

Real Property, Probate & Trust



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Estate Planning for Non-Traditional Families

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I. Introduction

Our society has held marriage as the primary and essential institution to define families. Thus, tax and state laws that provide numerous advantages and protection for married couples do not apply to unmarried couples. The number of unmarried couples, heterosexual or gay, living together in committed relationships has increased significantly in the last 30 years.

While societal views toward unmarried couples are changing, the law has not caught up with the demographic and societal changes. Many laws discriminate directly and indirectly against unmarried couples. In eight states, cohabitation without benefit of marriage is illegal.

The quasi-marital relationship cases have significant consequences for the estate planner. The potential property rights of cohabitating couples will impact the client's ability to dispose of jointly acquired property upon his or her death. The issues of dual representation and potential conflict of interest arise and must be addressed.

In *Connell v. Francisco*, 74 Wn. App. 306 (1994), the Washington Supreme Court held that the property acquired by the parties during the term of a "meretricious" relationship is subject to equitable distribution by the court upon the dissolution of the relationship. What is a meretricious relationship? It need not be long-term, but that is a significant factor. It could be short-term, but if so, it must also have a number of other significant and substantial factors present. The relevant factors include, but are not limited to, continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and intent of the parties.

The Supreme Court denied review of *Sutton v. Widner*, 85 Wn.App. 487 (1997), a Court of Appeals decision from Division III that held that a just and equitable distribution was pro-rata based upon the contributions of the cohabitating partners. *Sutton* appears to completely eviscerate the Supreme Court ruling in *Connell* by allowing wide discretion to the trial court, which in *Sutton* divided the property based on contribution.

The Washington Supreme Court held in *Peffley-Warner v. Bowen*, 113 Wn. 2d 243 (1989), that the surviving partner to a meretricious relationship is not a spouse for purposes of intestate succession and could not inherit the share of the deceased partner's estate (at least pursuant to the intestate succession laws). However, the sole issue addressed by the Court by certification from the Ninth Circuit was whether Washington law afforded a surviving cohabitant the same status as that of a spouse with respect to the division of the decedent's property. Ms. Warner was seeking widow's benefits under the Social Security Act, which the Court held to be not available.

In *Peffley* the Court states that the share for a surviving partner must be based on equity, contract or trust, and not on inheritance. It appears that the equitable claims recognized under *Connell* in the dissolution context will be available to the survivor upon the death of a cohabitating partner to a meretricious relationship.

Division II of the Court of Appeals recently held, however, that the equitable principles of *Connell* do not apply to gay cohabitants. In *Vasquez v. Hawthorne*, 99 Wn. App. 363 (February 2000), the Court held that the "meretricious" line of cases does

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Notes from the Chair

Serena S. Carlsen, Dorsey & Whitney LLP, Seattle

I was sorry to miss the midyear meeting at Skamania Lodge in June due to my wedding the same weekend. I want to take this opportunity to thank Mark Roberts for serving as chair of the Section last year, and conducting the Executive Council meeting at the midyear meeting in my stead. I also want to thank Bruce Coffey, formerly of Foster Pepper & Shefelman now with Costco, and Bill Rietz of Transnation Title Insurance Company for serving on the Real Property Council, and Matt McCutchen of Perkins Coie and Bruce Smith of Brett & Daugert for serving on the Probate Council, for the last two years. Further, I especially want to especially thank Maren Gaylor of Graham & Dunn for serving as our newsletter editor last year.

This year the Real Property Council will include two new members, Stephen Crossland of Johnson, Gaukroger, Drewelow, Crossland & Woollett and Timothy Krell of First American Title Insurance Company. The Probate Council will include Wendy Goffe of Graham and Dunn, and William L. Fleming of Whalen,

Firestone, Landsman, Fleming, Dixon & Matson. Karen L. Gibbon will serve as the assistant newsletter editor for the Section.

As those of you who have served on bar committees know, the time and effort spent by individual committee members is considerable. Our membership surveys have consistently told us that both the newsletter and our work on legislation is of greatest value to the members of the Real Property, Probate & Trust Section. We also hope to advance the technology we offer members by enhancing our webpage this year.

The Section Executive Committee will have its retreat in Harrison Hot Springs September 23 and 24 to discuss our agenda for the year and the legislation that we anticipate will need to be addressed during the upcoming legislative session. We welcome your comments, suggestions and questions. Please call or e-mail me or any of the members of the Executive Committee. •

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not apply to gay couples. The reasoning was that since gay couples cannot legally marry, they cannot be quasi-marital either. The case will likely be appealed. The trial court awarded property to the decedent's gay cohabitating partner in an intestate estate. The Court of Appeals reversed.

Although *Vasquez* was a death case, and not the dissolution of a long-term relationship, the Court's reasoning is broad and on its face would apply (at least in Division II) to both situations. The Court did remand the case to the trial court to address the remaining claims of constructive trust and implied partnership. These theories were of course the "legal fictions" employed by the courts earlier to ameliorate the judgmental refusal of the courts to protect unmarried heterosexual cohabitants and to avoid an injustice.

The *Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328(1984) and *Connell* line of cases finally adopted the more equitable and protective approach to protecting long-term, committed, unmarried cohabitants, and Division II Court of Appeals refused to extend that protection to gay couples. The Court states that it is up to the legislature to decide and not the courts. If that were in fact the case, the Court should not have fashioned the whole line of cases protecting unmarried heterosexual cohabitants either, given the legislature's failure to do so. Are we to overrule the whole line of cases that are now well established?

In *Pennington v. Pennington*, 93 Wn. App 913, 971 P.2d 98(1999), currently on appeal to the Washington Supreme Court, the Court will address whether the inability to marry the cohabitant because one of the parties was married to another during five years of the relationship precludes a finding of a meretricious relationship since the parties were legally unable to marry. This will be a case to watch. If *Pennington* is decided on the narrow basis of "legal ability to marry," the ruling should not be so broad as to include in its purview gay cohabitation cases. The very factors identified by the Court in *Connell* do not support such a restrictive definition based approach to equity (i.e. can the parties be quasi-marital or meretricious if they cannot legally marry?).

The estate planner must determine whether the clients constitute a meretricious relationship in order to identify joint and separate property. The attorney cannot advise the client as to what property she can dispose of by will, trust, joint tenancy or other will substitute without resolving these issues. Assets acquired during the relationship will be presumed to be joint property, and absent a separate property agreement, a portion of it appears to be subject to the claims of a cohabitating partner if their relationship is deemed to be meretricious.

It is my current practice to inform gay clients/couples of the *Vasquez* case and the *Lindsey* line of cases. The practitioner should still address these issues of joint versus separate property and the need for a domestic partnership agreement to define the intent/understanding of the clients. Further, it is not my belief that many of the King County judges will follow the *Vasquez* case unless compelled to do so by the Supreme Court.

II. Specific Concerns Regarding Wills and Will Substitutes for Unmarried Couples

A. Identification of Family and Concerns Regarding Pretermitted Children or Omitted Spouses

The current pretermitted child statute, RCW 11.12.091, applies only to surviving children (and not the descendants of a predeceased child) born or adopted after execution of the will (post-testamentary children), who are not named or provided for in the will. The statute further clarifies and defines what constitutes a "naming" or provision for a child or adopted child in order to determine whether the statute applies. A reference to a class described as children, descendants, or issue of the decedent who are born after execution of the will constitutes a "naming," while a reference to another class, such as a decedent's heirs or family, does not constitute such a naming. If it appears from the will or from other clear and convincing evidence that the failure to name or provide for such a child was intentional, the court need not award to the child his/her full intestate share.

The omitted spouse statute, RCW 11.12.095, applies only in the event a will fails to name or provide for a post-testamentary spouse. For gay clients, this would be an unlikely event as the laws of all states currently disallow such marriages. However, as to unmarried heterosexual couples, who may marry in the future, the attorney should inquire as to the intent of the client in the event the parties marry and should add provisions in the will providing for the spouse should the parties subsequently marry.

RCW 11.12.095(2) provides that a spouse is named if identified in the will by name, whether identified as a spouse or in any other manner and that reference to a future spouse is a sufficient naming. The court may consider a marriage settlement or other provisions for the omitted spouse outside of the decedent's will. RCW 11.12.095(3).

If a client is co-parenting a child of his/her partner, the attorney must ascertain the client's intent regarding provisions for the child(ren) of the partner. Where appropriate, the attorney could include in the will an expanded definition of children to include any child subsequently born to or adopted by the partner and co-parented by the client. If the client names the partner as a beneficiary, what is the client's intent if the partner predeceases?

It is sometimes advisable to specifically mention family members (heirs who would have taken in the absence of the will) and state in the will that leaving them nothing was knowingly and intentionally done.

B. Burial and Funeral Instructions and Dispositions of Remains

The arrangement for funerals, disposition of remains and burial instructions are important for unmarried couples. In the absence of enforceable written provisions, the client's partner would have no legal standing to make such arrangements. This

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can often be a source of painful conflict between the decedent's partner and the decedent's family members. Funeral homes are understandably unable to honor instructions from a non-relative and would subject themselves to potential legal liability to family members absent proper legal authority being granted to the partner. In the absence of directions by the decedent, the statute creates a hierarchy of persons who have the authority to make those decisions (the surviving spouse, the surviving adult children, surviving parents and the person acting as a representative of the decedent under a signed authorization of the decedent).

Thus, it is always necessary to make provision for the client's burial and funeral arrangements with unmarried clients. Such instructions may be located in the will or may be separately completed in compliance with the requirements of RCW 68.50.160.

C. The Anti-Lapse Statute

With unmarried couples, if the beneficiary is the child or other relative of the domestic partner, such beneficiary is not the "issue of a grandparent" for purposes of the anti-lapse statute, RCW 11.12.110. Thus, the anti-lapse statute would not apply to protect the descendants of such child or relative in the event the named beneficiary predeceases the testator. The will must specifically state whether the gift is conditioned upon the beneficiary surviving and is to lapse if the beneficiary predeceases or if the gift is to go to the descendants of the beneficiary.

D. Ademption

When a specific item of property is bequeathed in a will and is no longer owned by the testatrix upon her death, ademption occurs and the named beneficiary is not entitled to the property, the value of said property, the traceable funds therefrom, or any other equivalent property from the estate. For example, a bequest of a specifically identified home if later sold and replaced with another home (absent provision in the will for any after-acquired residence) would adeem. Often one of the major assets owned by unmarried couples is their home and a goal common for many unmarried couples is to provide that their jointly owned home will pass to their partner.

E. Probate and Nonprobate Assets/Abatement

Nonprobate assets include all property passing outside of a will except for the payable-on-death provision of life insurance, an annuity (or other similar contract), all employee benefit plans and other assets specifically excluded by RCW 11.02.005(15). Nonprobate assets will abate along with probate assets. The beneficiary of a nonprobate asset "that was subject to satisfaction of the decedent's general liabilities immediately before the decedent's death takes the asset subject to liabilities, claims, estate taxes, and the fair share of expenses of administration reasonably incurred by the personal representative in the transfer of or administration upon the asset." RCW 11.18.200. The

testator may vary the statutory provision for the abatement of assets and costs of administration.

Nonprobate assets are subject to creditors' claims and will abate in order to provide for payment of the decedent's liabilities and the costs of administration of the estate (arguably just those costs of administration "reasonably incurred by the personal representative in the transfer of or administration upon the asset").

Many clients believe that nonprobate assets pass outside of probate free of liabilities. The attorney should review the client's wishes in the event there are insufficient assets in the residuary estate to pay all creditors and costs of administration and to give effect to all of the gifts. The client may want bequests to the partner or to a child to abate last after exhaustion of all other assets or may want some or all nonprobate assets or a particular asset to abate last after exhaustion of all other assets.

Always consider the impact of both tax allocation and abatement/payment of creditors' claims provisions based on the total probate and nonprobate assets. Providing for payment of debts and taxes is commonly drafted to be paid from the residuary estate. However, if significant specific gifts and nonprobate assets have been left to someone other than the partner and the residue left to the partner, the testator may not wish to diminish the partner's share with all of these expenses. Each situation must be reviewed and considered individually.

F. Testamentary Capacity and Avoiding Post-Death Challenges from Families

A client is deemed to be possessed of testamentary capacity for the purpose of executing a will if "at the time of execution, he has sufficient mind and memory to understand the transaction, to comprehend generally the nature and extent of his property, and to recollect the objects of his bounty." *In Re Bottger's Estate*, 14 Wn.2d 676, 129 P.2d 518(1942). *In Re Riley's Estate*, 78 Wn.2d 623, 479 P.2d 1 (1970). If the competency of a client is in question or if the client has periods of forgetfulness, confusion or dementia with periods of lucidity, the attorney should be careful to have the client execute the will during a period of lucidity. A written opinion or chart note by the client's attending physician (after specific discussion with the physician as to the legal requisites of testamentary capacity) should be procured and copies maintained with the client's file.

If competency is a potential issue, at execution, the attorney should take special care to ask questions designed to elicit the specific information required to establish testamentary capacity. This could include a review *with the client in front of the witnesses* of the main provisions of the will, eliciting client confirmation and explanation of the specific provisions in the will, that such disposition reflects the client's wishes, identification of the client's family, partner and other significant persons (the natural objects of his/her bounty), the property owned by the

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client (the nature and size of his/her estate), the nature of the client's nonprobate assets, the manner in which they are held and the client's intent as to said nonprobate assets. If the client is not leaving assets to children or a spouse, have the client state that is his intent. The attorney should prepare a file note reflecting the questions and responses, and have the witnesses sign, date and confirm the truth of the notes. This could be used to refresh the witnesses' and notary's memories later.

A will must be executed by a testator acting of his/her own free will. The burden of proof has generally been on the challenger to a will to show that undue influence was utilized. Utilizing a witness to the will who benefits under the Will (an interested witness), will result in a presumption of undue influence and should be avoided. The court will consider the following factors to determine whether a testator was acting under undue influence: (1) did the beneficiary have a fiduciary or confidential relationship with the testator? (2) did the beneficiary actively participate in procuring or preparing the will? (3) what is the age, health and mental condition of the testator? (4) did the beneficiary receive an unusually or unnaturally large part of the testator's estate, including non-testamentary and nonprobate transfers to the beneficiary? (5) what is the nature and degree of the relationship between testator and beneficiary? (6) what opportunity did the beneficiary have to exert undue influence? and (7) an analysis by the court of the "naturalness or unnaturalness of the Will." *In Re Estate of Burbank*, 50 Wn. App. 611, 749 P.2d 691 (1988).

When a client is HIV positive, there is a high risk that a disinherited family member will question the client's competence to execute the will and may try to challenge the will based on alleged undue influence and/or fraud. Particular attention should be paid to these issues and thorough notes regarding the interview with the client and the impression of the client's competency are important. In cases in which a challenge is likely, extensively interview and question the testator in the presence of the witnesses, take notes on the interview of the client and have the witnesses sign and date written notes regarding the interview with the client and the witnesses' observations of the testator.

It may also be important to speak to the client's doctor and specifically inquire of the doctor as to the patient's testamentary capacity. Capacity is not a medical definition. As reflected above, testamentary capacity exists if the testator has an ability to understand the transaction, to comprehend generally the nature and extent of his property and to recollect the objects of his bounty.

The attorney should define these elements to the physician before eliciting the physician's opinions on the patient's ability to meet such a test. In the case of a client who is suffering from AIDS-related dementia and who may have moments of lucidity, it will be important to have the client's physician and other persons familiar with the client see the client as close to the time of execution as possible and/or be present for the execution.

Many practitioners include a no-contest clause in a client's will. The court has considered and recognized the validity of such provisions. *Boettcher v. Busse*, 45 Wn.2d 579(1954), *In Re Chappell's Estate*, 127 Was. 638, 221 Pac. 336 (1923). The Court recently addressed the issue of no-contest clauses in *Estate of Mumby*, 97 Wn.App.385(1999), and held that the clause is enforceable *unless the beneficiary initiates the contest in good faith and with probable cause*. Advice of counsel can constitute good faith and probably cause *provided the contestant has fully and fairly disclosed to the attorney all material facts*.

Further, such a provision would not seem to be sufficient to abrogate a post-testamentary spouse's or child's rights under the pretermitted child or omitted spouse statutes in the event they are not otherwise named or provided for in the will. It would not abrogate the rights, if any, of a current spouse or minor child to a family allowance or an award in lieu of homestead, nor would it be interpreted to derogate the rights to support or maintenance of a former spouse or a child as required by any Property Settlement Agreement, Decree or Order of Child Support.

It is a common practice and sometimes advisable in circumstances where a will challenge is expected to have the client sign the same will at two separate times a few months apart. Revocable trusts are another method of avoiding a will challenge, but would arguably be subject to some of the same challenges (undue influence, fraud, etc.) in a will. The trust would, however, avoid the probate notice requirements to heirs. Consider separate representation if a challenge is likely and undue influence could be alleged or has been threatened. Utilize nontestamentary dispositions as much as feasible (life insurance designations, beneficiary designations, joint tenancy with rights of survivorship), etc.

III. Federal Estate and Gift Taxes: Important Distinctions for Unmarried Couples and Some Estate Tax Strategies

A. Applicable Credit Amount

Basically, each individual has a tax credit, referred to as the "applicable credit amount," which applies to all taxable lifetime transfers and to the taxable estate at death. The unified credit results in an exemption from tax of \$675,000 for deaths in 2000 and increasing up to \$ 1,000,000 for deaths on or after 2006.

B. The Unlimited Marital Deduction

The unlimited marital deduction allows for a deduction for all gifts and bequests made to a donor's spouse (certain limitations apply to non-citizen spouses). The unlimited marital deduction does not apply to unmarried couples. Thus, any inter-vivos gift to a partner must be reviewed to determine whether it is a taxable transfer subject to estate or gift taxation. Estate planning devices

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drafted to utilize the applicable credit of a spouse (the credit shelter or bypass trust) are of no benefit to unmarried couples.

C. Annual Gift Tax Exclusion

The annual gift tax exclusion allows for a gift of a “present interest” in property to an unlimited number of donees, provided the annual gift to each donee does not exceed \$10,000 (the annual exclusion will rise in \$1,000 increments when cumulative inflation adjustments exceed the \$1,000 threshold).

The federal gift tax applies to all transfers in any given calendar year on the transfer of property by gift in excess of the annual gift tax exclusion. Such gifts include all direct and indirect gifts, outright or in trust. Interest free loans to a partner (which may also have income tax consequences) and the exercise or release of a general power of appointment would be subject to gift tax. If one partner pays all of the mortgage where both are liable on the mortgage or where the other is solely liable on the mortgage, the payment could constitute a gift. To the extent the payment of the partner’s obligation exceeds \$10,000 (or adjusted gift exclusion) per year, it will likely be deemed to be a taxable lifetime transfer.

D. Joint Interest Rule: Creation and Termination of Jointly Owned Property: Beware, No Qualified Joint Interests

Joint tenancy with right of survivorship (“JTWROS”) is commonly utilized by unmarried couples in order to avoid probate and to guard against family interference/challenge. However, it can lead to undesirable tax consequences. Additionally, property that passes outside of probate is no longer available to fund any remainder interests the client may wish to leave to children or other family members.

The gross estate at death includes the value of all property held (with a person other than the decedent’s spouse) as joint tenants with right of survivorship, except to the extent the funds utilized to acquire the property can be traced to the other joint tenant. IRC § 2040(a). If unmarried clients have a taxable estate and jointly own property, and they cannot trace the acquisition and payments on JTWROS property, the form of ownership should be changed to tenants in common to avoid this problem.

As to property jointly owned by a decedent and a spouse, only one-half of the property will be included in the decedent’s gross estate regardless of the source of the funds utilized for its acquisition. The Qualified Joint Interest rule (IRC § 2040(b)) does not apply to unmarried couples or unmarried joint owners of property.

In the case of married joint owners, transactions creating or terminating joint interests are generally not subject to gift tax consequences under IRC § 2523(a). For unmarried clients, the creation of a joint interest will generally constitute a completed gift for gift tax purposes if the parties did not provide the consideration for the acquisition in proportion to their respective

ownership interests. The termination of a joint interest will be treated as a gift if the proceeds are not divided in proportions that properly correspond to each joint owner’s interest in the property. The joint owner’s interest in the property should be determined pursuant to state law. If the donee is the spouse, the unlimited marital deduction would apply.

Property held as tenants in common, which does not have the incident of survivorship, is not subject to the rule of Section 2040 that mandates the inclusion of all the jointly held property except to the extent the survivor can carry the burden of proof as to source of the consideration.

E. Gift Splitting

A donor and her spouse may make an election to treat a gift as if it was made one-half by each of them. Thus, a married couple can make annual exclusion gifts from one spouse’s separate property of up to \$20,000 per year per donee by gift splitting. Unmarried couples cannot utilize the gift splitting provisions.

F. Estate Tax Strategies and Tools for Unmarried Clients

Although many of the traditional estate planning devices available to married couples to avoid, limit or defer federal estate taxes are not viable for unmarried couples, there are some estate planning devices available to unmarried couples. These would include the inter-vivos transfer of low value assets where the value is expected to significantly appreciate, the establishment of an Irrevocable Life Insurance Trust (ILIT), the lifetime gifting of assets or portions thereof within the annual gift tax exclusion amount (or in greater amounts which results in utilization of the donor’s applicable credit amount), and the charitable deduction.

Gifts may still be a viable tool when the gifted property is expected to appreciate. Gifts of a partial interest on undivided interests may be made in order to take advantage of valuation discounts and minority discounts. The creation of a partnership or limited company are valuable planning tools for this purpose. The lack of voting power, control, and limited marketability of such partnership interests would result in a discounted value for gift and estate tax purposes.

IV. Importance of Property/Domestic Partnership Agreements

It is advisable for the parties to execute a property status agreement (prenuptial or domestic partnership) to clarify the ownership of real and personal property, waive or affirm any meretricious property rights, and provide for the disposition of their separate and jointly acquired property upon the dissolution of their relationship, or in the event of the death of a partner.

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A prenuptial or property agreement between spouses requires full and fair disclosure of all material facts relating to the amount, character and value of the property of the parties, including assets and income information, together with full knowledge of all facts and circumstances that materially affect the contract, including property rights waived. *Friedlander v. Friedlander*, 80 Wn. 2d 293, 494 P.2d 200 (1972). While it is unclear whether the same criteria would be applied to agreements between unmarried couples, it is advisable to utilize the same requirements (i.e. independent legal advice, full and fair disclosure, and knowledge of the rights waived).

The attorney should not represent both parties to such an agreement. The potential that an actual conflict of interest exists is high and an attorney representing both sides to a pre-nuptial or domestic partnership agreement may be in violation of the rules of professional responsibility. The enforceability of such an agreement may be affected by joint representation. While the Court has not established a requirement of independent counsel, the lack of independent counsel is a factor as to the enforceability of the agreement, particularly where one of the parties is giving up certain rights. *Seattle First National Bank v. Whitney*, 16 Wash. App. 905, 560 P.2d 360 (1977).

V. Durable Powers and Health Care Directives

A. Powers of Attorney

Durable powers of attorney are authorized by RCW 11.94. The powers can become effective immediately upon execution or they may become effective only on the disability or incompetence of the principal. If the purpose of the power of attorney is to provide for the principal should he/she become disabled, it is important to make sure that the form being utilized has the requisite statutory language to create durability (i.e. to survive disability).

A grant of general powers such as “all authority to act that the principal would have if competent” includes numerous powers. There are a number of restricted or optional powers that are not included in the above general grant of authority, including the right to make gifts of the principal’s property, the right to make testamentary dispositions for the principal, the right to change beneficiary designations, the power to execute, amend, or revoke community property agreements or inter-vivos trusts, transfers to trusts, and the power to disclaim property on behalf of the principal. If these powers are advisable, they need to be specifically included.

The general purpose of gift language is to allow an attorney-in-fact to continue an already established pattern of gift giving by the principal and for the purpose of reducing estate taxes. Special consideration needs to be given to any gift-making powers included in a power of attorney in order to avoid the power being deemed to be a general power of appointment, which would

subject all of the principal’s property to possible inclusion in the estate of the attorney-in-fact upon the death of the attorney-in-fact. The general power of appointment problem can be avoided by limiting the authority of the attorney-in-fact to making gifts to himself/herself in accordance with an ascertainable standard under IRC § 2041.

RCW 11.94.010 provides that a principal may authorize his/her attorney-in-fact to provide informed consent for health care for the principal in the event the principal is not competent to do so. RCW 7.70.065 provides for informed consent for health care in the following order of priority: the appointed guardian if any; the person to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions; the patient’s spouse; the patient’s children (who are at least 18); the patient’s parents, and adult brothers and sisters of the patient. Thus, in the absence of a health care power of attorney, the client’s children, parents, and adult brothers and sisters would be authorized to grant informed consent for medical care.

It is important to consider provisions for the visitation of unmarried partners who may be prevented from such visitation by family members who are not supportive of the relationship. In the case of gay clients, it is also advisable to review with the client whether he/she wants visitation protection for friends.

Although one of the purposes in executing a power of attorney for health care decisions is to avoid the necessity of a guardianship, provisions should be added to the power of attorney designating a guardian of the person and an alternate. RCW 11.88.010(4) and RCW 11.94.010 provide that a principal may nominate a guardian or limited guardian of his/her estate or of his/her person in a durable power of attorney for the court’s consideration. The statute provides that the court must approve the most recently nominated person except for good cause or disqualification. The failure to nominate a guardian would allow other family members to petition for guardianship and revoke the power of attorney, thereby thwarting the client’s wishes. Provision should be made in the power of attorney form for the appointment of a guardian for the minor children in the event the client becomes disabled.

G. Health Care Directive

RCW 70.122, the Natural Death Act, was enacted to provide for the adult’s “fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or a permanent unconscious condition.” RCW 70.122.010. Effective in 1979, the addition of “permanent unconscious condition” was added to the legislative purposes clause and other portions of the statute. The statute specifically provides that a directive “may include other specific directions.” The directive should be kept with the declarer’s medical records. •

Real Estate Excise Tax Developments

Judee A. Wells, Foster Pepper & Shefelman, Seattle

There have been significant changes in the Washington state real estate excise tax over the past several years. These changes are continuing as the legislature, working with the Department of Revenue, continues to expand the reach of the tax by closing “perceived loopholes.”

The real estate excise tax is an excise tax imposed on each sale of real property in Washington, unless a specific exemption applies. A sale includes any transfer of real property for valuable consideration, including certain transfers and acquisitions of controlling interests in corporations, partnerships and other entities that own real property in Washington. The real estate excise tax is payable by the seller at the time of the transfer based on the selling price of the real estate, including the amount of any liens, mortgages or other debts. The tax is administered by the Department of Revenue. The state imposes a tax of 1.28 percent of the selling price on each sale. Each county or city may impose a tax at a rate up to an additional 1.50 percent of the selling price on each sale (up to an additional 2.0 percent if the city or county does not impose certain local sales taxes).

In the 1980’s and 1990’s, the Department of Revenue was constantly frustrated by the use of partnerships and corporations in commercial transactions to avoid the payment of real estate excise tax. The real estate excise tax had essentially become a residential real estate excise tax or a trap for unwary or unrepresented taxpayers. Sophisticated taxpayers were often contributing real property to partnerships and then transferring the partnership interests and paying no real estate excise tax even though the real property had been transferred for valuable consideration.

Effective July 1, 1993, the real estate excise tax statute was revised and the real estate excise tax was expanded to apply to the transfer or acquisition within any 12-month period of a controlling interest in any entity that owns an interest in real property located in Washington for valuable consideration. For purposes of the real estate excise tax, the transfer of the controlling interest is considered a taxable sale of the real property owned by entity. RCW 82.45.010(2); WAC 458-61-025(l). The purpose of extending the application of the real estate excise tax to controlling interest transfers was to equalize the excise tax burdens between other sales of real property and transfers of entity ownership essentially equivalent to sales of real property.

In the case of a corporation, a controlling interest for purposes of the real estate excise tax means either 50 percent or more of the total combined voting power of all classes of stock of the corporation entitled to vote, or 50 percent of the capital, profits, or beneficial interest in the voting stock of the corporation. RCW 82.45.033(1); WAC 458-61-025(2)(b)(i). Note that nonvoting shares are not taken into account in determining if a controlling interest has been transferred. In the case of a partnership, association, trust, or other entity, controlling interest means 50 percent or more of the capital, profits, or beneficial interest in

such partnership, association, trust, or other entity. RCW 82.45.033(2); WAC 458-61-025(2)(b)(ii). Note that control of the entity is not important for entities other than corporations; the test is an ownership test. It is also important to note that a transfer of 50% interest in capital or profits will trigger the application of the tax.

The measure of the tax is the selling price of the real property in Washington that is owned by the entity whose controlling interest has been transferred or acquired. WAC 458-61-025(4). If the transfer is taxable, the tax is imposed on 100% of the value of the real property in Washington regardless of the percentage interest of the entity that is transferred.

When there is a transfer or acquisition of a controlling interest in an entity that has an interest in real property, the seller of the interest is generally liable for the tax. WAC 458-61-025(7). When the seller has not paid the tax by the due date and neither the buyer nor the seller has notified the Department of Revenue of the sale within 30 days of the sale, the buyer is also personally liable for the tax. WAC 458-61-025(7)(a) When the buyer has notified the Department of the sale within 30 days of the sale, the WAC rules provide that the buyer is absolved from liability for any tax due. If neither the seller nor the buyer files an affidavit or a disclosure statement with the Department of Revenue, there is a significant risk that the statute of limitation will remain open and the transaction may be audited several years later.

If there is a delay in transferring control after the contract for sale is entered into, WAC 458-61-025(6)(a) provides that if it can be shown that the sole reason for the delay in transferring control is the avoidance of the tax, then the date of the contract arranging the transfer may determine if the transaction falls within the 12-month period. WAC 458-61-025(6)(a). WAC 458-61-025(6)(a) will only apply if the avoidance of the real estate excise tax is the sole reason for the delay in transferring control. If there are business reasons for the delay in transferring control in addition to the desire to minimize the real estate excise tax, the date of the actual transfer of control should be used to determine if there has been a transfer in a 12-month period and not the contract date. This WAC provision is a change from the typical “form over substance” provisions and requires a look at the substance of the transaction.

Even with this provision, options remain a viable alternative to transfer interests in an entity with a subsequent additional non-taxable transfer. An option will be respected if the option is a true option and not a disguised transfer. The WAC rules do not discuss options in connection with transfers of controlling interests and the 12-month rule. An option is different from a contract to transfer shares or other interests after the expiration of the 12-month period. A contract obligates the seller to sell and the buyer to buy. An option obligates the seller to sell, but the buyer has the “option” whether to buy. When the seller grants the option, no one knows if the shares or interest will ever be transferred (i.e.,

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Real Estate Excise Tax Developments

whether the buyer will exercise the option). The general rule concerning options should be that the shares or interests subject to the option would not be treated as transfer-red until, if and when the option is exercised. This rule is consistent with WAC 458-61-555 concerning the taxation of options to purchase real property. Ownership interests in entities that own real property are defined as “real property.” Accordingly, WAC 458-61-555 should control and options should be taxed when exercised.

The real estate excise tax does not apply to transfers that for federal income tax purposes do not involve the recognition of gain or loss for entity formation, liquidation or dissolution, and reorganization, including but not limited to, nonrecognition of gain or loss because of application of I.R.C. sections 332, 337, 351, 368(a)(1), 721, or 731. RCW 82.45.010(3)(o); WAC 458-61-376. If a transaction qualifies for the exemption under WAC 458-61-376 as a nonrecognition of gain or loss transaction for entity formation, liquidation or dissolution, or reorganization, but gain is partially recognized under the Internal Revenue Code provisions, the real estate excise tax applies to the amount of the transaction for which gain is recognized. WAC 458-61-376.

For example, assume that A and B are partners in LIMA Partnership. In a nontaxable I.R.C. section 721 transaction, C transfers real property to LIMA Partnership in exchange for a partnership interest in LIMA partnership. No consideration, other than the partnership interest in LIMA partnership, is given to C in exchange for C’s transfer of real property. Because the transfer is exempt under I.R.C. section 721, the real estate excise tax does not apply to C’s transfer of real property to LIMA partnership. WAC 458-61-376(4)(c).

Even with the rules on the transfers of controlling interests, the Department of Revenue became increasingly concerned that the 50 percent control test was being circumvented by the contribution of capital to an entity to dilute the percentage ownership of the existing owners to below 50 percent followed by a purchase of the diluted interest. This type of transaction could in some cases avoid the payment of the real estate excise tax even though there had been in effect a transfer of more than a 50 percent interest in the entity. Effective July 25, 1999, the exemption in RCW 82.45.010(3)(o) for transfers that are exempt for federal income tax purposes was revised by the addition of the following section:

However, the transfer described in (o)(i) of this subsection cannot be preceded or followed within a twelve-month period by another transfer or series of transfers, that, when combined with the otherwise exempt transfer or transfers described in (o)(i) of this subsection, results in the transfer of a controlling interest in the entity for valuable consideration, and in which one or more persons previously holding a controlling interest in the entity receive cash or property in exchange for any interest the person or persons acting in concert hold in the entity. This subsection (3)(o) (ii) does not apply to that part of the transfer involving property received that is the real property interest that the person

or persons originally contributed to the entity or when one or more persons who did not contribute real property or belong to the entity at a time when real property was purchased receive cash or personal property in exchange for that person or persons’ interest in the entity. The real estate excise tax under this subsection (3)(o)(ii) is imposed upon the person or persons who previously held a controlling interest in the entity.

The following example is an example of the abuse situation that the legislature was attempting to stop. Mr. X owns an office building in downtown Bellevue, Washington, and he wants to sell the office building to Mr. T without paying REET. Mr. X does not want to wait and use options; he wants to sell the property now. Mr. X contributes the office building to a single member limited liability company, Mr. T contributes cash to the limited liability company in exchange for a 60 percent interest. After a decent waiting period, sometimes only two or three days, Mr. T purchases Mr. X’s remaining 40 percent interest in the limited liability company and owns the entire property.

The legislative amendment will cause this type of transaction to be taxable because there is an exempt transaction followed by a transaction in which the seller receives valuable consideration. When you consider the two transactions together, Mr. X has transferred his controlling interest for valuable consideration and the transaction is taxable. If the application of this new provision is limited to this type of abuse transaction for which it was intended, the provision will be relatively easy for tax practitioners to apply. However, the language in the statutory amendment is broad and unclear and the provision may apply in other types of situations. There are numerous situations where there is an exempt transaction and a completely unrelated transaction within the twelve months before or after the exempt transaction that results in the transfer of control. This new statutory provision will apply regardless of whether the two transactions are related or the intent of the transactions is to avoid the real estate excise tax. In relying on the “no gain recognition under the Internal Revenue Code” exemption of the real estate excise tax statute, it is important to closely evaluate transactions before and after the exempt transfer to determine whether this new statutory provision applies.

There are two exceptions to this rule. The transaction will not be taxable if a taxpayer is distributed property that she originally contributed to the entity, and the transaction will not be taxable if the taxpayer did not contribute property to the entity and was not an owner when the entity purchased the property. These two exceptions are reasonable because in both cases, the taxpayers are not attempting to transfer real property that she owns without paying real estate excise tax.

The real estate excise tax area continues to be an “active area” for the Department of Revenue and taxpayers. The new statutory provision adds one more roadblock in the structuring of transactions and unfortunately may trigger a tax on transactions that are far beyond the intent of the statute. •

Recent Developments

Probate and Trust

Wendy S. Goffe, Graham & Dunn PC, Seattle

WASHINGTON COURT OF APPEALS

Estate of Fleming, 98 Wn. App. 915 (Div. I 2000).

In a case of first impression in Washington, the Court of Appeals determined whether a parental termination order terminating a biological parent's rights to a child deprived the biological parent and the parent's other issue from inheriting from the child who had never subsequently become adopted or had any intestate heirs of his own.

Thomas was born out of wedlock to Margaret, and she gave up her son for adoption in 1947. The adoption order stated that she was "hereby permanently deprived of any and all maternal rights and interests in and to "the child, committing the child to the permanent custody of the Catholic Charity of Dioceses of Seattle, and authorizing that organization to consent to his adoption. Thomas was never adopted, and when he died intestate in 1996, he was not married and had no issue of his own. His only living biological relatives were his mother Margaret and a half brother who was born to Margaret after she had terminated her parental rights to Thomas. Because he had no heirs, the Court Commissioner determined that his estate would escheat to the State of Washington.

The court first held that the legal effect of the 1947 termination order must be analyzed under the statutes in force in the time of the termination proceeding, not those in effect at the time of Thomas' death in 1996. The statute in effect at the time and the plain language of the order itself both clearly provided that all maternal interests and rights were terminated upon entry of the order, which the court interpreted to include rights of intestate succession. In determining that the order terminated Margaret's rights to intestate succession, the court drew a distinction between the rights of a parent who gives up a child for adoption and the rights that the child himself may have to inherit from a biological parent if the child is not adopted by other parents. While the child may have inheritance rights, the court saw that there was little reason for the relinquishing parent to reap the benefits of intestate inheritance if a child should happen to die intestate without having been adopted.

Further, because Thomas' biological mother's inheritance rights were terminated by the order, the rights of Margaret's other child to inherit from Thomas were likewise terminated. Because the intestacy statutes establish a system of intestate succession whereby the line of descent and distribution flows through a decedent's parents to reach the issue of parents, the half brother's inheritance line must flow through a common ancestor. Because Margaret's rights were terminated, the effect was to permanently sever Thomas from her family line.

Nelson v. Schubert, 98 Wn. App. 754 (Div. I 2000).

In a case of first impression, the court determined that the limitations period for bringing a wrongful death action relating to a person who has disappeared and is presumed dead is tolled during the seven-year period that must elapse after the disappearance in order to create the legal presumption of death.

Julianna disappeared in 1989. A little more than seven years later, her husband filed a motion seeking to have her declared dead. Immediately after the court granted the motion, he filed a petition for his appointment as personal representative and to probate his wife's will. Julianna's mother objected to his appointment on the grounds that he was Julianna's slayer. The trial court named Julianna's mother as special purpose personal representative to evaluate whether or not the estate should file a wrongful death action against the husband and pursue the action if appropriate. The husband moved to dismiss the wrongful death suit on the grounds that it was barred by the three-year statute of limitations.

In its holding, the court agreed that wrongful death actions are governed by a three-year statute of limitations under RCW 4.16.080. The husband responded that Julianna's mother could have commenced the lawsuit within three years after the date Julianna disappeared, or when she believed and/or discovered Julianna had died. The court noted that this was a matter of first impression in Washington, but a similar question had arisen in the context of insurance claims. Here, Julianna's death could not be established directly, and Julianna's husband had himself maintained that his wife was in fact alive, until he himself brought the action to probate her estate. Since Julianna's death could not be proven without the aid of the statutory presumption arising from her unexplained absence, the action was tolled until the plaintiff could present evidence of death by way of presumption.

Fracom v. Costco Wholesale Corp., 98 Wn. App. 845 (Div. III 2000).

In a case involving sexual discrimination and harassment claims by an employee against her supervisor and the company she was employed by, the Court of Appeals dismissed the employee's claims against the marital community of the supervisor for the tortious acts committed by the supervisor.

In reaching this conclusion, the court confirmed that community assets are exempt from separate tort judgments unless the act occurred (1) in the course of managing community property, or (2) for the benefit of the marital community. Here, the plaintiffs claimed that the community was liable, because the

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Recent Developments

Real Estate

Scott B. Osborne, Graham & Dunn PC, Seattle

WASHINGTON COURT OF APPEALS

Diamaco, Inc. v. Aetna Cas. & Sur., 97 Wn.App. 335 (1999)

Facts: Seattle hired Diamaco to perform a seismic retrofit of the Fauntleroy expressway. The use of defective material resulted in damage to the facility. Ultimately, the City imposed liquidated damages and other expenses upon Diamaco. The contractor commenced a declaratory judgment action against its comprehensive general liability carrier to cover these damages. The trial court dismissed the claim.

Holding: The court held that the nature of the loss did fall within the insuring clause of the policy. Exclusion (j) to the coverage, however, excluded coverage for property damage to

- (1) Property you rent, occupy or which is in your care, custody or control if:
 - a. You agreed to provide insurance coverage for it; or
 - b. Such property is owned by a person or organization controlling the insured or is under the control of the insured.

The first exclusion applied. Under the terms of its contract with the City, Diamaco agreed to provide coverage for claims “for property damage which may arise from any act or omission of the Contractor or the subcontractor, or by anyone directly or indirectly employed by either of them.” The Court construed this to mean property damage coverage and affirmed the dismissal.

Cle Elum Bowl v. North Pac. Ins. Co., 96 Wn.App. 698 (1999)

Facts: Cle Elum Bowl leased a bowling alley. Pursuant to the lease, the tenant was required to maintain a commercial general liability policy of insurance. This was obtained from North Pacific. Following a snowstorm, the roof of the building collapsed.

The landlord sued the tenant claiming negligence and breach of the lease. The tenant tendered defense to North Pacific, who denied coverage and the tenant sued. The trial court dismissed the claim against the insurer on a summary judgment.

Holding: The dismissal was affirmed. The CGL policy in Section I(A)(2)(j)(1) specifically excludes damage to property “you own, rent, or occupy.” The exclusion applied to damage to the building leased by Cle Elum. The contractual indemnity clause of the policy did not apply, because Cle Elum did not assume liability under the lease for damage to the building. The lease required removal of snow from the roof, but did not assign liability to Cle Elum for collapse. The landlord retained responsibility to maintain the structural integrity of the building, including the roof, walls and foundation.

Hayden v. Mut. of Enumclaw Ins. Co., 95 Wn.App. 563 (1999)

Facts: Hayden Farms suffered damages to its crops when Krause failed to properly graft orchard trees. Krause tendered the defense of the claim to his liability insurer. A default judgment was entered against Krause, who then assigned his rights under his insurance policy to Hayden. Hayden then sued the insurer claiming coverage under the policy and bad faith denial of the defense. The trial court dismissed the claim.

Holding: The dismissal was affirmed. The failure to provide a specific reference to the policy in the letter denying coverage was not a violation of WAC 284-30-380. The insurer had no duty to defend for acts specifically excluded from the policy. Assuming that Hayden suffered property damage from an occurrence, the claim was clearly excluded by exclusion (h) that provided in part:

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Recent Developments: Probate and Trust

supervisor’s actions were committed at work, and thus were in the course of managing community property or were for the benefit of the marital community. The court, however, held that it was clear that any sexual harassment itself was not for the benefit of or in the course of managing the community. Even though the actions occurred at work, sexual harassment at the

workplace certainly was not within the scope of the supervisor’s employment. Therefore, because the acts were outside the scope of the supervisor’s employment, there was no merit to the plaintiff’s argument that his marital community should be liable for those actions. •

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Recent Developments: Real Estate

This insurance does not apply:

...

- (h) to loss of use of tangible property which has not been physically injured or destroyed resulting from
 - (1) a delay in or lack of performance by or on behalf of the NAMED INSURED of any contract or agreement, or
 - (2) the failure of the NAMED INSURED'S PRODUCT or work performed by or on behalf of the NAMED INSURED to meet the level of performance, quality, fitness and durability warranted or represented by the NAMED INSURED . . .

Hayden's damages arose from a claimed delay in harvesting the crop, and the claim was clearly within the exclusion of the policy.

Schwindt v. Commonwealth Ins. Co., 94 Wn.App. 504 (1999)

Facts: A contractor obtained a builder's risk policy from Commonwealth in connection with the construction of a surgical center. The policy did not cover "defective workmanship" but did cover property damage arising from faulty workmanship. The contractor abandoned the work prior to 1990. In 1997, a claim was filed on the policy seeking recovery for various items of damage arising from faulty construction work. The trial court dismissed the action as time barred because it had not been filed within the six-year statute of limitation.

Holding: The applicable six-year statute of limitation began to run as of the date of the occurrence giving rise to the claim. The Court of Appeals rejected the argument that the statute did not begin to run until the insurance company refused the claim.

National Union Ins. Co. v. Puget Power, 94 Wn.App. 163 (1999)

Facts: Several insurers sought recovery against Puget Power following the payment under business interruption policies arising from a power outage experienced by Boeing. The insurers claimed a right to recovery under their subrogation rights. Puget Power claimed that its filed tariff absolved it from liability for power losses arising from weather conditions. Boeing had claimed that Puget Power should have activated a standby generator in anticipation of a severe storm. The trial court dismissed the insurers' claims.

Holding: The Court of Appeals reversed. The filed tariffs and regulations applicable to Puget Power require the utility to take reasonable steps to maintain service. The utility was required under WAC 480-100-076 to "endeavor to avoid

interruptions of service, and when such interruptions occur, to reestablish service with a minimum of delay." Evidence was presented that created a question of fact as to whether this duty was breached in light of the claim that the alternative generator could have been easily activated to avoid the cessation of power.

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REAL PROPERTY COUNCIL REPORT

Warren Koons, Davis Wright Tremaine LLP, Bellevue
Director - Real Property Council

Why I Became a Real Property Lawyer (Or Reading the Dictionary for Fun and Enlightenment)

Did you ever wonder what it was that attracted you to practicing real property law (as opposed to say estate planning)? Admittedly, in many of the negotiation battles we engage in as real property lawyers over forms, phrases and words, there often is an element of the nit-picky or absurd to it all: Please *change “commercially reasonable” to “reasonable”.... Tell them the recital of consideration in the deed should say “For valuable consideration” not “For \$10 and other valuable consideration”.... We’ll indemnify you for acts of “willful misconduct” but not “misconduct,” etc., etc.* Remember that great scene from that Marx Brothers movie (I think it’s *Night at the Opera*) where Graucho and Chico are negotiating a contract between the party of the first part and the party of the second part, and as they read through the legal gibberish Graucho keeps tearing off parts of the contract because it doesn’t make any sense, until they end up with just the signature line.... At least we get paid for what we do (usually).

Seriously, we must have been drawn to real property law for some good reason. To discover what drew us, let’s go back to the source — *Black’s Law Dictionary*, of course. Was it “real property” itself that drew us? Perhaps. Some people just like dirt and fields, but conceptually, “real property” is, well, pretty boring — “Land, and generally whatever’s erected or growing on or affixed to land...[and] rights issuing out of, annexed to, and exercisable within or about land.” (*Id.*, 4th Ed., p. 1383). Hmmm. It had to have been something more interesting, more noble than that that led us into real property law. No, we have to go deeper than the meaning of “real property.”

Assuming we know what “is” is, we need to delve to the depths of what “property” itself *is*. According to *Black’s*, property is, “That which is peculiar or proper to any person; that which belongs exclusively to one; in the strict legal sense, an aggregate of rights which are guaranteed and protected by the

government.” (*Id.*, 4th Ed., p. 1382). Now that *is* interesting — property is both a thing and a right....something is my property only because the government guarantees it is. (I can see that the Constitution comes in pretty handy at this point.) Maybe now we’re getting some place. *Black’s* further defines “property” as “[T]he unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it.” *Id.* I like that. Sounds like property is pretty wide open and free-wheelin’ — that’s attractive, and there’s also that one little word “legal.” How does that play in? I can see this being pretty darn interesting.

But then, we come to the ultimate meaning of property. “Property” according to *Black’s* is “The highest right a [person] can have to anything; being used for that right which one has to lands or tenements, goods or chattels, which no way depends on another [person’s] courtesy.” *Id.* Wow! That is amazing! The highest right a person can have to *anything*.... No wonder I became a real property lawyer! Well, that and I like dirt, too.

- **Real Property Council Update:** *The Real Property Council will be meeting in late September to plan for the coming year. Our efforts will include planning for the 2001 Midyear Meeting in Seattle and other CLEs and improving the RPPT Webpage to make it a more useful resource for the members. We are not currently aware of any legislative proposals affecting real property that are on the horizon or that should be advanced by the RPPT Section. If you know of any real property-related legislative proposals that may or should be brought up this year, please let us know. Please e-mail any suggestions, comments, thoughts (or dictionary readings) you may have on the RPPT or related issues to me at: warrenkoons@dwt.com.*

PROBATE AND TRUST COUNCIL REPORT

Thomas M. Culbertson, Lukins & Annis, PS, Spokane

Director – Probate and Trust Council

Returning to the RPPT Executive Committee after a year's absence, I look forward to a very interesting term. Not only is our half of the section working on some important legislative proposals at the state level, but external forces over which we have far less control may fundamentally change the way we practice.

Legislatively we are looking at three measures which may be proposed to the WSBA for introduction in the 2001 legislative session. The first involves the Rule Against Perpetuities. Following up on recommendations made by a committee chaired by Mike Carrico of Riddell Williams, we are advocating replacing the complicated common law rule with a simple 150-year rule (an interest must vest within 150-years of its creation). Consideration was given to the uniform rule adopted by NCCUSL (the longer of the common law rule or 100-years), but it was felt that any proposal which could require reliance upon the common law rule would not accomplish the goal of simplification. Consideration was also given to abolition of the Rule, but the Executive Committee felt that the Section should not advocate a proposal with such significant, and potentially controversial, policy implications (to say nothing of the fact that EC members themselves could not agree on the wisdom of repeal). Of course any proposal concerning the rule may induce others to push for repeal, and section members will be available to testify as to the relevant technical issues.

The second proposal is a new power of attorney statute. A committee chaired by Professor Karen Boxx from the UW law school has been hard at work for a year on such issues as requiring third party reliance, protections for third parties, protections for durable power of attorney principals, and a statutory form DPOA. As of this writing (early July), the committee anticipates only some of its work to be ready for the next legislative session, with the statutory form and some more minor matters needing another year to complete.

The third measure, which would validate trusts for the benefit of animals, has just recently been proposed to Section leadership, and as of this writing no decision has been made whether to sponsor it. It is modeled after provisions in the Uniform Probate Code, the Uniform Trust Act, and similar legislation in about a dozen other states.

A joint task force of this section and the Estate & Gift Tax Committee of the Taxation section has also taken a hard look at RCW 6.15.020, which provides that a non-participant spouse's community property interest in an IRA passes with the residuary, absent a contrary provision in the will. Several RPPT members

felt that the default rule was counter-intuitive and that the non-participant spouse's interest should pass to the participant spouse. After much spirited debate, no consensus could be reached. As a general rule the Section does not sponsor legislation on which the leadership is divided, so that project is not being pursued further.

Finally, another joint task force with the Estate & Gift Tax Committee is reviewing the Uniform Principal and Income Act. Fred Emry, from Paine Hamblen in Spokane, is chairing that effort. A controversial provision in the Uniform Act gives trustees, under certain circumstances, the discretion to allocate to income receipts which would ordinarily be allocated to principal, and vice versa. Such discretion might be exercised in a low interest rate environment where an income-only beneficiary receives very little while remaindermen benefit from huge appreciation in principal. Institutional trustees have expressed concern about the liability such discretion may expose them to, and there is concern that individual trustees will lack the expertise to exercise that discretion appropriately. The task force does not anticipate completing its work until the 2002 legislative session.

The external forces I refer to are the efforts to permit multi-disciplinary practices (MDP) and to repeal estate and gift taxes. Space constraints in this column permit only an invitation to discussion and debate, with the hope that these issues can be reviewed in greater depth in future issues of the newsletter. To start the discussion, I have a couple of personal observations. On the issue of MDP, I fear the potential loss of professional independence. Most of the debate has focused on lawyers working for accounting firms, but what about estate planning done by the legal department of a life insurance company? On the issue of estate and gift tax repeal, I would urge all lawyers, regardless of their view on the subject, to do what they can to keep the debate honest and factual. A poorly written paragraph in the July issue of the ABA Journal would lead readers to believe that a \$1 million estate is subject to \$747,306 in taxes, when any practitioner in the area knows that is simply not true. If that well-respected publication confuses readers, it is no wonder that much misinformation comes out of the lay press (to say nothing of politicians!). If you have thoughts on either of these issues which you would like to see added to the public debate, please email me at tculbertson@lukins.com.

HOW TO REACH US!

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