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# Real Property, Probate & Trust



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## Seller's Disclosure Requirements in Residential Real Estate Transactions and the *Edmonds* Case

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It has been more than three years since the January 1, 1995 effective date of the Residential Real Property Transfers - Seller's Disclosures Act (the "Act"), found in Chapter 64.06 of the Revised Code of Washington ("RCW"). Somewhat surprisingly, although all recent residential transactions are impacted by the Act's disclosure requirements imposed on a Seller, only one published case has addressed the Act. This article provides a refresher on the requirements of the Act, the remedies available for the Buyer, and discusses the recent case involving a seller's nondisclosure of a drainage defect.

The Act applies only to residential real property, which the statute defines to include: 1) real property improved by one to four dwelling units; 2) a residential condominium, unless the sale is subject to the public offering statement requirements of the Washington Condominium Act; or 3) a residential timeshare, unless subject to written disclosure under the Washington Timeshare Act. The Act also excludes newly constructed

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## Understanding the Non-Legislative History of Washington Community Property Law

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There is perhaps no area of the law of Washington State which has entertained more speculation than the historical background of its community property system. Ever since Washington achieved statehood in 1889 it has had a system of community property law. However, the community property statute enacted upon statehood merely effected a continuation of the marital property laws that had governed Washington Territory for nearly twenty years. What makes the passage of a community property law in Washington Territory so significant is that by adopting a community property system, the residents of the Territory affirmatively abandoned the only marital property law they had known since the Territory was first established.

Unfortunately, not much is known about this legislative event. Virtually all of Washington Territory's official records were lost and the surviving few do not shed light on why it passed a community property statute rather than continue with the traditional common law. This article explores some of the possible reasons behind Washington's decision to implement a community property law and reviews two of the most overriding concerns held by its residents that likely guided their decision to codify the doctrine of community property: first, the Territory's lawmakers wanted to align Washington's laws more closely with the laws of California, and second, the overwhelming majority of bachelors in the Territory wanted to use the adoption of a community property statute to attract women to Washington. A more comprehensive treatment of this topic, with citations, may be found in the most recent edition of the seminar materials from "Community Property Law & Developments" which was presented by the Washington State Bar Association on October 10, 1997.

### I. The Early History of Washington Territory.

It is helpful to have at least a basic knowledge of the general history of Washington in order to understand how the doctrine of

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## Notes from the Chair

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

We recently enclosed a survey with our Newsletter asking for your input on how we are doing. More specifically we wanted to know what services provided by the Section you found to be most useful. The results are in! We received input from almost 200 of you, or about eight percent of our membership. Those who responded indicated that the Newsletter was the most important benefit provided by Section membership, followed in order by the annual Midyear Conference, other CLE seminars, and legislative activities. Also of great interest to us was your input on services that you felt the Section could or should be providing to its members. Many of those responding wanted some form of on-line or Web access to Section and Bar materials.

We are already in the process of creating a Web page for the Section. As reported in the last newsletter, the Section's Web page will contain information on the Section, legislative matters, a calendar of events, and links to related pages. If all goes well that page should be up and running by the time you receive this issue. It will be found under the Sections directory at [www.wsba.org](http://www.wsba.org). We will be exploring other content options with the Bar as well, including the possible posting of the Newsletter and access to CLE materials and information.

There were also requests for book reviews in the Newsletter; recommendations on recent publications of interest; and publication of sample forms for specific topics. We will take these comments to heart in designing future CLE programs.

Several of you also wanted us to consider holding additional forums to discuss special topics, or matters of general interest. The Executive Committee will have a special meeting this spring for the sole purpose of exploring new outreach opportunities for our membership and the public at large. We believe that our Section and its members have a tremendous amount to contribute to each other and to the public, and we want to explore effective ways of disseminating that knowledge. We also believe that by educating the public about our practice areas people will better understand the value of good legal counsel. Some preliminary ideas include the establishment of a "speakers bureau" for free public presentations covering topics of general interest - such as the purchase and sale of a residence; the probate process in the State of Washington; or the pros and cons of living trusts. The possibility of holding one or two general forums for our membership during the year is also being considered. Conceptually this would give our members an opportunity to meet with the executive committee or other groups to discuss specific legal issues or topics of general concern. As always, we would welcome any input you might have on these or other possible options.

As noted above, one of the most valuable services provided by the Section is the presentation of seminars of interest. WSBA CLE is considering the establishment of a CLE Curriculum Advisory Board to assist it in understanding our practice areas. This will help them develop CLE programs that are relevant and on point to specific topics of interest. There would be a separate board of approximately fifteen or twenty practitioners for each practice area. If you might be interested in being a member of an Advisory Board, please let us know.

The Directors of the Real Property and the Probate & Trust Councils, Serena Schourup and Mark Roberts, have provided updates on the status of pending legislation in their respective reports. I invite you to take a look at the specific bills by signing onto the Washington State Legislature's home page at <http://www.leg.wa.gov>.

The program for the 1998 Midyear conference is shaping up nicely under the guidance of John Riley as Seminar Chair, and Barbara Sherland and John Glowney as program co-chairs. The program will be held at Skamania Lodge in Stevenson Washington on June 5 - 7. The program will include the annual updates on Washington real property, probate and trust laws, and concurrent sessions on ethical issues confronting real property, probate and trust practitioners, and the new amendments to the Uniform Partnership Act (presently pending before the Legislature). For the real property practitioner there will also be separate sessions on the amendments to the Deed of Trust Act (presently before the Washington State legislature); environmental appraisals, unhappy tenants and how to protect their rights; easements in commercial settings; the mobile home

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## *History of Washington Community Property Law*

community property came to exist in this state. Washington Territory was initially part of the territory of Oregon, which comprised of a tract of land including the present states of Oregon, Washington and Idaho.

Following the founding of a trading post on the Pacific Coast by John Jacob Astor in 1811, American trappers, traders, settlers and missionaries moved slowly into the Pacific Northwest, with most immigrants settling along the Willamette River. Although the Hudson's Bay Company and the local Methodist mission provided a crude form of government for the earliest settlers, for over two decades these loggers and trappers lived without any form of government or legal system. As more people came to the area, however, the need for some form of organized government increased. The turning point came when a man named Ewing Young died shortly after settling in Oregon Territory, leaving a will to be probated. There was no official code of local laws and tremendous disagreement resulted as to which law should apply. While it is not clear under which law Mr. Young's estate was eventually probated, it was his death that prompted the settlers to agree to form a provisional government for the purpose of drafting a local code of laws.

A provisional government was established at a public meeting in 1843. The first legislators of Oregon Territory (which was not officially recognized by Congress until 1848) adopted the common law of marital property as the Territory's rule of decision, thus continuing the common law tradition familiar to the majority of settlers. Almost a decade later, in 1853, the territory of Washington was carved out of the vast Oregon Territory when Congress separated the land north of the Columbia River from Oregon. Congress provided for the continuation in the new Washington Territory of the laws of Oregon until the new Territory either repealed or replaced them. In 1856, without written explanation, the Washington Territorial Legislature repealed the laws derived from Oregon Territory yet made express provision for the continuation of the common law as the rule of decision.

### **II. The Early Community Property Statutes of Washington.**

In 1869, nearly a decade after its formation, Washington Territory affirmatively abandoned the traditional common law in favor of a community property statute. At that time, the territorial legislature enacted a marital property statute entitled "An Act Defining the Rights of Husband and Wife." The statute was modeled on – indeed, copied almost verbatim from – the California Community Property Act of 1850 (which was contained in California's first state constitution and continued the tradition of community property established there while under Spanish control). For the next twenty years until statehood, the legislature of Washington Territory struggled with its decision to adopt community property as law.

Washington's marital property statute enacted in 1869 made the community property law compulsory only where no pre-marital contract provided contrary stipulations. Under this statute, with few exceptions, the husband was granted the sole right to manage and dispose of all marital property. The Marital Partnership Property Act replaced the earlier statute in 1871; its provisions were compulsory, with no option to contract out of the community property system. Similar to the statute it succeeded, the Marital Partnership Property Act awarded the husband the power to dispose of and encumber all community property, requiring the wife to join only for sales of real estate. However, under the new act, the wife was allowed to dispose of or encumber her separate property as she desired.

The Marital Partnership Property Act was repealed in 1873 and Washington Territory's community property law was made optional once again, so that a prenuptial contract could reject the provisions of the statutory property system. Once again, the husband solely controlled the management of all property, whether deemed community or separate, with one exception: the separate personal property of the wife. This act was slightly modified in 1879 to allow each spouse to dispose of by Will half of the community property in any manner desired, in addition to his or her separate property. As one can imagine, Washington Territory revised its community property law several more times prior to statehood, but the rights of each spouse were not significantly altered from the provisions of the 1879 act.

After outlining briefly the legislative history of community property in Washington Territory, it is now appropriate to explore some of the possible reasons behind its decision to abandon the common law in favor of a community property system.

### **III. Possible Reasons Why Washington Territory Adopted Community Property Law.**

Possibly, the sole motivation behind Washington Territory's decision to change its marital property law was simply to align its laws more closely with those of California. After all, California achieved statehood earliest among the western states and its rapid admission into the union was a process the other territories wanted to follow. By virtue of being the most organized and most populated, California quickly became the dominant source of legislative and judicial material on the Pacific Coast. It is evident that Washington Territory, as it slowly developed its own code of laws, relied heavily on the legislation and case law generated by California.

This theory does not provide a complete answer, however. If Washington Territory simply intended to align its laws to the dominant legal source on the West Coast, then why didn't Washington Territory conform its other, non-property-related laws to match those in California? And why did other western territories, like Oregon, choose not to adopt a community property

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### *Seller's Disclosure Requirements. . .*

residences and several types of exempt transactions outlined in RCW 64.06.010.

In each residential transaction not otherwise excluded under the Act, the Seller must make certain disclosures proscribed by the Act about the property's title, water, sewer/septic system, structural, systems and fixtures, common interest and other general matters. In such disclosure statement, the Seller has the choice of answering "yes", "no" or "I don't know" as to each question. RCW 64.06.050 sets forth the standards for errors, inaccuracies or omissions in the disclosure statement. A Seller "shall not be liable for any error, inaccuracy, or omission in the real property transfer disclosure statement if the seller had no actual knowledge of the error, inaccuracy, or omission." RCW 64.06.050(1). The statute further provides that if the seller disclosure is based on information provided by a third party, such as a public agency, surveyor, title company, structural inspector, pest inspector, licensed engineer, or contractor, the seller shall not be liable for an error, inaccuracy or omission. RCW 64.06.050(2)

Unless the Buyer has expressly waived the right to receive the disclosure statement, RCW 64.06.030 requires the seller to deliver to buyer the disclosure statement not later than five business days after mutual acceptance of a purchase and sale agreement. The buyer shall then have three days to either approve and accept the disclosure statement or rescind the agreement, based on the buyer's sole discretion. If, prior to the closing of the purchase and sale, seller becomes aware of additional information or an adverse change occurs to make the previous disclosure inaccurate, the seller is required to amend the disclosure statement and deliver the amendment to the buyer. There are no obligations by seller to amend the disclosure statement after closing for any "act, occurrence, or agreement arising or becoming known after the closing...causes a real property transfer disclosure statement to be inaccurate in any way." RCW 64.06.040(2).

Other than the seller's relief of liability for having no actual knowledge or having relied on statements of third parties found under RCW 64.06.050, the Act does not eliminate or impair any common laws rights or remedies of a buyer against the seller or against any agent acting for the seller. RCW 64.06.070 specifically confirms that the only right or remedy for buyer created by the Act is the right of rescission, so long as it is "exercised on the basis and within the time limits" provided by the Act. So that there was no further confusion, the Act specifically provides that the practices covered do not affect the public interest for purposes of utilizing the Consumer Protection Act from RCW 19.86.

A recent case specifically dealt with a seller's disclosures in a disclosure statement. Although the transaction involved preceded the January 1995 effective date of the Act, the Seller had voluntarily provided the Buyer a copy of a completed disclosure statement. *Edmonds v. John L. Scott*, 87 Wn. App. 834, 942 P.2d 1072 (1997). In *Edmonds*, the seller voluntarily provided to the buyer a disclosure statement in which the seller

stated that "they were not aware of any existing problems with flooding or drainage on the property" and specified that a contractor had corrected a prior problem. *Edmonds*, 87 Wn. App. at 842. In an addendum to the purchase and sale agreement, the buyer's agent specified that the Seller must "furnish copy of warranty for drainage work done." *Id.* at 841. After receiving the disclosure statement and prior to closing, the buyer found quite a bit of water in the basement. This discovery was especially relevant to the buyer because she intended to create a home office in the basement. It is unclear from the facts whether the seller's contractor did any further work to alleviate the problem after this flooding. The buyer was unable to obtain warranty assurances from the seller that the drainage problem had been remedied. Buyer notified the seller that she was terminating the transaction and demanded a refund of her earnest money. A few days later, the basement flooded again.

Both the seller and the buyer were represented by John L. Scott ("Scott") agents. Scott's counsel told the buyer's counsel that the drainage had been repaired and authorized disbursement of one-half of the earnest money to the seller and the balance split between the two real estate agents. The buyer brought an action alleging unlawful forfeiture, breach of contract, breach of fiduciary duty, conversion, misrepresentation, fraudulent concealment, and violation of the Consumer Protection Act.

The trial court found that, at the time the seller provided the seller disclosure statement, the seller failed to adequately disclose the extent of the drainage work that had been performed on the property and determined that the seller and buyer's agent had knowingly presented a disclosure statement that contained a false statement. The trial court found that the seller had breached the purchase and sale agreement by failing to deliver the warranties as to the drainage work. Furthermore, the trial court held Scott liable for conversion for disbursement of the earnest money, for breach of fiduciary duty, and for violation of the Consumer Protection Act. Scott appealed the trial court's finding of liability.

In its opinion, the Court of Appeals extensively discussed Scott's "deceptive and unfair trade practices" in finding Scott liable for Consumer Protection Act violations. The Court was especially concerned with Scott's failure to disclose to the buyer its practice to have the general counsel unilaterally determine whether buyer's complaints merit investigation and whether there was a default in the transaction. The Court's discussion of the elements of a Consumer Protection Act violation is a good summary of the law in this subject area.

In its discussion of the seller misrepresentation in the seller disclosure statement, the Court noted that the trial court found both the seller and the buyer's agent knew that the seller's disclosure was false as to the lack of drainage problems. The Court noted that the buyer's agent testified at the trial that he knew the disclosure statement was inaccurate when presented but felt that did not matter since everyone, including the buyer,

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## *History of Washington Community Property Law*

law? The balance of the answer may rest in the severe imbalance of the sexes in Washington Territory, a problem that Oregon did not appear to have.

### **A. The Community Property Debate in California.**

As mentioned previously, all of Washington Territory's records regarding the passage of its first community property law were lost, including the legislative debate transcripts. The community property debates held in California, however, were recorded in great detail and provide insight as to why Washington chose to adopt a marital property law rich in Spanish heritage when there is no evidence that Washington had any kind of connection to Spanish civil law.

By way of background, the United States acquired California from Mexico in 1848 and the Spanish-Mexican law already in force in California remained in effect after its acquisition, including the law of community property. Following the discovery of gold shortly thereafter, the influx of American settlers into the Territory of California meant that the native Californians were quickly outnumbered. Many among the newcomers, including judges and lawyers who had moved there from the East, believed that the common law should be the rule of decision in California because the common law was the legal system known to the majority of the settlers. As a result, the American settlers lived under the common law and the native Californians lived under the civil law.

Anxious for statehood, the American settlers in California called for a convention to write a state constitution, hoping to force Congress to provide for the government of the Territory. There was considerable debate in the convention as to whether the common law or the civil law should be the rule of decision and the question of whether community property should be adopted was clearly answered.

The first issue addressed by the delegates involved the conflicting legal backgrounds of those settled in California. The controversy between the common law and the Spanish civil law became clear almost immediately after the delegates submitted proposals for a marital property provision. One committee submitted a proposal based on community property while another committee submitted one based on the common law. While delegates on either side of the issue framed it as a matter of which law was the most familiar to the majority of the Territory's residents should prevail, many others believed that the choice of a property law should hinge on the question of women's rights and whether California would provide for the security of the property of wives.

The debate between those who believed in the recognition of limited property rights for married women and those who opposed the assignment of such rights was intense and reportedly spanned many hours. One delegate, James McHall Jones, summarized the argument in support of community property as follows:

What is [this] principle so much glorified by [the common law] but that the husband shall be a despot, and the wife shall have no right but such as he chooses to give her? It had its origins in the barbarous age, when the wife was considered in the light of a menial, and had no rights.<sup>1</sup>

Another delegate, Charles T. Botts, represented those who were opposed to the doctrine of community property. He summarized their position by announcing to the president of the convention:

[T]his doctrine of women's rights is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe...the only despotism on earth that I would advocate, is the despotism of the husband. There must be a head and there must be a master in every household; and I believe this plan by which you propose to make the wife independent of the husband, is contrary to the laws and provisions of nature—contrary to all the wisdom which we have derived from experience.<sup>2</sup>

Botts concluded his argument by declaring:

[I]f she had a masculine arm and a strong beard, who would love her? She had just as well have them as a strong purse because she is rendered just as independent by the one as the other, and as little lovable. The God of nature made woman frail, lovely, and dependent; and such the common law pronounces her.<sup>3</sup>

Despite the moral and philosophical reasons espoused by many of the delegates in support of their position on this issue, there were a fair number of delegates who had a very practical reason for supporting the community property proposal: its appeal to single women. This was exactly why delegate Henry Halleck favored the adoption of community property, stating:

I would call upon the bachelor's [sic] in this convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduce into the Constitution.<sup>4</sup>

This sentiment was seconded by most of the younger delegates at the convention, indicating that Halleck's statement touched on a very real concern for the majority of men who had settled in the western territories. The settlers were overwhelmingly male and the number of suitable wives continued to decrease. The desire to offer some kind of incentive to single women to move to the West, despite the harsh reality of frontier life, was strong. Consequently, a majority vote in favor of community

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property was recorded and it became the law of California in 1850.

### **B. The Adoption of California's Community Property Law by Washington Territory.**

Although the California delegates' comments regarding that state's marital property laws reflect a growing recognition of a woman's marital property rights, little evidence exists to suggest that the adoption of community property by Washington Territory was a reflection of the larger movement toward improving the property rights of married women. While a few newspaper articles suggest that the settlers of Washington Territory were aware of the women's rights movement in the East, the territorial newspapers make no mention of any local reform movement. In all reality, there probably were not enough women in the Territory to even begin a local movement if they had so desired. Besides, the various married women's acts that were being enacted in the East were not meant to replace the common law, as did the community property statute of Washington. Therefore, it is unlikely that an awareness of the growing women's rights movement was influential in the decision of Washington Territory to adopt community property.

Nevertheless, the arguments made during the California convention with respect to using community property law as an incentive for single women to travel to the Territory echo similar sentiments expressed in Washington Territory during the years immediately preceding the passage of its first community property law. The lack of women "suitable for marriage" was a valid concern for men living in Washington Territory. By most accounts, practically the entire Territory was populated by young and middle-aged bachelors. For years, the Puget Sound Herald, the primary newspaper of the Territory, had been complaining of the lack of "decent white women." At one point during the early 1860's, the Herald estimated that the ratio of men to women, regardless of marital status, was 9 to 1. Based on those statistics, roughly 2,000 of the 3,000 voters in the Territory were anxious to get married.

Several meetings of lonely bachelors were reportedly held in various Puget Sound settlements during the 1860's. These meetings gave rise to formal pleas to the territorial legislature asking for its help in bringing single women to Washington Territory. Newspapers printed articles intended to help these bachelors, ranging from columns entitled "Courting under Difficult Circumstances" to articles about why a wife is better than the smell of tobacco. The newspapers also complained that government officials needed to get the word out about Washington Territory. As one writer explained, "Easterners have no idea about Washington Territory and think it's unbearable ... Oregon and California don't have this problem because they sent out pamphlets...."<sup>5</sup> Describing the pamphlets that had been distributed by neighboring territories and how they showcased the

opportunities for women in the West, including the benefits of community property, one Washington Territory newspaper editor wrote that "...there seems to be other ways of getting women besides advertising for one."<sup>6</sup>

It is clear that the bachelors of Washington Territory were interested in attracting a certain kind of woman to the region. The conditions of frontier life meant that a woman had to be willing and capable to perform hard work and to live in difficult circumstances. Community property gave more rights to women and was more likely to attract the strong-minded and adventurous women needed in the Pacific Northwest. Put simply, the common law disabilities of married women did not mix well with the cooperative lives of pioneer husbands and wives; not only did the common law greatly restrict married women in their power to manage marital property, it also worked a hardship on married men who were out West without their wives. The common law required a buyer of land to obtain a deed or release of dower rights from the wife in order to take title free and clear. However, it was often the situation that the wife was left behind by the husband, to be brought West later or simply abandoned. The effect of this common law requirement on husbands trying to do business on the frontier was potentially disastrous.

As a result of the severe public outcry, one man by the name of Asa S. Mercer made it his personal mission to bring women to the Territory. Asa Mercer was in Washington Territory only a little while when he was named president of its university. After serving his second term, Mercer was commissioned to go East to recruit women to settle in the predominantly-male logging communities of Washington Territory. Although the territorial governor at the time encouraged Mercer, there were not enough funds in the public treasury to help him in his efforts. Instead, private contributions by male citizens of the Territory financed his trip.

Mercer made his first trip back East in 1864. He reportedly held a meeting in Lowell, Massachusetts, where there was a large population of Civil War widows and orphans. At that meeting he emphasized to the women the good pay to be made in Washington Territory as teachers and seamstresses. According to most accounts, Mercer made no mention of the matrimonial purposes of his trip. Eventually, eleven women agreed to travel west with Mercer and they arrived in Seattle close to midnight on May 16, 1864. Even at that late hour, they were given what was described as "a royal reception, with such music as the town afforded and plenty of refreshments thought suitable for New England ladies."<sup>7</sup> When asked to describe the kind of reception awaiting them, one woman commented that the welcoming party looked like "a pack of grizzlies in store clothes."<sup>8</sup> Despite such first impressions, records indicate that ten of the eleven women married shortly after their arrival (the eleventh woman died without marrying).

Mercer planned a second trip in 1865. This time he allegedly entered into contracts with some of the men, promising to bring

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each of them back a wife “of good moral character and reputation ... on or before September of 1865” in exchange for three hundred dollars.<sup>9</sup> How many of the single men of Puget Sound signed the contract is not known. Mercer sought financial backing for this second trip from President Abraham Lincoln, a friend of the Mercer family. Mercer arrived in New York two days after his good friend had been assassinated, however, and President Johnson refused to uphold Lincoln’s offer to help Mercer. Nevertheless, after much delay and difficulty, Mercer brought a shipload of approximately two hundred young women back to Washington Territory where they became known as “the Mercer Girls.” Based on all accounts, the Mercer Girls became the aristocracy of the frontier towns and most found jobs as teachers and seamstresses in addition to becoming wives and mothers.

It was after years of this kind of attention and debate about the great imbalance of the sexes that the legislature of Washington Territory re-examined its marital property laws and ultimately repealed the long-standing common law in favor of community property law. Despite all efforts, the population remained greatly imbalanced as the number of men working in the logging camps continued to increase at an incredible rate. By way of illustration, one source reported that there were close to 11,000 men within a radius of 50 miles of Seattle during the late 1860’s, meaning that half of the population of the entire Territory was on Puget Sound.

#### **IV. Conclusion.**

While there appears to be no records revealing any special reason behind Washington Territory’s decision to abandon the common law and implement a system of community property, a fair number of historians believe that the serious imbalance of the sexes in Washington Territory exerted the strongest influence on the legislators when it came time to vote on the 1869 community property statute. The bottom line was that community property law gave married women a limited independence, more so than many would experience in other parts of the country, and this was an attractive notion in the logging communities seeking to lure “industrious and independent women from the East.” Isolated by three months travel time to the East, and unknown to few people outside of the Pacific Northwest, there was not much natural appeal to the Territory of Washington. As noted repeatedly by the newspaper editorials, something had to be done to help the population of Washington grow. Of the two systems considered by the territorial legislature— common law and community property — the latter was more likely to improve the situation. As Henry Halleck stated, “it is the best provision to get us wives....”<sup>10</sup>

As the legislature grappled with the one-sided population of the Territory, concern was also expressed about the development of its laws. California had been growing steadily since its

admission into the Union and its legislators had already addressed many of the organizational and statutory problems faced by Washington Territory in the 1860’s. Recognizing the dominance of California in those areas, the legislators of Washington Territory probably felt it wise to align the laws of Washington with those of California. By doing so, they were able to accomplish two objectives of serious consequence to Washington Territory.

Given the lack of documentary evidence surrounding this issue, we may never know for certain what motivated Washington Territory to adopt a community property system. In her efforts to continue to learn more about this subject, the author welcomes any additional information readers may have about the history of this law or the circumstances surrounding its initial passage.

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- 1 Ray August, The Spread of Community Property Law to the Far West, 3 W. Leg. Hist. J., Wntr-Sprg 1990, at 264.
- 2 Id. at 257.
- 3 Id.
- 4 Id. at 259.
- 5 Olympia Transcript, December 28, 1867 at 3; see also Olympia Transcript, April 4, 1868 at 2.
- 6 Modes of Proposing,” Olympia Transcript, February 2, 1868 at 4-5.
- 7 Stewart Holbrook, Mercer’s Maids for Marriage, Woman’s Day, December, 1948 at 47.
- 8 Id.
- 9 Id.
- 10 August, supra note 1, at 256.

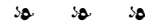
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### Notes from the Chair

landlord-tenant act; concurrent interests in real estate; title insurance; purchase and sale agreements for undeveloped land; and quick summaries of the 1997 tax act, powers of attorney, and new adverse possession statutes (presently pending before the Washington State legislature). On the probate and trust side there will be sessions on advising the personal representative; the Alaska Trust Act; conservation easements; succession planning for closely held business interests; charitable giving options; Crummey withdrawal powers; and an elder law update. It should be a great seminar. Hope to see you there!

Let us know your thoughts. Questions, comments and suggestions are welcome and encouraged! Please provide us with your thoughts by contacting me at:

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### Seller's Disclosure Requirements. . .

had seen the water in the basement. The Court was also concerned that the buyer's agent had failed to mentioned the basement water problem in the notice of the buyer's disapproval of the buyer's structural inspection report; the buyer's agent rationalized that he had included instead the addendum language that required the seller to furnish a copy of a warranty for the drainage work.

The Court of Appeals gave its guidelines of what the buyer's agent should have done to adequately protect the buyer under these circumstances:

The language [the buyer's agent] inserted in the earnest money agreement was insufficient to protect [the buyer's] interests with respect to the water problem and fell below the standard of care of a reasonable and prudent attorney in preparing a residential purchase and sale agreement. To protect [the buyer's] interests, there should have been an identification of who was doing what work, the right to inspect the work, and to specify when the work was to be completed, the right to require that the work be done to the buyer's satisfaction, an assurance that the warranty was assignable to her, and the availability of other remedies.

*Edmonds*, 87 Wn. App. at 853.

Without more specific case law guidance on the use of a seller disclosure statement, it is important to see what principles from *Edmonds* are applicable to other factual scenarios. The language cited above as to how the buyer's agent should have more adequately protected the buyer imposes sophisticated drafting obligations on the buyer's agent in preparing or amending a purchase and sale agreement. One might surmise that a buyer's agent that encounters a false representation in the seller disclosure statement will be affirmatively obligated to build into the purchase and sale agreement sufficient protections for the buyer. Certainly, another reasonable application from *Edmonds* relates to advising a seller or a seller's agent when there is a prior defect that a seller believes was remedied. The *Edmonds* seller failed to disclose

any drainage problem and stated that a prior problem had been adequately fixed by a contractor. The fact that the *Edmonds* seller was installing a sump pump during the pendency of the transaction confirmed the falsity of this statement. Furthermore, by not disclosing more information about the nature of the drainage problem that had previously been fixed, it did not put the buyer in an easy position to inspect the potential problem and use experts or contractors of buyer's choice to advise the buyer on the extent of the problem.

In applying the Act to disclosure of a prior problem that has been fixed, a seller can avoid liability for any "error, inaccuracy or omission" if the seller can show that they had no actual knowledge of the error, inaccuracy or omission, based on information provided by a third party, such as a contractor who inspected or performed work on the property. RCW 64.06.050. However, to avoid problems such as the seller experienced in *Edmonds* a seller presumably should disclose the basis of the information received by the third party to shift the investigation burden to the buyer.

Implicit in the Act's exclusion from liability based on no actual knowledge would be an element of good faith on the seller's part. In *Edmonds*, the seller was aware that there was water in the basement after the contractor had completed repairs on the prior problem. In fact, during the transaction, seller's contractor was still working to resolve the drainage problem. In advising a seller on disclosure of a prior defect, it is clear that one should err by disclosing more information rather than to simply state that a prior problem was fixed.

The next few years in the court system will make evident whether the Act has significantly reduced claims for seller nondisclosure in residential real estate transactions. Whereas for years the Washington cases firmly have held to a buyer beware doctrine, the Act seems to modify the doctrine to one in which the seller shall affirmatively disclose what they know or do not know, and then it is up to the buyer to beware based on these disclosures.



## PROBATE AND TRUST COUNCIL REPORT

*Mark W. Roberts, Davis Wright Tremaine LLP, Seattle  
Director - Probate and Trust Council*

During each session of the Washington State legislature, the Probate and Trust Council reviews and comments upon proposed legislation that we believe may affect probate and trust law practice. Several bills proposed during the current legislative session affect trusts and estates practitioners, and they are summarized below.

- **Roth and Education IRAs.** RCW 6.15.020 protects certain benefits under employee benefit plans against execution, attachment, garnishment or seizure under legal process. Further, an amendment to RCW 6.15.020 made last year confirms that a non-participant spouse has a community property interest in an individual retirement account that is subject to disposition at death. It has been proposed that scope of RCW 6.15.020 be broadened to include so-called Roth IRAs and Education IRAs created under the Taxpayer Relief Act of 1997, as well as both advance payments of tuition to one of Washington State's universities or colleges and deferrals made under the Washington State Deferred Compensation program.
- **Slayer's Statute.** Chapter 11.84 RCW currently bars the right of a person who has slain another individual (a "slayer") from inheriting property from that decedent. It has been proposed (SB 6274) that the reach of the so-called Slayer's Statute be extended to bar inheritance of Washington State retirement benefits that the slayer would otherwise be entitled to receive from a slain person, including the slayer's community property interest in those retirement benefits if the decedent and slayer were married to each other. Another proposal (HB 2369) would further broaden the current reach of Chap. 11.84 RCW to also prohibit the slayer from inheriting under any transfer on death bank account or security, revocable trust, or individual retirement account, or similar nonprobate asset. In addition to inheritance rights under a will or intestacy, current law cuts off the slayer's inheritance rights under life insurance, joint with right of survivorship property and certain future interests in trusts, it does not currently affect these other nonprobate assets.
- **Testamentary Disposition of Nonprobate Assets.** The Real Property, Probate and Trust Section has sponsored a bill (SSB 6181) permitting a testator to direct by will the disposition of certain nonprobate assets, notwithstanding a prior designation of a different beneficiary in the documents relating to the nonprobate asset. For example, the bill would allow an individual to override the survivorship provision on a joint with right of survivorship bank account made prior to

the date of the will to provide that the testator's interest be distributed to the same beneficiaries who receive his or her residuary estate.

The testamentary disposition of nonprobate assets bill does not affect all nonprobate assets. It cannot be used to change the disposition of the testator's interest in property passing under a community property agreement, real property passing under a joint tenancy with right of survivorship; an individual retirement account; or a life insurance contract. It also does not apply to assets with respect to which a beneficiary designation has been made after the date of the will.

- **Uniform Transfers to Minors Act.** The current provisions of the Uniform Transfers to Minors Act, found in Chapter 11.114 RCW, allow a person to designate a custodian to hold property transferable to a minor upon the occurrence of a future event, such as upon the death of an insured person when life insurance proceeds become payable to a minor. SSB 6181 proposes that as an alternative to naming a specific person as custodian, the nomination or beneficiary designation document could also allow the person owning the asset to specify another person, e.g., his or her personal representative, who will hold the right to designate a custodian for the minor beneficiary at the time the property becomes distributable.
- **Technical Amendments.** A bill sponsored by the Section also makes minor technical corrections to the probate legislation enacted by the legislature in 1997, as well as update certain references to the Internal Revenue code to reflect the current law. SSB 6181.

As of this writing, none of the foregoing proposals have yet been enacted. Regardless of whether or not all those proposals do become law, we thought it would be informative to describe the types of estate and trust related proposals that our legislature has been considering. The text of all legislative bills can be obtained from the Washington State legislature's home page on the internet. The internet address is <http://www.leg.wa.gov>.

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## RECENT DEVELOPMENTS

### Probate and Trust

*Kari M. Larson, University of Washington School of Law  
(J.D. expected June 1999)  
Wendy S. Goffe, Bogle & Gates P.L.L.C., Seattle*

#### WASHINGTON COURT OF APPEALS

**In re Estate of Catto, 88 Wn. App. 522, 944 P.2d 1052 (September 26, 1997)**

**Summary:** A community property agreement executed during marriage will remain in effect until it is rescinded by both parties, and property subject to the CPA cannot be transferred at the death of the first spouse to anyone other than the surviving spouse.

**Facts:** Jack Catto and Marjorie Hansen were married in December 1988. In April 1989, they executed a community property agreement ("CPA") which provided that upon the death of either of the parties, all community property as defined by the CPA would automatically vest in fee simple in the surviving spouse. In September 1992, Marjorie separated from Jack by moving to Iowa. In January 1993, Marjorie prepared a new will disinheriting Jack and revoking all of her prior wills. One week later, Marjorie filed an action for dissolution. The next day, she died.

Marjorie's will was admitted to probate, and Jack was appointed as co-executor. He claimed there were no assets in the estate because the CPA vested him with all title to Marjorie's property. Marjorie's heirs (Ownbey) claimed that the CPA was void because of her inconsistent will and because the marriage was defunct. The trial court held that although the marriage was defunct on the date of Marjorie's death, the vesting provisions of the CPA remained effective. Both parties appealed.

**Discussion:** Ownbey argued that the CPA was not effective at the time of Marjorie's death because (1) the CPA was rescinded by the parties, (2) the CPA contained an implied term terminating the effectiveness of the agreement when the marriage became defunct; and (3) the CPA was void because Marjorie did not have independent counsel at the time it was signed. The court disagreed with Ownbey's arguments and upheld the trial court's judgment.

The court relied on *In re Estate of Wittman*, 58 Wn.2d 841, 843-44, 365 P.2d 17 (1961), for rules governing the use of CPAs. (CPAs are enforceable contracts and are not governed by laws relating to wills, they are completely executed when one of the parties to the contract dies, and upon death, title to the community property vests as the sole and separate property of the survivor.)

In addressing Ownbey's argument that the contract was rescinded by the parties, the court noted that unilateral intent to

*continued on page 11*

### Real Property

*Janet Strand Selby  
Davis Wright Tremaine LLP, Seattle*

#### WASHINGTON COURT OF APPEALS

**Robinson v. Khan, 88 Wn. App. \_\_\_\_, 948 P.2d 1347 (January 5, 1998).**

**Summary:** In an action to quiet title under RCW 7.28.010, a removable cloud on title includes a recorded personal services contract because it has a tendency to impair the fee owner's ability to exercise the rights of ownership.

**Facts:** In 1987, Thomas and Susan Robinson (the "Robinsons") entered into a written contract with M.A. and Amtul Khan (the "Khans") under which the Khans were to provide consulting services for the development of property the Robinsons owned in Bellevue. In return, the Khans were to receive 15% of the net proceeds of the property upon its sale. The contract did not convey any interest in the property to the Khans.

The Khans recorded the Agreement in 1991. Four years later, the Robinsons discovered that the contract had been recorded, and they filed suit seeking to have the contract removed from the title to their property. The trial court concluded that it could not order the contract to be removed from the title because the contract did not "affect" that title.

**Discussion:** The court of appeals first noted that the Robinsons were trying to remove a contract that fell outside the scope of what is generally recorded upon title to property in Washington. The purpose of the recording statute is to create a public record of the existence of claims that might affect a prospective purchaser's interest. This, the court stated, does not include personal services contracts that do not create a security interest or any other kind of interest in the real property that would affect the interest of a prospective buyer.

Under RCW 7.28.010, a plaintiff may obtain a judgment quieting or "removing a cloud" from his or her title to property. Generally, removable clouds are actual encumbrances, defined as "any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant." Under this definition, an encumbrance must convey or represent a right to or interest in the property. The contract gave the Khans a right to a portion of the proceeds upon the eventual sale of the property, but the contract did not give them any right or interest to the property itself.

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### Recent Developments: Probate and Trust

abandon an agreement is not sufficient for recession to occur. Although a “meeting of the minds” may be shown by conduct of one party that is inconsistent with the continued existence of the contract and the conduct is known to and acquiesced in by the other, where knowledge and acquiescence are absent, the requisite mutuality of intent will not be shown and the agreement will not be rescinded (citing *In re Estate of Lyman*, 7 Wn. App. 945, 503 P.2d 1127 (1972), *aff’d*, 82 Wn.2d 963, 512 P.2d 1093 (1973)).

The court also refused to find an implied clause terminating the effectiveness of the CPA if the marriage became defunct. The CPA contained no express clause doing so, and the court could not find an implied clause because the terms of the CPA were not inconsistent with a defunct marriage. The court pointed out that under some circumstances a person may be separated but still intend his or her spouse to receive the community property at death. Thus, the court acknowledged that it is conceivable that the parties intentionally omitted a termination clause.

Ownbey unsuccessfully argued that the CPA could be avoided because Marjorie was not represented by independent legal counsel. The court discussed that neither case law nor RCW 26.16.120 governing community property agreements require that each party have independent counsel. Furthermore, the court noted that according to the record there was no indication of coercion or lack of comprehension.

**Dissent:** The dissent agreed with the court on the issues of mutual rescission, right to counsel and on its jury instruction dispositions, but argued that the testamentary prong of the CPA should have terminated when the marriage became defunct. The dissent would hold that unless such an agreement expressly provides otherwise, its testamentary prong ceases to operate if, when the parties’ marriage becomes defunct, the conversion prong is wholly executory. In other words, the dissent would be willing to imply a requirement that distribution of property to the survivor is dependent upon an ongoing marriage.

**Sweet v. O’Leary**, 88 Wn. App. 199, 944 P.2d 414 (October 2, 1997)

**Summary:** The homestead exemption creates an interest in property that attaches to the surplus proceeds from a nonjudicial foreclosure sale under a deed of trust, and a judgment creditor’s claim will be limited to funds in excess of the homestead, if any exist.

**Facts:** A nonjudicial foreclosure sale was held on the deed of trust against the Sweets’ home. A judgment creditor, O’Leary, submitted the winning bid of \$245,000. The trustee paid the costs of sale and of the foreclosure, and deposited the surplus of \$68,117 into the registry of the court. Creditor Rockwood, with rights superior to those of O’Leary, petitioned the court and received its share of the surplus, reducing the fund in the court’s registry to approximately \$30,000. The Sweets moved to have

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### Recent Developments: Real Property

The court of appeals held that clouds removable from title should not be restricted to actual encumbrances, and instead should include recorded documents that have “any tendency to impair the fee owner’s ability to exercise the rights of ownership.” The court concluded that this standard was met because a prospective purchaser (or the title insurer) would request an explanation of the contract and the 15% of net sale proceeds to be paid to the Khans. The court viewed this as an unnecessary complication of a potential sale that amounted to a cloud upon the title to the Robinson’s property. The Robinsons were therefore entitled to an order removing the contract from the title.

**Hale v. Island County**, 88 Wn. App. 764, 946 P.2d 1192 (November 17, 1997).

**Summary:** Under Island County’s two-step rezoning application process, preliminary use approval under the first step constituted a final and binding rezone decision, giving the applicant a vested right to have its application processed under county provisions that were held invalid after preliminary use approval was granted.

**Facts:** In 1994, Nichols Brothers Boatbuilders, Inc. (“Boatbuilders”) applied to have property adjacent to its Whidbey Island boat building business rezoned from rural residential to non-residential. Jay and Bernice Hale (the “Hales”), who owned property nearby, opposed the rezone.

In 1994, the Island County Code (“ICC”) provided a two-step application process to have rural residential land rezoned as a “Non-Residential Floating Zone,” which allowed commercial and industrial uses. The two steps involved an application for preliminary use approval followed by submission of a specific site plan for final approval. Preliminary use approval was binding on the County regarding land use policy, but the County’s zoning maps were not changed until after final approval.

The Planning Commission recommended rezoning of Boatbuilders’ property. The Board of Island County Commissioners (“BICC”) adopted the Planning Commission’s recommendation and granted Boatbuilders preliminary use approval subject to conditions. Although the BICC had the power to waive the specific site plan requirement, it did not do so. Boatbuilders submitted its application for final approval in March 1996. That same month, the Hales filed a land use petition in superior court challenging the BICC’s decision.

On April 10, the Western Washington Growth Management Hearings Board invalidated Island County’s Non-Residential Floating Zone provisions as violative of the Growth Management Act. In response, Island County enacted

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## Recent Developments: Probate and Trust

the remaining \$30,000 surplus disbursed to them under the homestead exemption. O'Leary opposed the motion, and the trial court agreed, holding that the Sweets no longer possessed any homestead right to the funds. O'Leary received the remaining funds, and the Sweets appealed.

**Discussion:** The court held that the granting of a deed of trust to one beneficiary does not deprive the homestead owner of his rights to the homestead as against other parties.

The court used the rationale underlying the homestead exemption as well as the reasoning in *Wilson Sporting Goods v. Pederson*, 76 Wn. App. 300, 886 P.2d 203 (1994), to determine the relative priority between claimants other than the beneficiary of a deed of trust over the surplus proceeds.

The court stated that O'Leary's judgment lien is junior to the Sweets' homestead exemption and to hold otherwise would ignore the homestead right and would amount to a permanent extinguishment by operation of the deed of trust statute. Since 1981, homestead protection is "automatic" and protects property owners from the time the real property is occupied as a principal residence. RCW § 6.13.040. Furthermore, homestead and exemption laws are favored in law and are to be liberally construed. See *Lien v. Hoffman*, 49 Wn.2d 642, 306 P.2d 240 (1957).

Quoting *Wilson*, the court highlighted the similarities between O'Leary's lien and a second mortgage:

The second mortgage is for a certain amount, but the actual value of the lien is limited by the value of the property in excess of the first mortgage. Similarly, the lien on excess value of homestead property is for a certain amount, the amount of the judgment. The actual value of the creditor's lien, however, is limited by the value of the property in excess of the homestead exemption. Following its policy of protecting homesteads, the Legislature has required that a determination be made that there is indeed excess value before the lien is actually executed.

*Wilson*, 76 Wn. App. at 305-306. The court concluded that a property owner's homestead exemption has priority over the claim of a judgment creditor.

O'Leary unsuccessfully argued that granting a deed of trust on homestead property extinguishes all homestead rights forever. He mistakenly focused on the priority between the Sweets' homestead and the beneficiary of the deed of trust, however, not the relative priority between the Sweets' homestead right and his own judgment lien.

### **In re Estate of Watlack, 88 Wn. App. 603, 945 P.2d 1154 (October 28, 1997)**

**Summary:** A Will may be invalidated where it can be shown by clear, cogent, and convincing evidence that at the time the Will was executed, the testator was laboring under insane delusions that materially affected the disposition of the Will; and in a Will

contest between personal representatives of two separate Wills, proponents of both Wills may be entitled to allowance out of the estate for costs and reasonable attorneys fees.

**Facts:** Between March 26, 1988, and June 22, 1988, Stephen Watlack executed two Wills. The first Will named his children as beneficiaries and the second Will disinherited them in favor of the children of his favorite brother. At the time of signing the second Will, Mr. Watlack held the false belief that his daughter had stolen money from him. From at least March 1988 through the date of his death in 1993, Mr. Watlack suffered from this and other insane delusions. A guardianship proceeding was commenced on his behalf in June 1988.

The trial court set aside the second Will as the product of insane delusion and admitted the first Will to probate. The personal representative and the beneficiaries of the second Will appealed.

**Discussion:** The appellate court upheld the trial court's conclusion on the issue of the insane delusion doctrine, holding that a Will may be invalidated if it is shown by clear, cogent, and convincing evidence that at the time the Will was executed the testator was laboring under insane delusions that materially affected the disposition of the Will (citing *In re Estate of Meagher*, 60 Wn.2d 691, 692, 375 P.2d 148 (1962)). The court discussed the definition of insane delusion, concluding that it is "not well defined by case law." In this case, the court held that the decedent's "continued adherence to [a] false belief despite all evidence to the contrary which was presented to him constituted an insane delusion."

The decedent's children claimed that while they were entitled to attorney's fees, their cousins (who were beneficiaries under the second Will) were not. The court disagreed, and held that where all beneficiaries are involved in a dispute, the award of fees against an estate may be justly imposed because the litigation ascertained their respective rights (citing *In re Estate of Burmeister*, 70 Wn. App. 532, 540, 854 P.2d 653 (1993), *rev'd on other grounds*, 124 Wn.2d 282, 877 P.2d 195 (1994)). The court concluded that the proponents of both Wills were entitled to allowance out of the estate for costs and reasonable attorney fees incurred in the litigation.

Mr. Watlack's children also argued that the appeal should be dismissed because appellants failed to file a report of proceedings. The court disagreed, stating that filing a report of proceedings is unnecessary where clerk's papers, findings of fact and conclusions of law provide a sufficient record for review. Furthermore, the appellants were not asserting any factual challenges, but instead challenging whether the conclusions were supported by the court's findings.

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## REAL PROPERTY COUNCIL REPORT

*Serena M. Schourup, Bogle & Gates P.L.L.C., Seattle  
Director - Real Property Council*

As was discussed in last quarter's column, the legislative session has been quite active for the Real Property Council and several pieces of legislation have been making their way through the House and Senate. Last year, SB 5554 which contained amendments to the Deed of Trust Act, passed both the Senate and the House but was vetoed by Governor Locke. In response, several real property and debtor-creditor attorneys formed a focus group to draft a bill amending the Deed of Trust Act. The proposed amendments clarify many technical areas in the existing Deed of Trust Act which currently raise questions and thorny issues for many real estate practitioners.

The proposed amendments were sponsored in a bill submitted in both the House and Senate. After some amendments, Engrossed Substitute Senate Bill 6191 and Engrossed Substitute House Bill 2823 have been passed out of their respective committees. The deadline for floor action on each bill is March 6, 1998. We fully expect that one of the bills will be passed into law. As the bill has undergone review and comment by many constituencies, the Section hopes that it will receive favorable treatment by the Governor. Again, I want to take this opportunity to thank our past Chair, Gordon Tanner of Stoel Rives LLP, for the tremendous amount of work he has done in coordinating this effort. Also, a thank you to Dwight Bickel of Transnation Title Insurance Company who testified on behalf of the Section at the Senate Law & Justice hearing. Of course, the Washington State Bar Association's lobbyist, John Fattorini, has been invaluable to us. If any of our members are interested in receiving a summary of the proposed changes, or copy of final bill, please call me at (206) 621-1415 and I will send a copy to you.

Several bills have been submitted this session to abolish or amend adverse possession. HB 2584 would have extended the period to commence a quiet title action to 20 years and would have abolished tacking. SB 6317 would have abolished both the statute of limitations to bring a trespass claim and the right to bring an adverse possession claim. The Section strenuously objected to both HB 2584 and SB 6317. Neither bill passed out of committee. A third bill, SB 6323 limits adverse possession claims against forest land owners to those in which the cost of the permanent or semi-permanent improvements exceeds \$50,000. After the Section's initial objection to SB 6323, the bill was subsequently amended by its sponsors to: (1) include in cost calculation the cost of all of the claimant's improvements rather than just the cost of the improvements which are encroaching; and (2) allow the bill to apply to only those forest land owners vested in not less than 500 forest land acres as of the date an action is filed. The bill was subsequently amended on the floor of the Senate to allow the bill to apply to forest land owners vested in not less than 20 acres of forest lands. The Section will continue to closely monitor the progress of this bill.

The program for the upcoming Midyear meeting has been finalized and will be of interest to our members. In the event the Deed of Trust Act Amendments are signed into law by the Governor, we will have a program explaining the amendments in detail. If the forest lands adverse possession bill is successful, it will be covered in the Real Property updates portion of the program.

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## Recent Developments: Real Property

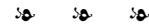
an ordinance clarifying that land use applications for which preliminary use approvals had been granted created vested development rights in the applicant.

The Hales moved for summary judgment based upon the decision of the Growth Management Hearings Board. The superior court granted the Hales partial summary judgment, ruling that Boatbuilders' rights had not vested because the ICC provisions were invalid. The superior court ruled that Boatbuilders' final application could not be processed under the subsequently invalidated ICC provisions for site plan review. Boatbuilders appealed.

**Discussion:** In Washington, a landowner obtains a vested right to develop land under the zoning ordinances in effect upon submission of a complete building or development permit application. This principle does not always apply to rezoning applications. The court of appeals found that, unlike the typical rezone application situation, Island County had made a binding decision to rezone Boatbuilders' land upon preliminary use approval and the vesting rights principle did apply.

After preliminary use approval, the Planning Director retained the authority to deny an application for site plan review, but only for site specific requirements. The second stage did not allow for reconsideration of the BICC's decision to allow the use approved at preliminary approval. The policy level decision that the preliminary application meets the ICC's requirements is made in the first step of the process. The ICC recognized this, providing that the Planning Commission's recommendation is "final and conclusive." Thus, the court of appeals concluded that under the ICC "preliminary" does not mean "tentative," and the critical decision to allow the rezone is made at the preliminary use approval stage.

The court of appeals held that having received preliminary use approval before the ICC's provisions at issue were held invalid, Boatbuilders had a vested right to have its application processed under the laws in effect at the time the application was made and preliminary use approval was granted.




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## Nominations for Executive Committee Membership

Pursuant to the Bylaws of the Real Property, Probate & Trust Section, the Nominating Committee, composed of Janis A. Cunningham, Michael D. Carrico and Ellen C. Dial, has recommended the nomination and election of the following persons to the offices indicated for the 1998-1999 term of the Real Property, Probate & Trust Section:

**Director, Probate and Trust Council:**

Barbara C. Sherland  
*Stoel Rives LLP, Seattle*

**Probate & Trust Council:**

J. Bruce Smith  
*Brett & Daugert, LLP, Bellingham*

Matthew B. McCutchen  
*Perkins Coie, Seattle*

**Real Property Council:**

Bruce A. Coffee  
*Foster Pepper & Shefelman PLLC, Seattle*

William H. Reetz  
*Commonwealth Land Title Insurance Company*

Pursuant to the Section Bylaws, John M. Riley III of Witherspoon, Kelley, Davenport & Toole, P.S., Spokane, will become Chairperson of the Section for the 1998-1999 term, and Mark W. Roberts of Davis Wright Tremaine LLP, Seattle, will become Chairperson Elect.

Any additional nominations should be received by the Chair of the Real Property, Probate & Trust Section no later than twenty (20) days before the annual meeting which will be held during the Real Property, Probate & Trust Section Midyear Meeting scheduled for June 5-7, 1998 at Skamania Lodge in Stevenson, Washington. Nominations must include the name of the person to be nominated, the position for which the person is nominated, and written endorsement by five members of the Real Property, Probate & Trust Section. The Chair of the Section to whom nominations must be submitted is Douglas C. Lawrence at Stokes Lawrence, P.S., 800 Fifth Avenue, Suite 4000, Seattle, WA 98104-3179.

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



A publication from the Real Property, Probate & Trust Section of the Washington State Bar Association

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### **Advance Notice: Upcoming RPPT Section Midyear Meeting & CLE**

<i>Year</i>	<i>Date</i>	<i>Location</i>
1998	June 5-7, 1998	Skamania Lodge, Stevenson, WA
1999	June 4-6, 1999	Wenatchee Convention Center, Wenatchee, WA
2000	June 2-4, 2000	Skamania Lodge, Stevenson, WA
2001	June 1-3, 2001	Yakima Convention Center, Yakima, WA