// Real Property, Probate & Trust

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Attorneys' Fees in Trust and Estate Disputes Before and After TEDRA

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I. Introduction

Washington follows the American rule that a prevailing party in litigation is not entitled to an award of attorneys' fees unless specifically authorized by contract, statute or recognized ground in equity. In trust and estate proceedings in Washington, the American rule has been fairly well abrogated. A number of provisions in Title 11 RCW grant courts great discretion in awarding attorneys' fees in a variety of situations.

The number of statutory provisions authorizing attorneys' fees in trust and estate disputes, the variety of situations in which they apply, who is entitled to an award and the standards that courts must use in awarding attorneys' fees in any given situation, make this area complicated and confusing. A number of policies underlie these attorneys' fees provisions, such as: to preserve estate assets for the intended beneficiaries; to compensate individuals who successfully challenge actions or decisions of a personal representative or trustee; to discourage frivolous and wasteful litigation that delays or frustrates the orderly administration of trusts or estates; to make the estate or trust whole; to reduce the financial burden that may be imposed on individuals who serve as personal representative or trustees; to compensate those who substantially benefit the estate; and to discourage those who pursue a dispute in bad faith.

Recently, the legislature enacted the Trust and Estate Dispute Resolution Act, Laws of 1999, ch. 42 (hereinafter "TEDRA") which becomes effective January 1, 2000. TEDRA authorizes any party to a trust or estate dispute to require that all parties to the dispute submit to mediation and then to arbitration before litigation. In required mediation or arbitration proceedings, TEDRA overrides the variety of existing statutes authorizing attorneys' fees by providing that, in general, each party shall bear its own costs and attorneys' fees. TEDRA also provides that any party not satisfied by an arbitration decision may appeal to the superior court for a trial *de novo*. The most significant change TEDRA makes regarding attorneys' fees in trust and estate disputes is to mandate that the court award attorneys' fees to the prevailing party in such an appeal.

This article outlines the existing statutory provisions that authorize payment of attorneys' fees in trust and estate matters. It also reviews the sections of TEDRA that concern attorneys' fees in mediation, arbitration and litigation under the new act. In any request for an award of attorneys' fees in trust and estate disputes, the statutory basis and source for such an award are only the first issues to address. The second issue is whether those fees are reasonable. TEDRA does not alter the requirement that the court may award only reasonable attorneys' fees. This article outlines the factors to consider in establishing that any request for attorneys' fees in trust and estate disputes is reasonable.

II. Current Bases for Attorneys' Fees

A. RCW 11.48.210 — The Personal Representative's Attorneys Are Entitled to Be Paid from the Estate

Attorneys representing the personal representative of an estate are to be compensated out of the estate "as the court shall deem just and reasonable." RCW 11.48.210. The attorneys' compensation may be allowed at the final accounting or at any time during administration upon application by the personal representative or the attorney. Id. The personal representative's attorneys' fees are considered expenses of administration and are given first preference for payment from the estate. RCW 11.92.035(1). Likewise, the fees for attorneys representing a

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Notes from the Chair

John M. Riley III
Witherspoon, Kelley, Davenport & Toole, P.S., Spokane

In my last article as chair of the Section, I want to thank all of my fellow Executive Committee members for their contributions to the Section over their respective terms of office. Over the last year, our Executive Committee members dedicated numerous hours to many activities and projects, some of which are:

- The review of proposed legislation
- Interacting with other EC members and the WSBA lobbyist to comment on proposed legislation
- The preparation of Newsletter articles and materials
- Getting the Newsletter together and to press
- The organization of excellent CLE seminar locations and chairs
- The preparation and presentation of quality CLE seminars
- The update of WSBA Public Service Pamphlets
- Liaison with other WSBA Sections, Committees and related Bar and Practice Organizations
- The preparation, creation and dissemination of the RPPT disk
- The analysis of the existing and potential features and preparation of materials for our Section web page
- Assisting the WSBA in responding to practice-related ethical inquiries
- Discussing and implementing long range plans for the Section

I want to thank Jane Rakay Nelson and Steve Tubbs of the Real Property Council and Thomas M. Culbertson and Marcia K. Fujimoto of the Probate and Trust Council for their volunteer efforts in many of these areas. They spent many hours working for our benefit. I also want to thank Warren Koons and Michael Currin for their contributions while on the Editorial Advisory Board.

As Mark Roberts assumes the Chair of the Section, Serena Schourup advances to Chair Elect, Warren Koons advances to Director of the Real Property Council and Barbara Sherland continues as Director of the Probate Council, I am confident that the history of great leadership of the Section continues into the future.

Our recent Midyear Conference in Wenatchee was another success. We had a full complement of registrants, and the comments on the topic presentations and materials has been very positive. Co-chairs Dennis A. Ostgard and Karen E. Boxx deserve many thanks for organizing and managing the seminar. Next year we will have the Midyear at Skamania Lodge (with a bigger block of rooms!).

This next year promises to be filled with lots of interesting Section activities. We, as always, hope to involve our members in our existing projects and the ones just over the horizon. Please don't hesitate to contact any Board member, me or Mark Roberts if you see or hear about an activity you would be willing to volunteer for. Our Web page expansion is just one area where Section members can have fun.

It has been my pleasure to serve as your Chair over this past year. Thank you especially if you wrote or called. We have wonderful talent and vigor in our new Executive Committee Board members. I look forward to an exciting next year.

If you would like to contact us, we are at:
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"notice agent" administering nonprobate assets are considered costs of administering those assets and are given first preference for payment from the nonprobate assets. RCW 11.42.090(2)(a).

The personal representative is individually liable to his or her attorneys for all services rendered, whether properly chargeable against the estate or not. *Estate of Kleinlein*, 59 Wn. 2d 111, 116, 366 P.2d 186 (1961); *Estate of Peterson*, 12 Wn. 2d 686, 731, 123 P.2d 733 (1942). A personal representative may (1) pay his or her attorneys then ask to be credited in the final accounting; (2) delay payment until such accounting is made and then request an allowance to himself or herself for compensation to the attorneys; or (3) wait and move the court on final accounting for an order allowing fees to be paid directly from the estate to the attorneys. *Peterson*, 12 Wn. 2d at 731.

B. RCW 11.92.180 — Fees for a Guardian's or a Limited Guardian's Attorney

A guardian or limited guardian is to be compensated for services as the court deems "just and reasonable." RCW 11.92.180. Where a guardian or limited guardian is an attorney, the guardian must separately account for time as a guardian and for time as an attorney providing legal services. Id. The guardian's or limited guardian's compensation and expenses, including attorneys' fees, shall be fixed by the court. Id. Application for fees may be made in any annual or final accounting or at any time during the administration of the estate. Id.

C. RCW 11.96.140 — General Provision for Fees in Trust and Estate Proceedings

The general attorneys' fees provision applicable to trust and estate proceedings states:

> Either the superior court or the court on appeal, may, in its discretion, order costs, including attorneys' fees, to be paid by any party to the proceedings or out of the assets of the estate or trust or nonprobate asset, as justice may require.

RCW 11.96.140 (repealed effective Jan. 1, 2000 by TEDRA, Laws of 1999, ch. 42, § 637(18)). The language "costs, including attorneys' fees" as used in RCW 11.96.140 is not limited to statutory attorneys' fees but is intended to encompass actual attorneys' fees. *Estate of Mathwig*, 68 Wn. App. 472, 479, 843 P.2d 1112 (1993). Thus, the statute allows courts wide discretion to award attorneys' fees (1) to any party and (2) against any party, including the estate or trust, or even the personal representative individually. See *Estate of Kerr*, 134 Wn. 2d 328, 341-42, 949 P.2d 819 (1998); *Mathwig*, 68 Wn. App. at 479.

Whether a party prevailed is not the standard governing the award of fees under RCW 11.96.140, as the statute plainly allows an award of fees "as justice may require." Courts will award fees against a personal representative individually where he or she has breached a fiduciary duty owed to the estate or to a beneficiary. *Gillespie v. Seattle First National Bank*, 70 Wn. App. 150, 178-79, 855 P.2d 680 (1993). On the other hand, a "lack of success does not indicate bad faith or a lack of probable cause in making the challenge" and in that case attorneys' fees will not be assessed against the personal representative individually. *Estate of Magee*, 55 Wn. App. 692, 696, 780 P.2d 269 (1989).

On its face, the statute applies in *any* proceedings under Title 11 RCW. See also RCW 11.96.130. In two cases, however, courts have held that it does not apply in will contests. See *Estate of Marks*, 91 Wn. App. 325, 957 P.2d 235 (1998); *Bentzen v. Demmons*, 68 Wn. App. 339, 349-50 n.8, 842 P.2d 1015 (1993) (dictum) (plaintiff claimed she and decedent had orally contracted for devise of certain property). In *Marks* the court held that because will contests are governed by RCW 11.24, which has its own specific attorneys' fees provision, RCW 11.24.050, the general attorneys' fee provision, RCW 11.96.140, did not apply. *Marks*, 91 Wn. App. at 338. Other cases have applied RCW 11.96.140 where other specific attorneys' fees provisions would apply but do not directly conflict. See *Kerr*, 134 Wn. 2d at 343 (RCW 11.96.140 does not conflict with RCW 11.68.070 in awarding fees to personal representative who successfully defeats petition for removal); *Mathwig*, 68 Wn. App. at 477-79 (RCW 11.96.140 and RCW 11.76.070 both apply).

The issue of whether the general attorneys' fees provision, RCW 11.96.140, applies to situations governed by other specific attorneys' fee provisions found in Title 11 RCW is resolved by TEDRA. The legislature repealed RCW 11.96.140, effective January 1, 2000, and replaced it with a similar but much clearer general attorneys' fees provision. Laws of 1999, ch. 42, § 308. The new provision expressly applies to all proceedings governed by Title 11 RCW, and "shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise." Laws of 1999, ch. 42, § 308. Of course, no statute specifically provides otherwise at this point.

D. RCW 11.24.050 — Fees in Will Contests

The attorneys' fees provision applicable to will contests provides:

> If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney's fees as the court may deem proper.

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RCW 11.24.050. The term "costs" used in the statute is not limited to statutory costs under RCW 4.84.010, but includes reasonable attorneys' fees. *Estate of Zimmerli*, 162 Wn. 243, 250, 298 P.2d 326 (1931). Again, a will contest is the one proceeding in which the general attorneys' fees statute, RCW 11.96.140, does not apply. See *Marks*, 91 Wn. App. at 325.

1. Fees for the personal representative. If the will is upheld, the personal representative's attorneys' fees are to be paid by either the estate or the unsuccessful contestant. *Marks*, 91 Wn. App. at 337 (where will is upheld, court may assess attorneys' fees against contestant in favor of estate, unless contestant acted in good faith). Where the will is revoked, the personal representative's fees may be paid by the estate, unless the personal representative did not act in good faith. A personal representative has a duty to defend the will. *Estate of Reilly*, 78 Wn. 2d 623, 665, 479 P.2d 1 (1970); *Estate of Jennings*, 6 Wn. App. 537, 538, 494 P.2d 227 (1972). So long as he or she does so in good faith, his or her attorneys' fees will be paid by the estate, regardless of whether or not the personal representative is successful in the defense against the will contest. *Reilly,* 78 Wn. 2d at 665; *Estate of Esala*, 16 Wn. App. 764, 772, 559 P.2d 592 (1977). The sole test in determining whether the personal representative may recover costs and attorneys' fees from the estate is whether the deposed personal representative acted in good faith. *Kleinlein*, 59 Wn. 2d at 115; see also *Marks*, 91 Wn. App. at 336.

Two courts of appeals have held that undue influence perpetrated by the personal representative in a will contest imports a finding of bad faith. *Estate of Pfelghar*, 35 Wn. App. 844, 848, 670 P.2d 677 (1983); *Jennings*, 6 Wn. App. at 538-39. The majority in *Pfelghar* held that an executor cannot act in good faith in seeking to establish a will he himself, by fraud and undue influence, caused to be executed. *Pfelghar*, 35 Wn. App. at 848. In his dissent, however, Judge McInturff rejected the majority's *per se* rule that an executor who unduly influences a testator cannot as a matter of law defend a will in good faith. Id. at 850-52 (McInturff, J., dissenting). Rather, Judge McInturff would leave to the trial court the factual determination of good faith after weighing the evidence and considering the totality of the circumstances. Id. According to Judge McInturff, the "determination that the executor asserted undue influence is one factor, but not the controlling factor in determining whether the will was defended in good faith." Id. The issue is whether the defense of the will is in good faith, not whether the executor procured the will from the decedent by undue influence. Judge McInturff holds open the possibility that the executor could have unduly influenced the execution of the will innocently or unintentionally.

2. Fees for the contestant. If the will is revoked or annulled, the court may award the contestant his or her attorneys' fees to be paid by the estate. RCW 11.24.050. There appears to be no basis for assessing the contestant's attorneys' fees against the personal representative individually. If the will is upheld, the contestant will be responsible for his or her own attorneys' fees. In *Marks,* the court of appeals held that RCW 11.24.050 does not provide for an award of attorneys' fees to an unsuccessful contestant from the estate, and that because it is a will contest, the general fees provision RCW 11.96.140 also does not apply. *Marks,* 91 Wn. App. at 337. Thus, under no circumstances does current law provide a basis for an unsuccessful contestant to receive an award of his or her attorneys' fees from the estate. However, TEDRA may have opened this possibility under some circumstances.

Summary of Sources for Payment of Attorneys' Fees in Will Contests

	If the will is upheld	If the will is revoked
Personal Representative's Attorneys' Fees	Either from the estate or from the contestant individually, unless the contestant acted in good faith	Either from the estate, if the personal representative acted in good faith, or by the personal representative individually
Contestant's Attorneys' Fees	By the contestant individually; not from the estate or the personal representative individually	From the estate or by the contestant individually; not from the personal representative individually

E. RCW 11.68.070 — Fees in Petition to Remove the Personal Representative

Any heir, devisee, legatee or unpaid creditor who has filed a claim, may file a petition to remove a personal representative with nonintervention powers, alleging that he or she has failed to execute his or her trust faithfully or that he or she is subject to removal for any reason. RCW 11.68.070.

> In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words 'Powers restricted' upon the original order of solvency together with the date of said endorsement, and in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the court determines.

Id. While the statute allows an award of attorneys' fees to a petitioner who successfully persuades the court to remove or restrict the powers of a personal representative, it does not refer to attorneys' fees in instances in which the personal representative successfully defends against such a challenge. See *Kerr*, 134 Wn. 2d at 343. In *Kerr,* the court used the general provision RCW 11.96.140 to fill that gap. The court relied on the rule of statutory construction that preference is given to a more specific

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statute over a general statute only if the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized. Id. The court could harmonize the specific statute RCW 11. 68.070 and the general statute RCW 11.96.140 because, with respect to an award of fees to a personal representative who successfully defends against a challenge, the statutes do not conflict. Id. Because RCW 11.68.070 makes no mention of an award of attorneys' fees to a personal representative who successfully defends against a removal petition, the court permitted an award of fees against the petitioner in favor of the personal representative under the general fee provision of RCW 11.96.140. Id.

Like other awards of attorneys' fees under Title 11 RCW, if the personal representative is removed on a successful petition for removal because of some breach of a fiduciary duty, the court would not abuse its discretion by assessing the petitioner's fees against the personal representative individually. See, e.g., *Estate of Cooper*, 81 Wn. App. 79, 92, 913 P.2d 393 (1996).

F. RCW 11.76.070 — Fees to Contest an Erroneous Account or Report

If any interested party retains legal counsel either to compel or to challenge an accounting or report and the court orders an accounting or denies approval of the account as rendered by the personal representative, the court may in its discretion, and in addition to statutory costs, award reasonable attorneys' fees in favor of the person instituting the proceedings and against the personal representative, or the surety on any bond. RCW 11.76.070; see also *Mathwig*, 68 Wn. App. at 478-79; *Estate of Hamilton*, 73 Wn. 2d 865, 868-69, 441 P.2d 768 (1968). An action for an accounting is the means by which the conduct of the current or prior personal representative is examined for any improprieties or errors, and has the ultimate goal of making the estate whole in the event there has been any loss. Cf. *Guardianship of Hallauer*, 44 Wn. App. 795, 797, 723 P.2d 1161 (1986). The purpose of an award under RCW 11.76.070 is to make the estate whole. *Hallauer*, 44 Wn. App. at 797-98. Thus, persons objecting to the final report are entitled to such an award only to the extent the disapproved items in the report benefit the estate. *Estate of Larson*, 103 Wn. 2d 517, 534, 694 P.2d 1051 (1985); *Hamilton*, 73 Wn. 2d at 869; *Estate of Bonness*, 13 Wn. App. 299, 315, 535 P.2d 823 (1975). Of course, where the court finds that the beneficiaries of an estate were not required to employ legal counsel to compel an accounting and the accounting was not found to be erroneous, the beneficiaries are not entitled to an award of their legal fees under RCW 11.76.070. *Estate of Ehlers*, 80 Wn. App. 751, 763-64, 911 P.2d 1017 (1996). In addition to paying the attorneys' fees of the successful contestant in an action for an accounting, the personal representative may be barred from recovering from the estate his or her attorneys' fees in preparing and defending the accounting. *Estate of Walker*, 10 Wn. App. 925, 934-35, 521 P.2d 43 (1974).

G. RCW 11.42.080 — Fees on Petition for Allowance of Claim Against Nonprobate Assets

If a claim against nonprobate assets is rejected or not allowed, or if the "notice agent" fails to timely notify a claimant of allowance or rejection, the claimant may petition the court for a hearing to determine the claim. RCW 11.42.080(2).

> If the court substantially allows the claim, the court may allow the petitioner reasonable attorneys' fees chargeable against the decedent's assets received by the notice agent or by those appointing the notice agent.

Id. The statute does not address an award of fees in the event the claim is not allowed. Presumably, either RCW 11.96.140 or thereafter Section 308 of TEDRA would provide the court the discretion to award attorneys' fees in favor the personal representative against the unsuccessful claimant. See *Kerr*, 134 Wn. 2d at 341-44; Laws of 1999, ch. 42, § 308.

H. RCW 11.72.006 — Fees on Partial Distribution

In the event a beneficiary applies to the court for a partial distribution from the estate, the court may assess against the applicant the costs of the proceedings and a reasonable allowance for attorneys' fees for the benefit of the estate. RCW 11.72.006. Whether successful or not, the beneficiary requesting the partial distribution, may be responsible for the estate's attorneys' fees. The statute does not address whether or not the beneficiary requesting the partial distribution may be awarded his or her attorneys' fees, although presumably RCW 11.96.140 or thereafter Section 308 of TEDRA would provide the court the discretion to do so. See *Kerr*, 134 Wn. 2d at 341-44; Laws of 1999, ch. 42, § 308.

I. RCW 11.88.090 — Fees for Petition to Remove a Guardian ad Litem

Within three days of a guardian ad litem's appointment, any interested party may set a hearing and file a motion for an order to show cause why the guardian ad litem should not be removed. RCW 11.88.090(2)(b). If the guardian ad litem is not removed, the court has the authority to assess against the moving party all attorneys' fees and costs related to the motion. Id. The statute does not address whether the guardian ad litem may recover his or her attorneys' fees if the guardian ad litem is removed. Presumably RCW 11.96.140 or thereafter section 308 of TEDRA would permit such an award. See *Kerr*, 134 Wn. 2d at 341-44; Laws of 1999, ch. 42, § 308.

J. Substantial Benefit to the Estate

1. Generally a substantial benefit is required to award fees from the estate. Under any of the foregoing sections, an award of attorney fees to be paid to any beneficiary, claimant or petitioner by an estate requires that the litigation result in a

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substantial benefit to the estate. *Estate of Niehenke*, 117 Wn. 2d 631, 648, 818 P.2d 1324 (1991). It is inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate. Id. at 648; *Mcdonald v. Moore*, 57 Wn. App. 778, 783, 790 P.2d 213 (1990). If the attorneys' services are solely for the benefit of certain parties and are not the estate, the estate should not be required to pay those attorneys' fees, even though the estate may be benefited incidentally by having adverse claims decided. *Niehenke*, 117 Wn. 2d at 648. Thus, where the beneficiaries are unsuccessful in their litigation and primarily pursue their action for their own benefit, the court does not abuse its discretion in denying them attorneys' fees. *Ehlers*, 80 Wn. App. at 764.

2. Does a personal representative have to show a substantial benefit? In *Estate of Morris*, 89 Wn. App. 431, 949 P.2d 401 (1998), the court, contrary to RCW 11.48.210, required that the personal representative show a substantial benefit to the estate in order for court to authorize payment of his attorneys' fees. The court held that a personal representative's successful defense of his or her position, without more, does not entitle him or her to attorneys' fees from the estate; rather, the trial court must weigh the benefit of that defense to determine if it is "substantial." Id. at 435. The court stated that continuing to act as personal representative is of some benefit to the estate, but in any particular estate it may not be a substantial benefit. Id. The factors that the court suggested ought to be considered in determining whether a personal representative's action has substantially benefited the estate include (1) whether the personal representative was acting in his or her representative capacity and not an individual capacity; (2) whether the personal representative was personally at risk or whether the estate was at risk as a result of the court's decision; (3) whether the action was outside of the probate or part of the probate proceedings; and (4) whether the personal representative was defending a past action rather than suggesting a proposed course of conduct. Id. at 435-36. While the requirement of a substantial benefit to the estate makes sense for an award of attorneys' fees to be paid from the estate to beneficiaries, claimants, or others involved in an estate dispute, it is not required by RCW 11.48.210, nor does it make sense to impose such a burden on a personal representative who in many instances has a fiduciary obligation to defend against a dispute irrespective of whether or not it will have a substantial benefit to the estate.

3. If all the beneficiaries are involved, substantial benefit may not be required. Despite the "substantial benefit" requirement, three cases have awarded attorneys' fees to beneficiaries from the estate, where the litigation resulted in no substantial benefit to the estate. In *Estate of Burmeister*, 70 Wn. App. 532, 854 P.2d 653 (1993), *rev'd* 124 Wn. 2d 282, 877 P.2d 195 (1994), the court of appeals awarded costs and fees assessed against the estate to two rival beneficiaries stating that the supreme court's opinion in *Niehenke* did not hold that attorneys' fees could never be appropriately awarded against an estate if the estate were not substantially benefited, but rather recognized that there will be situations where attorneys' fees are justly assessed against the estate. In awarding fees from the estate to both beneficiaries, the court in *Burmeister* found that all the beneficiaries were involved in the dispute and that the award against the estate justly imposed the costs of the litigation to ascertain their rights upon all those involved. Id. Moreover, both sides advanced reasonable and good faith arguments for their respective positions. Id. The Supreme Court reversed the court of appeals on the ground that the will was valid. *Burmeister*, 124 Wn. 2d at 288. The Supreme Court declined to award fees. Id. In *Estate of Kvande v. Olsen*, 74 Wn. App. 65, 72, 871 P.2d 669 (1994), the court of appeals, relying on the earlier court of appeals decision in *Burmeister*, awarded attorneys' fees to all the beneficiaries finding that all sides advanced reasonable and good faith arguments, for which attorneys' fees out of the estate is proper. The court did not address the "substantial benefit" to the estate. See also *Estate of Watlack*, 88 Wn. App. 603, 612, 945 P.2d 1154 (1977) (all beneficiaries under each will were involved in litigation to ascertain their respective rights).

4. Fees incurred in proving reasonableness of fees may not be awarded in probate matters. In *Larson*, 103 Wn. 2d at 533, the Court held that attorneys in probate are not entitled to additional attorneys' or experts' fees in proving the reasonableness of requested fees. The Court reasoned that the attorneys' defense to the objections served only their own interests and in no way worked to the benefit of the estate. Id. Moreover, the value of the estate was reduced in direct proportion to the amount the court increased the attorney fees. Id. The only holding in the Larson decision to which a majority of the court agreed was that no attorneys' fees should be awarded for merely proving the reasonableness of attorneys' fees. See id. at 533 (Dore, J., with Cunningham and Hamilton , JJ. Pro Tem); id. at 535 (Pearson, J., dissenting, with Utter, Dolliver and Dimmick, JJ.).

III. Attorneys' Fees Under TEDRA

TEDRA provides for required mediation and arbitration of trust and estate disputes before litigation. Laws of 1999, ch. 42. In adopting TEDRA, the legislature revised the general attorneys' fees provision applicable to Title 11 RCW, and set out additional provisions for attorneys' fees and costs incurred in mediation, arbitration, litigation and appeals. Although TEDRA expressly repeals RCW 11.96.140, all other sections of Title 11 RCW concerning attorneys' fees remain intact. Those specific provisions, however, would be applicable only if the trust or estate dispute is never submitted to mediation or arbitration under TEDRA. If it is, the attorneys' fees provisions under TEDRA would apply.

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A. Section 308 — General Attorneys' Fees Provision

Section 308 of TEDRA replaces RCW 11.96.140 and provides as follows:

> (1) Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.
>
> (2) The section applies to all proceedings governed by this title including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This statute shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(9).

The comments to this section indicate that the language was added to the old RCW 11.96.140 to make clear that the application of the general attorneys' fees statute is not limited by any other specific statute that provides for the payment of costs. It is intended that a court may award costs in any matter subject to Title 11 RCW if the court determines that such an award would be equitable.

Section 308 differs from RCW 11.96.140 in three minor ways: (1) the standard by which the court exercises its discretion was changed from "as justice may required" to "as the court determines equitable," which in practice may be an insignificant change; (2) it clarifies the sources from which the court may award fees, although it probably does not broaden the scope of the existing RCW 11.96.140; and (3) it clarifies that the general attorneys' fees provision applies to guardianships even although arguably RCW 11.96.140 already does. More importantly, however, the adoption of section 308 resolves the uncertainty concerning whether the general attorneys' fees provision applies in situations that may be addressed by specific attorneys' fees provisions. See generally *Kerr*, 134 Wn. 2d at 343.

B. Costs of Mediation

Under TEDRA, either party to a trust or estate dispute may require that the matter be submitted to mediation. Laws of 1999, ch. 42, § 505(1). The act further provides that in mediation, "[e]ach party shall bear its own costs and expenses, including legal fees and witness expenses. . . ." Laws of 1999, ch. 42, § 505(8). "Legal fees" as used in section 505 presumably includes "attorneys' fees." The act provides two exceptions to the rule that the parties bear their own costs and expenses. First, if it is necessary for a party to pursue an order compelling mediation under section 507, that party would be entitled to reimbursement for the costs and expenses of obtaining and enforcing an order compelling mediation. Laws of 1999, ch. 42, §§ 505(8) & 507. Second, if the matter is not resolved by mediation and either the arbitrator or court finally resolving the matter directs otherwise. Laws of 1999, ch. 42, § 505(8).

C. Costs of arbitration

If the parties agree, if the court orders, or if mediation has been attempted but failed, a party may require that the matter be submitted to arbitration. Laws of 1999, ch. 42, § 506(1). The act provides that in arbitration each "party shall bear its own costs and expenses, including legal fees and witness expenses . . . ." Laws of 1999, ch. 42, § 506(5)(e)(ii).

The act provides three exceptions to this general rule. First, "[t]he arbitrator may order costs, including reasonable attorneys' fees and expert witness fees, to be paid by any party to the proceedings as justice may require." Laws of 1999, ch. 42, § 506(6). Both section 505(8), concerning costs of mediation, and section 506(5)(e), concerning costs of arbitration, provide that each party shall be responsible for its own "witness expenses." The exception in section 505(6) does not mention "witness expenses" but rather refers to "expert witness fees." The distinction may be unintended but could have some significance in practice.

Second, if it is necessary for a party to pursue an order compelling arbitration under section 507, that party would be entitled to reimbursement for the costs and expenses of obtaining and enforcing an order compelling arbitration. Laws of 1999, ch. 42, §§ 505(5)(e) & 507. Third, if the matter is not resolved by arbitration and the court finally resolving the matter directs otherwise. Laws of 1999, ch. 42, § 505(5)(e).

D. Costs on Appeal of an Arbitration Decision

Any aggrieved party (a party that does not prevail at arbitration) may appeal the arbitration decision and request a trial *de novo* in the superior court within 20 days of the arbitration decision. Laws of 1999, ch. 42, § 505(8). In that case, the act makes an award of attorneys' fees to the prevailing party mandatory:

> The prevailing party in any such de novo superior court decision after an arbitration result must be awarded costs, including expert witness fees and attorneys' fees, in connection with the judicial resolution of the matter. Such costs shall be charged against the non prevailing parties in such amount and in such manner as the court

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> determines to be equitable. The provisions of this subsection take precedence over the provisions of section 308 of this act or any other similar provision.

Laws of 1999, ch. 42, § 505(9).

The comments to this section indicate that the policy behind the mandatory award of fees and costs is to encourage the use of the arbitration procedures for final resolution of disputes. The policy is also intended to recognize and support appeals based on reasonable grounds by awarding fees and costs to the prevailing party, and to likewise discourage frivolous appeals by assessing fees and costs against the non-prevailing party.

E. Costs to Compel Compliance

Finally, section 507 of TEDRA provides that if a party needs to seek a court order to compel compliance with the mediation and arbitration provisions of TEDRA, they are entitled to reimbursement of costs and attorneys' fees incurred in connection with the petition and any other actions taken after the issuance of the order to compel compliance with the order, unless the court at the hearing on the petition determines otherwise for "good cause shown." Laws of 1999, ch. 42, § 507.

IV. Award of Reasonable Fees

There are a variety of standards used in the statutory sections authorizing awards of attorneys' fees in favor of or against a party, the estate or the personal representative individually. For example, statutes use such standards as "the court shall deem just and reasonable," RCW 11.48.210, RCW 11.92.180; "justice may require," RCW 11.96.140, Laws of 1999, ch. 42, § 506(6); "reasonable attorney's fees," RCW 11.68.070, RCW 11.42.080, RCW 11.72.006; "the court may deem proper," RCW 11.24.050; "in the court's discretion," RCW 11.24.050, RCW 11.76.070; and most recently in TEDRA, "as the court determines to be equitable," Laws of 1999, ch. 42, § 308(1). Whatever the formulation of the standard, the court may only award reasonable attorneys' fees. See *Larson,* 103 Wn. 2d at 522; see also RCW 11.68.100 (at time of final hearing to close estate, court upon request shall determine reasonableness of any fees for personal representative's attorneys). TEDRA does not change the requirement that the court may only award reasonable attorneys' fees.

> [T]he determination of what fees are reasonable involves more than simply multiplying the number of hours spent on a given case times a specific rate. An attorney must use judgment and discretion in rendering a bill. This includes recognizing the limits of one's own capacity and one's own inefficiencies. . . . A substantive analysis must . . . be made: first, by the attorney to determine what fees to charge; and second, by the court to determine what to award.

Hallauer, 44 Wn. App. at 800.

A. Criteria for Testing Reasonableness

The criteria courts consider in evaluating attorneys' fees requests in trust and estate proceedings are set forth in *Peterson*, 12 Wn. 2d at 728, and include:

1. The amount and nature of the services rendered.

2. The time required in performing the services. The time required, rather than the time actually expended, is a factor in determining the reasonableness of fees. *Larson*, 103 Wn. 2d at 532-33. Rather than rely on counsel's billing records, the trial court should make an independent decision as to what constitutes a reasonable amount for award of attorneys' fees. *Scott Fetzer Co. v. Weeks*, 122 Wn. 2d 141, 151, 859 P.2d 1210 (1993). A probate attorney may charge the estate only for those hours that are reasonably necessary in probating the estate. *Larson*, 103 Wn. 2d at 531-32. A client should not be expected to pay for work that is duplicative. Id. The award must be based on more than mere estimation or conjecture. *Austin v. US Bank*, 73 Wn. App. 293, 310, 869 P.2d 404 (1994).

3. The diligence with which they have been executed.

4. The value of the estate. In considering the value of an estate, the court should look to the actual value at the time of final settlement for purposes of fixing the fees. *Peterson*, 12 Wn. 2d at 729.

5. The novelty and difficulty of the legal questions involved.

6. The skill and training required in handling the legal issues. Clients should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks that, with reasonable experience, become matters of routine. *Larson*, 103 Wn. 2d at 531. Likewise, an attorney is not entitled to fees at professional legal rates for tasks that should be performed by staff, such as depositing checks in a bank. Id.; *Mathwig*, 68 Wn. App. at 476.

7. The good faith in that the various legal steps in connection with the administration were taken.

8. All other matters that would aid the court in arriving at a fair and just allowance.

These criteria are similar to those in RPC 1.5(a), which also

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"Ask Ms. Ethics"

Nancy Bickford Miller
Disciplinary Counsel with the Washington State Bar Association

Q: Is it true that real property (and probate) lawyers are less likely than attorneys in some other fields to be subject to a grievance investigation by the WSBA, and if so, why should I read this article?

A: Yes, lawyers in family law and criminal law are more frequently the subject of grievances. Yet it can be more upsetting to a lawyer to have a first grievance after years of practice than for one in a field where grievances are more common. Overconfidence can be a dangerous thing. All lawyers need to be vigilant and ever-cognizant of the Rules of Professional Conduct ("RPCs"). On average, grievances are filed against approximately 10 percent of the state's lawyers every year.

Q: Even if I am hit with a grievance or two over the years, what is the big deal? Isn't it true that most grievances are dismissed?

A: Yes, most grievances do not result in formal disciplinary proceedings, and many grievances have no basis or result from a misunderstanding of the legal system. However, the grievance process costs lawyers time and energy. Investigation of a grievance can go on for months, even years. You will be asked to provide a written account of your conduct and explain why it did not involve ethical violations. Later, we may ask for a second or third letter of explanation. We may ask to review client documents and files, which are sometimes in storage. This will cost you billable hours, and may cause anxiety or resentment.

Q: Are a lot of grievances groundless, filed by people who are trying to take advantage of the system?

A: Not every grievant is ethical, just as not every lawyer is ethical. Some grievants – lawyers among them – may try to use the system for a tactical advantage or out of spite. We try to recognize such grievances at an early stage and dismiss them if appropriate, after reviewing the facts.

Q: My clients like me. If you are friendly and communicate well, you should not have a problem, right? For instance, I read about medical malpractice claims being more of a problem for arrogant doctors than for caring family physicians.

A: Your point about communication is a good one. A large number of grievances complain about lawyer communication even if the substance of the grievance really revolves around another problem. I recommend that every lawyer reread the RPCs on a once-a-year basis. As you probably remember, RPC 1.4 (Communication) provides:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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should be used as guidelines in establishing the reasonableness of fees. *McNeary v. American Cyanamid, Co.,* 105 Wn. 2d 136, 143, 712 P.2d 845 (1986); see also RCW 11.68.100 (court is to consider all the criteria forming basis for determination of fees contained in code of professional responsibility [now rules of professional conduct]).

B. Burden of Establishing Reasonableness

The party requesting fees has the burden of demonstrating the need for and the reasonableness of its attorneys' fees. *Morris*, 89 Wn. App. at 434. In defending against any objections raised by interested heirs, the estate attorney must assume the burden of proving that the hours charged to the estate were necessary. *Larson*, 103 Wn. 2d 531-32.

C. Appeal of Fees Awards

The trial court's award of fees in probate matters is reviewed under an abuse of discretion standard. *Larson,* 103 Wn. 2d at 521. Discretion is abused when it is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Morris*, 89 Wn. App. at 433-34.

V. Conclusion

Although there are some issues regarding TEDRA's attorneys' fees provisions that need further clarification, TEDRA has simplified and clarified the statutory provisions authorizing attorneys' fees in trust and estate disputes. While the existing attorneys' fees provisions, with the exception of RCW 11.96.140, will remain, they may be of marginal utility after January 1, 2000. At that point, most of those statutory provision will only apply to disputes never submitted to mediation or arbitration under TEDRA. • • •

1 Copyright © 1999 by Scott A.W. Johnson. Mr. Johnson is a shareholder at the Seattle law firm of Stokes Lawrence, P.S. Mr. Johnson and the firm were counsel for the personal representative in *Estate of Kerr*, 134 Wn. 2d 328, 949 P.2d 819 (1998), which is cited in this article.

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"Ask Ms. Ethics"

Q&A

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Every lawyer, in every field, can always improve in communication techniques. Some of the complaints we frequently receive are about failure to return telephone calls, failure to share copies of documents and letters received from opposing counsel, and failure to explain what is happening on the matter.

It is also good practice to document the communication. A stamp reading "*Client Copy* Mailed on______" is helpful. Keep and file copies of fax transmissions with time and date receipts. Mailings may be documented by a secretary's date notation or affidavit. These records are very helpful in the investigation process and can help to evaluate the credibility of the complaining party. One cannot really over communicate, and I do not believe that we have ever received a grievance complaining about too much communication from the lawyer, such as too many telephone calls and letters (assuming that this is not a basis for unnecessary charges).

Q: What are some typical problems that might affect real estate lawyers?

A: Conflicts are a major source of problems. Real estate transactions often involve joint owners. Perhaps a partnership agreement will be needed along with other real property documents. This will generally require mutual written waiver and consent under RPC 1.7 (Conflict of Interest; General Rule) if separate counsel are not involved. Lawyers should not assume that because they handle several real estate transactions in a row, the material facts will be the same for each conflict letter, or that one letter will necessarily suffice for an ongoing conflict involving multiple transactions. No one usually objects until the deal falls apart and the co-owners or parties begin to squabble. Then a dissatisfied party may decide to file a grievance.

Multiple parties can also be a problem in recognizing later conflicts. If the client seen in the office is the managing partner of the real estate entity, it is easy to forget that all the other partners may also be clients. Real estate foreclosures and Chapter 11 bankruptcies also may involve multiple parties. All possible names should be entered into the client conflict checking system, to avoid later problems. The cost is low compared to the potential problem of responding to a grievance – and perhaps facing disqualification - in the middle of a complex transaction or litigation matter. Smaller law firms or sole practitioners may assume they will always recognize the names of former clients. It is important to maintain thorough and complete conflict records from the beginning of a practice.

Another source of conflicts could be the client who becomes a friend over years of representation. Eventually the lawyer might be invited to participate in a particular property transaction, or the lawyer might even suggest a possible business relationship to the client (for instance to develop a small office building for the lawyer). Occasionally a client may want to borrow money from the lawyer or offer to loan money to the lawyer. Real property lawyers are used to handling secured loans, and may use the same loan documents as would be used for a bank loan, including Truth-in-Lending disclosures. However there are also explicit requirements in RPC 1.8, Conflict of Interest; Prohibited Transactions, Current Client. At a minimum a written disclosure should be prepared. Usually the client should have separate representation. Taking any other course presents a risk of an ethical violation. In addition, the Washington Supreme Court has taken a dim view of such transactions, stating as a beginning point: "An attorney-client transaction is *prima facie* fraudulent." *In re McMullen*, 127 Wn.2d 150, 168, 896 P.2d 1281 (1995).

Real estate closings are another fertile field for conflicts. If you are representing one party and handling the closing escrow, particularly if the other party is not represented by counsel, your role must be fully disclosed and consented to in writing by that party. RPC 1.7(b)(2). You also have a duty to inform the party of the advisability of obtaining independent counsel. Taking the most conservative view, there is still a potential conflict that should be disclosed and consented to, even if the other party is represented by a lawyer, since the closing attorney has a duty to both parties. Although not lawyer discipline cases, an attorney acting in such a capacity should also review *Bowers v. Transamerica Title Insuranc*e, 100 Wn.2d 581, 675 P.2d 193 (1983) and *Stiley v. Block*, 130 Wn.2d. 486, 925 P.2d 194 (1996).

The potential conflict can become even stickier if a party without legal counsel asks you, as the closing agent, for an interpretation of the documents. Under *Bowers* you cannot provide legal advice to both parties to the transaction. See also *Hurlbert v. Gordon*, 64 Wn. App. 386, 398, 824 P.2d 1238 (1992). If steps must be taken in connection with the closing, such as paying a lien holder or making repairs, and the lawyer trusts the client to take these steps without verification, then there may be both financial liability and an ethical issue for the attorney if the client does not follow through. Finally, note that escrow funds should be deposited in an IOLTA account. WSBA Formal Opinion 187 (1990).

If you agree to handle a real estate closing and do not represent either party in the closing, a serious conflict situation may result if a dispute arises and you then attempt

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to represent one of the parties to the transaction. Both parties have been your clients. You cannot then choose to represent one side without full written disclosure and consent.

Still another potential source of conflicts is the lawyer role as trustee in a real property foreclosure. The trustee is a fiduciary for both grantor and beneficiary. See *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). Therefore it may not be possible to aggressively represent the beneficiary during the foreclosure process. Arguably the trustee should be a neutral party who does not represent the beneficiary on an ongoing basis and therefore is able to exercise independent judgment. In *Cox*, the Court suggested that where an actual conflict of interest arises, the person serving as trustee and counsel for the beneficiary should prevent an ethical breach by transferring one role to another person.

Q: What other rules are out there waiting to trip me up?

A: RPC 6.1 (Pro Bono Publico Service) urges us to render public interest legal service. Remember, however, that in performing public service you need to open the same types of files and maintain the same types of conflict records for nonpaying clients as for paying clients. Also, whether in pro bono work or otherwise, there are special duties in dealing with unrepresented persons. See RPC 4.3. You need to take special care when dealing with a person not represented by a lawyer on behalf of your client. This is a common occurrence in real estate transactions.

Another point to remember is that your personal life (if any) outside the practice of law may also cause you to be subject to discipline if you are involved in serious misconduct. Examples would be dishonesty, corruption, assault or other acts reflecting disregard for the law. On April 8, 1999, the Washington Supreme Court reaffirmed this principle in a disbarment case involving business practices unrelated to the lawyer's legal practice. *In Re Huddleston,* 137 Wn.2d 560. This principle would certainly apply to any unethical actions of a lawyer in real estate transactions and/or development for the lawyer's own account as opposed to work for a client.

Q: If I want to avoid grievances, do you have any other general suggestions?

A: Do not be afraid to look or ask for help. A situation may leave you uneasy or uncertain, but without being able to put your finger on the source of the problem. A first step is to consult the RPCs, found in the Washington Court Rules. *Resources,* published by the WSBA, also contains the RPCs, an index and summary of Ethics Opinions, and a discussion on managing client trust accounts. The WSBA also has an ethics hot line (206-727-8284), where you can informally consult with a Bar attorney about a particular question or problem. In addition, talking with a partner or a respected colleague may help to sort out the ethical issues. Lawyers sometimes hesitate to ask for help, knowing that other lawyers are equally busy. However most lawyers are flattered to be asked for advice on an ethical problem — provided you begin, "I know you have never had this problem, but…." It is also possible to seek legal advice on a paid basis from attorneys focusing on this field.

Q: You seem to be suggesting that if you strictly follow the "recipe" of the RPCs, then the cake will *not* fall, and you will stay out of trouble. Is that all there is to it?

A: Not entirely. No one, not even Ms. Ethics, has all the RPCs memorized. Another simplistic truism, a rule to follow but not an RPC: Do the right thing! I remember an occasional impulse when in private practice to take an action for a client that I would not have done for myself, e.g. to make a misleading but not necessarily untrue statement. Clients may expect us to be aggressive — even sometimes over-reaching — on their behalf, but most clients do not expect us to be unethical, and we should *not* be willing to do something for the client that is inappropriate or unethical, whether or not there is a specific RPC prohibition. We would not (and should not) cheat on our income tax returns, or fail to correct a mistake in a bill or return too much change offered by a cashier. Likewise we should be willing to correct a mistake in a real estate closing statement, even if in our client's favor, or revise a client statement if it is misleading. The obligation of lawyers is to maintain the highest standards of ethical conduct. See Preamble to RPCs. By doing so we may also avoid the unpleasant process of defending a grievance.• • •

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Recent Developments

Probate and Trust

Wendy S. Goffe, Graham & Dunn, P.C., Seattle
Alice McCarty, University of Washington School of Law *(J.D. expected June 1999)*

WASHINGTON COURT OF APPEALS

Heilig Trust v. First Interstate, 93 Wn. App. 514, 969 P.2d 1082 (Div. II 1998)

Summary: Trust beneficiaries sued First Interstate Bank ("FIB") for failing to notify them of trust fund withdrawals by the trustee, alleging breach of fiduciary duties, negligence, and breach of contract. The Superior Court entered summary judgment in favor of FIB because the Bank did not have knowledge or notice of the theft and, therefore, did not breach its fiduciary duty to the beneficiaries. The Court of Appeals affirms.

Facts: In 1975, the Heiligs created a living trust agreement and appointed James Renggli ("Renggli") as the trustee. As trustee, Renggli was responsible for the distribution of the net income or principal to the Heiligs "as the trustee deems best for the health, maintenance and welfare of the trustors, taking into consideration their accustomed standard of living."

Renggli maintained a trust checking account with FIB and had unlimited access to the account. Renggli also had a personal bank account with FIB.

From September 1987 through July 1994, Renggli stole funds from the trust account at FIB. After Renggli's activities were discovered, Renggli pleaded guilty to first degree theft and the court ordered $297,267.18 restitution. The Heiligs then sued FIB. The trial court entered summary judgment in favor of FIB, holding that the bank did not have actual knowledge or notice of the theft. The Heiligs appealed.

Discussion: In determining the basis of the duty owed the Heiligs, the Court of Appeals looked to RCW 62A.3, the Negotiable Instruments Act. There was a dispute between the parties as to which version of 62A.3 controlled because of the time when the theft occurred; however, the court held that the Heiligs' argument failed under both the earlier and current versions of the statute.

The court found that the language in the Act indicated that when a trustee withdraws funds from a trust payable directly to himself or herself, a bank's duty to alert trust beneficiaries may be triggered. This may occur only if the bank has knowledge that a fiduciary has negotiated the instrument in breach of the duty or knows of the breach of fiduciary duty. The court did not find any evidence in the record to support the Heiligs' assertion that FIB had knowledge of Renggli's breach.

The court also noted that Renggli was the only signatory on the account and was entitled to pay himself for services rendered on behalf of the trust. The court found that there was nothing unusual for FIB to suspect when Renggli withdrew payments to himself from the trust account. Therefore, the court found that FIB did not have knowledge that Renggli was violating the trust for his private inurement and owed no duty to the Heiligs.

Pennington v. Pennington, 93 Wn. App. 913, 971 P.2d 98 (Div. II 1999)

Summary: Substantial evidence does not exist to find a quasi-marital relationship[1] where one party remained married to another during seven years out of a 10 year period of cohabitation, property was not held under both names, and where one party refused to marry the other and contested the existence of a quasi-marital relationship.

Facts: In 1983, Evelyn Van Pevenage (also known as Sammi Pennington) ("Sammi") met Clark Pennington ("Clark") while each was married to someone else. By the end of 1983, Clark had separated from his wife, and Sammi dissolved her marriage. In 1985, Sammi moved in with Clark in Kapowsin.

Together, they purchased and installed home furnishings. Sammi purchased food and home supplies, while Clark paid the mortgage and utilities. Her credit cards were issued in the name of "Sammi Pennington."

In 1988, Clark sold the Kapowsin home and the couple moved to a new home in Yelm. Clark's name alone was on bank and title documents. Together, Sammi and Clark designed and decorated their new home.

Clark divorced in 1990. In 1991, when Clark refused to marry Sammi, she moved out for a few weeks. Shortly after Sammi returned, Clark suffered a stroke. Sammi stayed with him during his stay and quit her job to take care of him when he came home.

During the time that the couple lived together, Clark allowed Sammi to drive his cars and Clark paid for her car insurance. Sammi drew a salary from, received medical benefits from, and had check writing privileges for Clark's business. Clark listed Sammi as the beneficiary of his life insurance policy.

During the 10 years that the couple lived together, there were periods where Sammi moved out, including the few weeks in 1991 and an 18-month period during 1993 and 1994. Sammi also moved in with another man for a month in September 1994. In October 1995, Sammi moved out of the Yelm residence permanently. In February 1996, Sammi filed a complaint for a dissolution of a quasi-marital relationship. At trial, several of the couple's friends testified that each cared for the other as a husband and wife would. One of the friends did not even know that Sammi went by any other name until the day of the trial. The trial court found that a quasi-marital relationship existed, jointly

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owned property was acquired during their relationship, and the court awarded Sammi $214,200. Clark appealed.

Discussion: The Court of Appeals found that there was substantial evidence of a quasi-marital relationship. The court looked to five non-exclusive factors articulated by the Washington Supreme Court for determining whether a quasi-marital relationship exists. Those include: (1) continuity of cohabitation; (2) duration of the relationship; (3) purpose of the relationship; (4) pooling of resources and services to accomplish common goals and projects; and (5) intent of the parties. *Connell v. Francisco*, 127 Wn. 2d 339, 346 (1995). The court also agreed that such a finding depends upon the facts and circumstances of each case.

Even though the court did not find a quasi-marital relationship existed, it agreed with the trial court's finding that despite the periods of separation, a court must look at the entire time of the relationship beginning in 1985 for its analysis.

While the court acknowledged that it is possible to be in a quasi-marital relationship while married to another, in this case the court did not find that there was a clear purpose of the relationship, in part because Clark was married to another woman during the first 5 years of the parties' cohabitation. In 1991, after Clark's divorce, he refused to marry Sammi and denied that they were ever engaged. The fact that others saw them as husband and wife was not material.

While the couple combined resources to furnish their Kapowsin and Yelm homes, the court pointed out that none of the loan or title documents contained Sammi's name, nor did they ever maintain joint checking or savings accounts. In sum, periods of separation, cohabitation with another partner, title in one person's name only, or cohabitation while still married do not necessarily bar a finding of a quasi-marital relationship. The court found that the facts and circumstances were not sufficient in this case to make such a finding, however.

Estate of Egelhoff, 93 Wn. App. 314, 968 P.2d 924 (Div. II 1998)

Summary: The Court of Appeals held that ERISA does not preempt RCW 11.07.010 (under which a spouse's rights as a named beneficiary of a nonprobate asset belonging to the other spouse are automatically revoked upon dissolution or invalidation of a marriage), because the statute does not make "reference to" or have a "connection with" ERISA plans. Additionally, ERISA will not preempt family and community property statutes unless those laws do "major damage" to "clear and substantial" federal interests. Therefore, the court held that the distribution of both life insurance and pension funds was controlled by RCW 11.07.010 rather than ERISA.

Facts: David and Donna Egelhoff married in 1988 and divorced in 1994. During their marriage, David named Donna as beneficiary of his life insurance policy and pension plan, both of which were through the Boeing Company. Under the terms of their dissolution settlement, David was awarded 100% of his 401(K) and IRA.

Less than two months after the dissolution became final, David died from injuries sustained in a car accident. Donna was still listed as the beneficiary on David's insurance policy and pension plan. David died intestate. David's statutory heirs were his children from his first marriage. The children filed suit, alleging that under the dissolution decree, Donna had waived her rights to the pension plan. The insurance proceeds had already been paid out to Donna, so the children also filed a conversion suit, relying on RCW 11.07.010, alleging that the statute removed her as the beneficiary.

The trial court held that ERISA preempted state law with respect to both the pension plan and the insurance policy and therefore, entered summary judgment in favor of Donna. The children appealed.

Discussion: ERISA regulates all employee benefits sponsored by an employer or an employee organization. David's pension fund and insurance policy, sponsored by the Boeing Company, fell within the auspices of ERISA. The Court of Appeals, however, found that while ERISA regulates the type of pension plans and insurance policies at issue, ERISA did not control under this set of facts because the state statute involved does not sufficiently "relate to" employee benefit plans.

The court looked to legislative history as articulated in both recent federal and state cases for its analysis. In significant part, the court drew from *Emard v. Hughes Aircraft Co.*, 153 F.3d 949 (9th Cir. 1998) which held that "preemption analysis within the specific context of ERISA ... [must begin with the question of] whether the state law at issue has (1) a reference to or (2) a connection with an ERISA plan." The court found that RCW 11.07.010 did not act immediately and exclusively upon ERISA plans, nor was the existence of ERISA essential to the state statute's operation.

The court also noted that ERISA preemption has been significantly narrowed in recent decisions. Specifically, the Court found support in the Supreme Court's suggestion that ERISA preemption should be limited with regard to areas traditionally left to state regulation. See *De Buono v. NYSA-ILA Med. and Clinical Services Fund*, 520 U.S. 806, 117 S.Ct. 1747, 1751, 138 L.Ed. 2d 21 (1997). *Emard* followed this analysis when it analyzed California's community property laws' application to life insurance. Keeping in step with this directive, the court held that neither David's life insurance nor his pension fund benefit disbursements were preempted by ERISA.

Consequently, under the plain language of RCW 11.07.010, the court held that the children were entitled to the proceeds of their father's pension fund, as yet undistributed, in addition to the insurance proceeds, which had already been disbursed to Donna. The court held that there was insufficient evidence in the record to determine whether the children had followed the requirement of RCW 11.07.010 to recover the insurance proceeds directly from the insurer or from Donna, and remanded this matter to the lower court.

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Recent Developments: Probate and Trust

***Estate of Stevens*, 94 Wn. App. 20, 971 P.2d 58 (Div. II 1999)**

Summary: Where a beneficiary fails to respond to any of the notices sent to her by the Trustees during several months of court proceedings devoted to resolving the rights of beneficiaries to a trust estate, a beneficiary may not have an order of default entered against her set aside based upon an argument of excusable neglect because she relied upon the Trustees to protect her interests.

Facts: George Stevens ("George") was a single man, without descendants, who traveled the country in his motor home but retained residency in Washington. George had three siblings, Bob, James and Ruth, and four nieces.

In March 1994, while in Arizona, George executed two originals of a revocable living trust. This document was not witnessed. George named himself as the initial trustee and designated one of his friends, Kathleen Powell Knight ("Knight") and his niece, Rita K. Stevens ("Rita") as successor co-trustees, followed by his brother Bob J. Stevens ("Bob") as the first alternate successor co-trustee.

In July 1996, George died while traveling with Rita. The day after his death, Knight relinquished her appointment as a co-trustee. Bob then became co-trustee with Rita. Bob and Rita found two originals of George's trust documents in his motor home. Those originals contained a Schedule C that named the beneficiaries of the remainder of the trust estate.

Knight disputed the contents of Schedule C, claiming that the valid Schedule C was held with the drafting attorney, Dwight Bickel, in Arizona ("the Bickel Schedule C"). The Bickel Schedule C was significantly different than Schedule C found in George's home. Most importantly, the shares in the Bickel Schedule C awarded Knight and two other friends of George 10% instead of 0.5%, and decreased family shares from 20% to 10% and in one instance from 10% to nothing.

Despite two disinterested witnesses' claims that they remember George showing them Schedule C, Knight asserted that the Bickel Schedule C was valid. In response to the dispute surrounding the dueling Schedule Cs, Rita and Bob filed a Petition of Interpleader and Declaratory Relief, asking the Court to determine each beneficiary's share under the trust.

Over the next several months, as the trustees' petition progressed through the trial court, Bob and Rita served notice on each beneficiary in connection with each of the motions and hearing dates. Another of George's friends, Maxine Curtis ("Curtis") (whose share under the Bickel Schedule C was increased to 10% from 0.5%) acknowledged that she received these notices. Curtis never filed any responses or attended any hearings, however, and asserted that she did not appear in the action because she believed that Knight, as a co-trustee, would act in her best interest. Knight entered into a settlement agreement with the other beneficiaries active in the lawsuit. Knight did not negotiate on behalf of Curtis.

Because Curtis failed to respond, the trial court entered an order of default against her in July of 1997. According to the judgment, Curtis' share of George's trust was 0.5% as described in the Schedule C found in George's motor home.

Curtis retained an attorney and attempted to set aside the order of default. The trial court concluded that there was neither excusable neglect, nor substantial evidence that the settlement agreement reached by the other beneficiaries was inappropriate. Curtis appealed.

Discussion: The Court of Appeals upheld the trial court, finding that a motion to vacate an order of default or a default judgment is within the sound discretion of the trial court, and unless there is a clear abuse of that discretion, the decision will not be reversed on appeal. Generally, an order of default may be set aside upon a showing of good cause. CR 55(c)(1). To establish good cause, a party may demonstrate excusable neglect and due diligence. The court found that Curtis' actions, or rather lack thereof, did not constitute excusable neglect because she received adequate notice of the dispute, never responded on her own, and never made any attempts to contact Knight or her attorney. Therefore, it was unreasonable for Curtis to believe that Knight represented her interests during the proceedings. In light of these facts, the court found the trial court's decision reasonable.

Curtis further sought to set aside the settlement agreement reached by the other beneficiaries, claiming it was in violation of RCW 11.96.170, which requires in part that non-judicial settlements be in writing and signed by all required parties. Curtis asserted that she should have been given notice of the settlement proceeding. The court found, however, that RCW 11.96.170 did not apply because the dispute was brought under RCW 11.96.080 (Petition for Judicial Proceeding). Even if RCW 11.96.170 did apply, the court reasoned, a party cannot contest the subsequent proceedings or notice thereof once an order of default has been entered against that party. Because Curtis was the party in default, the court held that she could not contest later proceedings or decisions entered into by the other beneficiaries of George's trust.

[1] Note that the Court of Appeals for Division One in *Marriage of Lindemann*, 92 Wn. App. 64, 960 P.2d 966 (Div. I 1998), acknowledged that the use of the term "meretricious" is archaic and instead used the less pejorative term "quasi-marital relationship." While the Court of Appeals for Division II continues to use the term "meretricious" the authors have used the term quasi-marital in their discussion.

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Recent Developments

Real Estate

Scott B. Osborne, Graham & Dunn, P.C., Seattle

WASHINGTON COURT OF APPEALS

Griffith v. Centex Real Estate Corp., 93 Wn.App. 202, 969 P.2d 486 (Div. I 1998)

Facts: Several homeowners commenced a class action against Centex for alleged defective siding installed on houses. The claims were based on a theory of breach of warranty, misrepresentation and violation of the Consumer Protection Act. The trial court dismissed all of the claims on the grounds that Centex complied with its express warranties, a one-year claim period with respect to the warranties was effective, Centex complied with its duty of disclosure concerning exterior painting, and the plaintiffs had no claim for negligent construction under Washington law. The plaintiffs appealed.

Holding: The dismissal was reversed. The warranty claim dismissal was proper and the application of the economic loss rule prevented any claim for negligent misrepresentation to recover contract damages. Viewing the evidence most favorably to the plaintiffs, Centex knew that its customers expected a high-quality siding and that the siding failed to meet this standard. The failure to disclose this information could constitute an unfair and deceptive act or practice, and the CPA dismissal was reversed.

Brickler v. Myers Constr., Inc., 92 Wn.App. 269, 966 P.2d 335 (Div II 1998)

Facts: Bricklers purchased a home from Myers Construction. The purchase and sale agreement provided for attorneys fees in the event of any dispute arising under the agreement. A dispute arose concerning the adequacy of the septic system and other construction defects. Brickler repaired the system and sued to recover. The trial court awarded damages to Brickler, but refused to award attorney fees.

Holding: The order denying fees was reversed. A warranty of habitability was an implied term of the purchase contract. A breach of that warranty entitled Brickler to recover reasonable attorneys fees.

Real Property of Smith, 93 Wn.App. 282, 968 P.2d 904 (Div. III 1998)

Facts: The Bank of Pullman loaned $35,000 to Smith, secured by a mortgage which was not recorded. Shurtleffs loaned Smith additional money through an intermediary. A deed to the property pledged to the Bank was placed in escrow to secure payment. The intermediary took the money and somehow recorded a copy of a deed to the property. The Bank then recorded its mortgage. Following a default on the Bank loan, Shurtleffs was held to be a bona fide purchaser for value and had priority over the Bank.

Holding: The ruling was affirmed. The Bank had actual and constructive notice of the deed to Shurtleffs prior to recording its mortgage. The Court concluded that there was ample evidence in the record to conclude that the intermediary delivered the deed to on behalf of Smith and the conveyance was completed.

Puget Sound Inv. Group v. Bridges, 92 Wn.App. 523, 963 P.2d 944 (Div. I 1998)

Facts: Puget Sound Investment Group ("PSIG") purchased Bridges' house at an IRS tax foreclosure sale. Bridges refused to vacate the house and PSIG commenced an unlawful detainer action. After quashing a writ of restitution issued by a commissioner, the trial court refused to allow PSIG to amend its complaint to seek relief under a theory of quiet title and ejectment.

Holding: The decision was affirmed. RCW 59.12 is not available unless PSIG could demonstrate that Bridges did not enter onto the property without permission or without color of title. PSIG was not able to establish either, and the unlawful detainer was properly dismissed.

Mariners Cove Beach Club v. Kairez, 93 Wn.App. 886, 970 P.2d 825 (Div. I 1999)

Facts: Kairez purchased waterfront property and constructed a dock. The dock exceeded the 30-foot length permitted under restrictive covenants applicable to the property. The homeowners' association sued and the trial court ordered the removal of the dock to the extent it exceeded the permitted length. Kairez appealed.

Holding: The trial court was reversed. The applicable covenant provided in part that if the decision approving the construction of a proposed dock was delayed for more than ten days or "in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof" then approval shall be deemed to have been given. Since no suit was commenced until after completion, the association could not require removal of the dock.

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PROBATE AND TRUST COUNCIL REPORT

Barbara C. Sherland, Stoel Rives LLP, Seattle
Director - Probate and Trust Council

We have an active year for the Probate and Trust Council before us. Before looking forward, I wanted to thank Tom Culbertson and Marcia Fujimoto, whose terms just ended, for their generous contributions to the Council. Marcia was key to our improved liaison with other Sections, most importantly the Gift and Estate Tax Sub-committee of the Tax Section. Tom has been chairing our legislative "Hole Committee" and has generously offered to continue heading the committee this coming year. We are fortunate to welcome Ken Myklebust to the Council and to welcome back Lora Brown, who is joining us after having served as editor of the newsletter. With continuing members Matt McCutchen and Bruce Smith, we enjoy a strong Council for the work ahead.

We will be concentrating on three legislative areas this year: the rule against perpetuities, the power of attorney statute and issues involving transfer of non-participant spouses' IRA interests. Several states have abolished the rule against perpetuities and we are evaluating whether we should follow suit or modify and simplify the present statute. We are considering developing a statutory form power of attorney and are working with other members of the Gift and Estate Tax Sub-committee on the IRA issue. Tom and the Hole Committee will be busy!

We will also be exploring ways to better communicate with you through our Web Page, developing liaisons with the judiciary and updating our citizens' pamphlets. As always, your involvement in any of these areas is welcomed and appreciated! Have a great summer!

REAL PROPERTY COUNCIL REPORT

Serena M. Schourup, Dorsey & Whitney, Seattle
Director - Real Property Council

Due to the make-up of the legislature this year, the legislative session was unusually quiet for the Real Property Council. Once again, several bills were submitted this session to abolish or significantly amend adverse possession. None of the bills were successful in passing. However, there are a couple of bills that were passed and signed which may be of interest:

HB 1092 amends the provisions of RCW 18.84 pertaining to escrow officers. While employees of financial institutions continue to be exempt, escrow officers employed by title companies are now regulated by the insurance commissioner. In addition, consumer protection measures were added to the statute.

Engrossed HB 1163 requires a legal description be included in judgments recorded against real property.

HB 1233 increases the homestead exemption. This bill substantially reverses the result of the *Coltrane* decision.

HB 1664 makes amendments to the real estate excise tax such that "step" transactions, which transfer control of entities within a 12 month period, are taxed.

Last, but not least, the Recording Act was once again modified to provide for the recording of certain non-standard documents.

For those of you who were not able to attend, the Midyear Meeting materials were very informative and provide a wonderful synopsis of recent case law and legislation collected by our perennial favorite, Scott Osborne.

After two years of serving as your Director, I am handing the baton to Warren Koons. It has been a very enriching experience to work on legislation affecting real estate practitioners.

Leave a Legacy Launches Campaign

'Leave a Legacy' is a campaign to educate and encourage people to make planned gifts through their estates to their favorite charities. The public awareness campaign is a collaboration among the Washington Planned Giving Council, community organizations, businesses and professionals.

The campaign is reaching out to the general public through public events and media attention. It works hand-in-hand with professionals, charities and the media and will include a trained speakers bureau, volunteer phone bank, professional resource listing and resource materials for professionals as well as the general public.

The campaign began in Eastern Washington last year and is being launched in Western Washington at a public Kickoff Breakfast at Benaroya Hall on September 9,1999.

For more information on Leave a Legacy in Eastern Washington call David Walker at 509-353-7088. In Western Washington call Laurie Merwin at 206-285-6237 or visit their web site at www.leavelegacy.org.

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Upcoming Section CLE Seminars

The Real Property, Probate & Trust Section will host the following events in 1999 and beyond.

Advanced Probate

July 21, 1999 - Cavanaughs on Fifth Avenue (Seattle)
July 22, 1999 - Cavanaughs Inn at the Park (Spokane)

TEDRA (Trust and Estate Dispute Resolution Act)

September 15, 1999 - Seattle (location to be determined)

TEDRA

April 10, 2000 - Seattle (TBD)
April 16, 2000 - Spokane (TBD)

Real Property, Probate & Trust Section Midyear Conference

June 2-4, 2000
Skamania Lodge (Stevenson, WA)

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