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An Overview of Washington's 1998 Deed of Trust Act Amendments

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On June 11, 1998, a set of comprehensive amendments to Washington's Deed of Trust Act, chapter 61.24 RCW (the "Act"), took effect. The 1998 amendments revise 12 of the 14 sections of the prior Act, create 4 new sections, and modify RCW 7.28.300 (quieting title against a real property security lien) and RCW 7.60.020 (appointment of a receiver). This article provides only a thumbnail sketch of the most significant substantive changes and clarifications contained in the 1998 amendments, and the practitioner is advised to carefully review the amended Act in its entirety.

I. NEW DEFINITIONS

The starting point of any analysis of the 1998 amendments is the Act's new definitions section. Unlike the prior version of the Act, which did not define many of the key terms used throughout the statute, the 1998 amendments define eleven key terms: *grantor, beneficiary, affiliate of beneficiary, trustee, borrower, grantor, commercial loan, trustee's sale, fair value, record* and

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Sale of Residential Real Property From an Estate:

Practical Suggestions and Ways to Limit the Personal Representative's Liability

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The standard Northwest Multiple Listing Service ("NWMLS") forms for the sale of residential real property contemplate that the seller is the owner who is familiar with the property. Typically, this familiarity is because the property is either the seller's primary residence or rental property. However, when the owner has died and the seller becomes the personal representative who may be a son, daughter, friend or corporate fiduciary, this familiarity is lost. In this situation, using the standard NWMLS forms without modification can result in the personal representative incurring unnecessary liability by making broad representations and warranties based on little or inaccurate knowledge. The following points can help you limit the personal representative's liability and lay the groundwork for a smoother closing.

1. The Basics.

The following assumes that you have covered the basics: (1) the personal representative has the authority to sell the property, either under nonintervention powers or court order; (2) the sale is consistent with the terms of the Will and no beneficiary wants the property as all or part of his or her distributive share; and (3) the property is adequately insured against loss pending the sale.

However, there is one additional basic step that is often overlooked: Confirm that the decedent held title to the real property. From experience, individuals can creatively transfer real property, especially after they have received estate planning advice. For example, the decedent may have sold, gifted or transferred all or a fraction of the property to an individual, trust or limited liability company. The personal representative may not be aware of the transfer and, assuming that the decedent held title, will proceed to list the property for sale.

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Notes from the Chair

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

On May 15 the Executive Committee had a special meeting to consider ways in which we can better serve you. Many different options were considered, including broader outreach through public education; co-sponsoring special events with other Sections and outside organizations; and holding “forums” to bring current information to our members and give our membership an opportunity to speak directly with the Executive Committee.

After spending time evaluating these options the Executive Committee determined that the most effective way for us to enhance the benefits provided to our members is to (1) enhance the Newsletter, and (2) develop a top-notch Web site for our section. As reported in the last issue, the Newsletter has already been identified as one of the principal benefits of membership, and we have received many creative suggestions for its improvement. The Web page will give us an ability to post current developments and items of interest quickly, and will provide a means of immediate and direct contact to our members.

As a result of this meeting the “jobs” of the various Executive Committee members are being redefined. Over the coming year a significant portion of each Executive Committee member’s time while working for the Committee will be

committed to developing and enhancing these tools. We hope to have several “brainstorming” sessions to help develop ideas on content and delivery. As always, we hope to have as many of you involved as possible. Several of you have already contacted us and volunteered to help with these projects. This is great! If anyone else is interested, just let us know!

Since this will be my last article as Chair of the Section I want to extend my gratitude to all of my fellow Executive Committee members who continue to make this Section a success. Over the last year our Executive Committee members volunteered scores of hours to help with many projects that are intended to benefit our members:

- The review of proposed legislation
- The preparation of Newsletter articles and materials
- The preparation and presentation of quality CLE seminars
- The production of the RPPT Section Directory
- The update of WSBA Public Service Pamphlets on topics related to real property, probate & trust matters
- The preparation of a computer disk of statutory materials of interest for free distribution to our members (which should be ready this coming fall)
- The preparation of materials for inclusion on our Section’s Web page

Our Section has been successful because of these volunteer efforts and we owe a great deal of thanks to these folks. I am confident that John Riley III, who is our new Section Chair, will continue the tradition of active participation with the Bar and legislature in ensuring that the interests of our membership will always be taken into consideration.

Our Midyear Conference at Skamania Lodge (June 5 - 7) was a big success. We once again had over 200 registrants, and feedback on the presentations has been overwhelmingly positive. Many thanks to our co-chairs, Barbara Sherland (our new Probate & Trust Division Director) and John E. Glowney, for all of their efforts in putting this successful seminar together. Next year the Midyear Conference will be held at the Wenatchee Center in Wenatchee on June 4 - 6. In the year 2000 we will return to Skamania on June 2 - 4. We are pleased to report that for the Conference in the year 2000 we have received a block of 150 rooms at Skamania Lodge - an increase of 50 rooms over this year’s allocation.

As a final item, we are already starting to gear up for the 1999 legislative session. On the real property side our Executive Committee will be working on interim projects involving possible adverse possession legislation and changes affecting Homeowners Associations. The probate & trust division is

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Usually the best way to confirm that the decedent held title to the real property is for the personal representative to request a preliminary commitment for title insurance. Eventually, the personal representative as seller will have to provide title insurance to the buyer, so all this request does is generate the preliminary commitment earlier than usual. See Residential Real Estate Purchase and Sale Agreement, NWMLS Form No. 21, Rev. 6/97 (hereinafter, the “Purchase and Sale Agreement”), paragraph 14 (seller to pay for buyer’s title insurance). In addition, this will give you time to clear any unforeseen title exceptions such as old real estate contracts and mortgages long since paid but not released of record.

Now that you have covered the basics, your attention can turn to reviewing the standard purchase and sale documents, provided the personal representative gives you that opportunity.

2. The Listing Agreement.

Usually, your personal representative locates a real estate agent and signs a sale and listing agreement without your knowledge. One such current form is captioned Exclusive Sale and Listing Agreement, NWMLS Form No. 1A, Rev. 12/96 (hereinafter, the “Sale and Listing Agreement”). However, a brief review of the Sale and Listing Agreement shows why it is important for the personal representative to give you an opportunity to review it before signing.

A. Confirm Correct Seller.

The seller is typically listed as the individual or corporate entity serving as personal representative. The correct seller, however, is “[name of individual or corporate entity], as personal representative of the estate of [decedent’s name].”

But correctly identifying the seller is a very minor point compared to the warranties and representations that the personal representative may unknowingly make when signing the Sale and Listing Agreement; warranties and representations that the personal representative will come to regret, and wish that you had significantly limited, if a dispute arises with the buyer.

B. Limit the Warranties and Representations.

Under paragraph 5 of the Sale and Listing Agreement, the personal representative warrants that he or she has the right to sell the property and that the information on the attached Listing Input Sheet is correct. Typically, the broker completes the Listing Input Sheet that contains information ranging from the dimensions of the lot to whether urea-formaldehyde insulation is present. Next under paragraph 5, the personal representative represents, to the best of his or her knowledge, that there are no structures or boundary indicators that either encroach on adjacent property or on the property for sale. Finally, after making these warranties and representations regarding a wide range of facts,

the personal representative acknowledges that the broker and real estate agents will make representations to buyers based on these facts, and agrees to indemnify and hold the broker and real estate agents harmless if any of the warranties and representations are incorrect.

The concern is that the personal representative probably does not have the requisite knowledge to be making these broad warranties and representations, especially if the personal representative is a son, daughter, friend or corporate entity who only knows that the estate holds title and that the property needs to be sold. This concern is perpetuated because the real estate agents in turn make representations based on potentially incorrect information, for which the personal representative is liable. As a result, you should consider adding the following as a rider to the Sale and Listing Agreement:

Paragraph 5 of the Agreement is amended to read as follows:

5. Seller’s Warranties and Representations. Seller warrants that he or she has the right to sell the Property in his or her capacity as Personal Representative of the Estate. Seller represents that, to the best of Seller’s knowledge, the information set forth on page 2 of this Agreement (the “Listing Input Sheet”) is true and accurate. Broker has prepared the Listing Input Sheet and represents that Broker has used due care in so doing. Seller makes no other warranties with respect to the Property information on the Listing Input Sheet and makes no representations or warranties whatsoever with respect to the actual boundary lines of the Property or the existence of any encroachments onto adjacent Property or onto this Property. Broker and other members of MLS are not authorized to make any representations concerning the same.

C. Closing Agent and Form of Deed.

Select the closing agent in advance, and do so carefully. Sometimes the most efficient closing agent is the title company issuing the title insurance. If possible, interview the closing agent in advance. Some escrow companies may not be accustomed to working with attorneys. Note, though, the custom still observed by some brokers is that the purchaser selects his or her own closing agent. If you are working with such a broker, you may have little input, if any, on the selection of the closing agent.

In contrast, one issue that you must have significant input on is the form of the deed. The Sale and Listing Agreement assumes that the personal representative will convey title by a statutory warranty deed. However, a personal representative

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recorded, and person. The newly defined terms not only promote consistency and clarity in the statute, but they contain important substantive changes as well. For example, the amended Act specifically distinguishes among a "borrower," "grantor" and "guarantor." In short, a guarantor cannot also be a borrower. Since the amended Act treats borrowers and guarantors differently with respect to their potential liability for a deficiency judgment, this distinction prevents a lender from requiring the same person to act in both capacities in an attempt to circumvent the statutory limitations on post-sale liability. However, the Act does not prevent a guarantor from being a grantor under a deed of trust that is given to secure the borrower's note, provided the grantor is not also a borrower. The new definitions contain other substantive changes as well, some of which are highlighted below.

II. ANTI-DEFICIENCY PROVISIONS

Among the most notable of the 1998 amendments are the changes to RCW 61.24.100 regarding the Act's anti-deficiency rules. Under the prior version of that section, the borrower had no personal liability for a deficiency following a trustee's sale. Under the new Act, however, if the underlying obligation is a "commercial loan" (defined as a loan that is not made primarily for "personal, family or household purposes"), and the deed of trust does not encumber the borrower's principal residence on the date of the trustee's sale, a lender who purchases the property at such sale now has limited recourse against a borrower. Specifically, if and to the extent the "fair value" (another newly defined term) of the property as of the date of the trustee's sale is less than the amount of the debt, and regardless of the amount of the lender's bid, the lender may obtain a judgment against the borrower (a) for the wrongful retention of any rents, insurance proceeds or condemnation awards that are owed to the lender, and (b) to the extent such difference is caused by waste to the property committed by the borrower after the date the deed of trust is granted. Both of those provisions also apply to the deed of trust grantor (who may or may not be the borrower). In both cases, the liable party must have been given the statutory notices of the foreclosure, and the action must be brought within one year after the date of the trustee's sale, as opposed to the normal six-year statute of limitations. The one year period is extended to the extent that action is tolled by bankruptcy or any other debtor protection statute.

The amended Act also provides that a trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the "substantial equivalent" of that obligation, is not secured by the deed of trust. RCW 61.24.100(10). Thus, the parties may segregate liabilities into those that may be included in the lender's bid price, and therefore recovered from the sale if the lender is outbid, and those that will survive a trustee's sale. Because of the "substantially similar"

qualification, however, the lender cannot have it both ways: that is, both secure a specific obligation and require the borrower to execute an unsecured indemnification and cause that obligation to survive the sale.

The amended RCW 61.24.100 also clarifies the scope of a guarantor's liability for a post-sale deficiency, an issue which the Washington courts have declined to resolve. *E.g., Glenham v. Palzer*, 58 Wn. App. 294, 298 n.4, 792 P.2d 551 (1990); *Thompson v. Smith*, 58 Wn. App. 361, 367 n.4, 793 P.2d 449 (1990). Under the new Act, the guarantor of a commercial loan is liable for a deficiency judgment, but only if the guarantor was given the same statutory notices that are required to be given to the borrower and the action is brought within the limitations period applicable to the borrower and grantor. In any such action, the guarantor may plead the "fair value" of the property as a defense to some portion or all of its liability. Under this defense, the guarantor's liability is equal to the debt as of the sale date, less the greater of the successful bid amount or the fair value of the property sold at the sale, plus interest on the amount of the deficiency from the sale date at the rate provided in the applicable loan documents, plus such costs, expenses and fees as are agreed to in the guaranty. If any other collateral for the same debt is sold prior to the entry of the deficiency judgment, the fair value of that property is added to the other fair values for the purpose of determining the extent of the guarantor's liability. This "fair value" defense avoids the inequities of a double recovery that would otherwise result from a successful bid that is significantly less than both the debt and the value of the property.

Finally, as long as the guarantor is not a borrower, the guaranty itself may be secured by a deed of trust. A trustee's sale under such a deed of trust extinguishes the liability of the guarantor under the guaranty to the same extent a borrower's liabilities are terminated by a trustee's sale. However, if the foreclosed property is the guarantor's principal residence, the guarantor has the first right to the sale proceeds in an amount equal to the homestead exemption, which, under RCW 6.13.030, is the lesser of \$30,000 or the guarantor's equity in the property.

III. OTHER REMEDIES

The 1998 amendments address other remedies as well. Washington prohibits a "concurrent action" on the same debt in the context of a judicial or nonjudicial foreclosure. RCW 61.12.120, 61.24.030(4). A 1990 amendment to the Deed of Trust Act clarified that with respect to a trustee's sale in commercial loan, a request for the appointment of a receiver is not such an "action." It also permitted concurrent and subsequent foreclosures of other security granted for a commercial loan. A new subsection (2) to RCW 61.24.100 addresses two additional points. First, by taking a deed of trust, a lender is not precluded from bringing another type of action prior to commencing a trustee's sale. In other words, Washington has no "security first" rule. Second, if

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should not use this form of deed to convey title, but instead should use a special warranty deed.

The statutory warranty deed is the form of deed that makes the broadest warranties possible. Basically, the grantor warrants from the beginning of time that, among other things, the real property is free from all encumbrances, the grantee is entitled to quiet and peaceable possession of the premises, and the grantor agrees to defend the title against all persons. If there are any encumbrances against the title, they must be called out as exceptions, otherwise the grantor may be held liable for a breach of warranty. *See Washington Real Property Deskbook, Vol. II at 32-4* (Wash. State Bar Ass'n, 3d. ed. 1996) (hereinafter "Real Property Deskbook"). Again, the concern is that the personal representative is only briefly involved with the real property, probably does not have significant knowledge about the property or its title, and is making broad warranties.

Instead, a personal representative should agree to convey title by a special warranty deed. The main difference is that it limits the warranties "to those created, permitted or suffered by the grantor." *Real Property Deskbook at 32-7*. This reflects the limited involvement and knowledge that most personal representatives have regarding the real property for sale. *See Mucklestone & McCutchen, Washington Probate Manual, Vol. I at 4-4* (1998) (example of special warranty deed for personal representative).

As a result of these two considerations, you should consider adding the following to your rider for the Sale and Listing Agreement:

The following is added to Paragraph 6 of the Agreement:

Any purchase and sale agreement shall provide that a commitment for title insurance has been ordered with _____ Title Insurance Company (the "Title Company"), Order No. _____; that the transaction will be closed by the Title Company and that title will be conveyed by Special Warranty Deed.

D. Decline to Complete the Disclosure Statement.

The seller of residential real estate must deliver to the buyer a disclosure statement, unless the buyer expressly waives the right or the transfer is exempt under RCW 64.06.010. *See* RCW 64.06.020. Consistent with this requirement, Paragraph 10 of the Sale and Listing Agreement provides that the personal representative as seller will provide to the broker a completed and signed disclosure statement. One such current form is captioned Real Property Transfer Disclosure Statement, NWMLS Form No. 17, Rev. 7/96 (hereinafter the "Disclosure Statement"). This form requests that the personal representative answer such questions ranging from whether there are any zoning violations

or unusual restrictions that would affect future construction or remodeling of the property to whether the plumbing or electrical systems have existing defects. Again, this is information that a personal representative probably does not have. Although the Disclosure Statement expressly provides that the information is based on seller's actual knowledge of the property at the time of disclosure, you should still consider taking advantage of RCW 64.06.010. This provision provides that the personal representative does not have to complete the Disclosure Statement.

As a result, you should consider adding the following to your rider for the Sale and Listing Agreement:

Paragraph 10 of the Agreement is deleted in its entirety and the following inserted in lieu thereof:

Real Property Transfer Disclosure Statement.

Seller will not complete and sign a "Real Property Disclosure Statement" (W.A.R. Form D-5 or NWMLS Form 17) because Seller is exempt from such requirement under RCW 64.06.

Please note, as discussed below, RCW 64.06 does not exempt the personal representative from complying with the federal lead-paint disclosure requirements.

E. Consider Adding a General Disclaimer and Covenants.

Finally, to further limit the personal representative's liability, consider adding the following paragraph to your rider for the Sale and Listing Agreement:

The following additional paragraph is added to the Agreement:

13. Disclaimer and Covenants. Seller disclaims all warranties, including, but not limited to, all warranties regarding the zoning of the Property, except those warranties expressly made in this Agreement. Broker shall make no representations or warranties on behalf of Seller other than representations and warranties that are specifically authorized by Seller in writing. Broker shall defend and save Seller harmless from any claims or liabilities growing out of any unauthorized representation or warranty made by Broker.

3. Review the Purchase and Sale Agreement.

Often you learn for the first time the real property has been put on the market when the personal representative informs you that he or she has signed a purchase and sale agreement. Again, a brief review of the purchase and sale agreement shows why it is important to instruct the personal representative to give you an

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opportunity to review it before signing, or to insert in the agreement that it is subject to your review and approval. See the Purchase and Sale Agreement.

A. Closing Agent and Title Insurance.

Paragraph 8 of the Purchase and Sale Agreement designates who will be the closing agent. As discussed above, this decision deserves careful consideration. If in the rider to the Sale and Listing Agreement you have amended paragraph 6 to designate the closing agent, the first sentence of paragraph 8 should be similarly amended to designate the same closing agent. If you ordered a preliminary commitment for title insurance when confirming that the decedent held title to the property and/or you are using a title company as the closing agent, again to be consistent this same title company should be inserted at paragraph 14 with regard to ordering the title insurance.

B. Correct Form of Deed.

The first section of paragraph 15 provides that the personal representative as seller will convey title by a statutory warranty deed. To designate the correct form of deed, all references to “statutory” should be deleted and replaced with “special.”

If the buyer is unwilling to accept modifications to an already signed Purchase and Sale Agreement in order to allow conveyance by a special warranty deed, then the personal representative is faced with basically two options. The first option, after understanding his or her potential liability under the statutory warranty deed and that the title insurance he or she is providing the buyer does not provide coverage for the seller, is to accept the risk and complete the sale. The second option is for the personal representative to attempt to obtain a seller’s title insurance policy. Only recently have some title insurance companies started offering this form of policy.

C. Review the Warranties.

Paragraphs 6, 17 and 18 contain warranties regarding the utilities and the condition of a well and septic system, if any. You should consider deleting these warranties depending on the real property involved, or at least limit them “to the best of Seller’s knowledge without inquiry.”

D. Consider Adding a General Disclaimer.

Finally, again to further limit the personal representative’s liability, consider adding the following paragraph as a rider to the Sale and Listing Agreement:

The following additional paragraph is added to the Agreement:

33. Disclaimer. Seller makes no representations or warranties and shall not in any way be liable for any representations or warranties with respect to: (1) the

dimensions, size or acreage of the premises; (2) the condition of the premises or any buildings, structures or improvements thereon or the suitability of the premises for habitation or for purchaser’s intended use or for any use whatsoever; (3) any applicable building, zoning or fire laws or regulations or with respect to compliance therewith or with respect to the existence of or compliance with any required permits, if any, of any governmental agency; (4) the availability or existence of any water, sewer or utility rights; (5) the availability of water, sewer or other utilities; (6) water, sewer or other utility districts; (7) access to any water or public or private sanitary sewer system; (8) easements; (9) rights to tide lands or (10) rights to private roads and access to public roads. Purchaser acknowledges to Seller that, by waiving its inspection contingency Purchaser acknowledges that it has fully inspected the premises and Purchaser assumes the responsibility and risks of all defects and conditions, including such defects and conditions, if any, that cannot be observed by casual inspection.

4. Disclosure Statement.

Assuming that the personal representative has declined to complete the Disclosure Statement, you should write on the first page of the form that “Seller is exempt from completing this form under RCW 64.06.” Subsequently, the buyer should sign and date the Buyer’s Waiver of Right to Revoke Offer found on the last page of the form. If this is not done, it appears that the buyer may rescind the Purchase and Sale Agreement up until the time of closing. See RCW 64.06.030.

5. Lead Paint Disclosure Statement.

You should note that RCW 64.06 does not exempt the personal representative from complying with the federal lead-based paint disclosure requirements if the residential dwelling was built prior to 1978. See 42 USC 4852d. One current form used to satisfy this disclosure requirement is captioned Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards, NWMLS Form No. 22J, Rev. 12/96 (hereinafter, the “Lead-Paint Disclosure Form”). If due to the age of the dwelling the personal representative is required to complete the Lead Paint Disclosure Form but has opted not to complete the Disclosure Statement, then the buyer should waive the right to receive an amended Disclosure Statement on page 2 of the Lead Paint Disclosure Form.

In summary, the standard NWMLS forms contemplate the sale by an owner who is familiar with the property and its title, and who is in a position to make broad warranties and representations. These forms may require modification by you when representing a personal representative as seller with limited knowledge about

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the other action has been concluded and any portion of the debt remains outstanding, the lender may thereafter judicially or nonjudicially foreclose a deed of trust. This should avoid concerns over whether a lender is precluded from obtaining a "pre-foreclosure deficiency" against the borrower because it may not seek a personal judgment after a trustee's sale is held. While these provisions were not previously codified, neither represents a departure from existing law.

IV. BANKRUPTCY CONCERNS

Another significant provision of the new Act attempts to circumvent a common bankruptcy problem by specifically defining the exact time when a trustee's sale is deemed "final." The problem arises when a bankruptcy is filed after the conclusion of a trustee's sale, but before the trustee's deed is recorded. In this situation, four sections of the Bankruptcy Code—Sections 362(a), 541, 544(a)(3), 549(a)—combine to bring the foreclosed property into the bankruptcy estate, stay the recordation of the trustee's deed, and permit the bankruptcy trustee to avoid the transfer of the debtor's interest in the property. *See, e.g., In re Williams*, 124 B.R. 311 (Bankr. C.D. Cal. 1991); *In re Walker*, 861 F.2d 597 (9th Cir. 1988).

The amended RCW 61.24.050 attempts to avoid this result by providing that a trustee's sale is "final" as of the time and date the trustee accepts a bid, provided the trustee's deed is recorded within fifteen days. This "relation back" approach follows a similar 1993 attempt by the California legislature to circumvent the same bankruptcy concern. California's relation back statute, Section 2924h(c) of the California Civil Code, has been tested and proven effective in at least two cases, *In re Engles*, 193 B.R. 23 (Bankr. S.D. Cal. 1996), and *In re Garner*, 208 B.R. 698 (Bankr. N.D. Cal. 1997). The California approach successfully

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the property. Recognize, however, that the broker, real estate agent and buyer may not agree with all or any of your suggested revisions, and negotiation may be necessary.

The foregoing points cover the basic forms and highlight some suggested revisions. As always, carefully review all forms and addenda related to the sale and determine what, if any, additional revisions are required. By considering these issues when conducting your review, you can limit the personal representative's liability and lay the groundwork for a smoother closing.

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avoids the automatic bankruptcy stay because Section 362(b)(3) of the Code excepts from the stay certain acts to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under Section 546(b) of the Code; Section 546(b), in turn, gives effect to state law provisions permitting retroactive perfection.

V. EXCLUSION OF AGRICULTURAL LAND

In order to provide farmers and other owners of agricultural property facing foreclosure the opportunity to harvest seasonal crops from their land, Washington law provides that the foreclosure of agricultural property must be accomplished judicially, thus allowing the land owner a longer foreclosure process as well as a one year redemption period. To accomplish this result, the prior version of RCW 61.24.030 required that a deed of trust, as a prerequisite to being non-judicially foreclosed, contain a statement that the secured property "is not used principally for agricultural or farming purposes." Under an amended RCW 61.24.030, this requirement remains, although the term "farming" has been eliminated due to its ambiguous meaning. However, the new Act requires that, in addition to the statement that the encumbered property is not used for agricultural purposes, the property is not in fact so employed. To this end, the revised section requires that if the statement is false as of both the date the deed of trust was granted and the date of the trustee's sale, the property must be foreclosed judicially. Thus, a non-judicial foreclosure is allowed if the statement is true as of either of those two dates. This prohibits the grantor from changing non-agricultural property to an agricultural use in an attempt to circumvent the beneficiary's contractual right to foreclose nonjudicially. However, if the property was originally used for agricultural purposes but its use changes during the term of the deed of trust, the deed of trust may be amended to include the non-agricultural use statement, thus providing to the beneficiary the remedy of nonjudicial foreclosure.

The new Act also specifically defines the term "agricultural purposes" as "an operation that produces crops, livestock, or aquatic goods." RCW 61.24.030. This definition is consistent with an approach used in other security contexts, most notably in the proposed, new Article 9 of the Uniform Commercial Code. *See* Draft Revision of Uniform Commercial Code Article 9 — Secured Transactions; Sales of Accounts and Chattel Paper, Sections 9-102(3), (23), (29); and 9-105(c).

VI. TRUSTEES AND THE FORECLOSURE PROCESS

In 1981, the Act was amended to allow any "domestic corporation" to act as a trustee. Since that amendment, a number of out-of-state entities have been incorporating in Washington with no physical presence within the state for the sole purpose of acting as trustees in nonjudicial foreclosures. Unlike the other

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¹ The author gratefully acknowledges the significant contributions by Ellen Conedera Dial and Carol Kirby to this article

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preparing the Trust and Estate Dispute Resolution Act for re-submission to the legislature, and may have some additional proposals for changes to the durable power of attorney statutes. As bills reach proposal status they will be included on our Web page. This will allow you to see the actual terms of the specific proposals, and will give you opportunity to give us your feedback.

It has been my pleasure to serve as your Chair over this past year. Thank you for all of your assistance and support. With John Riley as your new Chair, and Mark Roberts as the new Chair Elect, I know that our Section will continue its tradition of excellence in leadership.

As always, questions, comments and suggestions are welcome and encouraged! Please provide us with your thoughts by contacting me or John Riley at:

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parties authorized to act as trustees under the Act, these out-of-state entities are essentially unregulated and may offer the grantor no in-state contact. To rectify this problem, the modified RCW 61.24.010 requires that at least one officer of a domestic corporation trustee be a Washington resident. The amended RCW 61.24.030 also requires trustees to maintain a street address in Washington prior to the date of the notice of trustee's sale through the trustee's sale for purposes of personal service of process.

Another change concerns successor trustees. Under the prior RCW 61.24.010, the beneficiary could appoint a successor trustee at its discretion. Under the amendments to that section, any such appointment is deemed an automatic resignation of the predecessor trustee. This eliminates the previous requirement that the predecessor trustee resign, which simply complicated the process and increased the costs, particularly when the original trustee was difficult to locate.

The amended Act also makes several other changes and clarifications to various aspects of the foreclosure process, including the following: codifying the existing practice of allowing the beneficiary to "credit bid" the amount of its debt at the trustee's sale (RCW 61.24.070); creating specific procedures for the handling of surplus sales proceeds (RCW 61.24.080); providing that certain anti-competitive efforts to interfere with the bidding process at trustees' sales are violations of the

Washington Consumer Protection Act (new section); clarifying that a beneficiary may "pick and choose" which junior interests in the property will remain after the trustee's sale by simply not serving those parties (RCW 61.24.040(1)(b), .060); and codifying in the Act an existing practice under RCW 62A.9-501(4), whereby a trustee can sell a grantor's interest in any personal property which is secured by a deed of trust with security agreement provisions (RCW 61.24.020, .050).

** Craig A. Fielden is an attorney with Stoel Rives LLP, where he practices primarily in the areas of real estate finance, development and leasing. Mr. Fielden would like to thank Gordon Tanner, Chair of the committee that drafted the 1998 Deed of Trust Act amendments, and David Rockwell, Chair of the subcommittee that addressed post-foreclosure liability, for their help in the preparation of this article, and David Levant for his assistance with the bankruptcy portions of this article. Messrs. Rockwell, Tanner and Levant are also with Stoel Rives LLP.*



PROBATE AND TRUST COUNCIL REPORT

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

In May, our executive committee met to discuss ways of improving and increasing the benefits of membership in the Real Property Probate and Trust Section. We attempted to define our mission, identify the things we do well and our members find valuable, and seek ways to improve the benefits of membership.

In the coming year, under the leadership of Barbara Sherland, the Probate and Trust Council of the Section will focus on these issues. In particular, our Council's emphasis will be on the following:

- Continuing Legal Education. In addition to the Midyear meeting, our Section also sponsors two probate and trust related continuing legal education seminars each year. As well as strive to organize quality Section-sponsored seminars, we will also seek to work with the Continuing Legal Education Department of the Bar to assist them in providing quality, meaningful seminars as a part of their general Continuing Legal Education schedule. We hope to accomplish this by assisting the Continuing Legal Education Department in spotting important topics for seminars and sharing our knowledge of practitioners in serving as a conduit for identifying speakers with expertise in a particular area.
- Newsletter. The Section's newsletter allows us to communicate with the membership and provide information on probate and trust-related issues of interest. Our Council will be working with the newsletter editors and to continue to improve the content and to perhaps include new features.
- Web Page. The Internet will increasingly become the most efficient and easy means of disseminating and

accessing information. Our Section's web page will be up and running soon. We will be working on enhancing its features, perhaps adding draft legislation, forms, continuing legal education materials, links to other probate and trust related web sites, and other material of use to probate and trust practitioners in Washington.

- Public Outreach. The Council is currently working on revising and updating the Citizens' Rights pamphlets relating to probate and trust material published by the Bar Association. In addition to these materials, which can be given to clients and citizens, we would also like to continue to maintain a liaison with other Sections of the Bar, like the Young Lawyers' Section, to assist in their public outreach programs.
- Legislation. As appropriate, the Council will also focus on analyzing proposed legislation with regard to its effect upon probate and trust practitioners and then comment as appropriate to the Legislature. Further, where statutory problems are brought to our attention, the Council will also work to correct those problems.

In a recent survey, many individuals in our membership expressed their willingness to get more involved in the work of the Section and the Probate and Trust Council. We expect that our goals will both enable and require more members to get involved. If you would like to become more active in this section, please do not hesitate to contact either me or Barbara Sherland, who is the new director of the Probate and Trust Council.



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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 coupon below and mail with check for \$15 to: **Real Property, Probate & Trust Section, Attn: Sheri Borgford, Washington State Bar Association, 2101 Fourth Avenue - Fourth Floor, Seattle, WA 98121-2330**

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RECENT DEVELOPMENTS

Probate and Trust

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

WASHINGTON SUPREME COURT

Estate of Kerr, 134 Wn.2d 328, 949 P.2d 810 (1998)

Summary: Where beneficiaries have petitioned for the removal of a personal representative and the personal representative has successfully defended her position, the trial court has discretionary authority under both RCW 11.96.140 and RCW 11.68.070 to award attorneys' fees to the estate.

Facts: Mary Margaret Kerr died testate on January 3, 1995 with a probate estate valued at \$24,000. Her Will includes specific bequests to five grandchildren and designated her daughter, Susan Ruegg, as residuary beneficiary. One of the grandchildren, Stacy Bennett, a daughter of Susan Ruegg, was appointed personal representative. Mother Susan and daughter Stacy have been estranged since Stacy's childhood.

In March 1995, Susan filed a motion for Stacy's removal as personal representative, petition for appointment of an independent personal representative, and a full accounting of estate assets. Her motion was granted, but reversed on revision in June of 1995. Stacy was reinstated as personal representative. The trial court awarded attorneys' fees in favor of the estate, against Susan. The Court of Appeals reversed the award of attorneys' fees, and the Supreme Court granted review.

Discussion: In determining whether Stacy was entitled to attorneys' fees in defending her position as personal representative, the court had to resolve a potential discrepancy in the probate statute.

RCW 11.68.070 permits attorneys' fees when a petitioner successfully persuades the court to remove a personal representative. This statute does not mention whether attorneys' fees can be awarded where a personal representative successfully defends her position. RCW 11.96.140 permits the court to award attorneys' fees to any party in a probate action related to the declaration of rights or legal relations, "as justice may require."

Stacy argued that she was entitled to attorneys' fees under the general statute, RCW 11.96.140. She argued that even though RCW 11.68.070 provides for the award to attorneys' fees where a personal representative has been removed, it does not prohibit the award of fees to a successful personal representative. Susan argued that the specific statute, RCW 11.68.070, supersedes a general statute such as RCW 11.96.140.

The court looked to rules of statutory construction to resolve the conflict. It reasoned that these provisions do not contradict each other; RCW 11.68.070 does not prohibit the award of

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Real Property

Scott B. Osborne, Graham & Dunn

1998 STATUTORY ENACTMENTS

The 1998 State Legislature session was very active during its 60-day session. Over 370 separate pieces of legislation were passed.

Not all of the bills that were passed were signed by the Governor. The following measures which would have affected real estate transactions in Washington were vetoed by the Governor:

- A statute preempting all local laws relating to landlord tenant matters;
- A measure allowing some rural counties to exempt themselves from the requirements of the Growth management Act;
- An act creating a center for real estate research at Washington State University to be financed by assessments upon real estate agents;
- An exemption of condominium developments from binding site plan requirements imposed by local ordinances; and
- A measure imposing additional requirements on local regulatory actions to avoid a regulatory taking.

Some, if not all, of these measures may return for consideration next year.

Below is a brief summary of the legislation affecting owners of real estate and real property transactions. Unless otherwise indicated, all of the laws passed in 1998 session take effect June 11, 1998.

ESSB 6191 (Chpt. 295, Laws of 1998) - *Deed of Trust Act Amendments*. The Deed of Trust Act (Chpt. 61.24 RCW) and several related statutes were amended to clarify certain "ambiguities." Among the provisions modified were those (i) stating the requirements imposed upon entities that serve as trustees under a deed of trust; (ii) relating to required notices; (iii) defining when the sale under the deed of trust is deemed to be completed; (iv) providing for guarantor liability following non-judicial foreclosure; and (v) setting forth the requirements for appointment of a receiver prior to foreclosure.

ESHB 2297 (Chpt. 27, Laws of 1998) - *Recording Act Amendments*. The recently enacted statutes regulating the format of recorded documents were amended to allow county auditors to accept documents with minor writings in the

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attorneys' fees to a successful personal representative. The court found that statutory provisions should be read together with related provisions to determine the legislative intent underlying the entire statutory scheme, and that a more specific statute will supersede a general statute only where the two statutes are of the same subject and conflict to the extent they cannot be harmonized. Thus, the court found that permitting discretionary awards of attorneys' fees under RCW 11.96.140 would harmonize the two statutes. The court reversed the appellate court and awarded attorneys' fees to the estate.

Estate of Malloy, 134 Wn. 2d 316, 949 P.2d 804 (1998)

Summary: If an attempted revocation or modification of a portion of a will significantly alters the original testamentary plan, it amounts to an alteration. Will alterations require the same formalities as the creation of Wills. If the formalities are not observed in the alteration, the altered portions are invalid and the Will is probated as originally written and executed.

Facts: Claire Malloy executed her Will in April of 1992. The Will provided specific bequests to a number of beneficiaries, including Claire's daughter, Mary. In April 1993, Claire changed her Will using a pencil to strike out certain words. These changes were not formally executed or witnessed and had the effect of increasing Mary's share, as residuary beneficiary of the estate. The trial court ruled that the strike-outs significantly changed the disposition of assets and were subject to the formal requirements for making a Will. Because the formal requirements were not observed, the trial court ruled the partial revocation invalid. The Court of Appeals affirmed. The Washington State Supreme Court granted Mary Malloy's petition for review.

Discussion: In determining whether Claire's partial revocation was a valid revocation or whether it was an invalid alteration or modification of a Will, the court first looked to the statute. Alterations and changes to a Will may be made by executing a codicil, which must also comply with the formality requirements set forth in RCW 11.12.020. Informal revocations are permitted; informal alterations or modifications are not. RCW 11.12.040.

The court then looked at relevant case law, which provides that whether a testator's act was a revocation or an alteration depends upon the intended consequence of the revocation and the actual effect of that consequence on the disposition scheme of the original Will. If the intent of the revocation was to significantly alter the testamentary scheme and if the revocation substantially changes the nature or value of a bequest, then an alteration and not a mere revocation has occurred. Generally, an increase in the residuary estate as an incidental consequence of the revocation would not invalidate the revocation, but where the sole purpose of the change is to increase the bequest to the residuary beneficiary, the revocation is no longer "incidental."

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margin areas. The amendments also clarified the terms "grantor" and "grantee."

SHB 2611 (Chpt. 255, Laws of 1998) - *Regulation of Mortgage Insurance*. The measure requires certain disclosures to mortgage loan applicants who are required to obtain mortgage insurance. For loans not subject to federal or secondary market requirements, borrowers have the right to cancel mortgage insurance upon the occurrence of specified events. Effective July 1, 1998.

SSB 5873 (Chpt. 6, Laws of 1998) - *MTCA Amendments*. A fiduciary acting in his or her individual capacity is not an "owner" for purposes of imposing liability under the Model Toxics Control Act. Claims against the assets of the estate, or against non-employee agents or independent contractors hired by the fiduciary were not affected.

HB 6169 (Chpt. 120, Laws of 1998) - *Third Party Appraisals*. Chpt. 18.140 is amended to allow financial institutions and mortgage brokers to use third parties who are not state licensed or certified appraisers to perform an appraisal or appraisal review under conditions acceptable to federal regulatory authorities.

ESHB 2596 (Chpt. 112, Laws of 1998) - *Master Planned Resorts*. The requirements for services to be provided master planned resorts under the Growth Management Act are modified to ease the restriction on these types of developments.

ESHB 2830 (Chpt. 286, Laws of 1998) - *Growth Management Act Amendments*. This measure amends the GMA in accordance with recommendations from the Land Use Study Commission appointed following last year's legislative session. Provisions relating to urban areas, mineral areas and resource lands are modified.

SSB 6130 (Chpt. 155, Laws of 1998) - *Underground Storage Tanks*. The expiration of Washington's statute regulating underground storage tanks is extended to July 7, 2009. Provisions relating to evidence of compliance and coordination of UST licenses and master business licenses were added to existing statutes.

SB 6159 (Chpt. 12, Laws of 1998) - *Eliminating Land Bank*. The statute establishing the Washington land bank, Chpt. 31.30 RCW was repealed.

SHB 2931 (Chpt. 33, Laws of 1998) - *Electronic Signatures*. Certification authorities are restricted from employing persons convicted of felonies.

SHB 2576 (Chpt. 46, Laws of 1998) - *Splitting Commissions on Mobile Homes*. Licensed brokers or salespersons may split commissions with a manufactured housing retailer licensed under Chpt. 46.70 RCW on the sale of manufactured housing sold in conjunction with the sale or lease of land.

ESSB 6323 (Chpt. 57, Laws of 1998) - *Adverse Possession of Certain Forest Lands*. Adverse claimants of forest lands of

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Even where an increase in the residuary estate is only an incidental consequence, the court will look to the effect of that increase. Where the increase is significant or has a profound effect on the testamentary scheme, the revocation will be declared invalid because it constitutes an alteration not a revocation.

The court found that Claire's sole purpose in canceling the specific bequest and trust provisions was to increase the amount and the form of her daughter Mary's share of the estate, and hence an alteration, not a revocation, had occurred. Because the strike-outs were made without the formalities required for the proper execution of Wills, the court found them invalid and ineffective. Therefore, the original April 1992 Will was ordered probated as written and executed.

Young v. Estate of Snell, 134 Wn.2d 267, 948 P.2d 1291 (1997)

Summary: In an action for personal injuries against the estate of an alleged tortfeasor who was insured at the time of the injury, but died prior to the expiration of the applicable statute of limitations, the suit must be brought within three years of the conduct giving rise to the action.

Facts: On August 29, 1991, William Young, a Washington resident, was involved in an auto accident allegedly caused by Rex Snell, a California resident. Slightly over a year later, Snell died intestate of unrelated causes. On August 18, 1994, Young filed a personal injury action in Pierce County naming Snell as defendant. Young did not attempt to serve a personal representative of Snell with a copy of the summons and complaint. On February 24, 1995, Young's attorney had Harry Platis appointed as personal representative of the Snell Estate. One week later, a second summons and amended complaint was filed and served on Platis.

The Snell Estate moved for summary judgment on the grounds the suit was barred by the three year statute of limitations applicable to personal injury actions. RCW 4.16.080(2). The trial court denied the motion. It relied upon *Augustson v. Graham*, 77 Wn. App. 921 (1995), and concluded that there is no statute of limitations on actions against the estate of a decedent if the decedent was insured against liability for the incident giving rise to the claim, and died prior to the running of the three year statute of limitations. Young sought discretionary review of that decision with the Washington State Supreme Court.

Discussion: The court held that the legislature intended the three-year statute of limitations of RCW 4.16.080 to apply to personal injury actions even where the alleged tortfeasor dies prior to the expiration of the term. The court's holding is based upon an analysis of a number of seemingly conflicting statutes.

RCW 4.16.080(2) provides a three year limitation on actions for personal injury. However, RCW 4.16.200 provides that the rules of RCW ch. 11.40 apply to actions against persons who die before the expiration of the otherwise applicable time period. RCW 11.40.011 (repealed, see RCW 11.40.060) enumerates

circumstances under which liability or casualty insurers may not benefit from a statute of limitations related to a decedent's estate. The statute, however, does not expand the statute of limitations for bringing actions against the estate of a decedent.

The Snell Estate argued that the three year statute of limitation under RCW 4.16.080 governed, and thus Young's suit is time-barred. Young argued that there is no applicable statute of limitation on his claim because the decedent had liability insurance.

The court agreed with the Snell Estate and held that the three-year statute of limitations applied. Citing the legislative history of RCW 4.16.200 and 11.40.011, the court found that the intent was to subject claims such as Young's to the normal statute of limitations. Specifically, the Legislature intended for actions against estates to be brought within the time provided in the statute of limitation that would have applied had the alleged tortfeasor not died prior to its expiration. In other words, the court concluded that while former RCW 11.40.011 precluded insurers from benefiting from the time limitations for filing of claims against the estate of a decedent, it did not intend to change the time limitations for plaintiffs to bring lawsuits against the estate of a decedent. The State Supreme Court reversed the Superior Court and remanded the case for entry of an order granting summary judgment in favor of the estate.

WASHINGTON COURT OF APPEALS

Estate of Morris, 89 Wn. App. 431, 949 P.2d 401 (Div. II 1998)

Summary: In order for a personal representative to receive attorneys' fees for a successful defense of its position, the personal representative must establish that the litigation provided a substantial benefit to the estate.

Facts: Howard Morris died in January 1989, and his wife Alice died a few months later. Puget Sound National Bank (the "Bank") was appointed as the personal representative of both estates in Thurston County Superior Court.

The heirs of the estate sued the Bank in King County for failure to disclaim a particular asset in Morris' estate, which resulted in adverse estate tax consequences in Alice's estate. The Bank prevailed on summary judgment, but did not request attorneys' fees at the time. Instead, the Bank petitioned the court in Thurston County for attorneys' fees as a cost of administration in Morris' estate. The court denied the Bank's petition, reasoning that the request should have been made during the King County action. The Bank appealed.

Discussion: In an action for attorneys' fees under RCW 11.96.140, the proponent has the burden of proving that the litigation resulted in a substantial benefit to the estate.

The Bank argued that the court should adopt the rule that, in trustee fee cases, a trustee who successfully defends her right to

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REAL PROPERTY COUNCIL REPORT

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

As many of you know from previous columns, the legislative session was quite active for the Real Property Council. Several pieces of legislation were signed into law and are effective as of June 11, 1998. The first, and perhaps the most important, of these bills is the Amendments to the Deed of Trust Act. The amendments clarify many technical areas in the existing Deed of Trust Act which have raised questions and thorny issues for real estate practitioners. A session at the midyear meeting will be devoted to a review of these amendments and, for those of you who cannot attend, the materials will be available through the WSBA.

Another significant bill repeals certain provisions of the Uniform Partnership Act and effectively adopts portions of the newly revised Uniform Partnership Act. This bill allows the merger of various business entities, provides criteria for certain partnership agreement provisions and prohibits the waiver of certain partnership rights. The bill also clarifies the liability and rights of a partner.

Several bills were submitted this session to abolish or amend adverse possession. The only bill to be passed and signed into law was SB 6323 which limits adverse possession claims against forest land owners to those in which the cost of the permanent or semi-permanent improvements exceeds \$50,000.

HB 2611-S regulates the required disclosure and requirements for mortgage insurance. The bill provides that if a borrower is required to obtain and maintain mortgage insurance as a condition of entering into a residential mortgage transaction, the lender must disclose to the borrower whether and under what conditions the borrower has a right to cancel the mortgage insurance premium in the future. The new legislation further provides that on or after July 1, 1998 no borrower entering into a residential mortgage transaction in which the principal amount of the loan is less than 80% of the fair market value of the property can be required to obtain mortgage insurance.

Last, but not least, the Recording Act was modified to allow the recording of instruments where on the first page of the document a portion of a notary seal, incidental writing, or minor portion of the signature extends beyond the margins. Since the bill is limited to the first page of the document, it may not be as effective as its drafters intended. For those of us who have met with frustrations in getting documents recorded in counties other than our own, something is better than nothing.

If you have any questions or comments regarding any real estate legislation that has been discussed in this column, please write, call or e-mail me. You can write to me at Bogle & Gates, 601 Union Street, Seattle, WA 98121-2346 or contact me at my Email address, sschourup@bogle.com, or by telephone at (206) 621-1415. Your input is greatly appreciated.



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twenty acres or more must establish by clear and convincing evidence that the claimant has made or erected substantial improvements costing more than \$50,000, which have remained on such lands for at least ten years.

SSB 6669 (Chpt. 100, Laws of 1998) - *Perpetual Timber Rights*. The process for completing forest practices applications has been changed for lands affected by permanent transfers of timber rights.

HB 2306 (Chpt. 258, Laws of 1998) - *Sufficient Cause for Nonuse of Water Rights*. The relinquishment of water rights is deemed not to occur under certain lease situations.

ESHB 1223 (Chpt. 276, Laws of 1998) - *Landlord Tenant Relations*. Unlawful detainer actions are authorized against tenants involved in gang related activity.

HB 1549 (Chpt. 306, Laws of 1998) - *Reducing Property Tax*. An owner affected by land use restrictions may petition for a reduction in property taxes.

HB 2309 (Chpt. 310, Laws of 1998) - *Notification of Denial of Property Tax Exemption*. Notice by certified mail is no longer necessary in connection with a denial of property tax exemption. Effective January 1, 1999.

SHB 2315 (Chpt. 311, Laws of 1998) - *Technical Corrections of Excise and Property Tax Statutes*. Provides corrections to certain ambiguous provisions and makes statutes gender neutral.

ESSB 6205 (Chpt. 327, Laws of 1998) - *Waiver of Interest on Delinquent Taxes Due to Death*. Interest can be waived on failure to timely pay taxes on the residence of a deceased parent or stepparent.

Case Law Updates: WASHINGTON SUPREME COURT

Sing v. John L. Scott, Inc., 134 Wn.2d 24, 948 P.2d 816 (1997)

Facts: Sing sought to purchase property listed through a John L. Scott office. After submitting an offer through Scott, two other agents in the Scott office made a competing offer which the owner accepted. Sing sued for tortious interference with contractual expectancies and a violation of the consumer protection act. The trial court awarded damages for a CPA violation based on the failure of the broker to take precautions to safeguard the confidentiality of Sing's offer. The Court of Appeals affirmed.

Holding: The Supreme Court reversed. Scott had no duty to maintain the confidentiality of Sing's offer. As the listing agent, Scott's primary duty was to the seller and that duty included the obligation to get the best deal possible for the seller. There is no statutory prohibition on agents buying property listed through their office even if an offer has been

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Recent Developments: Probate and Trust

continue administering the trust is presumed to have conferred a benefit on the trust, and is thus entitled to fees. Instead, the court distinguished trustee fee and personal representative fee cases, by pointing out the differences in the roles of these two types of fiduciaries. In essence, trustees serve for longer duration and are chosen for their ability to make sound investment decisions for the trust over time. Personal representatives are rarely chosen for their investment abilities, and unlike Trustees, they are expected to perform their duties expeditiously and to close the estate as quickly as possible. While interim investments may be made, generally a personal representative is not faced with long-term investment decisions. Based upon these differences, the court determined that the presumption in trust cases should not be applied to awards of attorneys' fees for personal representatives defending their position. Instead, trial courts must determine, on a case by case basis, whether a personal representative's defense of his or her position confers a substantial benefit on the estate.

Furthermore, the court rejected the Bank's argument that it should be awarded fees as a matter of public policy, because otherwise it, and other corporate personal representatives, will be forced to charge higher fees to cover unexpected exposure. The court reasoned that the Bank, like all professionals offering services for a fee, risk claims that services were not performed properly. The court determined that this should be an expected risk, which should not be shifted to an estate, in the absence of a finding of substantial benefit to the estate arising out of this type of litigation.

In this case, the probate was near its conclusion when the litigation arose, and the personal representative was ready to close the estate. Since the dispute did not bear on the Bank's ability to continue acting as a personal representative, the Bank was not entitled to attorneys' fees because no "substantial" benefit was conferred upon the estate under RCW 11.96.140.

Estate of Wood, 88 Wn. App. 973, 947 P.2d 782 (Div. III 1997)

Summary: An administrator or personal representative of an estate who is also an heir has standing to appeal an order removing her as personal representative.

Facts: Allyn A. Wood died in 1994. One month later the court admitted her will to probate and issued letters testamentary to her daughter, Nancy Russell. One year later, Ms. Russell's siblings filed a motion to revoke the letters testamentary and appoint Ms. LaBelle, another child of Ms. Wood, as personal representative. The court entered an order removing Ms. Russell as personal representative and appointing Ms. LaBelle. Ms. Russell appealed that order. The clerk of the court then set before a commissioner, a motion to determine the appealability of that order. The commissioner referred the question to the Court of Appeals.

Discussion: The court held that an order revoking letters testamentary and removing a personal representative is an appealable final order. Ms. Russell could appeal the court's decision as a matter of right because the order removing her as personal representative is a decision determining action under RAP 2.2(a)(3). A decision determining action is any written decision affecting a substantial right which in effect either determines the action and prevents a final judgment or discontinues the action. *Id.* Because the order removing Ms. Russell discontinued the probate proceeding with respect to her rights as the appointed personal representative, the order was a decision determining action which entitled her to an appeal as a matter of right.

Ms. LaBelle also claimed that Ms. Russell lacked standing to bring the appeal. Only an aggrieved party has standing to appeal a superior court decision. RAP 3.1. An aggrieved party is someone whose proprietary, pecuniary, or personal rights are substantially affected. Although an administrator who has no interest in the probate action other than being the administrator lacks standing to appeal, Ms. Russell had a pecuniary and personal interest as an heir of the estate, which confers upon her standing to bring the appeal. Thus, the court ruled that Ms. Russell has standing.

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made through that agency. Sing's argument that Scott violated the CPA by not starting a "bidding war" was also rejected.

WASHINGTON COURT OF APPEALS

***Edmonds v. John L. Scott Real Estate*, 87 Wn. App. 834, 942 P.2d 1072 (Div. I 1997)**

Facts: A prospective buy of a house sought to recover an earnest money deposit. The purchaser refused to close the purchase of the house because the basement leaked. She had specifically instructed the sales agent to make certain that the leak was repaired prior to closing. The in-house counsel for the realtor determined that the purchaser had breached her obligations under the purchase agreement and forfeited the deposit, one-half to the seller and the other half to the realtor. The trial court entered a judgment in favor of the purchaser and found the realtor in violation of the consumer protection act.

Holding: The judgment was affirmed, except for the portion awarding attorneys fees. The Court of Appeals remanded the determination of attorneys fees to the trial court to make a new award based upon a "lode star" calculation. The agent breached its obligations to the buyer by failing to adequately draft the purchase agreement in accordance with the buyer's instructions. The practice of the realtor of unilaterally determining the party at fault if a transaction does not close and distributing escrow funds which it held accordingly violated the consumer protection act and the realtor's duty as an escrow agent.

Editor's note: The Washington Supreme Court denied review of this case. *Edmonds v. John L. Scott Real Estate*, 134 Wn. 2d 1027, 1998 Wash. LEXIS 314 (1998). The appellate case was discussed at length in the lead article by Nancy Cahill ("Seller's Disclosure Requirements in Real Estate Transactions and the *Edmonds* Case") in the Spring 1998 edition of this newsletter.

***Seattle First Nat'l Bank v. Mitchell*, 87 Wn.App. 448, 942 P.2d 1022 (Div. I 1997)**

Facts: Seafirst sued its tenant for breach of lease. Seafirst claimed that the tenant refused to repair fire damage to its premises. The damage was covered by insurance, but Seafirst sought reimbursement for the deductible portion of the loss. The tenant claimed that the waiver of subrogation provision of the lease exempted the tenant from liability.

Holding: The dismissal of Seafirst's claim by the trial court was upheld. The waiver of subrogation provision provided that the parties mutually waived "their respective rights of recovery against each other for any loss insured by fire, extended coverage and other property insurance policies." The loss was

covered by the insurance policy; the deductible was simply a portion of the loss that Seafirst elected to self-insure.

***Robin L. Miller Construction v. Coltran*, 87 Wn.App. 112, 940 P.2d 661 (Div. I 1997)**

Facts: Robin L. Miller Construction ("RMC") obtained a default judgment against Coltran in 1989. The judgment was recorded in July, 1992. After the recording of the judgment, HFC made a loan to Coltran, which was secured by a deed of trust on Coltran's house. In 1994, Coltran defaulted. HFC foreclosed, resold the house to Hyppas and loaned a portion of the purchase price to the new buyer. In March, 1995, RMC attempted to execute on the property. The trial court granted Hyppas motion to quash the writ of execution against the property.

Holding: The Court of Appeals affirmed the trial court. The determination of the excess value of a homestead property to which the judgment lien attached was to be made as of the time of the appraisal of the homestead property and not when the judgment was recorded. In computing the net value of the property to determine the excess value available to satisfy the judgment, all liens against the property must be included in the determination plus the homestead amount. In this case, the value of the home was \$145,000; the sum of the \$30,000 homestead, plus the HFC mortgage of \$111,650, plus the judgment lien of \$18,904 exceed the value of the house, so there was no net value and the writ of execution was properly quashed.

***Ackerman v. Sudden Valley Community Ass'n*, 89 Wn.App. 156, 944 P.2d 1045 (Div I 1997)**

Facts: Members of a homeowners association challenged the right of the association to levy different dues against lot owners. Lots which were developed with residences paid more than lots which were undeveloped. The members claimed that this dues structure violated the terms of the covenants and the provisions of the association's articles of incorporation. The trial court found that the dues structure violated the association's articles, but did not violate the covenants.

Holding: The Court of Appeals reversed the trial court's ruling with respect to the articles. Both the covenants and articles as drafted allowed a two tiered dues structure so long as the structure is equitable. The fact that the association could have only one class of members did not mean that all members had to pay the same amount of dues.

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Upcoming Section CLE Seminars

The Real Property, Probate & Trust Section will host the following events in 1998 and beyond.

Commercial Real Estate Drafting

September 11, 1998 - Washington State Convention & Trade Center (Seattle)
September 18, 1998 - Cavanaugh's Ridpath (Spokane)

How to Handle Federal Estate Tax Returns

September 11, 1998 - Seattle Center (Seattle)
September 18, 1998 - Cavanaugh's Ridpath (Spokane)

New Deed of Trust Act

October 1, 1998 - Seattle Center (Seattle)
October 8, 1998 - Cavanaugh's Inn at the Park (Spokane)

Project Development from A to Z

February 25, 1999 - Seattle (Site to be announced)
March 3, 1999 - Cavanaugh's Inn at the Park (Spokane)

Advanced Will Drafting

March 17, 1999 - Seattle (Site to be announced)
March 19, 1999 - Cavanaugh's Inn at the Park (Spokane)

Real Property, Probate & Trust Section Midyear Conference

June 4-6, 1999
Wenatchee Center, Wenatchee

Advanced Probate

July 21, 1999 - Seattle (Site to be announced)
July 22, 1999 - Cavanaugh's Inn at the Park (Spokane)

Real Property, Probate & Trust Section Midyear Conference

June 2-4, 2000
Skamania Lodge, Stevenson