

# Real Property, Probate & Trust



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## The Endangered Species Act and Conservation Land Acquisition Techniques Tips for Real Estate Practitioners Working with the Tri-County Model 4(d) Rule Response Proposal

### Part II

by James A. Greenfield, Davis Wright Tremaine LLP, Seattle  
(Mr. Greenfield wishes to thank Mr. Jonas Monast for his help with this article)

#### I. Introduction

In response to the declining populations of salmon along the West Coast, the National Marine Fisheries Service (NMFS) has listed 14 salmon and steelhead stocks as “threatened species” under the Endangered Species Act (ESA),<sup>1</sup> including the Puget Sound chinook salmon.<sup>2</sup> In order to apply the ESA’s section 9 prohibitions against harming a listed species, NMFS subsequently adopted a rule under ESA Section 4(d) describing the regulation necessary and advisable for the survival of the species, thereby making it illegal to harass, harm, or kill a listed fish (the “4(d) Rule”).<sup>3</sup> This final 4(d) Rule went into effect for steelhead on September 8, 2000, and on January 8, 2001 for salmon.<sup>4</sup> Though the 4(d) Rule prohibits “take” in most situations, it does allow proposals for take limits, effectively exempting those proposed activities from ESA liability upon receiving NMFS approval. In central Puget Sound (Snohomish, King and Pierce Counties), a group of local jurisdictions has been working to fashion a model set of programs and regulations each locality may adopt in order to comply with the 4(d) Rule and establish “take limits” exemptions for certain activities including real estate development. This “Tri-County Model 4(d) Rule Response Proposal” provides a template for jurisdictions to apply that, it is

hoped, will greatly expedite review and approval by NMFS and facilitate development in the face of the ESA listing.

The ESA listing, the 4(d) Rule and the Tri-County Model 4(d) Rule Response Proposal have significant implications for real estate practitioners in the Central Puget Sound. Not only will this listing and the 4(d) Rule affect how real estate may be developed, a critical piece of the Tri-County Proposal will be the acquisition of substantial acreage of salmon habitat for conservation purposes. One element of the Tri-County Proposal is to provide one percent of each jurisdiction’s capital budget for salmon habitat acquisitions and restoration for so long as the jurisdiction seeks the protection of the 4(d) Rule MRCI take limit. One percent of the year 2000 capital budget of the seven largest Tri-County municipalities (Snohomish, King and Pierce Counties, Seattle, Everett, Tacoma and Bellevue) is approximately \$14.5 million. In addition, the State Salmon Recovery Funding Board and other state and federal grant funders will provide comparable sums for salmon habitat acquisition and restoration. Consequently, there will likely be approximately \$30 to \$40 million per year available for acquisition of salmon habitat – hundreds of millions of dollars over the next several years. These funds represent a tremendous opportunity for buyers and sellers of such property.

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## *Endangered Species Act, Part II . . .*

The first part of this article, published in the last issue, focused on the 4(d) Rule and the Tri-County Proposal. This second part of the article outlines a number of creative conservation land acquisition and disposition strategies.

### **II. Creative Techniques for Salmon Habitat Acquisition**

Local government and private conservation agencies in the central Puget Sound area have been very successful in acquiring land for conservation purposes over the last several years. For example, King County, the City of Seattle and several suburban King County cities acquired over 17,000 acres of land and expended over \$350 million implementing the 1989 Open Space Bond, the 1993 Regional Conservation Futures Bond, and related programs. King County's Waterways 2000 program has acquired or protected some 2,000 acres of salmon habitat and expended nearly \$18 million. The Cascade Land Conservancy, a non-profit private land trust operating in Snohomish, King and Pierce Counties, has preserved another 4,000 acres of natural resource land. Through their efforts, much can be learned about how to leverage conservation dollars and successfully fashion agreements with private landowners. This portion of this article explores the lessons learned with these acquisitions and how such lessons might be applied in using habitat acquisition funds that will become available as a result of implementing the Tri-County Proposal.

Many of these creative conservation land acquisition techniques involve "slicing and dicing" the fee estate of the conservation land parcel itself. Following are some examples of successful applications of these techniques.

#### **A. Preliminary Considerations**

Before attempting to structure a successful conservation land agreement, buyer's and seller's counsel should consider some basic issues.

##### **1. Buyer's and Seller's Core Interests**

• Counsel should identify what the conserva-

tion agency really needs to acquire to accomplish the intended conservation purpose and identify what interest, if any, Seller really wants to retain. First, counsel should understand the nature of the resource sought to be protected and identify what is valuable. Is it fragile habitat with which public access is not compatible? Is it a property that supports habitat even if species do not live on it (*e.g.*, a spring with a source of cold water for a salmon stream)? Does it provide other public benefits such as view shed or a regional separator? Is it needed for public recreation and is public access necessary? Does the property simply provide a sense of privacy for neighboring property owners? Second, counsel should understand the nature of the potential development of the property proposed and the economics of development that may lead to greater or lesser flexibility in modifying the design of the site plan. Can development rights be transferred? Can size or location on the property restrict development? Can uses be restricted? Is the property key to a larger development plan?

##### **2. Budget and Valuation Issues •**

Counsel should also consider how expensive various acquisition alternatives would be, using a before/after appraisal approach to compare alternatives. What is the budget available for acquisition of all or a part of the property? Do the sources of acquisition funds have restrictions that limit flexibility in working with the owner? Does the owner need money now or can she wait? Would the owner benefit from tax advantages of donating conservation easement or the property?

##### **3. Site Management Issues •**

Next counsel should consider, given the nature of the resource to be protected and the nature of the public and private use contemplated, how the property would best be managed. Does the owner or the conservation agency have funds, staff or expertise

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## *Endangered Species Act, Part II . . .*

to perform the necessary management? How will promises to steward be enforced?

**4. Technical Real Estate Issues** • Finally, counsel should evaluate whether a partial fee interest may be conveyed without going through a formal subdivision process, and if not, whether that process will be cumbersome and time consuming. King County recently modified its land segregation code to exempt conveyances of five acres or more to public agencies from its subdivision requirements (KCC 19A.08.040C). Previously, all conveyances to the county were exempt. Counsel also should evaluate title. Is the property subject to liens and unacceptable encumbrances? These may be more difficult to remove with fewer sale proceeds.

### **B. Enlarging/Shrinking Size of Fee Parcel Acquired**

#### **1. Partial Acquisition or Acquisition of Less than All the Property Initially Targeted**

Where the agency has the budget and the inclination to buy property in fee, but is willing to live with less, there is lots of room to negotiate.

##### **a. Swamp Creek (King County Open Space Program)**

The County sought to protect shoreland along the Sammamish Slough. The resource property consisted of several legal lots, many improved with a home located several hundred feet from the shoreline. Each of these lots was owned by a different party. Many property owners were unwilling to sell their homes. The County successfully negotiated acquisition of the desired resource land by severing portion of several parcels from smaller plots of land containing older houses along the roadside. The owners kept their homes and the new, smaller roadside parcels and the County acquired the open space.

##### **b. Lawton (King County Open Space Program — Three Forks Natural Area)**

Again, the owner did not want to sell his home situated on a large parcel of riverside resource land. Here, the County succeeded by custom designing the parcel to be acquired with a surveyed boundary. The owner retained his home, road frontage and access to certain work areas and the County acquired the riverside area for open space.

##### **c. Petty (King County Open Space Program — Tiger Mt./Squak Mt. Corridor)**

This situation involved acquisition of open space land with a swap for adjacent county land. King County received 24 acres in return for a payment of \$470,000 plus conveyance of 4 acres of less desirable, but adjacent county land. The county did not

have to acquire an expensive home and the owner was allowed to retain a pasture on his property.

##### **d. Scott (King County Open Space Program — Three Forks Natural Area)**

King County acquired only the riverside portion of the property in fee (for public access) and acquired development rights over the remaining property. This allowed the owner to keep the old farm in the family, but prohibited him from further development. King County obtained a right of first refusal on the restricted fee (to bring the property into county ownership if the family decided to sell).

### **2. Acquisition of More Property than Needed**

Sometimes the negotiation will be successful if the agency is able and willing to buy more than it targeted.

#### **a. Volpe (King County Open Space Program — East Lake Sammamish to Klahanie Trail)**

In this case, a needed trail easement interfered with the owner's plans to develop property and accommodating development forced the trail to a less desirable route. Negotiation succeeded when the county offered to purchase the entire property with the intent of locating the trail where it desired and then selling the surplus. The result will likely be a very low cost easement in a better trail location.

### **C. Acquisition of Less than Fee Simple Interest**

#### **1. Conservation Easement/Development Rights**

An easement for a particular purpose (*e.g.*, conservation easement over the Inner Management Zone) is the most basic "less than fee" acquisition.

A conservation easement is an estate in land restricting a seller's right to use property for certain purposes and granting a buyer certain enforcement rights. With a development rights acquisition, a vested right to develop property more intensely is severed from the fee and acquired by the agency. RCW 64.04.130 recognizes conservation easements and development rights as estates that may be conveyed to any state agency, federal agency, county, city, town or non-profit historic preservation corporation or non-profit nature conservancy corporation. Public agencies and land trusts often prefer acquisition of conservation easements and development rights to full fee acquisitions for several reasons. First, these estates are generally much less expensive than buying the fee. Second, the property owner, not the public agency, bears the cost of stewarding the property. Third, the property owner retains hazardous substance liability.

#### **a. Bear Creek (King County Open Space Program — Waterways 2000)**

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## *Endangered Species Act, Part II . . .*

Waterways 2000 was a later element of the King County Open Space Program designed to preserve salmon habitat by acquiring key properties within particularly critical watersheds. Waterways 2000 targeted the conservation easement as a preferred acquisition tool because it lowered the purchase price and, perhaps more importantly, fostered a continuing relationship with the property owner and the community. This Bear Creek acquisition is a particularly creative example. The County purchased a conservation easement from neighbor 1; neighbor 1 used the proceeds from this sale to purchase a fee interest in adjacent land from neighbor 2; then neighbor 1 sold a conservation easement to the county over the adjacent land formerly owned by neighbor 2. As a result, the county acquired a total of 10.14 acres of conservation easement for \$30,000.

### **b. Mountains to Sound Greenway/ King County Biosolids Program**

In an extremely creative partnership with the U.S. Forest Service, Forest Legacy Program and King County's Waste Water Treatment Division, the King County Open Space Program acquired a "restricted fee" interest in 1,100 acres of forest land, subject to a conservation easement held by the Forest Service. King County wanted land to spread biosolids and to maintain forestry uses. USFS Forest Agency provided money to buy a conservation easement to keep the property in forest production.

### **c. Hazel Wolf Wetlands (King County Open Space Program)**

The Cascade Land Conservancy accepted a donation of a pristine 116 acre wetland from the developer, sold a conservation easement to King County and used the proceeds (along with dedicated homeowners fees) to maintain the property.

## **D. Clustering and Transfer of Development Rights**

One great way to preserve natural resource land while accommodating the economic interest of the property owner is to allow the owner to realize her economic return by developing a different more suitable property. Two ways of accomplishing this are (1) clustering, concentrating what could be sprawled development over an entire parcel to a smaller portion of the property, and (2) transfer of development rights, legally restricting the development of one property while enhancing the development capacity of another.

### **1. Clustering**

#### **a. Uplands Reserve**

The property owner held 440 acres of forested property outside North Bend and adjacent to Rattlesnake Mountain Natural Area. The property had been divided into 22 twenty-acre lots. Adjacent to the property was a 70-acre forested tract with an

active forest practices permit. The owner wanted to enhance the development capacity of the property, while King County wanted to preserve the integrity of the large forested area and keep the 70-acre tract from being divided. The owner and the County reached agreement whereby the owner would acquire the 70-acre property and limit development of the greater 510-acre property to 100 acres of the least environmentally sensitive land. This developable property includes approximately 18 acres of roads and 41 two-acre home sites. The home sites are to be located by the homeowner within one of the 41 private lots (ranging from 3 to 17 acres). Approximately 308 acres are to be held as common tracts. The common tracts and the areas of the private lots not within the two-acre home sites (altogether 410 acres) are subject to a conservation easement conveyed to King County. The conservation agreement requires the owner, through a homeowners association, to manage the property pursuant to a forest management plan that was approved by the county and to levy sufficient association dues to provide for the management.

### **2. Transfer of Development Rights**

#### **a. Direct Property to Property Transfer – Mitchell Hill/Issaquah Highlands**

King County has actively implemented a broad reaching TDR program. In 1999, King County reached agreement with the developers of Issaquah Highlands, the owners of 313 acres of adjacent rural land, and the city of Issaquah to transfer the right to develop approximately 62 homes on the rural property and convert it into the right to develop 500,000 square feet of needed retail and office space within the urban Issaquah Highlands development. The Mountains to Sound Greenway brokered the deal. The Greenway paid the owners \$3 million for the rural property and then sold the development credits to the Issaquah Highlands developers for \$2.75 million and the restricted fee and timber rights to the property to King County for \$250,000. The Issaquah Highlands developers also agreed to provide \$1 million to make certain improvements within the city. The County realized a needed open space and trail connection that is part of the Mountains to Sound Greenway.

#### **b. Designated Urban Receiving Zones — Denny Triangle**

King County and Seattle have recently approved the Denny Triangle Transfer of Development Credits (TDC) Interlocal Agreement. As part of the agreement, qualified rural landowners from the Cedar, Green and Snoqualmie River Basins may now sell their development rights to property owners in the Denny Triangle neighborhood of Seattle. New buildings inside the Triangle can achieve a 30 percent increase in building height only through the acquisition of rural development rights. In exchange

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## *Endangered Species Act, Part II . . .*

for sale of their development rights, rural landowners accept a permanent conservation easement that preserves forest and farm lands and precludes new residential development.

### **E. Time Shifting Strategies**

These techniques are useful when a buyer may not presently have all the funds to complete the acquisition and it is not possible to wait for the next appropriation or to issue a bond or note to cover the cost. These techniques are also useful when a seller wants to keep all or a portion of the property for a period of time

#### **1. Option — the Right to Purchase the Property At a Later Date**

This is the most straightforward time shifting technique, although sometimes paying option consideration may be problematic for a public agency.

#### **2. Phased Acquisition — Buy Pieces of the Property at Different Times**

The buyer and seller must agree to segregate the parcel and allocate the fair market value so that the deal meets the buyer's programmatic needs and the seller's needs.

##### **a. Meadowbrook Farm (King County Open Space Program)**

The Trust for Public Land had an option on this large expensive property at the center of the Mountain to Sound Greenway. King County managed to acquire all the property in three phases — each more expensive than the next — over several years.

##### **b. Sunset Quarry (King County Open Space Program — Cougar Mountain/Squak Mountain Corridor Project)**

King County did not have sufficient funds to acquire all 120 acres and did not want to assume certain gravel mine restoration obligations. The County and the seller reached agreement whereby the County acquired 70 forested acres and obtained an option to acquire an additional damaged 50 acres at a fixed price over 25 years as the owner restored.

#### **3. Fee Subject To a Condition Subsequent (Rock Creek — King County Open Space Program)**

Two pieces of a highly developable and expensive, pristine salmon habitat property had a willing seller, but only at a price beyond the present appropriation. King County accomplished the deal in two phases. The seller conveyed both pieces to the county in fee upon initial payment. The seller retained a right to reenter the second piece of property and terminate the estate upon the buyer's failure to make the second payment by a certain date. The advantage of this technique is that it does not create an

unauthorized "debt" of the agency (a tricky problem under Washington state law), it allows for a single conveyance; the seller saves property taxes and insurance expenses during the period the second piece is in the buyer's hands; and it establishes "momentum" — the buyer must "give the property back" if it fails to appropriate funds. There are some disadvantages as well. It is an unusual transaction and an explanation will likely have to be made to the title company. Also, the seller must remove encumbrances early in the process.

#### **4. Note Securing Promise To Pay (Maury Island Marine Park / King County Open Space Program)**

If nothing else will work and there is enough political will, the public agency sometimes can issue a municipal bond or note to secure its promise to pay the remaining purchase price. King County used this technique to purchase a 300-acre parcel with one and one-third miles of Puget Sound shoreline, the Maury Island Marine Park that was threatened to become a gravel mine.

#### **5. Transfer of Development Right Bank**

Time shifting may apply in the TDR context as well. Often, rural property owners may be willing to sell development rights, but the right to develop urban property more intensely than presently allowed is not yet valuable enough to support the purchase of rural development rights. In this circumstance it becomes advantageous to "hold" the development rights for a period of time and sell them when the urban market values them more. This is what King County is attempting to accomplish with its TDR bank proposal. King County has appropriated \$1.5 million to purchase development credits from rural landowners who plan to sell to developers of property within certain selected receiving sites. The Denny Triangle in Seattle has been approved as a receiving site and the county is negotiating with several other suburban cities for TDC receiving sites as well. In early 2001, King County purchased 56 TDRs on Sugarloaf Mountain in southeast King County for approximately \$1.4 million, permanently protecting some 285 acres. King County hopes to sell TDCs to developers of qualified "receiving sites" desiring additional development capacity, such as in the Denny Triangle.

### **F. Techniques Where Seller Wants to Retain Some Use**

#### **1. Life Estate/Term Estate**

The agency acquires an estate subject to a present fee estate retained by the seller that expires after a period of time or upon the death of the seller.

#### **a. McClennahan (King County Open Space Program / Cougar Mt./Squak Mt. Corridor)**

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# Revisions to the Durable Power of Attorney Statute Recent and Proposed

by Karen E. Boxx, Assistant Professor, University of Washington School of Law

The Washington State Bar Association Real Property, Probate and Trust Section formed a task force two years ago to review RCW CH. 11.94, the state durable power of attorney statute, and to propose revisions. The members of the Task Force are Eden Toner of Karr Tuttle Campbell, William Reetz of LandAmerica Title Company, Ivan Landreth of Bank of America, and the author of this article. The work of the Task Force resulted in HR 1135, signed into law on May 2, 2001, which became effective July 22, 2001. The Task Force continues to meet, and intends to propose additional changes to the statute. This article discusses the need for change, describes the 2001 revisions, lists the continuing concerns, and invites section members to contribute comments to the Task Force.

The original durable power of attorney statute was enacted in 1974 and was extremely brief. It remained substantially unchanged with the exception of 1984 revisions that added the power to make health care decisions and the requirement that gifting powers had to be specifically conferred. Since the

introduction of durable powers of attorney, their use had become extremely widespread and problems with their use had arisen. Two particular concerns were third party acceptance and abuse by unscrupulous or careless attorneys-in-fact, and the limited access to a court to resolve those issues. The abuse issue presented another concern: how to address abuse without overly restricting the convenience and privacy of durable powers of attorney, which are their major advantages. In addition to the abuse problem, there were several ambiguities and gaps in the statute that were identified.

One such gap was the absence of automatic revocation upon divorce of a principal and a spousal attorney-in-fact. Our statutes provide for automatic revocation of Wills and certain beneficiary designations upon divorce, but powers of attorney remained in effect (unless the document provided for revocation). There have been reported cases as well as other instances where the ex-spouse caused problems with a power of attorney, and several other states, as well as the Uniform Probate Code, have automatic

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## *Endangered Species Act, Part II . . .*

The seller was willing to sell his large resource property but wanted to operate his business there for an additional three years. King County did not want the liabilities presented by removing structures from the property. The County and seller agreed to a conveyance subject to a three-year term life.

### **G. Sale With Leaseback/Permit**

#### **1. Venn (King County Open Space Program, Three Parks Natural Area)**

King County purchased this agricultural/open space property and allowed the owner to continue a "grass chop" operation in return for a rent payment. This also reduced the county's maintenance expense.

### **II. Conclusion**

These several examples demonstrate that there are many ways to structure a salmon habitat acquisition negotiation into a "win-win" result and to avoid an unnecessary and unresolvable battle over the preservation of natural resource land threatened by development. The key is to identify the core interests of the parties involved and utilize these strategies to carve up the fee estate to meet the parties' interests. These techniques are particularly well suited to conservation land acquisition and should be useful to practitioners working to buy or sell salmon habitat lands

with funds appropriated to help local agencies comply with the ESA listing of Puget Sound Chinook salmon. •

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<sup>1</sup> 64 Fed.Reg. 14308. The Puget Sound Chinook salmon regulations apply to all or portions of the Washington counties that border the Sound. See <http://www.governor.wa.gov/esa/regions/listings.htm>. Between August 1997 and March 1999, NMFS listed fourteen species of salmon and steelhead as threatened species under the ESA. 64 Fed.Reg. 14308.

<sup>2</sup> In November 1999, soon after NMFS listed the salmon as a threatened species, the US Fish and Wildlife Service (FWS) listed the bull trout (another species found in the Puget Sound area) as threatened. FWS has a long-standing regulation that automatically imposes the ESA section 9 take prohibitions immediately for any species the agency lists as threatened without having to first enact a 4(d) Rule. The FWS bull trout take prohibitions became effective on December 1, 1999. The agency indicated in the Federal Register that it is considering enacting a 4(d) Rule to create exceptions to or limits on the section 9 prohibitions, but no action has been taken at this time. 50 CFR Part 17; 64 Fed. Reg. 58934 (Nov. 1, 1999); see also Tri-County Proposal Executive Summary. Because the FWS rule does not currently allow exceptions, this article will focus on the efforts to qualify for the 4(d) take limits provided by NMFS for West Coast salmon and steelhead

<sup>3</sup> 65 Fed.Reg. 42422.

<sup>4</sup> NMFS, *4(d) Rule Implementation Binder for Threatened Salmon and Steelhead on the West Coast*, 4 (Sept. 22, 2000) (*hereinafter Rule 4(d) Rule Implementation Binder*) at 5.

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### *Revisions to the Durable Power of Attorney . . .*

revocation provisions. The 2001 legislation added a new section to RCW 11.94 that revokes appointment of a spouse as attorney-in-fact upon entry of a decree of dissolution or legal separation or declaration of invalidity of the marriage, unless the power of attorney document or the decree provides otherwise. The revocation was made effective on the entry of the final decree rather than on the filing of the petition for a few reasons. Although the period of time that a divorce action is pending certainly can be hostile and the potential for damaging use of an unrevoked power of attorney exists in that period, the purpose of the statute is to serve as a stop-gap. Parties can protect themselves by revoking the power of attorney once the dissolution action has been filed, or by providing in the power of attorney document for automatic revocation upon filing a dissolution petition. By delaying the automatic statutory revocation until the final order, when the court is involved, flexibility is given to the court to override the revocation in its final order (which may be desirable in some circumstances). Also, delaying revocation until the final order avoids interference with a couple's possible reconciliation. This factor also motivated the drafters of RCW 11.07 to provide that revocation of beneficiary designations under that chapter take effect at the entry of the final decree.

The 2001 revisions also address an ambiguity in interpreting RCW 11.94.050. That statute provided that "the attorney in fact . . . shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter or revoke any of the principal's wills, codicils, life insurance beneficiary designations, employee benefit plan beneficiary designations, trust agreements, community property agreements; . . ." Some practitioners read this language to imply that if the document authorized the attorney-in-fact, the attorney-in-fact could execute or revoke a Will or codicil on behalf of the principal. Other practitioners took the position that the requirements of the Statute of Wills (codified at RCW 11.12.020), which require the testator either to sign the will or to direct another to sign while in the presence of the testator, would supersede any such implied authority under RCW 11.94.050. The ambiguity was resolved by clarifying that an attorney-in-fact cannot execute a will or codicil for the principal. RCW 11.94.050 was also revised to include other nonprobate transfers in the list of changes an attorney-in-fact can make if specifically authorized. Annuity contracts, payable-on-death designations for securities as authorized by RCW 21.35, joint tenancy designations and nonprobate transfers recognized under 11.02.091 were added, so practitioners should consider whether to specify those types of transfers as authorized when drafting powers of attorney.

To bolster third party acceptance of powers of attorney, RCW 11.94.040 was revised to protect third parties when accepting powers of attorney if the third party confirms the identity of the person claiming to be the attorney-in-fact and receives an affidavit from the attorney-in-fact that makes certain representations

detailed in the statute. If the statutory requirements are satisfied, then the third party is presumed to have acted "without negligence and in good faith in reasonable reliance." The presumption may be rebutted, however, if there is clear and convincing evidence that the third party knew or should have known that a material statement in the affidavit was false. The intention of these provisions is to give a safe harbor to third parties, in order to encourage acceptance, while still giving third parties an incentive to refuse powers of attorney under suspicious circumstances. Third parties who are presented with powers of attorney, such as banks and title companies, play an important role in preventing abuse of powers of attorney, and it was critical to maintain that role.

The most significant change in the 2001 legislation was the addition of a hearing procedure. An attorney-in-fact, a principal, or persons who can show an interest in the well being of a vulnerable principal can request court review of issues involving a power of attorney. These provisions are intended to provide efficient access to court to resolve issues regarding a power of attorney, such as potential abuse or negligence or questions about the attorney-in-fact's authority, while preserving the principal's wishes as much as possible. Under prior law, there was no judicial procedure other than guardianship available to resolve problems under a power of attorney. If a concern arose, the durable power of attorney usually had to be abandoned in favor of a guardianship. For example, if a third party refused to accept a durable power of attorney, and the principal was incapacitated, the attorney-in-fact was forced to commence a limited guardianship in order to obtain court-appointed authority to manage the asset in the hands of the third party. Under this new procedure, the attorney-in-fact can ask for a court order compelling the third party to recognize the power of attorney, thus avoiding the guardianship proceeding.

The new procedure can also be used where a friend or family member has concerns about the actions of an attorney-in-fact. The concerned friends or family members can now ask the court to order the attorney-in-fact to provide accountings to specified individuals or to order the posting of a bond or similar oversight. If the attorney-in-fact is found to be negligent, then the attorney-in-fact can be replaced by a successor attorney-in-fact. The proposed procedure therefore would allow the court to resolve the issue with only the formality and expense required for the particular situation. By contrast, under prior law, guardianship was usually the only solution to such problems.

In addition, the new procedure can be used to request authorization of an action that the attorney-in-fact believes is desirable but is hesitant because of potential conflicts of interest or questions raised by others about the prudence of the transaction. Under prior law, the attorney-in-fact had no avenue to obtain court approval of such action and could go forward only at personal risk.

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*Revisions to the Durable Power of Attorney . . .*

The legislation therefore is intended to strengthen the use and functioning of powers of attorney so that relatively minor issues can be resolved with assistance from the court, without resorting to a guardianship. Access to the court to resolve controversial issues are particularly critical for efficient functioning of durable powers of attorney where the principal is incapacitated. However, the legislation is not intended to convert durable powers of attorney into court-supervised arrangements that would vary little from guardianships. The procedure is meant to be used in isolated incidents when necessary to resolve issues, but aside from those resolutions of isolated issues, the durable power of attorney arrangement should continue to operate without court supervision.

Several provisions were included to avoid abuse of the petition process. A person wanting to bring a petition (other than the principal, the principal’s spouse, the attorney-in-fact and a guardian for the principal) must make a threshold showing that “the person is interested in the welfare of the principal and has a good faith belief that the court’s intervention is necessary, and that the principal is incapacitated at the time of filing the petition or otherwise unable to protect his or her own interests.” Section (2) of the “Persons entitled to file petition” section allows the principal to exclude named individuals whom the principal wants to deny such participation in the principal’s affairs. Occasionally families will have one family member who is particularly litigious or troublesome, and this designation would allow the principal to prevent that family member from abusing the petition process. Practitioners should therefore ask clients if there is anyone they wish to name in the power of attorney as being excluded from the petition process.

Also, to prevent abuse of the petition process, the court has the discretion to award attorney’s fees as it sees just. A person bringing a meritless petition therefore risks being charged with attorney’s fees. Also, a third party refusing to accept a power of attorney without grounds for that refusal may be charged with attorney’s fees.

The provisions of RCW 11.96A are made applicable to the petition process, both for consistency with respect to Title 11 proceedings, and because those provisions provide a thorough and efficient procedural scheme. However, the arbitration and mediation provisions are made inapplicable, because the issues to be resolved under the proposed section do not lend themselves to those processes.

There are several issues remaining on the Task Force’s list of concerns about RCW 11.94. They include: the advisability of a statutory form durable power of attorney; a conflict of laws provision; a statutory definition of the duties and standard of care of an attorney-in-fact; update of RCW 11.94.050(2); ability of acting attorney-in-fact to name a successor; nomination of guardian for minor children when parent incapacitated; changes to Medicaid rules to allow attorney-in-fact to be compensated from principal’s funds; expansion of the right to exclude persons from petition process to allow exclusion of a class of persons, such as descendants from first marriage; definition of necessary capacity to execute a power of attorney; and specified qualifications of attorneys-in-fact. The Task Force welcomes any thoughts the members may have concerning the issues under consideration or any other perceived deficiencies in the statute that could be corrected. •

**Join Today!**

The officers of the Real Property, Probate & Trust Section urge you to become an active member of this important section. All members of the Washington State Bar Association are eligible. Simply fill out the form below and mail with a check for \$15 to: **Real Property, Probate & Trust Section, Attn: Section Liaison, Washington State Bar Association, 2101 Fourth Avenue, Suite 400, Seattle, WA 98121-2330**

**RPPT SECTION MEMBERSHIP FORM**

Name \_\_\_\_\_  
 Firm \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_  
 State \_\_\_\_\_ Zip \_\_\_\_\_

- Please enroll me as an active member of the Real Property, Probate & Trust Section. My \$15 annual dues are enclosed.
- I am not a member of the Washington State Bar, but I want to receive your informational newsletter. My \$15 is enclosed.

Send this form with check to:

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 Total \$ \_\_\_\_\_

## Recent Developments

### Real Property

by Scott B. Osborne, Graham & Dunn PC, Seattle

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#### WASHINGTON COURT OF APPEALS

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The Washington Court of Appeals issued two recent decisions concerning deeds of trust. In *Dwyer v. Kislak Mortgage*, 103 Wn.App. 542, 13 P.3d 240 (2000), the court considered the appropriate items that could be included in a payoff demand made by a lender as part of a refinancing transaction. *U.S. Bank v. Oliverio*, 109 Wn.App. 68 (2001) addressed the effect of a mistaken reconveyance of a deed of trust.

In *Dwyer, supra*, the plaintiffs were homeowners that were refinancing their house. Kislak was the current mortgage lender. The escrow agent requested a payoff amount from Kislak, who provided a statement by fax. The first line of the statement read: "This statement reflects the amount needed to prepay this mortgage in full." The statement included the principal and interest due. It also included "Misc Service Chgs" and a fax charge. All of these charges were totaled at the bottom of the statement and included in the "Balance Due."

Dwyer paid the amount shown as the balance due. The refinance closed, and the Kislak deed of trust was reconveyed. Dwyer objected to the miscellaneous charges and fax fee. Dwyer then sued Kislak, claiming damages from an alleged breach of contract, unjust enrichment, and violation of Chpt. 19.86, RCW, the Washington Consumer Protection Act. The trial court dismissed the contract and unjust enrichment claims. Kislak then sought dismissal of the CPA claim. The trial court dismissed that claim as well, finding that since the charges to which Dwyer objected were fully disclosed on the payoff statement, they were not unfair or deceptive. Dwyer appealed.

The Court of Appeals reversed the trial court. The sole question it considered was whether the "practice of including 'Misc Service Chgs' along with secured sums due on its mortgage payoff statement 'Balance Due' violates the Washington Consumer Protection Act because it has the capacity to deceive consumers into believing that Kislak will not release their mortgages unless they pay the fee." The Court found that the manner in which the charges were presented to Dwyer had the capacity of deceiving the borrower:

"The document Kislak provided is entitled, 'Payoff Statement' and the balance due is headed by a paragraph which begins, 'This statement reflects the amount needed to prepay this mortgage in full.' Taken at face value, a reasonable consumer could believe that declaration to mean that unless all sums included on the statement are paid, Kislak will not release the mortgage . . . Including

non-secured fees with secured obligations has the capacity to deceive reasonable consumers into believing that they must pay the fees before Kislak will release the mortgage." *Dwyer, supra* at page 547.

The Court noted that its decision did not prevent Kislak from charging for miscellaneous services. However, the mortgagee could not attempt to collect charges not secured by the deed of trust as a condition to satisfying the secured obligation. The matter was remanded for a trial court determination of attorney's fees due under the CPA and damages.

The opinion concludes without any discussion that the service charges and fax fees were not secured by the deed of trust. Presumably, Kislak conceded this point, since there is no discussion of any provision in the deed of trust that describes what is and what is not a secured obligation. The opinion also concludes that, as a matter of law, the payoff statement was deceptive. One wonders what the result would have been had Dwyer objected to the charges and the mortgage lender released the mortgage without payment of the charges.

The willingness of Dwyer to litigate over a \$25 fax fee and \$50 of service charges makes more sense in light of the fact that the litigation was commenced as a class action, and Dwyer was pursuing the claim individually and on behalf of a certified class. Footnote 8 in the opinion collects several recent "fax charges" cases that have been pursued in other jurisdiction. Although the applicable state law in these other cases varies from the Washington CPA, the common thread of the cases is a claim that the lender has charged a fax fee that the borrower has never agreed to pay and was never disclosed to the borrower prior to the time it was billed as part of the payoff process.

*U.S. Bank v. Oliverio, supra*, involved a situation not addressed by the Deed of Trust Act that has created difficulties over the years — the mistaken reconveyance of the deed of trust prior to payment of the debt.

U.S. Bank loaned money to the Oliverio family and the loan was secured by a deed of trust on property owned by a family trust. When the loan went into default, the bank commenced a foreclosure. The bank, however, also generated a request for full reconveyance, which led to recording a reconveyance. When the bank became aware of this mistake, it commenced an action to reinstate its lien on the property. The trial court entered a summary judgment in favor of the bank. Oliverio appealed.

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### *Recent Developments: Real Property*

The judgment was affirmed. Noting that no Washington case had decided the “question of the remedy available to a creditor who inadvertently releases a security interest in real property,” the Court stated that every other state that had considered this question had decided to reinstate the lien.

And we have previously held that, under the Uniform Commercial Code (UCC), the mistaken or unauthorized cancellation of a promissory note is inoperative. [citation omitted] While the UCC does not apply to a deed of trust, the reasoning is analogous. The law will not relieve a party of an obligation due to another’s mistake. Moreover, as the Bank argues, leaving the Bank without security for its loan would create an inequitable windfall for the Oliverios. *U.S. Bank v. Oliverio, supra*, at page 73.

This issue arises because the Washington Deed of Trust Act does not contain any provision that allows the trustee to correct an erroneous reconveyance of a deed of trust. Other states, such as California, have a statutory authorization for the trustee to reinstate the deed of trust. As one can imagine, this occurs with some frequency. Title companies that are trustees have unilaterally filed a notice of reinstatement to correct erroneous reconveyances. Often neither the grantor nor the beneficiary ever discovers that this has happened. Since the title company-trustee is also the title company that is most likely to be issuing a commitment for title insurance on the property, the title company simply shows the deed of trust as a lien without reference to the mistaken reconveyance. Unless a full title search is conducted after the receipt of the commitment, the reconveyance is never discovered.

The unilateral filing of a reinstatement by the trustee is probably ineffective to resurrect the reconveyed deed of trust. In order to reinstate the lien, it is necessary to obtain the consent of the grantor or, like U.S. Bank in the *Oliverio* case, commence an action, naming the grantor, requesting that a court confirm the existence of the lien.

*Brown v. Johnson*, 109 Wn.App. 56 (2001) involved a claim of fraud and misrepresentation in the sale of a house. Brown purchased a house from Johnson. Brown had an inspection of the house, but it failed to reveal substantial defects in the property. After closing, the defects became apparent to Brown, and she sued for damages. A jury trial returned a verdict in favor of Brown. Johnson appealed and Brown cross-appealed the trial court’s limitation on her right to recover attorney’s fees.

The Court of Appeals affirmed the misrepresentation and fraud verdict. Only a portion of the full opinion was published. The unpublished portion of the opinion contains an extensive recitation of the defects in the house, but the condition of the property was best summarized by the following:

Later, she [Brown] found slugs in the basement and she could hear frogs croaking downstairs. They became a recurring problem. . . . The first time it rained, water leaked into the basement, flooding it with between one-quarter inch to one-half inch of water. Brown could hear the water running under the floor of the basement and she could see it seeping through the walls.

Johnson was found to have misrepresented the condition of the house and failed to disclose hidden defects.

The significant part of the case dealt with Johnson’s allegation that Brown’s claim for attorney’s fees based on the attorney fee provision in the purchase and sale agreement should be denied. Johnson argued that the purchase and sale agreement was merged into the deed, and since the deed had no attorney’s fee provision, Brown could not recover her fees. The trial court had limited Brown’s attorneys’ fees to those associated with claims relating to the septic system, which did not comply with a warranty in the purchase agreement. The Court of Appeals rejected Johnson’s position.

If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees. An action is ‘on a contract’ if (a) the action arose out of the contract; and (b) if the contract is central to the dispute. *Brown v. Johnson, supra* at page. 58.

The Court distinguished prior rulings that had denied the award of fees based on the doctrine of merger. Those cases involved claims that related to the condition of title to the property, and the decisions held that since the deed described the condition of title, the provisions of the purchase agreement, including the attorney fee provision, merged into the deed.

The rule [doctrine of merger] also does not apply where terms of a purchase and sale agreement are not contained in or performed by the execution and delivery of the deed, are not inconsistent with the deed, and are independent of the obligation to convey. In this case, Brown’s action for misrepresentation does not relate to title or any other terms contained in the deed and therefore falls within the doctrine’s exceptions. *Id.* page 60. •

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## *Recent Developments*

### Probate and Trust

*by Alice E. McCarty, Graham & Dunn PC, Seattle*

#### Supreme Court of the State of Washington

*Vasquez v. Hawthorne*, 145 Wn. 2d. 103 (2001)

**Summary:** Where a surviving partner of a same-sex relationship asserts claims for equitable relief against the estate, the equitable claims must be analyzed under the specific facts presented in each case. Equitable claims are not dependent on the ‘legality’ of the relationship between the parties, nor are they limited by the gender or the sexual orientation of the parties.

**Facts:** Robert Schwerzler (Schwerzler) and Frank Vasquez (Vasquez) lived together from April 1967 through October 1995, with the exception of two years in the early 1970s in which Schwerzler and Vasquez lived in different apartments in the same building. Schwerzler died intestate. Vasquez filed a claim against the estate asserting that he and Schwerzler had formed an economic community and that he was entitled to an equitable share of the property during their relationship. Joseph Hawthorne (Hawthorne) was appointed personal representative of the estate and denied the claim.

At the trial court level, Vasquez moved for partial summary judgment requesting relief under the meretricious relationship doctrine. Vasquez submitted affidavits offering proof of his long-term relationship with Schwerzler. Vasquez also presented claims for equitable relief under implied partnership and equitable trust. Hawthorne submitted conflicting affidavits, asserting that no such relationship existed and that Vasquez was merely a handyman to Schwerzler. The trial court granted partial summary judgment for Vasquez, holding that Vasquez and Schwerzler had a meretricious relationship and that the property acquired during their relationship was presumed jointly owned. The trial court also awarded property to Vasquez through analogies to community property law. The Court of Appeals reversed and remanded back to the trial court and the Supreme Court granted the petition for review.

**Discussion:** The Supreme Court found that there were too many conflicting facts presented through the various affidavits for the trial court to have determined the relationship between Vasquez and Schwerzler, or the nature and extent of contribution to any property acquired between them, or what equitable theories would be most appropriate. The Court did not find that partial summary judgment was appropriate due to these conflicts and lack of sufficient information.

The Supreme Court vacated the Court of Appeals and reversed and remanded the case for trial to fully weigh the

evidence and determine which equitable theories apply and whether Vasquez has established his claim for equitable relief.

#### Washington Court of Appeals

*Marriage of Harris*, 107 Wn. App. 597, (Div. I 2001)

**Summary:** Where a divorced spouse (the payee spouse) is awarded a proportionate share of the payor spouse’s military retirement benefits as valued as of the earliest date the payor spouse is eligible to retire, the payee spouse is not entitled to have an adjusted upward share of such benefits if the payor spouse actually retires at a later date, with an increased retirement payment.

**Facts:** Theresa and Perry Harris were married in 1982 and separated in 1998. Theresa had been active in the Navy since 1980 and had received the rank of Lieutenant in 1992. Her earliest retirement date would be July 2000 for her 20 years of active service with the Navy. She would then be eligible to receive \$1,086.30 per month in retirement. If Theresa waited until June 2002 to retire, having served 10 years as an officer, she would be eligible to receive \$2,004 per month. If Theresa waited until June 2010 to retire, and attained the rank of Captain, she could receive \$2,917.20 per month. Theresa testified that she intended to retire after 30 years of service.

Both parties agreed that Perry would receive his proportionate share of the pension at the earliest date that Theresa could begin receiving retirement benefits, regardless of whether or not she actually retired. Both parties agreed that Perry’s share of the pension was 41.4 percent and that Theresa would begin making monthly payments to Perry in the amount of \$450, as of August 1, 2000. The court awarded Perry spousal maintenance until Theresa began paying him his share of the pension as well as retirement pay cost of living increases.

Perry also requested step increases to coincide with Theresa’s increased pension payment eligibility, up through her actual retirement, which the trial court rejected. Perry appealed. The Court of Appeals, in reviewing the property distribution, did not find an abuse of discretion resulting in an inequity to Perry. The Court of Appeals affirmed the trial court.

**Discussion:** A court has broad discretion in dividing property in a marriage dissolution proceeding and there are no set rules for dividing military retirement benefits. Under RCW 26.09.080, the court is required to make a “just and equitable” property distribution, and is guided by the following factors: 1. the nature

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### *Recent Developments: Probate and Trust*

and extent of the community property; 2. the nature and extent of the separate property; 3. the duration of the marriage; and 4. the economic circumstances of each spouse at the time the division of property is to become effective. The typical formula used to determine the community share of a retirement pension is the months of service during the marriage divided by the total months of service at retirement multiplied by the monthly retirement benefit. The community share of a pension may include increased benefits but not increases due to additional years of service. Therefore, Perry will not be awarded increasing amounts of his proportionate share of Theresa's pension, as she continues to work or once she does retire.

**Schumacher v. Williams**, 107 Wn. App. 793, (Div. I 2001)

**Summary:** When a mentally disabled resident of a privately owned and operated adult boarding home dies, her brother, individually and as personal representative of her estate, will not have a cause of action to recover damages because he is not a statutory beneficiary (i.e. spouse, child) nor financially dependent upon the decedent as required under the Washington wrongful death and survival statutes.

**Facts:** Maria Schumacher, who had Downs Syndrome, lived at The Homestead, a privately owned and operated adult boarding home licensed by the State of Washington, from September 1982 through May 1997. Maria sustained severe hot water burns when taking a bath with the assistance of another resident and died a week later as a result of the burns.

Charles Schumacher, Maria's brother, filed an action as personal representative of Maria's estate and individually, seeking recovery against The Homestead, its owners John and Delores Williams and the State of Washington. Charles filed claims under RCW 74.34, the abuse of vulnerable adults statute, the Civil Rights Act, 42 U.S.C. § 1983 (1994), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (1995) and the Rehabilitation Act of 1973, 29 U.S.C. § 794. Charles acknowledged that he was not financially dependent on Maria, nor did the estate sustain economic losses.

The Homestead, the Williams and the State sought dismissal of all claims. The trial court granted summary judgment against Charles, individually, and as personal representative of the estate. The trial court held that the estate had no recognized statutory beneficiaries under Washington's wrongful death and survival statutes. Charles, as personal representative, appealed the dismissal regarding the claims under the abuse of vulnerable adults statute and the Rehabilitation Act.

**Discussion:** Washington State's wrongful death statute provides that only a spouse or child may maintain a wrongful death action. If there is no spouse or child, such action may be maintained for the benefit of parents or siblings who are financially dependent upon the decedent. Washington's abuse of vulnerable adults statute does not directly address the financial dependency

requirement, however, the Court did not find legislative history or intent to exclude it from the statute. In addition, the Court did not find Charles' Rehabilitation Act claim persuasive because he failed to establish that Maria was denied any benefit solely because of her disability, or that her death was the result of intentional discrimination on the part of the Williams or the State. Therefore, the Court of Appeals affirmed the trial court, holding that Charles was not a statutory beneficiary under Washington's wrongful death and survival actions, which precluded him from recovery under the abuse of vulnerable adults statute and the Rehabilitation Act.

**Estate of Bachmeier**, 106 Wn. App. 862, (Div. II 2001)

**Summary:** Where there is a three-pronged community property agreement, the Court will imply a termination of the testamentary prong by operation of law where there is a finding that at the time of death the parties have permanently separated and the marriage is defunct, even without a final divorce decree.

**Facts:** In 1966, John and Angie Bachmeier were married. In 1977, they executed a three-pronged community property agreement that provided that all property then owned or thereafter acquired would be declared community property and that upon the death of either of them, all of the community property would immediately vest, in fee simple, in the surviving spouse.

Several years later, the Bachmeiers suffered marital problems. In 1995, John wrote a letter (but never sent it) indicating that he would "sever ties with Angie," detailing the items he would keep and allow Angie "to do as she pleases with the rest." In 1998, John left the family home and filed a petition for legal separation and requested a division of the parties' accumulated property.

During John and Angie's separation, Angie executed a Will, naming her daughter, Sandra L. Johnson, as personal representative of her estate. Angie also left her entire estate to her daughter and named her other six children as contingent beneficiaries. Angie expressly left nothing to John. Two days later, Angie died.

Sandra petitioned to admit the Will to probate appointing herself as personal representative. John moved to dismiss the petition, or alternatively, for orders to appoint him as personal representative. The court admitted the Will to probate, but appointed John as personal representative.

On December 30, 1998, Sandra petitioned the trial court for a ruling that either John and Angie had revoked their community property agreement or that the agreement had terminated as a matter of law when their marriage became defunct. The trial court dismissed the petition, concluding that the community property agreement was neither revoked nor terminated.

Sandra appealed the trial court's decision. The Court of Appeals reversed the trial court and remanded for further proceedings.

**Discussion:** The Court reviewed whether the testamentary third prong of the community property agreement terminated by

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## Nominations for Executive Committee Membership

### Pursuant to the Bylaws of the Real Property, Probate & Trust

Section, the Nominating Committee, currently composed of Mark W. Roberts of Preston Gates & Ellis LLP (Seattle), John M. Riley III of Witherspoon, Kelley, Davenport & Toole,

P.S. (Spokane) and Douglas C. Lawrence of Stokes Lawrence (Seattle), has recommended the nomination and election of the following persons to the offices indicated for the 2002-2003 term of the Real Property, Probate & Trust Section:

#### Director, Probate & Trust Council

*Lora L. Brown* – Stokes Lawrence, P.S. (Seattle)

#### Real Estate Council

*Karen L. Gibbon* – Karen L. Gibbon, P.S. (Seattle)

*Michael A. Winslow* – Law Office of Michael A. Winslow (Mount Vernon)

#### Probate & Trust Council

*Charles W. Riley, Jr.* – Lane Powell Spears Lubersky LLP (Seattle)

*Alfred M. Falk* – Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, LLP (Tacoma)

Pursuant to the Bylaws, Warren E. Koons of Davis Wright Tremain LLP (Bellevue), will become the Chair of the Section for the 2002-2003 term and Thomas M. Culbertson of Lukins & Annis, P.S. (Spokane), will become the Chair-elect.

Any additional nominations should be received by the current Chair, Barbara C. Sherland, Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, WA 98040, no later than 20 days before the annual meeting which will be held during the

Real Property Probate & Trust Section Midyear Meeting scheduled for May 31-June 2, 2002 at Skamania, 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.

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

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### *Recent Developments: Probate and Trust*

implication when John and Angie separated and their marriage became defunct. RCW 26.16.120 allows a husband and wife to execute a community property agreement, however, the statute does not address revocation of such an agreement. Despite this silence, Washington courts recognize two instances in which a valid community property ceases to be effective. First, the parties may rescind it by mutual consent. Second, the agreement is rendered inoperable by a final divorce decree. The Court declined to follow its previous analysis under *Estate of Catto*, 88 Wn. App. 522 (1997) review denied, 134 Wn. 2d 1017 (1998), in which the Court declined to imply a clause terminating the testamentary provision of a community property agreement where the parties had been separated for a prolonged period of time.

The Court revisited its analysis under *Catto*, finding that it was flawed. The Court found no evidence that the Bachmeiers considered the issue of the agreement's continued effectiveness upon their separation, and therefore, found no basis in the

"implied in fact" analysis. The Court did find, however, that the community property agreement's effectiveness in light of a separation was essential to any determination of the parties' rights and duties. The fact that no provision existed to revoke the agreement made such a revocation an omitted term. Accordingly, the Court decided that the community property agreement implied a termination clause by operation of law and it terminated the testamentary prong of the agreement upon the parties' permanent separation.

To find the testamentary prong of the Bachmeiers' community property agreement inoperable by termination by law, the marriage would need to be found defunct. The trial court had not reached this determination, reasoning under *Catto* that the law did not support a termination of the agreement, even if the marriage were defunct. The Court of Appeals reversed the trial court and remanded to the trial court to determine whether the Bachmeiers' marriage was defunct. •

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## PROBATE AND TRUST COUNCIL REPORT

*by Thomas M. Culbertson, Lukins & Annis, PS, Spokane  
Director – Probate and Trust Council*

This year's RPPT Annual Meeting and CLE seminar (May 31-June 2 at Skamania Lodge) promises to be a good one. Given the fact that our block of rooms at the Skamania Lodge usually sells out, I would recommend making your reservations early. By the time you receive this edition of the newsletter, you will have received the Bar's pamphlets describing the speakers and topics. Many thanks to co-chairs Lora Brown and Zach Stoumbos for their hard work in putting the seminar together.

One of the purposes of the Annual Meeting is to elect new members to the Section's Executive Committee. This year's nominations on the probate and trust side are Lora Brown (P&T Council Director), Al Falk, and Chuck Riley. Lora, who is a partner at Stokes Lawrence, is returning to the Executive Committee after having served several years as newsletter editor and executive committee member. Al, a partner with Gordon Thomas in Tacoma, has been very active with the Estate and Gift Tax Committee, served on the RUIA task force discussed below, and is a member of ACTEC. Chuck is a partner with Lane Powell in Seattle, is an active member of the RPPT and Taxation Sections, and is a frequent CLE speaker, including a great presentation on IDITs at last fall's Seattle Estate Planning Council seminar. Other nominations are welcome, but as a practical matter, that seldom occurs. We look forward to the participation of the elected nominees and appreciate their willingness to contribute their time and energy to the Section.

We also welcome to the Executive Committee Doug Lawrence and Danette Capello, who are our new Web page editors. Many thanks to them for the countless hours they have put in making the Web page a useful tool for Section members.

On the legislative front, RPPT (along with the Taxation Section's Estate and Gift Tax Committee) is actively pushing for the passage of the Revised Principal and Income Act, and by the time you read this, it will hopefully have passed. A Bar task force spent two years reviewing and revising the uniform act (RUIA) and drafting an additional section on unitrusts. That section allows for the conversion of trusts that annually distribute all their income to trusts which annually distribute 4 percent of the trust corpus. Those who attended last fall's Seattle Estate Planning Council seminar will remember the convincing presentations Bob Wolf gave on the benefits of unitrusts. Unfortunately because that section is not part of what was drafted by the National Conference of Commissioners on Uniform State Laws, NCCUSL has informed us that the legislation cannot be referred to as the Revised *Uniform* Principal and Income Act. The task force feels that the unitrust provisions are important enough that it has been willing to drop "uniform" from the name, even though the other several dozen sections vary from the Uniform Act in only minor details.

Also on the legislative front, Watson Blair and Bill Fleming have been part of a group working on legislation authorizing the use of mental health care directives. Such a directive would enable a person to express his or her wishes concerning mental health care should the person become incapacitated. As this column is being written, there are some major disagreements between attorneys who have been active in the process and proponents of the bill from other disciplines, and it remains to be seen whether this legislation will be supported by RPPT. Watson and Bill are to be commended for their efforts to assure that the legislation is unambiguous, not overly broad, and able to accomplish its purposes.

Finally, the Executive Committee is very interested in learning more about members of the Section, and we urge you to take a minute to respond to the questionnaire being circulated in this newsletter and by email. The survey results should be invaluable in helping us determine how the Section can be the most beneficial to its members. •

### **CLE Credits for Pro Bono Work? Limited License to Practice with No MCLE Requirements?**

Yes, it's possible!

Regulation 103(g) of the Washington State Board of Continuing Legal Education allows WSBA members to earn up to six (6) hours of credit annually for providing pro bono direct representation under the auspices of a qualified legal services provider.

APR 8(e) creates a limited license status of Emeritus for attorneys otherwise retired from the practice of law, to practice pro bono legal services through a qualified legal services organization.

For further information contact Sharlene Steele, WSBA Access to Justice Liaison at 206-727-8262 or [sharlene@wsba.org](mailto:sharlene@wsba.org).

## Notes from the Chair

*by Barbara C. Sherland*

We need your help — but it will only take a minute (or two). If you have not already done so, please take the time to complete the enclosed “Two Minute” Member Survey. The survey will help us understand the composition of our membership so that we can develop better programs that address your needs. The survey is included in this Newsletter and has also been sent via email to members for whom we have email addresses. This is truly a two-minute survey — please check the boxes and help us know you better.

Have you ever wondered how Washington’s new reciprocity rules with Oregon and Idaho work? Have you ever thought that it would be interesting to have a Washington Supreme Court Justice give you his or her impression of recent probate and trust and/or real estate cases? It is all happening at the 2002 Midyear meeting. Mark May 31-June 2 on your calendars and join us at Skamania. You will not only learn about the new reciprocity rules, but also will receive a direct comparison of how property rights and interests vary under Washington, Oregon and Idaho laws. The Honorable Richard B. Sanders of the Washington Supreme Court will join us to give his thoughts on case developments in our practice areas — a rare glimpse behind the velvet curtain. Warren Koons, Lora Brown and Zach Stoumbos have put together a great program so join us in Skamania on May 31-June 2, 2002.

If you have not visited the section Web site, you have an opportunity to watch a work in progress. Doug Lawrence and Danette Capello are updating our web page and making it more useful to members. They are coordinating with WSBA to make the site more accessible and working to keep the web site current with information such as proposed legislation and seminar updates. They are also looking for ways to enhance the web site by including our Newsletters and resource directories. Stay tuned.

The events of September 11 have given us all pause. As busy professionals with ever-present demands of clients, it is easy to get caught up in the details of work and miss or overlook the important things of life. In his book, *The Seven Habits of Highly Effective People*, Stephen Covey advises sitting down to compose your own obituary. (I am not one of those highly effective people, but this exercise strikes a chord with my trusts and estate background.) Give it a try. Distilling your life into a few paragraphs forces you to focus on what is ultimately important. “*Things which matter most must never be at the mercy of things which matter least.*” Goethe.

Have any questions or concerns about the section? Please give me or any of the Executive Committee members a call (our contact numbers are listed in the newsletter). We welcome your input and encourage you to get involved with us! •

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## REAL PROPERTY COUNCIL REPORT

*by William H. Reetz, LandAmerica Financial Group, Seattle  
Director – Real Property Council*

With the last two editions of the RPP&T Section of the Newsletter, you received a copy of the RPPT “Two Minute” Member Survey. Please take the time to complete and return it. The survey is intended to provide the Executive Committee and the WSBA with, what we hope, will emerge as a valuable tool for planning seminars, mid-year meetings, Web-site services and other future services to our section’s members. We have frequently wondered about the make-up of the section (both the probate and real property sides), who of the various specialties attends seminars and the mid-year meeting, and how we might design these programs so that they best meet members’ needs. Your assistance and input will be appreciated.

The 2002 legislative season is now in progress. The Real Property Council is currently involved in two projects that I discussed in the winter edition of this Newsletter. These are the durable power of attorney and reconveyance task forces. Neither

will offer any legislative proposals this season. The Real Property Council was not contacted prior to commencement of the legislative session regarding any significant real property legislation but, as is usually the case, bills are introduced that for better or worse can affect real property practitioners. The Real Property Council has identified as one of its principal mission objectives the review of pending real property legislation. A more substantive report will follow.

Each year, two nominations are made to the Real Property Council and Executive Committee. This year, the nominating committee of past-Chairs Doug Lawrence, John Riley and Mark Roberts has nominated Karen L. Gibbon of Seattle and Michael A. Winslow of Mt. Vernon. Both currently serve on the Newsletter Editorial Board with Karen serving as Editor. Their nominations will be voted upon at the mid-year meeting this summer. •

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