broker or agent handling the offer.

RCW 6.23.120(1)

From the proceeds, the broker is paid, the purchaser at the execution sale receives 120% of the redemption amount, and the balance, if any, is paid to the judgment debtor. Presumably, this statute offers a safeguard to judgment debtors against unreasonably low purchase prices being paid at execution sales.

In a rare (*i.e.* only) judicial interpretation of this statute, the Court of Appeals in *Graham v. Findahl*, 122 Wn. App. 461 (2004), ruled that a "qualifying offer" could not contain terms and conditions which imposed legal obligations on the execution sale purchaser beyond those stated in the statute. Findahl purchased a condominium unit as a sheriff's execution sale. The judgment debtor did not redeem, and a sheriff's deed was issued to Findahl. A broker listed the unit during the redemption period.

Graham offered to buy it for 125% of the redemption price, plus the applicable real estate commission. The offer was submitted on a Northwest Multiple Listing Service form of residential purchase and sale agreement. Findahl refused to accept the offer, and contended that it was not a "qualifying offer" as contemplated by the statute. Specifically, the offer required Findahl to convey by statutory warranty deed, make certain representations and warranties concerning the property, and pay for a policy of title insurance. The trial court agreed with Findahl, and dismissed Graham's action to compel the sale.

In affirming the decision, the Court of Appeals noted that the sheriff's deed received by Findahl was substantially in the form of a bargain and sale deed, and that the requirement of providing a warranty deed contained in Graham's offer imposed substantially more burdens upon Findahl than contemplated by the statute:

... it would contravene the legislature's intent to force Findahl to accept terms in the offer that are not contemplated in the statute. Requiring Findahl to convey the unit by statutory warranty deed, which is of higher quality than a bargain and sale deed, would increase the burden that the redemption statute would otherwise place on him. Indeed, it might increase the burden to the point of impossibility.

Findahl, 122 Wn. App. 467.

The Court also observed that the offer contained other terms that went beyond the requirements of the statute, such as an attorneys' fee provision, and it was clear from Graham's position that he sought to have sale terms imposed upon Findahl that went beyond the requirement of the statute. As final advice to Graham,

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Recent Developments: Probate and Trust

surcharging the trustee or trustees for all losses, if any, caused by negligent or willful breaches of trust."

RCW 11.106.080 addresses the effect of the trial court's decree referenced in RCW 11.106.070 above, providing as follows: "[t]he decree rendered under RCW 11.106.070 shall be *deemed final, conclusive, and binding* upon all parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust *subject only to the right of appeal* under RCW 11.106.090." The appeal right under 11.106.090 is the same as the right to appeal from a final order in civil actions where one may appeal to the supreme court or the court of appeals of the state of Washington.

Here, the court held that the statutory language of the RCWs is unambiguous in (1) requiring the court to enter a decree either approving or disapproving an accounting, (2) subjecting the validity of such decree only to the right of an appeal, and (3) requiring that such decree become irrefutable and unable to be altered or undone once the time for such appeal expires. Consequently, Barovic lost his right to recover the interest on the reimbursed payments when he failed to timely appeal, and the trial court, therefore, erred in awarding such interest.

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Recent Developments: Real Property

offered through the clarifying perspective of 20-20 hindsight, the Court stated:

Given the apparent rarity of this kind of offer to purchase unredeemed property, it might have been wise to present the offer in something other than a standardized purchase and sale agreement.

Findahl, 122 Wn. App. 469.

Deed Restrictions. In *Niemann v. Vaughn Community Church*, 154 Wn. 2d 365 (2005), the Washington Supreme Court affirmed the Court of Appeals decision at 118 Wn. App. 824 (2003), concerning the effect of a restrictive covenant contained in a deed. The Court of Appeals opinion was discussed in an earlier issue of the *Newsletter*, and the principal difference between the two decisions is the rationale used by the Court.

The case involved a conveyance from one church organization to another as part of a merger of the churches. The Emmanuel Congregational Church of Vaughn conveyed its property to the Vaughn Community Church of Christ (“CCC”), with the following covenant:

TO HAVE AND TO HOLD said property for the perpetual use of Protestant Evangelical Churches of the Community of Vaughn, Washington.

The dispute arose when a member of the CCC challenged a decision by the church to sell the property and use the proceeds to build a larger church. The Supreme Court, in affirming the trial court and the Court of Appeals decision allowing the property to be sold, based its analysis solely on trust principles, held that the restrictive covenant created a charitable trust. Under the trust law principle of equitable deviation (which is better discussed by the *Probate & Trust* half of this Section), the sale of the property was justified. In a dissent, Justice Madsen argued that the restriction was ineffective under general property law principles.

The Supreme Court did not comment on that portion of the Court of Appeals ruling that held that the covenant in the deed violated RCW 49.60.224, which voids any restriction in a deed that purports to prohibit further conveyance on the basis of race, creed, color, sex, national origin, families with children status, or disability, so we are left with the Court of Appeal opinion on this point. The Supreme Court, in a footnote, did observe that the deed restriction involved may not have actually restricted conveyance of the property, since it related only to use. If RCW 49.60.224 did apply, however, it is difficult to conclude that the void restriction somehow morphed into a declaration of trust. Given the Court of Appeals ruling, for the time being, if a grantor wants to restrict the use of real property to a particular use associated with a religious organization, the safer approach is through a trust instrument rather than a restrictive covenant that might be construed to run afoul of RCW 40.60.224.

Clarifications. In 2002, the State Legislature enacted various measures at the request of the construction industry designed to provide contractors with some relief from construction defect claims. The first was 64.50 RCW, which provided a mediation framework in which claimed defects associated with residential construction were to be resolved, or at least attempted to be resolved. In *Lakemont Ridge Homeowners Asso’c. v. Lakemont Ridge LP*, 125 Wn. App. 71 (2005), the Court of Appeals ruled that the procedures of the chapter applied to all construction disputes initiated after its passage, including those relating to structures constructed before the effective date of the statute.

In response to the opinion in *Architectonics v. Khorram*, 111 Wn. App. 725 (2002), which held the discovery rule applied to the commencement of the statute of limitations in construction contract actions involving non-observable defects, the construction industry prevailed upon the Washington Legislature to pass RCW 4.16.326 (the “statute of repose”), which became effective July 7, 2003, and provided that the applicable statute of limitations for the commencement of a contract action associated construction expires six years from substantial completion of the project, regardless of when the breach was discovered. In *1000 Virginia LP v. Vertecs Corporation*, 127 Wn. App. 899 (2005), the Court of Appeals held that statute of repose did not apply retroactively to causes of action initiated prior to the effective date of the statute.

One final note concerning the *Vertecs* opinion. In both *Vertecs* and *Graoch Associates v. Titan Construction*, 126 Wn. App. 856 (2005), Division One of the Court of Appeals has held that a standard one-year warranty provision typically found in construction contracts does not impose a one year contractual statute of limitations and does not limit the remedies available to the owner for breach of contract. Specifically, in both instances, the one year warranty did not bar an action under the general warranty in the contract to complete the work free from defects. In *Graoch*, the contractual provision was found in the standard AIA Document A11 – 1987, which was the “Standard Form of Agreement Between Owner and Contractor” for a cost plus a fixed fee. If the contractor desires the one year warranty in its contract to be the exclusive remedy, the contract has to specifically limit the remedy of the owner to those provided under the warranty. Since virtually all AIA construction contracts are drafted in a similar manner in connection with the warranty provisions, those form agreements do not provide the level of protection to the contractor that it may have previously assumed.

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HOW TO REACH US

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