

Real Property, Probate & Trust



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QTIP Elections and Washington's Estate Tax

by Nathan Schreiner, Washington State Department of Revenue, Legislation and Policy Division

On May 19, 2003, the Washington State Department of Revenue issued an Excise Tax Advisory ("ETA") allowing "Washington-only" QTIP elections on the Washington State Estate and Transfer Tax Return. Excise Tax Advisories are interpretive statements issued by the Department under the authority of RCW 34.05.230 (Washington Administrative Procedure Act). Washington QTIP treatment may be elected by completing Schedule M and claiming the corresponding marital deduction on the Washington return. No additional action is required to make a Washington QTIP election. The ETA is available on the Department's Web site at <http://dor.wa.gov/Docs/Rules/eta/2013.PDF>. The text of the ETA is also included with this newsletter.

I. Background

The Washington Legislature has not conformed the Washington estate tax system to the changes Congress made to the federal estate tax system in the Economic Growth and Tax Relief Reconciliation Act of 2001. Washington estate tax liability continues to be based on the state death tax credit determined under the Internal Revenue Code as it existed on January 1, 2001 ("2001 IRC"). As a result, the unified credit for the Washington return is now lower than for federal purposes. For deaths occurring in 2003, the federal unified credit is \$1,000,000; the Washington credit is \$700,000.

The different credit amounts complicate the use of credit shelter trusts. An estate using a credit shelter trust with a funding formula based on the Washington credit amount will not incur Washington or federal estate tax liability. However, by underfunding the trust for federal purposes, the estate loses the federal tax benefit of sheltering an additional \$300,000 (currently the difference between the Washington and federal credit

amounts). Funding the trust with additional property will increase the federal tax benefit, but at the expense of causing additional Washington estate tax liability. As the gap between the federal and Washington credits grows, the choice of funding levels for credit shelter trusts will become more significant.

II. ETA Purpose

Practitioners faced with this choice have asked the Department whether a QTIP election may be made for a larger amount or fraction on the Washington return, allowing the estate to take a larger marital deduction on the Washington return and make full use of the federal credit without incurring Washington estate tax liability. The Department has concluded that the different deductions are permissible. However, as is true for the federal deduction, a surviving spouse who receives Washington QTIP will be required to include the property in his or her gross estate for Washington estate tax purposes. The "Washington-only" QTIP provides an additional planning tool for married couples that wish to defer estate tax liability until the second death.

III. Assistance Regarding Other Washington Estate Tax Questions

For those with additional questions about Washington's estate tax, a variety of resources are available. The Department provides email updates about Washington estate tax issues to subscribers through the Department's estate tax electronic discussion group (listserve). The Department also answers questions received by mail. To subscribe to the listserve, or for additional information about Washington's estate tax, please use the contact information following this article.

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Skipping a Generation? Don't Skip Thinking About Consequences of Washington State Generation-Skipping Transfer Taxes

by Ann T. Wilson, Law Offices of Ann T. Wilson, Seattle

Most of the focus regarding Washington state transfer taxes continuing to be tied to the Internal Revenue Code as of January 1, 2001 ("2001 IRC") has been on the state estate tax implications. However, there are also disparities between the state and federal generation-skipping transfer taxes including:

1. The calculation of the tax;
2. The amount of GST exemption available for allocation; and
3. The rules for allocation of the GST exemption.

RCW 83.100.045 provides that:

A tax in an amount equal to the federal credit is imposed on every generation-skipping transfer, if real or tangible personal property subject to the federal tax is located in this state or if the trust has its principal place of administration in this state at the time of the generation-skipping transfer.

WAC 458-57-017(2) specifies that the amount of the tax is the amount of the federal credit provided under the 2001 IRC. The federal credit is contained in IRC section 2604. Section 2604(a) provides that if a taxable termination or taxable distribution occurs at the same time as, and as a result of the death of an individual, a credit is available

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The Department will provide a written letter ruling on request regarding the application of the law, rules, or advisories with respect to a Washington return. The ruling will state the Department's position with respect to the facts presented and has no precedential value. To request a letter ruling, send a written request to the mailing address below. To receive a reply that is binding on the Department, the request must identify the taxpayer and disclose all pertinent facts surrounding the issue.

Department of Revenue Contact Information

- Department Web site address: <http://www.dor.wa.gov>
- Links to new estate tax return: <http://www.dor.wa.gov/Docs/forms/Misc/EstateTransTxRtrn.pdf>
- Links to new estate tax return instructions: <http://www.dor.wa.gov/Docs/forms/Misc/EstateTransTxRtrnInst.pdf>
- Link to estate tax listserv: http://www.dor.wa.gov/Content/Contact/email/con_email_listserv_app.asp?listtype=estate
- Estate tax telephone contact numbers: (360) 753-5547 or 753-7518
- Department address:

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against the federal generation-skipping transfer tax in an amount equal to any generation-skipping transfer tax actually paid to a state. Section 2604(b) limits the credit to no more than five percent of the federal generation-skipping transfer tax imposed on the transfer.

Section 2604 comes into play almost exclusively when there is a taxable termination of a trust which is not wholly GST exempt. As a result of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), IRC section 2604 does not apply to generation-skipping transfers after December 31, 2004, for federal generation-skipping transfer tax purposes. In other words, no federal credit for state generation-skipping transfer tax will be available starting in 2005.

In the meantime, the amount of the credit available under section 2604 and the amount of the state generation-skipping transfer tax are different, because the federal generation-skipping transfer tax is calculated by multiplying the taxable amount by the applicable rate. The applicable rate is defined in IRC section 2641(a) as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer. Under the 2001 IRC, the maximum estate tax rate was fifty-five percent. In 2003, the maximum federal rate is forty-nine percent and, under EGTRRA, the maximum rate is scheduled to step down one percent each year until it reaches forty-five percent in 2007. As explained below, a trust may also have different inclusion ratios for federal and state generation-skipping transfer tax purposes. Thus, Page 3, Part 8 of the Washington State Estate and Transfer Tax Return and WAC 458-57-017(3) are misleading. They instruct that the amount of the Washington state generation-skipping transfer tax is to be determined from IRS Forms 706-GS(D) & (T). Instead, the amount of the tax should be calculated using the maximum rate of fifty-five percent and the inclusion ratio applicable for state generation-skipping transfer tax purposes.

Presently, the generation-skipping transfer tax exemption amount for both federal and state purposes is \$1,120,000. Starting in 2004, however, the exemption amount for federal purposes will be tied to the federal estate tax exemption amount. In 2004, that amount will be \$1,500,000 and it will continue to increase until it reaches \$3,500,000 in 2009. The state generation-skipping transfer tax exemption amount will remain \$1,000,000 (as adjusted for inflation). After 2004, there will be no reason for the IRS to publish the inflation-adjusted amount. It is not clear at this time whether the state will publish the new exemption amount each year or whether practitioners will have to do the calculation themselves.

EGTRRA also contains taxpayer friendly rules providing for automatic allocation of GST exemption to "indirect skips" and allowing for retroactive allocation of GST exemption to a trust if a beneficiary of the trust dies before the transferor and after December 31, 2000. The indirect skip rules provide for the automatic allocation of GST exemption to trusts that are likely to

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Powers of Homeowners' Associations

by Robert D. Wilson-Hoss, Hoss and Wilson-Hoss, Shelton, Washington

I. Introduction

I see homeowners' association issues from a practical perspective. I represent over 40 associations, and have been at this for about 15 years. Daily, I am asked to collect delinquencies, remediate property conditions, and help boards of directors balance their small business sides with their membership-service sides.

Almost always, before I can answer any questions from a new client about the powers of an association, I need to see all of the association's recorded and other governing documents. These include plat maps, deeds, easements, declarations of covenants, articles of incorporation, bylaws, and other rules. They then have to be compared to the Non-Profit Corporations Act, RCW 24.03 *et seq.*, and the Homeowners' Association Act, RCW 64.38 *et seq.*

Any more, on a good day, all I know is what I don't know. This includes many aspects of Washington State homeowners' association decisional law, especially pre-

1995. Cases criticized other cases. Inconsistencies and ignored theories were commonplace. Secondary sources have been happy to point out some of the problems, but they also are not immune. This article is an attempt to provoke discussion about this area of the law. If there are no responses, that will be all right, too. I will then start citing myself in this article to Division II of the Court of Appeals, and it will be amused.

II. The Question of an Association's Lawful Powers

Examples of the questions I and other practitioners who represent homeowners' associations are regularly asked are how to best collect unpaid dues and assessments, how to enforce property condition covenant violations, how to manage the common areas, and how to be both a business and a member-service association at the same time.

A foundation question is almost always, what can this association lawfully do? The
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Skipping a Generation? ...

experience a taxable event. The retroactive allocation rule allows a taxpayer to insulate a taxable termination from generation-skipping tax with out having to potentially waste exemption by allocating it at the time of the original transfer.

On July 26, 2002, the Washington Department of Revenue issued a Special Notice. That Notice states:

Washington will not follow the new federal generation-skipping transfer tax allocation rules. This is because Washington must use the allocation rules set forth in the Internal Revenue Code as it existed on January 1, 2001.

On the other hand, WAC 458-57-017(4) provides that:

The allocation(s) of the GST exemption for Washington purposes will be the same as the allocation(s) made for federal GST exemption purposes up to the amount allowed by section 2631 of the 2001 IRC.

It is the author's understanding based other her reading of other publications by and telephone conversations with the Department of Revenue that the above-referenced section of the WAC is not intended to imply that the indirect skip automatic allocation rules and retroactive allocation apply for state generation-skipping transfer tax purposes. Thus, practitioners will most likely have to make decisions about whether to allocate GST exemption to a trust at the time it is created for state GST purposes. At this point, it is unclear how one is to allocate state generation-skipping transfer tax exemption and whether it will be necessary to create multiple trusts to have an inclusion ratio of either zero or one for both state and federal generation-skipping transfer tax purposes. As the gap between the exemption amounts continues to grow, these issues will have to be addressed by the Legislature.

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Powers of Homeowners' Associations

answers used to come from a couple of lines of case law and a handful of secondary sources. Since 1995, the Homeowners' Association Act has also become part of the picture, though with an uncertain relationship to prior case law.

A. Secondary Sources

The secondary sources include, first, Professor Stoebeck, in his *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861 (1977), and his closely related but more recent work in *Washington Practice* at Vol. 17 *Real Estate: Property Law*, Chapter 3 ("Running Covenants"). Also very useful is the discussion by William H. Clarke in the Bar Association's *Real Property Deskbook*, "Running Covenants," at Chapter 14. Not so useful is *Restatement (Third) of Property: Servitudes*, which is too general, and ignores most of Washington's cases and statutes. There are also two books, Natelson, *Law of Property Owners' Association* (1989), and Hyatt, *Condominium and Homeowners' Association Practice: Community Association Law* (2d ed. 1988), which provide a good general introduction.

B. Washington Case Law

1. Real Covenants vs. Equitable Servitudes

Much of the discussion in cases and secondary sources about the power of homeowners' associations examines the law of running servitudes, or covenants. In general, if the restrictions come within a deed, they are running real covenants; if otherwise, they are running equitable servitudes. Necessary elements of the more formal running real covenants include: (a) a writing requirement (to satisfy the Statute of Frauds), (b) whether the servitude "touches and concerns" the land, (c) intent to bind successors, and (d) vertical and horizontal privity.

Equitable servitudes, as opposed to real covenants, must meet lesser standards. They must "touch and concern" the land, and notice is required, but case law takes a different approach from that applied to running covenants. First, a landmark case in Washington, *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920), enforced as a running equitable servitude a use restriction that was not even based on a writing, but simply on a general neighborhood scheme or common plan. Second, there is no requirement for proof of intent to bind successors; the intent can be easily inferred in most homeowners' association contexts. Third, horizontal privity is not an element at all of running equitable servitudes, and vertical privity requirements are relaxed as to equitable servitudes, as opposed to real covenants.

Those still reading this will by now likely react that all of these distinctions and requirements seem unnecessarily complicated and anachronistic. They are, and increasingly so. For example, most homeowners' associations are supported by covenants recorded separately, outside of deeds. They therefore get the relaxed equitable servitude treatment, as opposed to the more stringent real covenant standards. Even where restrictions are contained within deeds, it is common to also see an independent

declaration of covenants. Do the stricter real covenant standards apply in that situation? Not likely.

At least three recent cases - *Hollis v. Garwall*, 137 Wn.2d 683, 974 P.2d 836 (1998); *1515-1519 Lakeview Boulevard Condominium Association*, 102 Wn. App. 599, 9 P.3d 879 (Div. I, 2000); and *Pathe v Zech*, Nos. 49761-8-I and 50662-5-I, (Div. I, unpublished, April 28, 2003) - discuss directly some aspects of the current transformation of these rules. I think we may see develop two tests for running covenants in the homeowners' association context. First, there must be either a writing, with notice provided by a Statute of Frauds-worthy recording; or something else that imparts a yet to be determined level of either constructive or actual notice.¹ Second, there will be a relaxed "touch and concern" requirement. Since intent to bind successors and vertical and horizontal privity are the overall reasons for such covenants in the residential development setting, they should be presumed, except where the proof is otherwise.

This would produce a practical result consistent with the intentions of developers when they create residential projects, and the understanding of owners when they buy homes subject to homeowners' associations. When I read between the lines of most decisions, this result would be much welcomed by our appellate courts, as well as practitioners.

Powers of homeowners' associations, then, can be derived from these running servitudes. Anyone who buys land subject to running servitudes is obligated to respect them.

2. Organizational Documents as Contracts

There are at least two other sources for the powers of a homeowners' association, one unexpected. An obscure (to me) general rule in Washington for non-profit associations is that their articles of incorporation and bylaws constitute contracts with their members. The earliest Washington case I have found is *Seattle Trust Co. v. Pitner*, 18 Wash. 401, 406, 51 P. 1048 (1898) ("(t)his by-law had the force and effect of a contract").

So, in theory, if a lot owner can be tied to membership in a non-profit homeowners' association, its articles and bylaws, and presumably other lawful rules, taken together rise to the status of a contract with the member. This was what the Supreme Court said in 1956 in *Rodruck v. Sand Point Maintenance Commission*, 48 Wn.2d 565, 295 P. 2d 714. The articles and bylaws are "correlated" to the covenants; as such, they "constitute a contract between the (association) and its members."²

Rodruck is usually cited as an early case that liberalized the "touch and concern" requirement, but in the next breath it offered the correlated document/contract reasoning, derived from corporate law sources. Since *Rodruck*, a handful of cases have reached similar results in the homeowners' association context. Most of the cases since *Rodruck* that could have included this analysis, however, did not.

C. The Homeowners' Association Act, RCW 64.38

Finally, we come to RCW 64.38.020, enacted in 1995. This

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Recent Developments

Probate and Trust

by N. Elizabeth McCaw, Williams, Kastner & Gibbs PLLC, Seattle

WASHINGTON COURT OF APPEALS, DIVISION III

Estate of Jones, 116 Wn. App. 353 (Div. III 2003)

Summary: If a personal representative has nonintervention powers, then absent a finding that the personal representative is guilty of waste, embezzlement, mismanagement, fraud or neglect or has otherwise failed to faithfully execute his or her trust, the court does not have the authority to assume jurisdiction over the

administration of the estate or to remove the nonintervention personal representative.

Facts: Marcella Jones died testate in September 1995 and named one of her four sons, Russell, as personal representative of her Estate with nonintervention powers. Mrs. Jones left her entire

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Powers of Homeowners' Associations

statute gives remarkably broad powers to homeowners' associations, qualified only by, "(u)less otherwise provided in the governing documents." So, unless the covenants, articles or bylaws prohibit exercise of a power, a homeowners' association can do anything in its bylaws, anything that any other similar association can do, and also whatever is "necessary and proper for the governance and operation of the association." Or, pretty much everything, within reason.

Since RCW 64.38.020 was enacted in 1995 it has not played a major role in any appellate opinions about homeowners' association powers. It gets mentioned in unpublished decisions from Divisions II and III of the Court of Appeals, but nothing substantive about the Act has been determined in these cases.

I am aware of an argument that this statute does not apply retroactively to associations formed before 1995, but I do not find the argument persuasive. First, although statutes are presumed to apply prospectively only, and RCW ch. 64.38 does not directly address the issue, based on the language of *Godfrey v. State*, 84 Wn.2d 959, 530 P.2d 630 (1975), I would expect that a court would conclude that the legislative intent was to address existing associations. While it is true that a statute cannot interfere with vested rights under certain circumstances, the real issue is whether a member's or association's rights are actually vested. Such rights, here derived from contract, deeds, and/or equitable servitudes, must be more than "mere expectation based upon an anticipated continuance of the existing law."³ The commonly recited test for vesting is whether the right has "become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another."⁴

For running servitudes associated with homeowners' associations, those aspects of the association's activities subject to articles of association and bylaws, at least, do not implicate vested rights, because articles and bylaws can be amended. Most homeowners' associations are also subject to RCW 24.03, the non-profit association statute, and what a member of a non-profit association gets is membership in an organization whose articles of incorporation and bylaws can be changed. In addition, many covenants themselves also allow for amendment. If the governing documents of an association can be amended, I have difficulty

concluding that any "rights" to the terms of the documents pre-stipulate are "vested" for purposes of this analysis.

I look at RCW 64.38.020 and wonder why every case about homeowners' association powers since 1995 should not start and end with this statute. Certainly notice, either actual or constructive, of a restriction or covenant that an association intends to enforce is still essential, as is some relationship between a proposed action and the concept of running covenants and a homeowners' association.⁵ Also, the covenants themselves, the non-profit corporation statutes, and articles and bylaws are necessary to consider. Beyond that, the legislature has spoken, it seems to me.

And what did it say? Just about what I think the case law of running covenants, in its evolution, was starting to get around to saying: that homeowners' associations have broad powers, subject to requirements of notice and nexus, that are generally enforceable against members. Was RCW 64.38.020 a codification of not only where the common law was, but where it was heading? To me, this seems like a fair conclusion.

III. Conclusion

Throughout the course of Washington homeowners' association cases, courts have produced what some have called significantly inconsistent results. This is a very difficult area of the law for judges as well as practitioners. Now, when I answer an association's questions about the scope of its power or write a brief defending that power from challenge by a disgruntled owner, I first analyze the facts with a traditional running covenant/servitude discussion; I then turn to the less-than-well-seasoned correlated documents/contract theory; and finish with, oh, by the way, RCW 64.38.020 means what it says.

Readers are invited to respond to the author at rob@hctc.com.

¹ See RCW 64.38.010 (1) and (2).

² *Rodruck v. Sand Point Maintenance Commission*, 48 Wn.2d 565, 577-78, 295 P. 2d 714.

³ *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975).

⁴ *Id.*

⁵ See RCW 64.38.010 (1) and (2).

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Recent Developments: Probate and Trust

Estate to her sons - David, Russell, Peter and Jeffrey - in equal shares.

Russell was appointed as personal representative without opposition and was granted nonintervention powers. In December 1995, two of Russell's brothers, David and Peter, demanded \$5,000 distributions from the Estate. Not having the Estate checkbook with him, Russell paid his brothers \$5,000 each from his own checking account. Russell later reimbursed himself from the Estate account for these distributions, funeral expenses and the probate filing fee.

In May 1996, the Jones brothers met at their deceased mother's home to select personal property. Russell had been living in house with his mother prior to her death and continued to live there thereafter. At the time of the brothers' meeting, Russell presented them with a professional inventory and appraisal of all items of value. Peter asked to know the total value of the Estate, the terms of Russell's executorship and the terms of their mother's Will. Russell refused to answer his brother's questions. Peter subsequently became enraged over the fact that a secondhand dining table purchased when the boys were young had not been appraised because the appraiser had found it to have no value. Russell called the police and had Peter removed from the home.

Less than a week later, Russell filed an inventory with the court. The inventory did not include an appraisal of the decedent's personal property (which was not required under the statute applicable at the time this inventory was filed) nor did it list the decedent's bank accounts (which was required by applicable law). The value of the decedent's home was reported as \$120,900.

In November 1996, Peter and his brother Jeffrey petitioned the superior court for an order requiring an interim accounting. In a separate action, Peter and Jeffrey sought Russell's removal as personal representative, alleging breach of fiduciary duty.

A court commissioner granted the petition for an accounting, but this order was revised by a judge. Peter and Jeffrey then asked the trial court to: (1) enjoin Russell from occupying the residence or otherwise using Estate property; (2) reimburse the Estate for 71 months of rent at \$900 per month; (3) reimburse the Estate for utilities and taxes on the house paid for 1996 and 1997; (4) adopt Peter and Jeffrey's expert's appraised value of the home; (5) either remove Russell as personal representative or restrict his nonintervention powers; and (6) assess attorneys' fees against Russell personally.

The trial court removed Russell as personal representative for failure to provide an interim accounting, commingling of funds, living in the decedent's house rent-free, buying the house at below-market value, discrepancies in the records of securities transactions and bank accounts, driving the decedent's car, and reappraising Estate assets for retaliatory purposes. The trial court also ordered Russell to provide an interim accounting to the beneficiaries and awarded Peter and Jeffrey attorneys' fees (to be paid by Russell personally). Russell appealed, challenging in

particular the superior court's subject matter jurisdiction over the probate of a will with nonintervention powers.

Discussion: The court's jurisdiction over nonintervention probate proceedings is statutory. Based upon its interpretation of the applicable statutes, the appellate court found that once an order of solvency is entered, the administration of a nonintervention estate is exclusively in the hands of the personal representative and the probate court loses jurisdiction over the estate.

A beneficiary of an estate may invoke the court's jurisdiction by petitioning for removal of a nonintervention personal representative pursuant to RCW 11.68.070. However, according to the appellate court, the beneficiary must make a prima facie showing that the personal representative has failed to faithfully execute his or her trust or is subject to removal for any of the reasons specified in RCW 11.28.250. Otherwise, the court is without authority to assume general jurisdiction and intervene in the administration of the estate.

Thus, the Court of Appeals concluded that once a personal representative has been granted nonintervention powers, the authority of the court is limited to the conduct of a hearing to determine whether or not good cause has been shown that the disputed conduct is either so irregular as to indicate the personal representative did not faithfully discharge his or her trust or constitutes waste, embezzlement, mismanagement, fraud or neglect. In reversing the trial court, the appellate court held that in this case there were insufficient facts in the record to establish grounds upon which the trial court was empowered to intervene in the first place or to remove Russell as personal representative.

In addition, the appellate court found that nothing in the decedent's Will, the applicable statutes, or case law required Russell to provide an interim accounting to Peter and Jeffrey and held that the trial court had erred in requiring one. However, the Court of Appeals noted that in a separate petition, which was not acted upon, the beneficiaries had properly exercised their right to request an accounting after Russell had filed his declaration of completion.

Without this accounting, the appellate court determined that neither it nor the trial court could make a determination of whether or not Russell had faithfully executed his trust. The trial court's order to remove was therefore premature. On the basis of the foregoing and the fact that the remaining grounds for Russell's removal were not supported by the record, the appellate court remanded the case to the trial court for further proceedings, including a formal accounting.

Finally, since the petition to force an interim accounting could not have succeeded and Russell prevailed on all other issues, the appellate court granted Russell attorneys' fees against Peter and Jeffrey personally so that the fourth brother's distributive share of the Estate would not diminished.

Probate & Trust Council Report

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

In the last newsletter (which Section members can access via the Section's Web site – at <http://www.wsbarppt.com>), this column described certain House and Senate bills that the Section had on "watch" status. Two of the bills described in that column were signed into law by Governor Locke: the Mental Health Advance Directive (SB 5223) and the Transfer on Death Accounts (HB 1815). You can find both bills in final form at the Washington State Legislature Web site, <http://www.leg.wa.gov>.

The bills most watched by many of us, SB 5186, SB 5418 and HB 1401 (which would "recouple" the Washington and federal estate taxes), were not passed out of committee. Thus, for at least the next year, we will continue to scratch our heads and sharpen our pencils in making estate planning and post-mortem decisions with our clients.

One additional recent development in this area is the class-action lawsuit filed against the State of Washington and its Department of Revenue requesting refunds of the Washington estate taxes paid by estates of decedents dying after December 31, 2002 (discussed on page 5 of the Winter 2002 edition of this newsletter. On Friday, April 11, 2003, Thurston County Superior Court granted plaintiffs' motion for certification of the case as a class action pursuant to Civil Rule 23(b)(2). The court has ruled that the class will be comprised of all estates, whether or not a formal written protest was made at the time estate taxes were paid. You can find more specifics and read the current developments on this ongoing case at the Web site of the plaintiffs' attorneys, <http://www.estatetaxeswashington.com>.

As a reminder, the Section has several task-force projects underway. Topics under review currently by the Section include: (a) a legislative change following the *Bachmeier* case; (b) planning and implementing a state- or county-wide repository and/or registry for original Wills; and (c) reviewing the Uniform Trust Code to determine whether incorporating any of its provisions would improve the current Washington Trust Act. Another task force is reviewing whether to change the age of distribution from a custodial account held under the Washington Uniform Transfers to Minors Act (Ch. 11.114 RCW) from age 21 to 25. It is possible that a few of these ongoing projects will be proposed for legislative review and passage in the 2004 Legislature year. A few others are obviously long-term!

As always, we encourage your participation in Section or Bar-related activities. Please contact us if you have ideas or comments, to offer assistance with CLEs, articles for the newsletter, or pending projects.

Technology for Lawyers

WHAT IS A LISTSERVE¹ ANYWAY?

by Jody M. McCormick, Witherspoon, Kelley, Davenport & Toole, P.S., Spokane and Brian J. Danzig, Lane Powell Spears Lubersky, LLP, Seattle²

With the increased use of technology in the law, it is much easier to gather input from other attorneys to be used in solving client problems. Email listserves allow a lawyer to benefit from the collective knowledge and experience of his or her peers.

The Real Property, Probate, and Trust Section of the Washington State Bar Association maintains two listserves for members of the section. The Probate and Trust Listserve is located at <http://www.topica.com/lists/wsbapt> and the Real Property Listserve is located at <http://www.topica.com/lists/wsbarp>. The listserves allow lawyers to discuss changes in the law, ask questions about legal issues, and share experience and knowledge. Lawyers simply post questions or messages on the listserve and other lawyers respond. It is that easy.

To become a part of the listserve and send messages, registration is required. To register for the Real Property Listserve, send a blank email to wsbap-subscribe@topica.com. To register for the Probate and Trust Listserve, send a blank email to wsbart-subscribe@topica.com. Once registered, email messages can be automatically sent to all group members through the listserve email addresses. For real property, send messages to wsbap@topica.com. For probate and trust, send messages to wsbart@topica.com.

In addition to the Washington State Bar Association listserves, the American Bar Association also provides several that may be of interest to our Section member. The Real Property, Probate and Trust Listserves at <http://www.abanet.org/rppt/links-list-serves/list-serves.html> are divided up into specific discussion groups such as "Dirt," "Title Insurance," and "Emotional and Psychological Issues in Estate Planning."

It is important to note that the Washington State Bar Association listserves are not moderated. Additionally, the responses are accessible by anyone, even without registration. For those reasons, discretion should obviously be exercised when using any listserve. Try to avoid providing specific facts such that the case, transaction or client could be readily discernable. And remember that the opposing counsel may also be a listserve member! If you want expert input or advice on a specific situation, you may want to post a general question and request that anyone with special expertise contact you by email privately (off of the listserve) for further details and discussion.

You will be pleasantly surprised by the quantity and quality of assistance that your professional colleagues will provide on listserves. If properly used, a listserve can provide a great source of information that could potentially shorten the learning curve or

continued on next page

Practical Practice Tips: Commercial Real Estate Transactions

by Michael A. Barrett, Perkins Coie LLP, Seattle

Whether a transaction is very large or very small, a comprehensive checklist will help it progress from signing through closing. If done with care, preparation of a checklist forces us to chart each step of the transaction and identify in advance the issues and obstacles that are likely to arise so that they can be addressed in a timely manner. In a complex transaction, a checklist can be a useful tool for coordinating and monitoring the efforts of multiple participants. A good checklist also ensures that no detail is forgotten in the panic that ensues when unforeseen challenges or closing crises crop up – as they inevitably do – despite our best efforts to avoid them.

The checklist on the following pages was developed on behalf of the buyer in connection with the all-cash purchase of an office park in western Washington. The buyer was a pension fund assisted by a sophisticated real estate advisor who did much of the work that, with a less well-advised client, might have been performed by legal counsel. The checklist therefore reflects the particular requirements of the buyer, the need to keep track of the activities of other professionals, and the unique aspects of the property and transaction. The checklist moves – more or less –

through the transaction chronologically. It also attempts to be tediously comprehensive. Others may find it more useful to organize a transaction differently or with more or less detail. The checklist does not assign responsibility for the tasks identified therein to the buyer, seller or their respective consultants, inasmuch the allocation of work among the participants in transactions can vary even more than the components of the transactions themselves.

It is intended that the checklist will provide a helpful example for practitioners who may not yet have developed their own method of organizing and monitoring a transaction. The checklist is, of course, only an example and is not meant to be a substitute for legal advice. Any checklist has to be carefully reviewed and modified to incorporate the needs of the client and the peculiarities of each transaction for which it is used. Without such review and modification, a checklist is not simply of limited utility, it can become a trap. Relying on an incomplete or inaccurate checklist can lull us into ignoring concerns and issues until they become an impediment to closing or, worse, until after closing, when it may be too late to avoid them or minimize their impact on the client.

continued from previous page

Technology for Lawyers

speed research on an issue. It is also a good general resource for information on new developments in a practice area, current trends, or persistent problems. As more lawyers participate in listserves, the added ideas and larger pool of information will make listserves even more useful and valuable tools in the future.

Readers are invited to submit ideas for useful and practical technology articles to the authors. Ideas may be sent via e-mail to Jody McCormick at jmm@wkdtlaw.com or Brian Danzig at danzigb@lanepowell.com.

¹ “Listserve” as used herein refers to electronic discussion groups and is not to be confused with “listserv,” a trademarked term that refers to a software product of L-Soft International, Inc. The use of the term “listserve” herein is for convenience only and out of respect for the common usage of L-Soft International’s product. In general, this Newsletter refers to “listserves” as electronic discussion groups.

² A special thanks to Donald Torgeson, a summer associate at Witherspoon, Kelley, Davenport & Toole, P.S. and third year law student at the University of Idaho College of Law, for his assistance in drafting this article.

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REAL ESTATE PROJECT CHECKLIST

(Due Diligence Period Ends: __/__/__)
(Closing Date: __/__/__)

ACQUISITION OF XYZ OFFICE PARK
by BUYER ENTITY ("Buyer")
from SELLER ENTITY ("Seller")

Principals

Buyer - Buyer Entity

Attn: _____
Tel: _____
Fax: _____

Title Officer

_____ Title Insurance Co.

Attn: _____
Tel: _____
Fax: _____

Escrow Officer

Attn: _____
Tel: _____
Fax: _____

Counsel

Seller - Seller Entity

Attn: _____
Tel: _____
Fax: _____

Buyer - _____, Esq.

Attn: _____
Tel: _____
Fax: _____

Seller - _____, Esq.

Attn: _____
Tel: _____
Fax: _____

Consultants

Environmental - _____

Attn: _____
Tel: _____
Fax: _____

Engineering - _____

Attn: _____
Tel: _____
Fax: _____

Surveyor

Attn: _____
Tel: _____
Fax: _____

Seller's Broker

Attn: _____
Tel: _____
Fax: _____

Buyer's Broker

Attn: _____
Tel: _____
Fax: _____

REAL ESTATE PROJECT CHECKLIST *continued*

Description	Responsibility	Status	Comments
A. SUMMARY OF IMPORTANT DATES			
Description	Date		
Contract Date	__/__/__		
End of Inspection Period	__/__/__		
Close of Escrow	__/__/__		
B. PURCHASE AND ESCROW DOCUMENTS			
		<u>Drafted</u>	<u>Executed</u> <u>N/A</u>
1. Confidentiality Agreement		[]	[] []
2. Purchase and Sale Agreement		[]	[] []
3. Escrow Instructions		[]	[] []
4. Wiring Instructions		[]	[] []
C. REVIEW OF PROPERTY INFORMATION			
		<u>Received</u>	<u>Approved</u> <u>N/A</u>
1. Tenant Information:			
a) Rent Roll		[]	[] []
b) Leases/Amendments/ Subleases		[]	[] []
c) List of Security Deposits/ Prepayments		[]	[] []
d) Rent Delinquency		[]	[] []
e) Leasing Status Report		[]	[] []
2. Operating Information:			
a) Historical Financial Statements for Property		[]	[] []
b) Year-to-Date Financials		[]	[] []
c) Capital Budget and Operating Budget		[]	[] []
d) Service Contracts		[]	[] []
e) Real Estate Tax Bills		[]	[] []
3. Building Information:			
a) Plans and Specifications ("as-built" with architect's certificate)		[]	[] []
b) Existing Engineering Reports		[]	[] []

REAL ESTATE PROJECT CHECKLIST *continued*

Description	Responsibility	Status	Comments
4. Real Estate:			
a) Prior Surveys		[] [] []	
b) Prior Title Work		[] [] []	
c) Existing Property Inspection Reports (incl. seismic, structural, ADA)		[] [] []	
d) Existing Environmental Reports		[] [] []	
e) Certificates of Occupancy		[] [] []	
f) Permits		[] [] []	
g) Insurance Policies and Claims		[] [] []	
5. Compliance with Regulations/ Zoning			
a) Zoning Letter From Local Agency		[] [] []	
b) Verification of Permits and Certificates of Occupancy From Local Agency		[] [] []	
6. Appraisal		[] [] []	
7. Tenant Estoppels:			
a) Agreed Form		[] [] []	
b) Completed Estoppels		[] [] []	
D. TITLE			
1. Preliminary Title Report:			
a) Review of Preliminary Title Report		[] [] []	
b) Title Disapproval Letter		[] [] []	
c) Seller's Response to Title Disapproval Letter		[] [] []	
d) Buyer's Response		[] [] []	
2. Survey:			
a) New ALTA Survey		[] [] []	
b) Survey Disapproval Notice		[] [] []	
c) Seller's Response to Disapproval Notice		[] [] []	
d) Buyer's Response to Seller		[] [] []	
3. Pro Forma Policy		[] [] []	
4. Confirmation of Taxes		[] [] []	

REAL ESTATE PROJECT CHECKLIST *continued*

Description	Responsibility	Status	Comments
E. PHYSICAL INSPECTION			
1. Consultant's Physical Inspection:			
a) Sprinklers/Fire Safety		[]	[]
b) Mechanical, Electrical, HVAC and Plumbing		[]	[]
c) Roof		[]	[]
d) Parking Lot		[]	[]
e) Tenant Spaces		[]	[]
f) Architectural/ADA Compliance		[]	[]
2. Environmental Assessment:			
a) Phase I		[]	[]
b) Phase II		[]	[]
3. Termite Inspection		[]	[]
4. Mold Assessment		[]	[]
5. Tenant Interviews		[]	[]
6. Buyer's Inspection Report		[]	[]
7. Objections:			
a) Inspection Disapproval Notice		[]	[]
b) Seller's Response to Disapproval Notice		[]	[]
F. DOCUMENTS TO BE DELIVERED BY SELLER TO ESCROW		<u>Executed</u>	<u>Delivered</u>
		<u>N/A</u>	
1. Deed		[]	[]
2. Excise Tax Affidavit		[]	[]
3. Bill of Sale		[]	[]
4. Assignment of Leases (counterpart)		[]	[]
5. Assignment of Contracts, Warranties and Permits (counterpart)		[]	[]
6. FIRPTA Affidavit		[]	[]
7. Seller's Closing Statement		[]	[]

REAL ESTATE PROJECT CHECKLIST *continued*

Description	Responsibility	Status			Comments
8. Estoppels					
a) Tenants		[]	[]	[]	
b) Seller (re missing tenant estoppels)		[]	[]	[]	
9. Seller's Certificate Updating Reps and Warranties		[]	[]	[]	
10. Notices to Tenants		[]	[]	[]	
11. Seller's Escrow Instructions		[]	[]	[]	
		<u>Executed</u>	<u>Delivered</u>	<u>N/A</u>	
G.DOCUMENTS TO BE DELIVERED BY BUYER TO ESCROW					
1. Assignment of Leases (counterpart)		[]	[]	[]	
2. Assignment of Contracts, Warranties and Permits (counterpart)		[]	[]	[]	
3. Excise Tax Affidavit		[]	[]	[]	
4. Buyer's Closing Statement		[]	[]	[]	
5. Buyer's Escrow Instructions		[]	[]	[]	
		<u>Delivered</u>	<u>Approved</u>	<u>N/A</u>	
H.MATERIALS TO BE DELIVERED OUTSIDE ESCROW					
1. Originals of Leases		[]	[]	[]	
2. Originals of Contracts		[]	[]	[]	
3. Permits, Certificates of Occupancy		[]	[]	[]	
4. Plans and Specs		[]	[]	[]	
		<u>Approved</u>	<u>Paid</u>	<u>N/A</u>	
I. PURCHASE PRICE, PRORATIONS AND ADJUSTMENTS					
1. Initial Deposit (\$_____)		[]	[]	[]	
2. Balance of Purchase Price		[]	[]	[]	
3. Prorations		[]	[]	[]	
4. Holdbacks, Etc.		[]	[]	[]	
5. Payment of Closing Costs by Seller		[]	[]	[]	
6. Payment of Closing Costs by Buyer		[]	[]	[]	
7. Due Diligence Costs		[]	[]	[]	

REAL ESTATE PROJECT CHECKLIST *continued*

Description	Responsibility	Status	Comments
		<u>Completed</u>	
J. POST-CLOSING ITEMS			
1. New Insurance		[]	
2. Change Utilities		[]	
3. Refund of Excess Closing Funds		[]	
4. Final Title Policy		[]	
5. Closing Binders		[]	
6. Disposition of Holdbacks		[]	
7. Final Proration after Annual Operating Expense Reconciliation		[]	

HOW TO REACH US

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Excise Tax Advisory

Excise Tax Advisories (ETAs) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

Number: 2013.57.015 (Estate Tax)

Issue Date: May 19, 2003

QTIP Elections and Washington's Estate Tax

The Department of Revenue has been asked whether a personal representative can make a different election for qualified terminable interest property (QTIP) on the Washington State estate tax return than on the federal estate tax return. Questions have also been raised as to whether a personal representative may make a QTIP election on the Washington State estate tax return when no federal return is required.

The Department will allow a "Washington-only" QTIP election and corresponding marital deduction on the Washington State Estate and Transfer Tax Return. As a result, a personal representative may choose to make a different QTIP election on the Washington return than on the federal return and a QTIP election may be made on the Washington return when no federal return is required.

Background

Under chapter 83.100 RCW, Washington State estate tax liability is based on the maximum amount of the federal credit for state death taxes, determined under the Internal Revenue Code as it existed on January 1, 2001 ("2001 IRC"). Consequently, the unified credit and filing threshold for the Washington return are now lower than for federal purposes.

A marital deduction is allowed for QTIP on both the Washington and federal returns. QTIP is defined for Washington purposes by section 2056(b)(7) of the 2001 IRC as property passing from a decedent to a surviving spouse in which the surviving spouse has a qualifying income interest for life and for which the personal representative makes an election. A qualifying income interest for life is generally an interest in property where the surviving spouse is entitled to all the income from the property payable at least annually and where no person can appoint any part of the property to any person other than the surviving spouse. The QTIP election can be made for a fractional or percentage share of the property; only the amount for which an election is made is deducted from the gross estate.

Application

Deductions available under the 2001 IRC are applied in computing Washington estate tax liability. Nothing in chapter 83.100 RCW prevents a personal representative from choosing an optional deduction for a different amount than on the federal return in order to maximize tax benefit. A personal

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Please direct comments to:
 Department of Revenue
 Legislation & Policy Division
 P O Box 47467
 Olympia, WA 98504-7467
eta@DOR.wa.gov

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representative may choose to make a larger percentage or fractional QTIP election on the Washington return than on the federal return in order to reduce Washington estate tax liability while making full use of the federal unified credit. If no federal return is required, a personal representative may make a QTIP election on the Washington return.

Section 2056(b)(7) of the 2001 IRC states that a QTIP election is irrevocable once made. Section 2044 states that the value of any property for which a deduction was allowed under section 2056(b)(7) must be included in the gross estate of the recipient. Similarly, a QTIP election made on the Washington return is irrevocable, and a surviving spouse who receives property for which a Washington QTIP election was made must include the value of the property in his or her gross estate for Washington estate tax purposes.