

# Real Property, Probate & Trust



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## The Terrorism Risk Insurance Act of 2002 – An Overview

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The terrorist attacks on the World Trade Center constituted the largest single insured event in history, with claims in the range of \$40-\$50 billion. The sheer magnitude and unpredictability of these losses and the belief that having once occurred, similar losses might occur again, caused all participants in the real estate industry – lenders, insurers, owners and users – to reevaluate what each considers to be the proper allocation of risk of loss. In large measure, this re-allocation of risk resulted in each participant in the real estate industry being forced to retain a risk of loss that they had previously been able to shift to another party. In an effort to shore up the insurance industry and guarantee the continued availability and affordability of property and casualty insurance, Congress passed the Terrorism Risk Insurance Act of 2002.

### I. Background

Almost immediately after September 11th, the insurance industry began to quantify the potential loss. At the same time, the insurance industry pursued a two-pronged approach to make certain that the industry would not be faced with losses on a similar scale in the future. The first prong was to lobby for Federal legislation placing the United States government in the role as the insurer of last resort. The second prong was to eliminate future exposure by eliminating coverage for losses arising from terrorist acts. In particular, the large reinsurance companies who absorbed the bulk of the World Trade Center losses began excluding coverage for terrorist acts soon after September 11th, the repercussions of which resonated throughout the real estate industry.

In the area of real estate development and finance, lenders who traditionally relied upon the value of real estate, including

improvements, as the principal security for the repayment of loans, suddenly found that security at risk. This was particularly true in non-recourse transactions, the most common form of long-term mortgage financings.

The perceived increased risk to lenders caused immediate negative repercussions in the industry. According to the Real Estate Round Table, in 2002 as much as \$15 billion in construction and real estate business and 300,000 jobs had been put on hold due to either the unavailability or exorbitant cost of terrorism insurance.

A February 2002, report from *BestWire Services*, a news service published by A.M. Best Company, Inc., cited examples of developments and financing transactions either stalled or aborted as the result of terrorism insurance issues. The owner of a one-million-square-foot office building on the east side of midtown Manhattan could not obtain sufficient coverage to satisfy its lender's requirements. The acquisition of a \$500 million midtown Manhattan building stalled because the purchaser was unable to obtain more than \$50 million to \$100 million in commercial property coverage. The refinance of a building in New Jersey failed because the owner could obtain only \$75 million of terrorist coverage, which was deemed inadequate by its lender.

The *BestWire* report also indicated that to the extent terrorist coverage was available, it was very limited and extremely costly. According to the report, AIG offered terrorism coverage subject to a \$150 million cap for a premium of 5% of value; Berkshire Hathaway offered coverage subject to a \$300 million cap for a premium of 2% of value.

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## **The Terrorism Risk Insurance Act of 2002 – An Overview**

Owners had to confront not only the issues of the elimination or reduction of coverage compounded with skyrocketing premiums, but increased liability exposure relating to terrorist acts occurring on their property. In the context of the landlord and tenant relationship, disputes began to arise regarding the allocation of risk and cost associated with losses from terrorist acts.

### **II. The Terrorism Risk Insurance Act of 2002**

The federal government's response to this increasingly dire situation did not evolve as quickly as the real estate industry would have liked. What began as a bill in the House in the fall of 2001 was finally approved by Congress on November 20, 2002, and signed into law by President Bush on November 26, 2002 as Public Law 107-297, the Terrorism Risk Insurance Act of 2002 (the "Act"). In creating this legislation, Congress specifically recognized that "the ability of businesses and individuals to obtain property and casualty insurance at reasonable and predictable prices ...is critical to economic growth, urban development and the construction and maintenance of public and private housing..."<sup>1</sup>

In short, the Act creates a temporary backstop while the industry has time to better assess and react to the increased risk of terrorist acts. The Act's stated purpose is to "provide temporary financial compensation to insured parties...while the financial services industry develops the systems, mechanisms, projects, and programs necessary to create a viable financial services market for private terrorism risk insurance."<sup>2</sup>

The Act establishes the Terrorism Risk Insurance Program (the "Program") within the Department of the Treasury.<sup>3</sup> The initial term of the Program expires December 31, 2004.<sup>4</sup> The Secretary of the Treasury may, however, on or before September 1, 2004, determine to extend the Program through December 31, 2005.<sup>5</sup>

Participation in the Program is mandatory for any insurer that is writing property and casualty insurance in the United States.<sup>6</sup> Reinsurers are, however, not required to participate. During the term of the Program, all Program participants must make available coverage for terrorist acts that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism.<sup>7</sup>

The Act also temporarily voids terrorism exclusions in any insurance contracts active as of the Act's November 26, 2002, effective date and voids any state approval of such terrorism exclusions.<sup>8</sup> An insurer may, however, reinstate a preexisting terrorism exclusion in an insured's policy if the insured either affirmatively authorizes such reinstatement in writing or fails to pay the increased premiums for terrorism coverage after notice from the insurer. If the insured does not respond within 30 days (or longer, if so directed by its insurer) after receipt of such notice, the exclusion is automatically reinstated.<sup>9</sup>

Additionally, in order to receive any Program payments, Section 103(b)(2) of the Act requires that an insurer disclose to its policy holders the premium charged for losses covered under the Program and of the government's share of compensation for such losses under the Program. For any policy issued prior to the date of enactment, the insurer must provide the disclosure to its policy holder no later than 90 days after enactment. Although the Act does not specify the precise content required in such notices, the Treasury Department has approved the model disclosure forms promulgated by the National Association of Insurance Commissioners as complying with the notice procedures required by the Act.

The Program covers only certain specified "acts of terrorism." Section 102(1)(A) of the Act defines an act of terrorism as follows:

The term "act of terrorism" means any act that is certified by the Secretary [of the Treasury], in concurrence with the Secretary of State, and the Attorney General of the United States—

- (i) to be an act of terrorism;
- (ii) to be a violent act or an act that is dangerous to—
  - (I) human life;
  - (II) property; or
  - (III) infrastructure;
- (iii) to have resulted in damage within the United States, or outside of the United States in the case of—
  - (I) an air carrier or vessel described in paragraph (5)(B); or
  - (II) the premises of a United States mission; and
- (iv) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

Notably, the Program only covers foreign acts or foreign sponsored acts of terrorism. Terrorist acts committed by or on behalf of domestic persons or interest, such as the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, are excluded. The Act also expressly excludes any terrorist act resulting in less than \$5 million in losses.<sup>10</sup>

Once it has been certified by the Secretary of the Treasury, the Secretary of State and the Attorney General of the United States that an act of terrorism has occurred, the Program provides for a cost-sharing mechanism dividing the loss between the insurer and the federal government. Each participating insurer is required to pay all losses up to the applicable "insurer deductible," which is computed based on the insurer's direct earned premium

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the prior calendar year multiplied by the applicable percentage indicated below:

calendar year 2003:	7%
calendar year 2004:	10%
calendar year 2005:	15% <sup>11</sup>

The federal government then covers 90% of the losses in excess of the insurer's applicable insurer deductible and the insurer pays the remaining 10% of the losses.<sup>12</sup> The government's aggregate annual payments under the Program are capped at \$100 billion.<sup>13</sup> Congressional approval is required to exceed that amount.<sup>14</sup>

The Act allows the government to recoup a portion of the payouts it makes with a surcharge on commercial property and casualty premiums.<sup>15</sup> The Secretary of the Treasury may establish an annual surcharge in the maximum amount of three percent of the total premium attributable to property and casualty insurance.<sup>16</sup> Insurers are required to collect and remit this surcharge to the Secretary of the Treasury.<sup>17</sup>

### III. Conclusion

It remains to be seen how effective the Act will be in alleviating the difficulties

faced by the various players in the real estate industry. The brief duration of the Program does not solve many issues of lenders, borrowers, owners, and tenants entering into obligations that extend well beyond the Act's December 31, 2005, expiration date. The Treasury Department is currently working on a separate study and report to assess the efficiency of the Program and the likely capacity of the property and casualty insurance industry to offer insurance for the risk of terrorism after termination of the Program. The Treasury Secretary will present this report to Congress on June 30, 2005, six months before the termination of the Program. It is assumed by industry participants that if the private sector has not developed the systems and programs necessary to create a viable financial services market for private terrorism risk insurance by that time, the Federal government will revise and extend the Program. The response of the insurance industry and the real estate industry will also depend in large part on the amount of terrorist activity that occurs in the Untied States over the next three years.

- 1 § 101(a)(1).
- 2 § 101(a)(6).
- 3 § 103(a).
- 4 § 103(c)(1) and 101(11).
- 5 § 103(c)(2).
- 6 §§ 103(a)(3) and 101(6).
- 7 § 103(c)(1).
- 8 §§ 105(a) and (b).
- 9 Section 105(c) of the Act provides:  
REINSTATEMENT OF TERRORISM EXCLUSIONS.—Notwithstanding subsections (a) and (b) or any provision of State law, an insurer may reinstate a preexisting provision in a contract for property and casualty insurance that is in force as of the date of enactment of this Act and that excludes coverage for an act of terrorism only—  
(1) if the insurer has received a written statement from the insured that affirmatively authorizes such reinstatement; or  
(2) if—  
(A) the insured fails to pay any increased premium charged by the insurer for providing such terrorism coverage; and

- (B) the insurer provided notice, at least 30 days before any such reinstatement, of—  
(i) the increased premium for such terrorism coverage; and  
(ii) the rights of the insured with respect to such coverage, including any date upon which the exclusion would be reinstated if no payment is received.
- 10 Section 102(1)(B) of the Act provides:  
LIMITATION. No act shall be certified by the Secretary [of the Treasury] as an act of terrorism if—  
(i) the act is committed as part of the course of a war declared by Congress, except that this clause shall not apply with respect to any coverage for workers' compensation; or  
(ii) property and casualty insurance losses resulting from the act, in the aggregate, do not exceed \$5,000,000.
- 11 § 102(7).
- 12 § 103(e)(1).
- 13 § 103(e)(2).
- 14 § 103(e)(2).
- 15 § 103(e)(7).
- 16 § 103(e)(8)(C).
- 17 § 103(e)(8)(B).

## **Pennington and Vasquez: A Look at Recent Meretricious Relationship Cases and Their Impact on Estate Planning**

by Alfred M. Falk, Harlowe & Hitt LLP, Tacoma

Non-traditional living arrangements have increased over the last several decades. In 1970, more than 70% of all households included a man and a woman living together as husband and wife. By 2000, such households represented less than 53% of the total. As pointed out by Siobhan Morrissey in a March 2002 *ABA Journal* article:

The domestic unit in early 21<sup>st</sup> century America is largely a crazy quilt of one-parent households, blended families, singles, unmarried partnerships and same-sex unions that would have astonished Ward, June and the neighbors at their cocktail parties and barbecues.

Of course, the reference to Ward and June is to the Cleaver family of *Leave It to Beaver*, the 1960s TV series.

Courts in the state of Washington have grappled with some of the issues raised by non-traditional families since at least *Walberg v. Mattson*, 38 Wn.2d 808 (1951). In a series of decisions, the courts searched for ways to provide equity in situations where unmarried cohabitants were unable to agree on the division of property titled in the name of one or the other of them. Courts tried to find relief for one party or the other based on a number of theories, including contract, constructive trust, resulting trust, and implied partnership or joint venture.

Eventually, the courts developed a theory to resolve property divisions on the dissolution of stable, cohabiting, non-marital relationships (referred to by the courts as “meretricious relationships”). Generally speaking, if a court determines that a meretricious relationship existed, and is now dissolved, the court will provide an equitable division of the property of the couple. Recent Supreme Court activity in this area has had the interesting effect of broadening the types of relationships to which it applies and the circumstances in which it will apply, while attempting to rein in the number of relationships to which it will apply. The net result is continuing and expanded ambiguity about the property rights of cohabiting couples, during life and at death.

This article will first take a look at *In re Pennington*, 142 Wn.2d 592 (2000), the Supreme Court’s most recent discussion of the factors that establish whether a meretricious relationship exists. Second, it will take a look at the Supreme Court’s decision in *Vasquez v. Hawthorne*, 145 Wn.2d 103 (2001). The Supreme Court, with little or no analysis, extended the meretricious relationship theory to same-sex relationships and to the division of property at the death of a party to a meretricious relationship.

### **I. In re Pennington**

The Supreme Court consolidated two different cases (*Pennington v. Pennington*, 93 Wn. App. 913 (1999) and *Chesterfield v. Nash*, 96 Wn. App. 103 (1999)) to consider the

factors to evaluate when determining whether a couple established a meretricious relationship. The Supreme Court identified five relevant factors to analyze, but cautioned that this listing is not exclusive. The five factors are: (1) continuous cohabitation, (2) duration of the relationship, (3) purpose of the relationship, (4) pooling of resources and services for mutual benefit, and (5) the intention of the parties. The factors, taken as a whole, must show the existence of a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist. It appears that each factor must be present to establish a meretricious relationship.

### **A. Continuous Cohabitation**

In *Pennington*, the couple lived together off and on (mostly on) over several years, and there were periods when each dated other people, especially near the end of the relationship. The Supreme Court found that this sporadic cohabitation is not sufficiently continuous to evidence a stable cohabiting relationship. In *Chesterfield*, the parties lived together from July 1989 until October 1993, separated, then got back together sometime in 1994 until November 1995, when the relationship ended. The Supreme Court held that the parties’ cohabitation was marked by separation and a failed reconciliation, and this was not sufficiently continuous to satisfy this factor.

The Supreme Court’s analysis suggests that if a couple’s relationship is troubled, especially near the end, and the parties see other people or if the cohabitation is interrupted at that point, then it will be difficult to establish a meretricious relationship. This appears to be an attempt to limit the number of cases where such a relationship will be found. Those circumstances are the hallmark of a relationship about to falter. When the relationship finally dissolves, the party who does not hold title to the assets will face greater difficulty establishing any right to a division of the assets due to circumstances that naturally attend the end of the relationship, even though previously continuous of sufficient duration.

### **B. Duration of the Relationship.**

In *Pennington*, the relationship spanned 12 years and was considered long enough to support establishment of a meretricious relationship. In *Chesterfield*, the Supreme Court found that a cohabitation of 4 years, 3 months could help support a conclusion that a meretricious relationship existed.

### **C. Purpose of the Relationship**

In *Pennington*, the trial court found that the purpose of the relationship included companionship, friendship, love, sex, and mutual support and caring. Without saying how that affects the

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analysis, the Supreme Court agreed with the trial court. There was no finding on this factor in the *Chesterfield* case.

### **D. Pooling of Resources and Services for Mutual Benefit**

In *Pennington*, the woman spent money for food, household furnishings, carpeting and tile, and some kitchen utensils. She cooked meals, cleaned house, and helped with interior decoration. The Supreme Court found that these activities and expenditures plus the sharing of some living expenses is not sufficient to show a "significant pooling of resources and services for joint projects." *Id.* at 771. She did not make constant or continuous payments jointly or substantially invest her time and effort into any specific asset. The Supreme Court said that without such an investment or effort with regard to specific assets, there is no inequity if she is deprived of an interest in them.

A relationship that would have been considered very marital-like in the 1960s *Leave It to Beaver* world will not suffice now to support the finding of a meretricious relationship. Apparently, the companionship, friendship, love, sex, and mutual support and caring that were long considered a fair contribution by a loving spouse in a marital relationship, giving rise to a right to a fair share of all the couple's assets if the marriage dissolves, will not provide a basis for equitable relief in a non-marital relationship.

It is important to note that in *Pennington* the man owned a corporate business that manufactures aircraft and machine parts, while the woman was a bartender. The disparate incomes of the parties could have led to their unequal contributions to living expenses and investments in specific assets.

The Supreme Court's analysis of this factor indicates that to establish a meretricious relationship, both parties should be in a position to invest either substantial money or time and effort in the very assets that are sought to be divided. A couple living in a relationship that more closely resembles a 1960s family, where one works to bring home a paycheck and the other works to keep the home (and perhaps work to make a modest contribution to living expenses), will lack at least this one key factor of a meretricious relationship, thereby depriving the homemaker of an equitable remedy. This should considerably reduce the number of cases where assertion of a meretricious relationship will succeed. It is difficult to see how such a finding advances the cause of equity, but it does give the more powerful, affluent member of such a relationship an easier path out of it.

In the *Chesterfield* case, the man was a dentist and the woman a sales clerk for Nordstrom. As with *Pennington*, contributions to living expenses were disparate. The parties each spent time contributing to the career of the other. The man filled out some of the woman's travel logs. She worked in his office as a dental assistant and performed some bookkeeping and word processing chores. Again, the Supreme Court found these facts "do not fully establish the parties jointly pooled their time, effort,

or financial resources enough to require an equitable distribution of property, as contemplated by *Connell*." *Id.* at 772.

Perhaps the women in these cases made more money than their occupations would indicate or the men less. But if that were the case, it would be unusual and the Supreme Court should have commented on that. Otherwise, we are left with the impression that disparate contributions to the couple's joint needs will defeat assertion of a meretricious relationship, even though resulting from disparate ability to contribute.

If this is equity in one setting, it may be equity in another. This approach to equitable division of assets in marriage dissolution cases would certainly be a departure from what has been considered equitable. Also, were these people married, the outcome of the analysis would not determine whether one party will receive an equitable division of assets, only what that division should be. Here, in the meretricious relationship setting, it actually makes the difference between whether one receives a just portion or nothing at all.

### **E. Intent of the Parties**

The parties must mutually intend to be in a meretricious relationship. If either party is married to or dates another person during any significant portion of their relationship, that will create sufficient ambiguity on this factor to defeat a claim that the relationship was meretricious. If either party wishes the relationship to lead to matrimony, that too indicates that at least that one party does not intend a meretricious relationship, but rather a marital relationship.

In *Pennington*, the woman made the mistake of expressing a desire to marry the man. The Court found that "Pennington's refusal, coupled with Van Pevenage's insistence on marrying, belies the existence of the parties' mutual intent to live in a meretricious relationship." *Id.* at 772. By desiring to wed, the woman put herself in a position to be denied an equitable division of the couple's property.

In *Chesterfield*, the woman was married to, but separated from, another man for some period at the beginning of the relationship. The Court found that was too equivocal on the question of intent to establish a meretricious relationship, although there was no indication that the woman's divorce was delayed by her in order to forestall a meretricious relationship.

It is difficult to see the equity in denying a division of assets because one party (or even both parties) to a relationship desires to wed, but fails to do so before the relationship deteriorates. It is counterintuitive that a desire to do what many in this society would consider to be "the right thing" is precisely what leads to no entitlement to equity. It's difficult to divine what purpose such a factor adds to the analysis other than one more opportunity to reduce the number of cases where the parties will be entitled to an equitable division of assets. If this is known to couples in this situation, it will discourage even exploratory discussion of the

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possibility of marrying. That does not seem to be sound public policy.

Segue: This discussion sets the stage for a look at the *Vasquez* case. Whereas *Pennington* obviously sought to reduce the number of cases where meretricious relationship would succeed as a theory for equitable division of assets, *Vasquez* will likely expand the types of relationships to which it will apply (to same-sex relationships), and the setting in which relief will be available (death-time divisions).

### **II. Vasquez v. Hawthorne**

In the *Vasquez* case, the surviving member of a same-sex couple claimed all of the decedent's assets under several equitable theories, including meretricious relationship. Despite dueling affidavits that appeared to supply a material factual dispute, the trial judge granted summary judgment for the plaintiff on the meretricious relationship theory. The Court of Appeals reversed the trial court decision, reasoning that equitable relief under that theory is not available for same-sex couples. The Supreme Court remanded the case to the trial court to review the case under the various theories that the plaintiff asserted, noting that the theories asserted included the existence of a meretricious relationship.

*Vasquez* was a unanimous decision of the nine justices with regard to the question of whether summary judgment was improperly granted. Each of the justices agreed that material facts were in dispute and thus, the trial court should not have resolved the matter on summary judgment.

Two of the justices filed concurring opinions with different reasoning, but the same result as the majority opinion. Justice Alexander based his concurring opinion solely on the ground that the meretricious relationship theory is not available to divide property if a death ends the relationship. He felt that it was not necessary to reach the question of whether the meretricious relationship theory applies to same-sex relationships.

Justice Sanders also concurred in the result, but, like Justice Alexander, would have sent the case back to the trial court to reconsider the case on theories other than meretricious relationship. First, he believes that by definition, two persons of the same sex cannot establish a meretricious relationship. He views the prior case law as defining a meretricious relationship as one involving a couple that could legally wed if they so desired. Since Washington law does not permit two people of the same gender to marry, it is not possible for them to avail themselves of the meretricious relationship theory when such a relationship dissolves. Second, he agreed with Justice Alexander that the theory is not available to provide an asset division on the death of a party to a meretricious relationship. Finally, he noted that allowing the theory to apply in this setting would frustrate the reasonable expectations of the parties.

### **A. Same-Sex Relationships**

The meretricious relationship theory should be available to provide equitable relief when a stable, same-sex cohabiting relationship dissolves. The primary policy consideration behind the meretricious relationship cases in the setting of heterosexual couples is to prevent unjust enrichment. Regardless of one's view of the propriety of same-sex relationships, it is a fact that they exist in large numbers. Such relationships often share one of the key elements of heterosexual relationships—such disproportionate power in the relationship that one party ends up owning all or most of the property.

It is not fair to protect some citizens against an unjust deprivation of property if they live with a person of the opposite sex, but not protect others because they live with a person of the same sex. With the exception of the ability to wed, or not, the factors that affect the relationships and the unjust result, are the same.

Ability to wed is not a valid basis for depriving a person of equitable relief. If a man in a heterosexual couple is married to another woman, that, by itself, should not be the basis for depriving the woman of an equitable division of property acquired by them during a stable, cohabiting relationship. The existence of a defunct marital relationship that neither spouse bothers to dissolve should not affect the equities of the cohabiting relationship. There is no reason for such a factor to affect the outcome of a same-sex relationship either.

The Supreme Court remanded the *Vasquez* case for trial. The trial court would apply the factors articulated by the Supreme Court in *In re Pennington*: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for mutual benefit, and intent of the parties. The gender of the parties to the relationship would not rule out the significance of any of those factors. Of course, the *Pennington* court's analysis of the factors, particularly the requirements of exclusivity and continuity to the very end of the relationship, nearly equal contributions to living expenses, and significant contributions to the acquisition of assets to be divided, will severely restrict the number of cases where asset divisions will occur.

### **B. Division of Assets at Death**

All of the prior meretricious relationship cases involved situations where the relationship was ended by the volitional act of one or both of the parties. In *Vasquez*, the death of one of the parties ended the relationship. Without comment, the Supreme Court extended the meretricious relationship theory to that circumstance.

Statute requires the equitable division of property upon the dissolution of a marital relationship. That provides the rationale for making a similarly equitable division of property upon the dissolution of a non-marital relationship. Death is not an occasion

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for the equitable division of marital property. Determinations are made, however, with regard to the nature of property when a husband or wife dies.

It is often important to ascertain which property was community and which was separate. There are rules for performing that chore. There are assumptions about property based on when and how it is acquired, the standard of proof to rebut presumptions, tracing rules, and so on. No such body of law exists with regard to meretricious relationships. An equitable division of a couple's property is an inherently ambiguous endeavor.

No precedent prohibits a court from making an equitable division of a couple's property when one of them dies, assuming they are in a meretricious relationship. Justices Alexander and Sanders both cite *Peffley-Warren v. Bowen*, 113 Wn.2d 243 (1989), for the opposite proposition. But the question in that case was whether the surviving partner in a meretricious relationship obtained the intestate succession rights of a spouse. Of course, that is a statutory right limited to surviving spouses. The question of whether he or she might be entitled to an equitable division of the couple's property was not before the Supreme Court. In fact, the Supreme Court referred to an equitable award to the surviving partner by the trial court in the decedent's probate proceeding "in recognition of 'the equities of the parties (*sic*) relationship during the time of the acquisition of the property.'" *Id.*

Practical problems arise if a surviving party to a meretricious relationship is entitled to an equitable division of their assets. Public policy may favor bearing the burden of those practical problems and addressing Justice Sanders' concern about upsetting the reasonable expectations of people living in meretricious relationships.

These cases seek to avoid unjust enrichment of one party at the expense of the other. Does satisfaction of that objective outweigh the practical difficulties that it presents to personal representatives and, at least until the public becomes aware of the law, frustrating the expectations of some people? Perhaps the majority in *Vasquez* weighed these considerations, but decided not to present its deliberations in the opinion. That could have assisted to better understand the result and its implications.

The Legislature or the Supreme Court also needs to provide guidance for practitioners and personal representatives. The death of a party to a meretricious relationship now creates substantial ambiguity about the ownership of the property owned by both of the parties, and its disposition. In *Vasquez*, the trial court's ruling on summary judgment found that the property owned by the couple was jointly owned and, thus, all passed to the survivor. It would seem the better resolution, under current law, would be an equitable division of the property, followed by disposition of the decedent's share by the provisions of his or her will or pursuant to the intestate laws if there is no will.

### **III. Probate and Trust Implications**

These cases raise interesting questions for probate and trust practitioners and impact the estate-planning process. If a client lives in a meretricious relationship (or a relationship that might be viewed as such), the status of that person's title to property (whether titled in the client's name or in the name of the other party) must be clarified before meaningful tax and dispositive planning can occur. That applies in same-sex relationships, too. It is no longer enough to assume that at death property will be apportioned as titled.

Cohabitation agreements that address division of assets only if the relationship dissolves will no longer be sufficient. Such agreements need to clarify the division of assets should one of the parties die during the relationship. They also need to specify the parties' degree of testamentary freedom with regard to their respective shares of the property. There should be a clear delineation of what constitutes dissolution of the relationship, especially if the property division is different on dissolution than it is on a death.

Once property status is determined, a dispositive plan can be fashioned. The client can then determine under what circumstances to leave additional property to the other party, to his or her own family or to others. Drafting clarity will go a long way to minimizing disputes in that regard. Such clients should have a will or use a living trust. The law is clear that parties to meretricious relationships do not acquire any rights under the intestate succession statutes. Thus, if one wishes to leave some of his or her share to the other, testamentary provisions will be needed.

The plan also should take into account the disposition of nonprobate assets. Although some nonprobate assets such as IRAs, cannot be divided on dissolution without adverse income tax consequences, the same is not necessarily true with beneficiary designations that take effect on the participant's death. As in the marital setting, provision for beneficiary designations in an agreement is not sufficient to effect the change. The parties must make arrangements with the custodians and plan administrators, etc., so that beneficiary designations will conform to the agreement.

Meretricious relationships raise a number of other issues that estate planners should consider. Helpful guidance is provided in "Estate Planning for Non-Traditional Families" by Elaine DuCharme in the Summer 2000 issue of this newsletter (Vol. 28, No. 3).

The *Vasquez* case also will affect the probate/estate settlement process. In a probate, the personal representative should determine whether a meretricious relationship might have existed. If so, the personal representative should consider seeking a resolution with the surviving party to the relationship or requesting a court determination of the parties' rights in their assets. At a minimum, a notice to creditors should be mailed to the surviving party to the relationship. Once title to assets has been determined, the personal representative can fulfill the decedent's testamentary desires or,

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## Recent Developments

# Probate and Trust

by Alice McCarty Adams, Esq., Seattle

### WASHINGTON COURT OF APPEALS, DIVISION I

*Estate of Furst*, 113 Wn. App. 839 (Div. I 2002)

**Summary:** A last will and testament, absent clear and express language, does not revoke a revocable living trust where such trust specifies a method of written revocation.

**Facts:** Robert J. Furst created and funded a revocable living trust, the Robert J. Furst Revocable Trust (the "Trust"). With the assistance of his attorney, Furst transferred all of his assets into the Trust, with the exception of his personal effects which included a diamond ring and \$13,000 in U.S. Savings Bonds. During his lifetime, Furst was the trustor, trustee and beneficiary of the Trust.

On the same day that Furst created the Trust, he also executed a pour-over will. In the will, Furst made specific bequests of nontrust assets to his niece, RoseMary Sunderland, and bequeathed the residue of his estate to the trustee of his Trust.

Over a year later, Furst executed a new will, which was prepared by a different attorney. Furst did not advise the new

attorney about the Trust or pour-over will, nor did he advise the former attorney of his new will. The new will revoked all former wills, but did not mention or purport to revoke the Trust. Unlike the pour-over will, the new will disposed of the remainder of his estate equally between his niece, RoseMary Sunderland, and Kathryn Whitcomb.

After executing the new will, Furst continued to receive statements from the Trust accounts, which showed that most of his assets remained in the Trust. Furst made no attempt to transfer any of these assets out of the Trust prior to his death. Sunderland, as successor trustee of the Trust and as personal representative of the estate, petitioned to have the trust assets distributed pursuant to the terms of the Trust. Whitcomb contested, seeking to have the Trust revoked and its assets distributed according to the terms of the new will.

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### ***Pennington and Vasquez...***

if there is no will, distribute the residue pursuant to the law of intestate succession.

Many other questions will deserve further thought. For example, if a surviving party to a meretricious relationship brings a claim against an estate for a division of property, will satisfaction of that claim reduce the gross estate of the decedent for estate tax purposes? It seems that it should. But if the parties make an agreement to divide property on death, will that likewise reduce the gross estate of the first to die if it results in a net transfer of assets to the survivor? What if the division of assets would have been different upon a dissolution of the relationship? Are there gift tax consequences to an agreement which fixes division of assets on death? What if the division is non-pro rata?

Washington does not recognize holographic wills, unless made in a jurisdiction in which the will was valid. After *Vasquez*, however, one's testamentary outcome may be altered by the course of his or her conduct. In essence, a decedent's property disposition can change without the benefit of a properly witnessed writing – perhaps with no writing at all. The Supreme Court may have considered the policy favoring our testamentary requirements, but we do not see it in the decision. Again, perhaps avoiding unjust enrichment justifies this change.

#### **IV. Conclusion**

The *Pennington* case should result in fewer cases where a court can find the establishment of a meretricious relationship. Perhaps courts will grant equity in fewer cases. Perhaps courts will rely on other theories more frequently to achieve fair results. In any event, cohabitation agreements are more important than ever before, at least for the benefit of the person in the relationship who has less power. Such agreements will also be important to prevent or minimize arguments about property dispositions and other post-mortem concerns.

The *Vasquez* case heightens the importance of proper planning for cohabiting couples, and especially for gay couples. The implications of that case create new potential pitfalls for personal representatives (and their legal counsel). Keeping abreast of these developments is critical.

Legislation in this area would be very helpful. The issues are too important to await resolution on a case by case basis. The Legislature could clarify fair, objective standards for determining the existence of meretricious relationships (and perhaps come up with a better label for them). It also could provide a more level playing field for the parties. Equitable division of assets should not be limited to those assets to which both persons made a direct contribution of effort or money in this setting any more than it should in marital dissolution cases.

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

The trial court found that there was a latent ambiguity in the will, because the will purported to bequeath a residuary estate that contained no probate assets. The court looked at extrinsic evidence to determine the intent of the testator and declared that the Trust had been revoked. Sunderland appealed.

**Discussion:** Execution of a new will and testament effectively revokes a prior will, but has no legal effect to dispose of property until the testator's death. Therefore, the standard reference to the disposition of the "remainder" of one's estate is not ambiguous merely because there are few, if any, probate assets in the testator's estate at his or her death. Therefore, the Court of Appeals found that there was no latent ambiguity in Furst's will.

In addition, a general residuary clause in a will is ineffective to dispose of nonprobate assets, because such assets are not governed by a will. Therefore, the provisions of Furst's Trust to dispose of nonprobate assets and the provisions of his will to dispose of probate assets could logically co-exist without any ambiguity or inconsistencies.

Furthermore, when a trust instrument specifies the method of revocation, only that method can be used. Article II of the Trust reserved to the trustor the right to amend or revoke the Trust, in whole or in part, by instrument in writing delivered to the trustee. A later will could accomplish that result, if by the terms in the document, it purported to revoke the trust. Furst's new will did not mention the Trust and therefore, could not purport to revoke it. Furst's inclusion of a residuary clause in his new will was a testamentary act and not a revocation.

Lastly, since 1998, RCW 11.11.020 has directed that one may change the beneficiary of a nonprobate asset by an express revocatory act in a later will and that "[a] general residuary gift in an owner's will, or a will making general disposition of all of the owner's property, does not entitle the devisees or legatees to receive nonprobate assets of the owner."

On the basis of the foregoing, the Court of Appeals reversed and remanded the decision for entry of judgment in favor of Sunderland.

***Estate of Otani v. Broudy***, 114 Wn. App. 545 (Div. I, 2002)

**Summary:** In a survival action, a claim for loss of enjoyment of life to compensate for a shortened life expectancy is not recoverable by the estate of the decedent because the decedent would not be entitled to such a claim had she lived.

**Facts:** While performing surgery to implant a pacemaker, Dr. Broudy punctured Ms. Yaeko Otani's aorta, which caused uncontrollable bleeding. Ms. Otani did not regain consciousness and died a few hours later. Ms. Otani was 81 years old and enjoyed a very healthy and active life. Had the surgery been successful, Ms. Otani would have had a normal life expectancy of an additional 7.9 years.

Ms. Otani's estate sued Dr. Broudy under the wrongful death and survival statutes. The trial court found that Dr. Broudy negligently caused Ms. Otani's death. Under the wrongful death statute, the court awarded damages of \$125,000 to each of Ms. Otani's two children, as statutory beneficiaries. In the survival action, the trial court awarded the estate \$450,000 for "loss of enjoyment of life which includes shortened life expectancy." Dr. Broudy appealed the survival action award of \$450,000 for the loss of enjoyment of life.

**Discussion:** Washington's wrongful death statutes, RCW 4.20.010 and 4.20.020, create a cause of action that is not available in the common law, for the losses of specific beneficiaries (e.g., spouse, child) caused by the wrongful death. By contrast, Washington's survival statutes, RCW 4.20.046 and 4.20.060, preserve the causes of action that the decedent could have maintained if he or she had lived. The former (RCW 4.20.046) preserves all causes of action that the decedent could have brought even for injuries unrelated to the death and the latter (RCW 4.20.060) is limited to claims for personal injury resulting in death.

The trial court found that the loss of enjoyment of life does not require a conscious perception of the loss – Ms. Otani never regained consciousness – based on the analogy that someone in a vegetative state can recover for loss of enjoyment of life. The court also distinguished loss of enjoyment of life from a claim of pain and suffering stating that "pain and suffering itself ends with the death.... but the loss of enjoyment of life begins with the death."

On appeal, the Court of Appeals found that, like pain and suffering, loss of enjoyment of life must be experienced in life before it can become the basis for an award of damages. The estate was not seeking an award for the hours between Ms. Otani's fatal injury and her death, but rather a number of years after her death. Given that the estate was not seeking damages based on this small window of time before Ms. Otani's death, the Court did not decide whether such damages would be available in the case of a person in a vegetative state for an extended period before death.

The Court further reasoned that because this was a loss that "begins with death," it is not a claim that Ms. Otani would have been able to make if she were still alive. Rather, Washington's survival statutes preserve claims that a living person could have brought and therefore, govern only pre-death damages.

The Court of Appeals reversed and remanded the case to the trial court.

## Recent Developments

# Real Property

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

**Condominiums: *One Pacific Towers Homeowners' v. HAL Real Estate***, 148 Wn.2d 319, 61 P.3d 1084, 2002 Wash. LEXIS 804 (2002).

The Washington Supreme Court further tilted the judicial scales in the favor of condominium owners who seek damages from developers. In an unanimous opinion, the Supreme Court refused to allow a seller of condominium units to use its ownership structure to avoid the requirement to provide a public offering statement to unit purchasers and disregarded the separate corporate identities to impose liability upon the corporate parent of the unit sellers.

OPT-1 Limited Partnership constructed a 75-unit condominium project in Seattle. The limited partnership sold 30 residential units, a commercial condominium unit and the parking garage for the project to OPT Holdings, Inc., and six subsidiaries, OPT II through OPT VII. OPT Holdings was in turn a subsidiary of HAL Real Estate Investments, Inc. HAL was owned by Paul Manheim, and Manheim was the sole officer and director of HAL, OPT Holdings and the six subsidiaries.

OPT II through VII each bought five condominium units for resale. OPT Holdings purchased the parking garage and the commercial unit. The stated reason that HAL adopted this structure was to avoid incurring "dealer" liability under the condominium statute. A dealer was defined under RCW 64.34.020(12) as one who sells six or more units. Following the purchase of the units, the OPT entities exercised certain special rights reserved to the limited partnership as declarant and resold the residential units. With each resale, the purchaser was provided with only a resale certificate instead of a Public Offering Statement (POS) that would have been required if the sales were consummated by a dealer or the declarant. The sales were completed in 1997 and 1998, and the OPT entities were dissolved. HAL received \$4,744,415 in profits, which the Court noted was a margin of 55.4% over cost.

The condominium association and twelve purchasers sued Manheim, HAL and the OPT entities in September 1999, to recover statutory penalties for failure to provide a POS. The statute allowed recovery of the greater of actual damages suffered as a result of the failure to receive the POS or 10 percent of the sales price of the units. The trial court dismissed the claims, holding that none of the entities was either a declarant or a dealer, and awarded \$73,894 in attorneys' fees against the plaintiffs. The Court of Appeals reversed. The Court of Appeals found that the OPT entities succeeded to special rights of the declarant and had an obligation under RCW 64.34.405(1) as a declarant to provide a POS to unit purchasers. The dismissal of Manheim and HAL was affirmed.

The Supreme Court affirmed the Court of Appeals as to the liability of the OPT entities, but reversed the dismissal of HAL. The dismissal of Manheim was not appealed. RCW 64.34.020(13) defines "declarant" as "...any person or group of persons acting in concert who (a) executes as declarant a declaration as defined in subsection (15) of this section, or (b) **reserves or succeeds to any special declarant right under the declaration.**" [Emphasis added]

The Supreme Court rejected HAL's argument that a recorded instrument was necessary to transfer special declarant rights in a manner that would create declarant liability, and that in the absence of a formal transfer, the remedy provided under the statute was the termination of the right to exercise the declarant's powers, not the characterization of the transferee as a declarant.

The Court of Appeals found that there was no reason to consider the remedies mutually exclusive.... We agree. Because the monetary remedy is contained in the Act itself rather than the comments, it is particularly unlikely that the legislature intended to provide the termination of the rights as an exclusive remedy.... We hold that the OPT entities are declarants under the Act because they exercised the rights to which a declarant is entitled, despite the fact that there was no formal transfer of the rights. *Id.* at 333 – 334.

The most significant aspect of the opinion, however, was the imposition of liability on HAL, the ultimate corporate parent. The Supreme Court found that HAL "acted in concert" with the OPT entities and therefore, was required to provide a POS as a declarant: "The owners argue that HAL should be held liable as a declarant for 'acting in concert' with OPT entities because HAL controlled the actions of the OPT entities. We agree." *Id.* at 334.

The Court of Appeals had rejected this argument on the grounds that the statute imposed declarant status only on those who, acting alone or in concert with others, succeeded to the rights of the declarant. HAL did not exercise any of the declarant rights, so the Court of Appeals rejected characterizing HAL as a declarant. The Supreme Court concluded that this interpretation was erroneous:

Under this interpretation, there would be no reason for the Legislature to include the "acting in concert" provision because each declarant would have to "succeed to" special declarant rights directly rather than as one who "acts in concert".... We decline to accept the Court of Appeals'

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## Recent Developments: Real Property

reasoning, as it renders the “acting in concert” language meaningless.” *Id.* at 334-335.

The Supreme Court adopted the definition in RCW 82.45.010(2)(a) to determine that “persons shall be treated as acting in concert when they have a relationship with each other such that one person influences or controls the actions of another through common ownership” and held as follows:

Under the definition of “acting in concert” provided in Title 82 RCW, the critical component is the control of the actions of one entity by another. Here, the actions of the OPT entities were controlled by HAL through their mutual officer and director, Paul Manheim. The OPT entities were created by and for the benefit of HAL so that HAL could avoid incurring liability as a dealer. They had no reason for existence other than to purchase and sell five condominiums each on behalf of HAL and were dissolved as soon as this was accomplished. HAL was the true beneficiary of the OPT entities’ actions, as it received the almost five million dollar profit generated by the purchases and sale of the One Pacific Towers property. ***Because the OPT entities were controlled by HAL and the companies worked together toward a common goal, Hal and the OPT entities clearly acted in concert.*** [Emphasis added] *Id.* at 336-337.

The difficult aspect of this opinion was the manner adopted by the Supreme Court to find that HAL acted in concert with its subsidiaries. The only “act” on the part of HAL cited by the Supreme Court was the exercise of corporate control that the owner of a closely held corporation necessarily exercises. The Supreme Court has in effect ruled that the statute required the disregard of the separate corporate nature of a declarant and the imposition upon the declarant’s owner. Presumably, this same rationale would be applicable to managers and managing members of limited liability companies.

It is not at all clear that the phrase “acting in concert” was used by the Legislature as a shorthand method to eliminate the shield from unlimited liability provided to corporations and limited liability companies. The Legislature certainly could have found a more direct way of expressing that desire instead of relying on the judicial interpretation of the phrase “acting in concert” to reach the desired result.

It is possible that the Supreme Court’s decision was influenced by the fact that the OPT entities had dissolved, and all assets had been distributed to HAL. Of course, had the profits remained with the OPT entities, there would have been no need to name the corporate parent. The Supreme Court might have used legal theories related to successor liability associated with transfers of corporate assets to reach the same result, but chose not to do so.

*HAL Real Estate* certainly adds to the problems faced by condominium developers. Washington courts have recently held that (i) declarants cannot require purchasers to arbitrate disputes arising from condominium transactions<sup>1</sup>; (ii) declarants cannot make comprehensive disclaimers of express warranties in new projects<sup>2</sup>; and (iii) the normal rules applicable to awarding attorneys’ fees to prevailing parties do not apply in the context of condominium litigation.<sup>3</sup> After *HAL Real Estate*, it will be the truly brave developer who is willing to risk unlimited personal liability to develop and sell condominium units.

**Multiple Listing Services: *Freeman v. San Diego Association of Realtors*, 2003 U.S. App. LEXIS 4091 (9<sup>th</sup> Cir. March 10, 2003)**

After observing that “monopolizing the local lemonade stand doesn’t get you into federal court,” the Ninth Circuit Court of Appeals engaged in a somewhat more serious-minded review of the pricing scheme adopted by the multiple listing service serving San Diego County, California. The Court concluded that the practice of imposing a fixed fee for each listing constituted a violation of Section 1 of the Sherman Act, 15 U.S.C. §1. The Court indicated that had the participating realtor associations simply agreed to share the data base costs and individually price those services to their respective members, the MLS arrangement would have withstood the price-fixing charge.

**Secured Lending: *Western Farm Services v. Olsen*, 114 Wn. App. 508, 59 P.3d 93, 2002 Wash.App. LEXIS 2983 (2002).**

At the end of most notes and deeds of trust used in Washington, there is a boilerplate insertion that states: “Oral agreements or oral commitments to loan money, extend credit, or to forbear from enforcing repayment of a debt are not enforceable under Washington law.” The *Western Farm* case answers the question of what happens if this disclosure is not included in loan documentation.

KeyBank loaned money to Olsen for farming operations. Simplot and Western Farm Services sold farming supplies to Olsen on credit. KeyBank, Olsen, Simplot and Western Farm entered into a subordination agreement following a year in which Olsen had been unable to repay the advances made by Simplot and Western Farm. The subordination agreement contained an addendum that provided:

If borrower attains 95% of projected budget production of his contacted potatoes, Bank shall review payoff of the undersigned creditors by 12-1-97.

Following the 1997 crop, a dispute developed between the creditors as to whether the production goal had been achieved and whether KeyBank had the obligation to pay off the suppliers after

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collection all of the crop proceeds. Representatives from the suppliers indicated that representatives of KeyBank assured them that the undertaking of KeyBank to “review” payment meant that the bank would in fact pay the suppliers’ shortfall if the requisite production level was achieved. When the bank refused, the suppliers sued. The trial court refused to instruct the jury that it could consider only the written promises made by KeyBank, based on the credit agreement statute of frauds, RCW 19.36.100 – 140. The jury awarded payment to the suppliers.

The Court of Appeals affirmed the judgment. The appellate court found that the subordination agreement was a “credit agreement” under the statute, since it was an agreement “to forbear with respect to the repayment of any debt or the exercise of any remedy” (citing RCW 19.36.100). The statute of frauds with respect to credit agreements applied only if the notice required by the statute was included within the agreement.

The notice shall be in type that is bold face, capitalized, underlined or otherwise set out from surrounding written materials so it is conspicuous. The notice shall state substantially the following:

Oral agreements or oral commitments to loan money, extend credit, or to forbear from enforcing repayment of a debt are not enforceable under Washington law.

RCW 19.36.140. If this notice is not given, RCW 19.36.100 - .140 will not apply. RCW 19.36.130. *Id.* at 517.

Since the subordination agreement did not contain the required notice, KeyBank was not entitled to the requested instruction. The testimony of the suppliers concerning the bank’s oral promise to pay was properly considered.

The Court of Appeals also reversed a portion of the trial court award against Simplot relating to payments made to Olsen. Simplot had paid Olsen directly for hauling services, and KeyBank contended that this constituted a conversion of KeyBank’s security interest in crop proceeds. The Court held that the hauling allowance was not “proceeds” to which the banks security interest attached and that the payment was allowed.

The credit agreement statute of frauds offers significant protections to parties to credit agreements, and the lesson in *Western Farm Services* is to include the statutory disclosure in any agreement that might be construed as a “credit agreement.” This includes subordination agreements and guaranties as well as notes and mortgages.

The case offers a more fundamental lesson, however. There is no substitute for clear drafting. The bank’s problems with its competing creditors arose from ambiguous language. Accepting the bank’s claim as to the intent of the language, the opinion points out the dangers of inserting “feel-good” but essentially

meaningless undertakings in agreements. Courts are reluctant to conclude that contract terms are essentially meaningless:

It can be argued that this term means only one thing: If the 95 percent benchmark were met, KeyBank had to review paying off the suppliers. But reading this provision with the remainder of the agreement and addendum suggests the term means something else: If the 95 percent benchmark were met, KeyBank had to pay off the suppliers. KeyBank was required to pay off the suppliers if certain conditions were met. ***If KeyBank had unfettered discretion in paying of the suppliers upon its review, there would be no need for the provision of the addendum at issue.*** The term is ambiguous. [Emphasis added] *Id.* at 520.

**Premises Liability: *Kamla v. Space Needle Corporation*, 147 Wn.2d 114, 52 P.3d 472 (2002).**

The rule announced in *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990), that an owner or general contractor that retained the right to control the manner of the performance of its contractors’ or subcontractors’ work, as the case may be, had a non-delegable statutory duty of care to ensure the safety of the worksite under the Washington State Industrial Safety and Health Act, Chpt. 49.17 RCW, was revisited by the Supreme Court in *Kamla*. The Court did not impose liability on the landowner for injuries suffered by a contractor’s employee, but reaffirmed that the right to exercise control can result in almost strict liability on the part of a landowner in the event of an injury arising from a WISHA violation.

Space Needle Corporation (“SNC”) hired Pyro-Spectaculars (“Pyro”) to install a New Year’s fireworks display to take place on December 31, 1997. Kamla, an employee of Pyro, was injured during the installation. Kamla, working on the 200 level of the Space Needle, dragged his safety line across an open elevator shaft. He was dragged down the shaft when a moving elevator caught the safety line and suffered serious injuries. Pyro was cited for WISHA violations as a result of the accident. Kamla sued SNC, claiming that the property owner had violated its common duty of care and statutory duty under WISHA based upon SNC’s retained control of the jobsite. SNC was granted summary judgment by the trial court on the grounds that (i) SNC did not retain control or supervision over the jobsite, and (ii) the danger of moving elevators was obvious.

The Court of Appeals affirmed on the issue of retained control, but reversed and remanded for trial, finding an issue of fact as to whether the SNC breached its common law duty of care to Kamla as an invitee.

The Supreme Court reinstated the trial court dismissal of the action. SNC had no liability for injury to an employee of Pyro, an independent contractor, in the absence of retaining control over

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### **Recent Developments: Real Property**

the manner in which the work was performed. In the absence of retained control, SNC had neither a common-law duty of care to Kamla nor a duty under WISHA to ensure compliance with safety standards.

The Supreme Court reversed the finding that there was a question of fact as to whether there was a breach of the SNC's common law duty to Kamla as an invitee. Under the standards of **Restatement of Second of Torts**, §§343 and 343A, SNC could have liability to Kamla as an invitee if SNC should have anticipated the harm to Kamla, despite the obvious nature of the hazard. Given the past experience of Pyro and Kamla working on the Space Needle, no reasonable trier of fact could have found that it was reasonable for SNC to anticipate that Kamla would drag his safety line across the elevator shaft. Dismissal of this claim was appropriate.

There is an interesting dissent by Justice Chambers that reviewed all of the theories of liability that can be utilized to impose liability for injuries suffered by persons while on the landowner's property. Justice Chambers argued for some type of reconciliation of these conflicting standards of care.

To some extent, the majority opinion confirmed the dissent's point. Having announced the general rule that the property owner was not liable for injuries to the employees of general contractors in the absence of retained control of performance, the Supreme Court felt compelled to also consider Kamla an invitee. These alternative theories of liability present something of a challenge to landowners who attempt to isolate themselves from liability for injuries suffered by employees of contractors. Adequate insurance remains the landowner's best defense against liability.

1 *See Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230 (2001).

2 *See Owners Ass'n, supra*.

3 *Eagle Point Condo. Owners v. Coy*, 102 Wn. App. 697 (2000).

## **Real Property Council Report**

*by Warren Koons, Davis Wright Tremaine LLP, Bellevue  
Chair - Real Property, Probate and Trust Section*

The Real Property Council has constituted separate task forces on deed of trust reconveyances (to address the problem of lenders who fail to timely cause the reconveyance of deeds of trust that have been fully paid) and deed of trust trustees (to address the problem of remote/out-of-state trustees who are non-responsive during the foreclosure process), which should each have a legislative proposal drafted by June for consideration in the 2004 legislative session. **But the big legislative news in real property law relates to the Washington Condominium Act.** Because of the plethora of litigation arising from the implied warranties in the Condominium Act and the corresponding cost increase and/or unavailability of insurance for condominium builders in the State, the 2003 legislative session will likely see the adoption of legislation amending the Condominium Act. Various condominium bills have been floated this session, which our Section has opposed on the basis of serious technical defects, unworkability and/or failure of the proposed bills to adequately address the problems to be solved. The Section has urged the formation of a bi-partisan task force to develop a proposal for consideration in the 2004 session; however the political pressure to adopt *something* in the 2003 session is intense.

In response to the urgent circumstances, the Section formed the 2003 Ad Hoc Condominium Act Committee which has drafted an alternative condominium bill, based on amendments to ESSB 5536. The Section is now urging legislators to adopt this amended bill which, among other things, amends the Condominium Act by:

- i) addressing the use of arbitration to resolve disputes governed by the Act;
- ii) clarifying the implied warranty of quality (particularly regarding defects which are not "material"); and
- iii) authorizing the establishment of a condominium task force, including representatives of various industry groups and stakeholders, to address whether changes are needed to the Act and whether affordable insurance is available for condominium builders.

The Section sent a letter dated March 19, 2003, to the Senate and House Judiciary Committees explaining the Section's objections to the prior version of ESSB 5536, recommendations, and our proposed revised version of ESSB 5536. A copy of this letter and draft of the Section's proposed amended ESSB 5536 is posted on the Section Website ([www.wsbarppt.com](http://www.wsbarppt.com)). (You can track the fate of ESSB 5536 by locating it on the Washington State Legislature website: [www.leg.wa.gov/wsladm/bills](http://www.leg.wa.gov/wsladm/bills).) The members of the 2003 Ad Hoc Condominium Act Committee are David Rockwell (Chair), Pete Middlebrooks, and Vince DePilli. The committee members have expended an enormous amount of time and energy in this effort on behalf of the Section, and they have our warmest appreciation and thanks.

# Probate & Trust Council Report

by Lora L. Brown, Stokes Lawrence, P.S., Seattle  
Director – Probate and Trust Council

One of the section's most important roles is participating in legislative activities that may impact the practice of law for our members. This legislative year our section did not sponsor any legislation. However, we are watching and providing resources for several House and Senate bills currently pending in various legislative committees. Several are worth noting.

## I. Current Proposed Legislation

1. Mental Health Advance Directives. HB 1041 & SB 5223. This provides a broad and powerful form of advance directive for mental health decisions. The Senate bill digest reads as follows:

- (a) A mental health advance directive must provide the individual with a full range of choices;
- (b) Mentally ill individuals have varying perspectives on whether they want to be able to revoke a directive during periods of incapacity;
- (c) For a mental health advance directive to be an effective tool, individuals must be able to choose how they want their directives treated during periods of incapacity; and
- (d) There must be clear standards so that treatment providers can readily discern an individual's treatment choices.

[The proposed bill] [a]ffirms that, pursuant to other provisions of law, a validly executed mental health advance directive is to be respected by agents, guardians, and other surrogate decision makers, health care providers, professional persons, and health care facilities.

Members of our section were unofficially involved with earlier reviews and discussions of this proposed legislation, but the section has not been active in its drafting, nor are we supporting it. The proponents of this bill believe that the proposed legislation grants an individual the necessary level of autonomy to make advance decisions about his or her own future mental health treatment and need for, or form of, commitment. It attempts to allow such individual to avoid a likely alternative, such as treatment decisions made by an agency or government, or by a court-chosen guardian. Other practitioners believe that it has very broad implications to an already problematic area of the law.

2. Washington State Estate Tax. SB 5186, SB 5418 and HB 1401. This proposed legislation would conform the Washington state estate tax to the federal tax as it existed on January 1, 2002. The Washington tax now conforms to the federal law as it existed on January 1, 2001, meaning (among other things) that while only estates over \$1 million are subject to federal estate tax, estates over \$700,000 are subject to state estate tax. The bills would

“recouple” the state estate tax, retroactively to January 1, 2002, the date on which they became “uncoupled.”

As a section of the WSBA, we are precluded from taking a position on whether the Washington estate tax should be recoupled or conformed to the federal estate tax, and if it is recoupled, whether it is done retroactively. However, our section and the Taxation Section have provided written suggestions to the Legislature so that if it determines that Washington law should be brought in line with the federal estate tax as of January 1, 2002, then it should consider several recommendations. For instance, we suggested that the bills contain a “severance” clause so if a portion of the legislation is found to be invalid for any reason, such invalidity will not affect the remainder of the legislation possibly saving the recoupling on a prospective basis even if the retroactivity of the pending legislation is declared unconstitutional.) Because this legislation will have a fiscal impact, we will not have a resolution until the end of the legislative session.

3. Transfer on Death Accounts. SB 5706. The bill would permit an investment management or custody account with a trust company or a trust division of a bank with trust powers to have a beneficiary designation that will take effect upon death of the owner.

The legislation will allow investment management or custody accounts, which generally are offered by trust departments in the banking industry, to compete on equal footing with accounts offered by brokerage companies and to offer payable on death transfers for such accounts. Our section was not actively involved with the drafting or support of this legislation.

Because this issue of our newsletter will be published well before the end of the regular legislative session on April 27th, I urge you to check our section's Web site for legislative updates: [www.wsbarppt.com](http://www.wsbarppt.com). You also may track any House or Senate Bill of interest by locating it on the Washington State Legislature Web site: [www.leg.wa.gov/wsladm/bills](http://www.leg.wa.gov/wsladm/bills).

## II. Pending Section Projects

Topics under review by volunteer task forces for potential legislative fixes include (a) a legislative change following the *Bachmeier* case (to address the issue of a revocation of the survivorship provision of a community property agreement when the marriage goes bad); (b) planning and implementing a state or county-wide repository and/or registry for original wills, (c) reviewing the Uniform Trust Code and determining whether incorporating any of its provisions would improve our current Trust Act, and (d) updating various nonconforming statutory references and technical corrections.

As always, if you have questions or comments, please let me know.

# Technology for Lawyers

## TEN GREAT WEB SITES FOR REAL PROPERTY LAWYERS

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

Quite a lot of useful information is out there in cyberspace, and it's yours for the taking if you know where to look. Last issue, we shared with you 10 Web sites that provide access to general legal information for little or no cost. This month, we have compiled a list of some of our favorite sites that offer information for the real estate lawyer.

Some of these sites will keep you up to date on legislative trends and lobbying efforts. Others offer tips and information about industry practices. Some will even be a source of forms that you can easily customize for your particular needs. Most of these sites contain links to even more information. We have listed these real property related links from general to the most specific:

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1. <http://www.abanet.org/rppt/home.html>. This is the American Bar Association's Web site for the Real Property and Probate And Trust Section. The site contains useful articles, legislative updates, and practical information for real estate lawyers.
  2. <http://www.naiop.org>. This is the Web site for the National Association of Office and Industrial Properties. Whether or not you are a member of this organization, you will find plenty of useful information here. The site features legislative news, articles about industry trends, and plenty of practical tips.
  3. <http://www.umkc.edu/dirt>. Many readers are familiar with the electronic discussion group hosted by Professor Patrick Randolph of the University of Missouri, Kansas City. This is Professor Randolph's personal homepage, appropriately titled "Dirt." The page features an archive of "daily developments" and forms and articles contributed by real estate practitioners around the country. There are also links to many other Web sites of interest to the real estate practitioner.
  4. <http://www.titlelawannotated.com>. This site provides in-depth information about title coverage matters. There are title endorsement forms, underwriting information and more useful information for real estate transactions. Links to other real property and title insurance-related sites are provided.
  5. <http://www.legalwa.org>. On this site, you will find Washington Supreme Court and appellate court decisions, the Revised Code of Washington, the Washington Administrative Code, and county and municipal codes. The Web site has links to other useful information, too.
  6. <http://www.epa.gov/echo>. Do you want to find out if a property was inspected by the EPA or state and local governments? Would you like to find out if violations were detected or whether enforcement actions were taken and penalties were assessed in response to environmental law violations? This site (abbreviated "ECHO" for Enforcement and Compliance History Online) for will help.
  7. <http://www.interest.com/calculators>. There are plenty of "mortgage calculators" out there. This one is particularly easy to use.
  8. <http://www.dol.wa.gov/forms/forms.htm-uniform>. This Department of Licensing Web site is the place to go if you need UCC forms.
  9. [ftp://ftp.metrokc.gov/records/excise\\_tax\\_affidavit.doc](ftp://ftp.metrokc.gov/records/excise_tax_affidavit.doc). This is the link to access the Washington Real Estate Excise Tax Affidavit form.
  10. [www.???](http://www.???). We leave the tenth most useful site to you, our readers. Write or email us with your suggestions, and we will include them in future columns.

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Visit these sites and explore. You are sure to find this portion of the Internet's "electronic library" a great asset. By mining the Internet, you may just find that gem of information you need.

*In an upcoming issue, look for a discussion of how to join and participate in an electronic discussion group (or "listserv"). If you have useful and practical technology tips for lawyers, please submit them to the authors at [jmm@wkdltlaw.com](mailto:jmm@wkdltlaw.com) or [danzigb@lanepowell.com](mailto:danzigb@lanepowell.com).*

## MEMBERS ONLY!

### RPPT Web Site and Midyear Meeting News

The RPPT Web site recently introduced a new "Members Only" page, which contains electronic copies of this newsletter, the Section Directory, seminar information and selected chapters from CLE materials. If you are already a member of the RPPT Section but do not have a password to access the Members Only page, please send your name and bar number to the Webmaster (who may be reached via our home page at <http://www.wsbarppt.com>).

The Members Only section of the Web site has text search capabilities, which can be used to find a name in the directory, select a particular newsletter article for re-reading, or locate a helpful CLE presentation. The search feature also is particularly useful in accessing one of the newest resources available on the site – sample chapters from the Real Property and Community Property Deskbooks. Members may access electronic versions of the following chapters from the Real Property Deskbook:

Easements and Licenses (Chapter 10)

Landlord and Tenant (Chapter 27)

Commercial Lease Practice (Chapter 28)

Conveyances (Chapter 32)

Purchase and Sale of Commercial Real Estate (Chapter 37)

Purchase and Sale of Residential Real Estate (Chapter 38)

From the Community Property Deskbook, the following chapters are available:

Character of Ownership (Chapter 3)

Management and Voluntary Disposition (Chapter 4)

The section also is pleased to announce that members who attend the RPPT Section Midyear Meeting in Yakima (June 6-8, 2003) will be able to purchase the Real Property Deskbook & 2000-2002 Supplements and the Community Property Deskbook & 1999 Cumulative Supplement at *substantial* discounts. The discounts will be offered only to section members who attend the Midyear Meeting, so make your plans now to join us in Yakima. We look forward to seeing you there!

### Practical Practice Tips: Planning for Marriage or Divorce

by Barbara C. Sherland and Laura H. Zeman,  
*Stoel Rives LLP, Seattle*

Attorneys often deal with the impact of marriage or the dissolution of a marriage on a client's estate plan. A marriage will immediately vest a spouse with rights and interests that may not be consistent with the client's plans or expectations. Prenuptial planning is essential. A client also needs to consider his or her estate plan in the event of a dissolution of a marriage or legal separation. Attorneys must be prepared to help their clients evaluate the impact of these life-changing events on their estate plans.

Published on pages 17 and 18 of this newsletter are two checklists. The first assists a client who is considering entering into a prenuptial agreement, and the second assists a client in considering the implications of dissolution of a marriage or legal separation on his or her estate plan. These checklists are intended to be used as a guide for clients to identify and understand the issues that arise in contemplation of a prenuptial agreement or in consideration of a dissolution of marriage and are not meant to be a substitute for legal advice.

### 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).

## PRACTICAL PRACTICE TIPS: CHECKLIST #1

### Considerations in Contemplation of a Prenuptial Agreement

*(NOTE: A detailed outline of Washington community property law should also be provided to clients along with this checklist.)*

Before entering into a marriage, many couples consider entering into a prenuptial agreement. The purpose of this overview is to outline some issues you should consider in contemplating a prenuptial agreement.

As a starting point, you should be aware of the basic presumptions under Washington community property law. Spouses have rights and interests during the marriage and upon termination, whether by dissolution of the marriage or death. Generally, property acquired before the marriage is the acquiring party's separate property. Property acquired during the marriage is community property, unless it was acquired by gift or inheritance. Similarly, any liability incurred before the marriage is the signing party's separate obligation. There is a strong presumption that any liability incurred after the marriage is both a community liability and the separate liability of the signing spouse.

If a marriage terminates by dissolution in Washington, the court equitably divides the parties' community and separate property. The court can award the separate property of one party to the other party and can order a party to pay spousal support (i.e., alimony).

If a marriage terminates by the death of a spouse, the surviving spouse retains his or her one-half interest in all community property; however, the deceased spouse is free to dispose of his or her one-half community property interest and all of his or her separate property in any manner desired. Generally, in Washington, there is no obligation to provide for one's spouse upon death and a surviving spouse has no right to a forced share of a deceased spouse's estate, other than a nominal family support award.

These presumptions and rights can be altered by agreement between the parties, such as with a prenuptial agreement. Although such agreements have long been recognized under Washington law, they are subject to challenge. A prenuptial agreement is more likely to be upheld if it is substantively fair (meaning that it makes fair and reasonable provisions for each party) and procedurally fair (meaning there was full disclosure of the amount, character and value of the property and the agreement was entered into fully and voluntarily on independent advice and full knowledge of rights). Each party should have separate counsel and the prenuptial agreement should be entered into, if possible, well before the date of the marriage.

Before entering into a prenuptial agreement, you should carefully consider the following issues:

- Should property presently owned by the parties remain each party's separate property or become community property?
- Should property acquired after the marriage be characterized as community or separate property?
- Should compensation received by the parties in the form of salary, bonuses, stock options, stock bonuses, deferred compensation, retirement benefits or some other form of incentive compensation or fringe benefit be community or separate property?
- How are debts and liabilities to be characterized?
- What is the effect of death of one of the parties? Should each party be free to dispose of his or her separate property and one-half interest in the community property? Should the parties waive their rights to bring a claim for a family support award or to serve as personal representative of the community estate?
- What is the impact of any prior marriage? Do obligations remain as a result of a prior marriage? Would the obligated party's one-half community property interest be reachable for claims for child support and, if that happens, should the other party be reimbursed?
- What are the parties' rights and responsibilities with respect to children of either party from a former marriage?
- Is one party supporting others, such as adult children, parents, etc.? What are the parties' expectations for continuing the support after the marriage?
- What is the effect of a possible dissolution of the parties' marriage? Should the prenuptial agreement spell out exactly what each party is entitled to, in property and maintenance allowance, or should these issues be left to the court's discretion?
- How are income taxes to be allocated among the separate property and community property estates?
- How will the parties' residence be owned and how will expenses associated with the residence be paid?
- Are any business enterprises owned or controlled by a party? If so, are they to remain such party's separate property?
- How will general living expenses be handled as well as expenses such as travel or entertainment?
- When do the parties think that they will retire and how do they plan to provide for living expenses upon retirement?

A prenuptial agreement should be tailored to fit the particular needs of the couple. Considering these issues before seeing your attorney will help you decide what type of prenuptial agreement you want and will assist your attorney in drafting the type of prenuptial agreement that fits your needs.

## PRACTICAL PRACTICE TIPS: CHECKLIST #2

### Estate Planning Considerations in Contemplation of Filing for Dissolution or Legal Separation

If you are considering filing for dissolution of your marriage or for legal separation you should immediately review your current estate plan. Particularly, you should determine if you have named your spouse as:

- your agent under your financial power of attorney or healthcare power of attorney;
- a beneficiary under your will or revocable living trust;
- a beneficiary under any life insurance policies or pension plans; or
- an executor of your estate or a trustee under your will or revocable living trust.

In some cases, your spouse's interest as a designated beneficiary or his or her right to serve as your agent or fiduciary will not automatically terminate merely because you file for separation or dissolution. If you do not wish your spouse to hold those interests or rights, you must take steps to change your estate plan.

You should determine if you have ever signed any of the following documents, and review those documents to determine whether you need to amend or change any interests or rights of your spouse. You also should consult with your attorney to discuss the need to revise or amend any of your estate-planning documents.

- Will:** Review your will to determine if you would like to eliminate any gifts to your spouse or remove your spouse as the designated executor or trustee.
- Revocable Living Trust or other Revocable Trusts:** Review your revocable living trust or other trusts to determine if you would like to change the designation of your spouse as a trustee or a beneficiary under the trust agreement.
- Community Property Agreement:** If you have a community property agreement with your spouse, you should review the agreement in light of your recent decision to file for legal separation or dissolution.
- Financial or Health Care Powers of Attorney:** Review your current financial or health care powers of attorney to determine if you would like to change the designation of your spouse as your agent.
- Beneficiary Designations for Nonprobate Assets:** Review your beneficiary designations for nonprobate assets to determine if you would like to change the designation of your spouse as beneficiary of those assets. Nonprobate assets include:
  - Life insurance policies
  - Bank accounts or brokerage accounts held as joint tenants with your spouse
  - Retirement accounts such as a 401(k), an IRA, or another qualified plan

### LawWeek2003



Week of MAY 1

**Law Week 2003** is an exciting opportunity for lawyers and judges to bring public legal education into the classroom. Each year, Law Week provides an enriching experience to youth through positive interactions with lawyers and judges.

Last May, nearly 16,000 Washington students, 58 judges and more than 400 lawyers participated in Law Week. Lawyers and judges in 34 Washington counties met with students to discuss current legal issues and specific areas of the law. Some presentations also included mock trials in which students played all the courtroom roles.

Law Week is one of the many Washington State Bar Association programs designed to increase citizen understanding of the important role that the law plays in their lives. Washington's Law Week coincides with the American Bar Association's Law Day, celebrated on May 1st across the country. Law Day was established in 1958 by President Dwight D. Eisenhower to strengthen the United States' heritage of liberty, justice and equality under the law.

For more information and to register for Law Week 2003, please visit [www.lawweek.org](http://www.lawweek.org).

## HOW TO REACH US

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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 Serena S. Carlsen of Stoel Rives LLP (Seattle), has recommended the nomination and election of the following persons to the offices indicated for the 2003-2004 term of the Real Property, Probate & Trust Section:

#### Director, Real Property Council

*Stephen R. Crossland* – Crossland Law Office (Cashmere)

#### Real Property Council

*Jody McCormick* – Witherspoon, Kelley, Davenport & Toole, P.S. (Spokane)

*Virginia M. Pedreira* – Stoel Rives LLP (Seattle)

### Probate & Trust Council

*Alan H. Kane* – Preston Gates & Ellis LLP (Seattle)

*N. Elizabeth McCaw* – Williams, Kastner & Gibbs PLLC (Seattle)

Pursuant to the bylaws, Thomas M. Culbertson of Lukins & Annis, P.S. (Spokane), will become the Chair of the Section for the 2003-2004 term and William H. Reetz of LandAmerica Financial Group (Seattle) will become Chair-Elect.

Any additional nominations should be received by the current Chair, Warren E. Koons, Davis Wright Tremaine LLP, 10500 NE 8th Street, Suite 1800, Bellevue, Washington 98004, no later than 20 days before the annual meeting which will be held during the Real Property, Probate & Trust Section Midyear Meeting scheduled for June 6-8, 2003, at Yakima, Washington. Nominations must include the name of the person to be nominated and written endorsement by five members of the Real Property, Probate & Trust Section.

## LawWeek2003



Week of MAY 1

## WSBA Service Center

800-945-WSBA • 206-443-WSBA

questions@wsba.org

## 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 \_\_\_\_\_

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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.

*Current membership year: October 1, 2002 – September 30, 2003*

Send this form with check to: \_\_\_\_\_

*office use only*

Real Property, Probate & Trust Section

Attn: Section Liaison

Washington State Bar Association

2101 Fourth Avenue, Suite 400

Seattle, WA 98121-2330

Date \_\_\_\_\_

Check # \_\_\_\_\_

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