

Real Property, Probate & Trust



Vol. 26, Number 3 Published by the Real Property, Probate & Trust Section of the Washington State Bar Association

Winter 1998

What Real Estate Attorneys Should Know About the Washington Revised Uniform Partnership Act¹

by Dori E. Brewer²

On January 1, 1999, the Washington Revised Uniform Partnership Act, RCW 25.05.005 *et seq.* ("RUPA"), will become applicable to all Washington partnerships.³ RUPA has made substantial changes to the law governing general and limited liability partnerships and many of those changes will affect how real estate attorneys deal with real property owned by partnerships and partnerships used in real property transactions. This article endeavors to summarize the major issues of concern to real estate attorneys, but is not a comprehensive discussion of all major changes.

Default Statute

RUPA is a default statute. It provides rules for partnerships without agreements, or for matters not addressed by a partnership's agreement. It also, however, contains ten provisions which may not be changed or waived by the partners. These non-waivable provisions deal with what might be considered fundamental rights of partners such as the right of access to books and records, duties owed by partners to one another, and an absolute right of a partner to withdraw from a partnership. RCW 25.05.015.

Character of Partnership Property

The former law governing partnerships, the Uniform Partnership Act, RCW 25.04.010 *et seq.* ("UPA") provides that partners have an interest in partnership property as "tenants in partnership." RUPA eliminates the tenancy in partnership concept and adopts the entity theory of partnerships. It provides, "a partnership is an entity distinct from its partners."

RCW 25.05.050(1). It further provides that property acquired by a partnership is property of the partnership and not of the partners. RCW 25.05.060.

Title to Property

Property is considered partnership property under the following circumstances:

- a. Property is transferred to the partnership in its name;
- b. Property is transferred to one or more partners in their capacity as partners if the name of the partnership is indicated in the instrument transferring title; or
- c. Property is transferred to one or more partners with an indication in the transfer instrument of the person's capacity as a partner or of the existence of a partnership, whether or not the partnership is named.

RCW 25.05.065(1) and (2). In addition, property is presumed to be partnership property if it is purchased with partnership assets or using partnership credit even if not acquired in the manner described in a, b or c above. RCW 25.05.065(3). Finally, property acquired in the name of a partner without using partnership funds or credit, and that does not meet the criteria listed in a, b or c above, is presumed to be the separate property

continued on page 3

TABLE OF CONTENTS

| | | | |
|--|---|---|----|
| What Real Estate Attorneys Should Know About the Washington Revised Uniform Partnership Act | 1 | Recent Developments/Real Property | 11 |
| Notes from the Chair | 2 | Probate and Trust Council Report | 12 |
| A Primer on Gifting on Behalf of Incapacitated Persons | 4 | RPPT Newsletter Index of Past Lead Articles (1996-1998) | 13 |
| Upcoming Section CLE Seminars | 7 | Editor's Note | 13 |
| Recent Developments/Probate & Trust | 8 | How to Reach Us! | 14 |

Notes from the Chair

John M. Riley III

Witherspoon, Kelley, Davenport & Toole, P.S.

You now have available to you, courtesy of your Section, two new services. First, the Section has a Website. I urge you to look at it. The address is the State Bar site, www.wsba.org. It has pages for general information, upcoming events, seminars, publications, links and legislation. Second, you will receive in the mail soon a disc containing commonly used legislation applicable to real property probate and trust. The disc has an index at the beginning, which I suggest you first peruse before calling up the law you need. Please call either me or Executive Committee member Steve Tubbs with any comments you have to improve the disc.

The Executive Committee and the councils expect another busy year at the legislature. This year, the Probate and Trust Council will be sponsoring a specific bill, TEDRA. A full copy of the bill is on the Website. Its purpose is to update RCW Chapter 11.96 and to incorporate alternative dispute resolution procedures into trust and estate disputes. The Real Property Council has, with Executive Committee approval, maintained its prior year's position on the anticipated reintroduction of legislation regarding the interaction of the Condominium Act and land use planning law. Last year the Section approved the bill. The Real Property Council also anticipates legislation to abolish the doctrine of adverse possession. The Section has consistently opposed such legislation.

If any legislation interests you and it is not on the Section's Website, bills can be reviewed at the Legislature's site, <http://leginfo.leg.wa.gov/>.

As usual, the Executive Committee and Mark Roberts, next year's Midyear

conference chair, are now determining the topic lineup for the Midyear conference. If you have an issue you'd like to see covered or if you researched or tried an issue of which you think the membership should be apprised, call any one of the Executive Committee members and forward your thoughts.

We are in the process of incorporating changes into the Website and the Newsletter to make them better. You will see layout changes and additional information in them over the balance of this year. We appreciate the many suggestions forwarded by members in their responses to the last Section member survey.

Best wishes to all of you in the holiday season.

We welcome your comments, questions and suggestions. Don't hesitate to contact me at:

John M. Riley III
Witherspoon, Kelley, Davenport &
Toole
1100 US Bank Bldg.
422 W. Riverside
Spokane, WA 99201
(509) 624-5265
jmr@wkdtlaw.com

• • •

Real Property, Probate and Trust Section

Officers

John M. Riley III, Chair
Mark W. Roberts, Chair Elect
Douglas C. Lawrence, Past Chair

Council Members

Real Property
Serena M. Schourup, Director
Bruce A. Coffey
Jane Rakay Nelson
William H. Reetz
Steven B. Tubbs

Probate and Trust

Barbara C. Sherland, Director
Thomas M. Culbertson
Marcia K. Fujimoto
Matthew B. McCutchen
J. Bruce Smith

Newsletter

Lora L. Brown, Editor
Maren K. Gaylor, Assistant Editor

Editorial Board

Real Property
Steve Crossland
Michael Currin
Warren Koons
Camille Ralston
Martin Strelecky

Probate and Trust

Karen E. Boxx
James A. Flaggert
Wendy S. Goffe
Carol Hunter
Kristina C. Udall
Kari M. Larson

WSBA Desktop Publisher, Clare M. Cox

This is a publication of a Section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association nor its officers or agents.

Washington State Bar Association
Real Property, Probate & Trust Section
2101 Fourth Avenue - Fourth Floor
Seattle, WA 98121-230

Printed on recycled paper



from page 1

What Real Estate Attorneys Should Know. . .

of the partner even if used for partnership purposes. RCW 25.05.065(4).

Statements

RUPA authorizes (but does not require) the filing of four different kinds of statements with the Washington Secretary of State. The first type, statements of partnership authority, are addressed in RCW 25.05.110 and have specific relevance for real estate transactions.

A statement of partnership authority may name partners that do or do not have authority to take certain actions on behalf of a partnership and in particular, may specify the names of partners authorized to execute an instrument transferring real property held in the name of the partnership. RCW 25.05.110(1)(b). It also may address any other matter. *Id.* A third party giving value, such as a buyer or lender, may conclusively rely on a statement of authority so long the party does not have actual knowledge that the grant of authority is no longer effective and so long as a limitation on that authority is not then contained in a subsequently filed statement. RCW 25.05.110(2) and (3). A third party is deemed to know of a limitation on authority of a partner to transfer real property contained in a filed statement, but not on other limitations contained in filed statements. RCW 25.05.110(3) and (4).

Based on the RUPA provisions applicable to statements of authority, it should become a mandatory practice at real estate transaction closings to obtain copies of filed statements from the Secretary of State's office to establish authority for signing on behalf of the partnership. Statements of authority are effective for five years after filing unless canceled or superseded by a subsequent filing. RCW 25.05.110(5).

The other three types of optional statements are as follows:

- a. **Statement of Denial.** This statement denies an assertion in a previously filed statement. RCW 25.05.115.
- b. **Statement of Dissociation.** This statement identifies a partner who has dissociated from the partnership and, ninety days after filing, will eliminate the dissociated partner's apparent authority to act on behalf of the partnership and liability for partnership obligations. RCW 25.05.265
- c. **Statement of Dissolution.** This statement provides constructive notice to all third parties ninety days after filing that the partnership is being dissolved and that all previously filed statements of authority are no longer effective. RCW 25.05.320.

Liability of Partners of a General Partnership

If a partnership has not registered as a limited liability partnership, partners are jointly and severally liable for all obligations of the partnership. RCW 25.05.125(1).

Limited Liability Partnerships

RUPA now provides "full-shield" liability protection for partners of limited liability partnerships. RCW 25.05.125(3). This protection only applies to liabilities incurred while the partnership is a limited liability partnership, and does not eliminate a partner's liability for previously-incurred partnership liabilities or for a partner's own torts. To become a limited liability partnership, the partners must approve the conversion (voting in the same manner as is required to amend the partnership agreement), and the partnership must register as a limited liability partnership with the Secretary of State. RCW 25.05.500(1) and (2). The form of filing is prescribed and must be accompanied by a filing fee of \$175. RCW 25.05.500(3).

The conversion of a partnership to a limited liability partnership should not itself create any federal income tax liability, but the operation of a limited liability partnership may have different tax consequences than the operation of a general partnership.

Dissociation and Dissolution

Under UPA, dissolution of a partnership is defined as, "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from winding up of the business." This has meant that, upon an event causing dissolution, such as the death or bankruptcy of a partner or a withdrawal of a partner from a partnership, if the remaining partners continue the business of the partnership, it has been considered a different entity than its predecessor. This has resulted in the practice of obtaining a "Fairway Endorsement" to title insurance policies, which provides that the admission or withdrawal of any individual or entity as a partner in the insured partnership, or a change in any partner's interest in capital or profits of, or as limited or general partner in, the insured partnership will not result in a lapse or termination of the title insurance policy. RUPA has changed these rules.

Under RUPA, a change in the relation of the partners that would cause a dissolution under UPA is now referred to as a "dissociation." Most importantly, a dissociation of a partner only results in a dissolution of the partnership under the following circumstances:

- a. The withdrawal by a partner from a partnership at will (which is a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking, RCW 25.05.005(8)); or

continued on next page

A Primer on Gifting on Behalf of Incapacitated Persons

by Pat L. Pabst
Pabst & Holland, PLLC, Vancouver

Many estate planning strategies involve gifting, whether outright or in trust, annual exclusion or larger gifts. When the donor is competent, he makes the final decisions and implements the plan after considering the recommendations of counsel and other advisors. For an excellent summary of reasons to gift, see "A Lifetime Gifting Refresher for Clients" by Alfred M. Falk, in the Winter 1997 edition of this newsletter.

Often, however, it first becomes apparent that gifting should be seriously considered when the donor is already incapacitated. Family members or advisors then learn that the estate is larger than they had suspected and substantially in excess of the incapacitated person's own needs, and that the estate will be subject to tax upon death.

Gifts made by a fiduciary on behalf of an incapacitated person are considered completed gifts for federal tax purposes and removed from the taxable estate only if the gifts are valid and complete under state law. Normally, a fiduciary's duty is to protect and invest the incapacitated person's assets, and not to give funds away. Therefore, the lawyer for the incapacitated person or the fiduciary must examine the existing estate planning

documents and Washington law for authority to make gifts at all and the scope of such authority if it does exist. In addition, the lawyer must consider the tax effects upon the fiduciary who holds and/or exercises the power to make gifts to himself.

Sources of Authority

Gifts may be made in Washington under specific authority granted in a durable power of attorney or a revocable trust, or by a guardian with court approval under state law. In addition, the spouse of an incapacitated person may be able to gift on behalf of the marital community or use gift splitting for gifts of separate property.

Durable Power of Attorney

A Washington durable power of attorney normally grants "all powers of absolute ownership of the principal" or "all the powers the principal would have if alive and competent." However, unless specifically provided otherwise in the document, the attorney in fact does not have the power:

continued on next page

from previous page

What Real Estate Attorneys Should Know. . .

- b. In a partnership for a defined term or particular undertaking, if the dissociation results (1) under RCW 25.05.225(6) through (10), which includes bankruptcy, death, appointment of a guardian, distribution of a trust's or estate's entire interest in the partnership or termination of certain types of entities, or (2) from a wrongful dissociation under RCW 25.05.230(2), and a majority of the remaining partners decide to wind up the partnership business.

RCW 25.05.300. In all other instances, the partnership continues as the same entity. This should mean that "Fairway Endorsements" should no longer be necessary, but this issue should be addressed with the title company issuing the policy.

Upon an event of dissociation that does not result in the dissolution of the partnership and subject to the terms of the partnership agreement, the partnership is required to purchase a dissociated partner's interest in the partnership for fair value under a statutory procedure. RCW 25.05.250.

Conversions and Mergers

RUPA authorizes the conversion of limited partnerships to general partnerships, and of general or limited liability partnerships to limited partnerships. RCW 25.05.355 and RCW 25.05.360.

In each case, the converted entity, "is for all purposes the same entity that existed before the conversion." RCW 25.05.365. This should mean that a title policy in effect at the date of conversion should continue in force, but again this issue should be addressed with a title company.

RUPA also authorizes the merger of partnerships with limited partnerships, limited liability companies, and corporations. RCW 25.05.370(1). The surviving entity automatically is vested with title to all of the assets of the merged entities.

Conclusion

RUPA provides us with another full-shield liability entity. This provides general partnerships with an easy way to obtain full shield liability for future obligations, and it will be a rare general partnership that should not take advantage of this opportunity. In addition, RUPA establishes partnerships as entities separate from their partners. This should make doing business in the partnership form less cumbersome than it was under prior law.



1 ©All Rights Reserved, 1998, Dori E. Brewer

2 Dori E. Brewer is a partner in the Seattle office of Perkins Coie LLP practicing in the areas of business law and transactions, corporate law, mergers and acquisitions, partnerships, joint ventures and limited liability companies. She is a member of the Partnership Law Committee of the Business Law Section of the Washington State Bar Association.

3 RUPA already applies to Washington partnerships formed on and after June 11, 1998 and to Washington partnerships formed prior to

from previous page

A Primer on Gifting. . .

“To make, amend, alter, or revoke any of the principal’s wills, codicils, life insurance beneficiary designations, employee benefit plan beneficiary designations, trust agreements, community property agreements; *to make any gifts of property owned by the principal*; to make transfers of property to any trust (whether or not created by the principal) unless the trust benefits the principal alone and does not have dispositive provisions which are different from those which would have governed the property had it not been transferred to the trust, or to disclaim property.”

RCW 11.94.050, emphasis added.

Therefore, unless the durable power of attorney specifically authorizes gifting on behalf of the principal, the gifts would be considered voidable by the principal, thus incomplete for federal gift and estate tax purposes.

Revocable Living Trust

A trustee also derives its power from both state law and the document itself. The Washington statutory list of trust powers does not include the power to make gifts of trust property. RCW 11.98.070. Most revocable trusts contain specific language stating that while the grantor lives, he or she is the only direct beneficiary of the trust. In some documents, the trustee also has authority to make distributions to or for the benefit of other persons who are dependent upon the incapacitated grantor, but these provisions are generally intended to provide care for spouses or minor children.

In recent years, it has been common for estate planning attorneys to intentionally omit or even preclude the power of the trustee to make gifts of trust property. The IRS had taken the position that gifts made under such authority within three years of the grantor’s death would be included in the grantor’s estate under IRC Sections 2035 and 2038. The safer practice was to withdraw the property from the trust first so the gift could be made by the grantor himself or by the attorney in fact with authority to gift. However, new IRC Section 2035(e) prevents this inclusion if the transfer is made from a grantor trust. Now gifts can be made from a revocable trust either by or at the direction of the grantor or by the trustee under authority given in the trust document without being subject to the three year rule. Attorneys should now consider including specific language in the revocable trust to allow the trustee to make gifts on behalf of an incapacitated grantor.

Guardianship

RCW 11.92.140 authorizes a guardian, with court approval, to make gifts on behalf of an incapacitated person. This section codifies the common law Doctrine of Substituted Judgment, an

excellent history of which can be found in the 1983 and 1984 RPPT Midyear materials, by Evan O. Thomas, III.

A guardian who wishes to make gifts must file a petition showing the following:

- That the funds are not needed for the incapacitated person’s care.
- The proposed plan for gifting.
- The results expected to be accomplished.
- The savings expected to accrue.
- That the recipients are prospective legatees, devisees, heirs apparent, or individuals or charities in which the person is believed to have an interest.
- That the gifts are consistent with the intentions of the incapacitated person insofar as the intentions can be ascertained. (If such intentions cannot be ascertained, the incapacitated person will be presumed to favor of reduction of tax and partial distribution of the estate.)
- Whether the gifts should be considered an advancement of a portion of the recipient’s share of the estate.

The statute also authorizes a broad range of other estate planning actions, with court approval. They include, but are not limited to, executing disclaimers and releases, creating revocable and irrevocable trusts which may extend beyond the incapacitated person’s life, establishing custodial accounts for minors, and changing of beneficiary designations and electing of options on life insurance policies and annuities.

Spousal Gifting

Either spouse may make gifts of community property, but gifts made without the consent of the other spouse may be voided. One might expect that the well spouse could make gifts of both spouses’ annual exclusion amounts when the other spouse is incapacitated, under the general principal that either spouse can manage community property, especially if there has been a pattern of gifting. However, the IRS is consistently treating gifts as incomplete if the incapacitated spouse could void them.

A related issue is whether the well spouse can make gifts from his or her separate property and then sign a gift tax return on behalf of the incapacitated spouse consenting to gift splitting. An argument can be made that consent to gift splitting would not require specific authorization in a power of attorney.

Scope of Authority

When drafting or reviewing powers of attorney or revocable trusts, the scope of the power to gift must be carefully considered. The language of the document may grant very broad authority or be limited as desired. Consider the following possibilities:

continued on next page

from previous page

A Primer on Gifting. . .

- Describe permissible recipients: descendants, spouses of descendants, other specific beneficiaries, contingent remainder beneficiaries, and charities.
- May gifts be either outright or subject to trust provisions designed by the fiduciary?
- Shall gifts be limited to annual exclusions or be unlimited?
- Must gifts be consistent with prior practices or the existing estate plan?
- Must gifts be equal among children or among family units? If grandchildren are to be included, shall family units be equalized later?
- Should lifetime gifting be considered an advancement of specific bequests?

Effect of Power on Powerholder

A fiduciary who has the power to make gifts or trust distributions to himself or for his own benefit or in satisfaction of his obligation of support may be deemed to have a general power of appointment for gift and estate tax purposes under IRC Section 2041 and 2514. This can result in the trust property being included in the powerholder's own taxable estate, and the release of the power being treated as a gift. However, if the power is limited to an ascertainable standard, such as health, support, maintenance and education, it will not be considered a general power. In addition, trust income may be taxable to the powerholder if he makes distributions which are used to satisfy his obligation of support.

To avoid these potential gift, estate and income tax consequences to the fiduciary, the drafter should consider the following limitations on the fiduciary's powers:

- Limit distributions to or for the benefit of the fiduciary to distributions for health, education, maintenance and support.
- Require that distributions beyond this standard be made by an independent co-trustee or special trustee, or with a co-fiduciary who has an adverse interest.
- Preclude distributions by the fiduciary in satisfaction of his own obligation of support.

Since many trusts and powers of attorney inadvertently grant overly broad powers to fiduciaries who are also potential beneficiaries, resulting in adverse tax consequences, Chapters 11.98, Trusts, and 11.95, Powers of Appointment, were amended in 1993 to limit the fiduciary's exercise of power in favor of the holder. Under RCW 11.98.200 and 11.95.100, a trustee or the holder of a power of appointment may make distributions or exercise the power in his or her favor only for his or her health, education, support or maintenance, as described in the Code and

regulations, unless the document clearly indicates that a broader or more restrictive power is intended. Power or discretion that is "absolute," "sole," "complete," or "conclusive" must be exercised reasonably in favor of the holder, and in accordance with the ascertainable standard. RCW 11.95.110 and 11.98.210. The trustee is also precluded from making discretionary distributions to satisfy his own obligation of support. RCW 11.98.200(3).

These protective statutes apply to documents executed after July 25, 1993, unless the document provides expressly to the contrary. In addition, they apply to most documents executed earlier. See special exceptions and elections under RCW 11.98.240 and 11.95.140.

Note that these statutes do not necessarily "save" a credit shelter trust which granted a spouse-trustee a power to invade principal which was not limited to an ascertainable standard. RCW 11.98.210 and 11.95.110.

If extraordinary gifting is desired, beyond what could reasonably be characterized as health, education, maintenance and support, it can be accomplished without adverse tax consequences if the distribution or gift is made by a co-trustee or a special trustee, who could be appointed for that purpose under a nonjudicial dispute resolution agreement under RCW 11.96.170. Otherwise, the guardianship statute could be used, since the transfer would then be subject to approval of the court.

Timing of Gifting

Often gifting on behalf of an incapacitated person involves deathbed transfers, in many cases multiple last minute annual exclusion gifts. To be outside of the taxable estate, such gifts must be completed. Uncashed checks and unexecuted instructions to the broker are not good enough. *Estate of Newman*, 111 T.C. 3 (1998) is a recent example that provides a good summary of the rules. To avoid this risk, make such gifts in the form of cashier's checks which are drawn immediately upon the donor's account.

Medicaid

Transfers to qualify for Medicaid and other benefit programs are specifically authorized for an attorney in fact under RCW 11.94.050(2) and can be made by a guardian with court approval under RCW 11.92.140. The incapacitated person's durable power of attorney may also contain specific language authorizing such transfers.

Practical Considerations

Embarking on a gifting program on behalf of an incapacitated person can be upsetting to family members and cause suspicion and conflict. Some family members may feel that the plan is inconsistent with the incapacitated person's wishes or could undermine his or her future financial security. Therefore, it is recommended that all family members who are directly involved

from previous page

A Primer on Gifting. . .

with the incapacitated person's care and will be the beneficiaries of the person's estate be fully informed about the plan for gifting. It is preferable if the financial information can be shared so that all concerned will be assured that the incapacitated person's care is not being compromised. The tax benefits of the gifting program should be explained. If gifting is to go beyond the primary beneficiaries of the estate (to grandchildren, for example), it should be by written agreement of the primary beneficiaries whose future inheritance will be diminished. If this will result in inequality among family units, there should be consensus as to whether there will be later "equalizing" among the primary beneficiaries. Under the best of circumstances, this would have been discussed with the incapacitated person and stated in the estate planning documents. However, if the donor's intent is unknown, there should be agreement of all of the primary beneficiaries.

Ethical Considerations and Conflicts of Interest

It is important for the lawyer to be clear about whether he or she represents the incapacitated person or the fiduciary. The fiduciary who has authority to make gifts to himself has a conflict

of interest. He must exercise extreme care to avoid even the appearance of personally benefiting more than similarly-situated beneficiaries. Often, the fiduciary is also receiving compensation for his services. Having separate representation for the incapacitated person and the fiduciary personally will reduce the temptation of the fiduciary to abuse his authority. Providing full financial information to immediate family members on a regular basis and maintaining complete records of the purpose and details of all intra-family transfers will minimize the risk of later charges of breach of fiduciary duties or other malfeasance on the part of the fiduciaries and their advisors.

Conclusion

There are many opportunities for doing gifting and other estate and tax planning for an incapacitated person under Washington law. Of course, it is always preferable to have well designed and carefully drafted documents under which the client has expressed his wishes and the fiduciary can implement the plan to the tax advantage of the family. However, even without documentary authority, in appropriate circumstances planners can utilize the Doctrine of Substituted Judgment as codified in RCW 11.92.140 to implement a comprehensive estate plan with the approval of the court.



UPCOMING SECTION CLE SEMINARS

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

Project Development from A to Z

February 25, 1999 - Washington State Convention & Trade Center (Seattle)

March 3, 1999 - Cavanaugh's Inn at the Park (Spokane)

Advanced Will Drafting

March 17, 1999 - Crown Plaza Hotel (Seattle)

March 19, 1999 - Cavanaugh's Inn at the Park (Spokane)

Real Property, Probate & Trust Section Midyear Conference

June 4-6, 1999

Wenatchee Center (Wenatchee)

Advanced Probate

July 21, 1999 - Seattle (Site to be announced)

July 22, 1999 - Cavanaugh's Inn at the Park (Spokane)

Real Property, Probate & Trust Section Midyear Conference

June 2-4, 2000

Skamania Lodge (Stevenson)

Recent Developments

Probate and Trust

Wendy S. Goffe, Bogle & Gates P.L.L.C., Seattle

Kari M. Larson, University of Washington School of Law (J.D. expected June 1999)

WASHINGTON SUPREME COURT

In re Estate of Lint, 135 Wn.2d 518, 957 P.2d 755 (1998) (en banc)

Summary: Where a Will is procured as a result of undue influence and fraud, a trial court's finding that the Will is null and void will be upheld on appeal; and where a marriage is the result of "exceptional circumstances indicating fraud of the grossest kind," a trial court will have jurisdiction to void the marriage even after one of the parties is deceased.

Facts: In 1991, the decedent, Estelle Champoux Murphy Line ("Estelle"), was befriended by Christian Lint ("Christian"), a man 18 years her junior, following the death of her husband of 30 years. In 1993, she executed a valid Will in which Christian was not mentioned. In April 1995, Estelle was diagnosed with lung cancer and began numerous treatments. During this time, Christian became more involved with her daily life: Christian moved into her home, fired her long-time housekeeper and hired replacements with whom he had a prior relationship. As Estelle's condition deteriorated, Christian successfully cut off her contact with the outside world. Hospice workers became concerned and discovered that Estelle was receiving an overdose of medication, which was attributable to Christian.

In October 1995, Christian took Estelle to Las Vegas and attempted to marry her at the "We've Only Just Begun Wedding Chapel." A videotape of the ceremony shows Estelle as unable to stand and unable to repeat words or complete sentences. That ceremony was not valid, because a marriage license had not been procured. Christian, later that day, obtained a marriage certificate from the Clark County, Nevada Courthouse. The reverend from the previous ceremony signed the certificate. However, it was unclear whether vows were exchanged. Later that month, financial and health care powers of attorney in which Christian was named attorney-in-fact were prepared. Although Estelle experienced difficulty writing and her mental faculties had substantially diminished, the signatures were witnessed and notarized.

In November 1995, the attorney hired by Christian prepared documents dismissing Estelle's prior attorney, as well as a new Will under which Christian was the primary beneficiary of her substantial estate. When Ms. Lint's prior attorney received the notification, he contacted Adult Protective Services and also instituted guardianship proceedings. Despite a temporary restraining order issued to prevent Christian from taking Estelle from the country, Christian took her to Mexico. Estelle died approximately five days later.

The November 1995 Will was admitted to probate, and the beneficiaries of the previous Will contested both the validity of the 1995 Will and Estelle's marriage to Christian. The trial court concluded that the 1995 Will was procured by fraud as well as undue influence and that the marriage to Christian was void due to lack of solemnization, Estelle's incompetence at the time of marriage, and "exceptional circumstances indicating fraud of the grossest kind." Christian appealed directly to the State Supreme Court.

Discussion: On appeal, the Supreme Court upheld the trial court's determination. Noting that appellant failed to allege any actual error in the trial court's finding of fact, the court upheld the trial court's determination of facts.

The Court agreed that Estelle's 1995 Will was null and void because it was procured by undue influence and fraud. The Court agreed with the appellant that a determination of fraud cannot rest on allegedly false representations of love, notwithstanding the fact that there was substantial evidence in the record as to the fact that Christian's expressions of love for Estelle were less than sincere. However, the Court upheld the trial court's finding of fraud based upon Christian's lies to Estelle, including false statements that Estelle's family wanted to put her in a home in order to get their hands on her estate. The Court also affirmed the trial court's finding of undue influence based on Estelle's mental condition (especially related to the disease), the constant presence of Christian and the exclusion of her friends, and the fact that Christian hired a new attorney for Estelle and fired her prior attorney. Based on these findings, the Court affirmed the trial court's determination that the 1995 Will was null and void.

Because the 1993 Will was therefore valid but failed to provide for Christian, Estelle's "husband," Christian stood to benefit under the omitted spouse provisions of RCW §11.12.095. However, the Court also affirmed the trial court's finding of jurisdiction to determine that no marriage ceremony took place. The Court acknowledged that it did not have jurisdiction to declare a voidable marriage void unless one of the parties to the marriage raised the issue. However, that was not the case in this instance. Because this case involved "fraud of the grossest kind," the marriage never came into being, and thus gave the court the inherent power to declare the alleged marriage void.

continued on next page

from previous page

Recent Developments: Probate and Trust

WASHINGTON SUPREME COURT

In re Marriage of Lindemann, 92 Wn. App. 64, 960 P.2d 966 (Div. I 1998)

Summary: Upon dissolution of a quasi-marital relationship, property interests in a business begun by one member of the relationship and transformed into a successful company by his labor during the relationship is analogous to community property, and the other member of the relationship is entitled to an equitable share of the value added to the business during the time they were together.

Facts: David and Kimi Lindemann (“David” and “Kimi”) married in 1978, separated in 1981, and divorced in 1982. In October 1982, David started an auto body repair business. David and Kimi began living together again in 1985, without remarrying, and stayed together for 10 years. David’s business was marginal initially but began to prosper in 1991, when he overcame a drug habit. During those 10 years, David worked at his business while Kimi worked for a newspaper; Kimi did not do any work for David’s business. They made no effort to keep their property or income segregated. In 1995 David and Kimi separated again, and Kimi petitioned the court to make an equitable division of their property and liabilities.

The trial court found the net value of David’s business had increased during their relationship solely as the result of David’s labor. The court required him to reimburse Kimi for half of the increased value. David appealed.

Discussion: The Court of Appeals affirmed the trial court’s property distribution, relying upon the holding in *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995). In *Connell*, the Washington Supreme Court held that courts are permitted to divide property a couple earns through community efforts during their relationship. In this case, the trial court properly attributed the increase in value to David’s enterprise to his labor and not to rents, issues and profits, or other qualities inherent in the business which would not give rise to a right of reimbursement to the community. Thus, the increase in value was properly characterized as analogous to community property and Kimi was entitled to her share of the “community.”

Thoughtfully, the court used the term “quasi-marital relationship” to describe the couple’s relationship status while living together, foregoing the “archaic” term “meretricious relationship.”

In re Estate of Elmer, 91 Wn. App. 785, 959 P.2d 701 (Div. III 1998)

Summary: Where testamentary language unambiguously gave an interest in a family business to the testator’s living

children and the descendants of any deceased children by right of representation, the court held that the decedent’s three living sons and the daughter of the decedent’s deceased son should each receive equal, one-fourth interests in the business, although neither the deceased son nor his daughter were mentioned by name in the decedent’s Will.

Facts: Richard Elmer (“Elmer”) bequeathed his family business in equal shares to his children using the following language: “[T]o all my children who survive me, and, by representation for their deceased parent, to all the children of any child of mine who dies before I do.” At the time the Will was created, Elmer had three living sons and one deceased son, the father of Elmer’s granddaughter, Patricia Hartt (“Patricia”).

Probate of Elmer’s Will commenced on January 22, 1990, and the petition listed Elmer’s second wife and his three surviving sons as the sole heirs of his estate. Patricia was never notified of the probate proceedings. Probate was completed on June 25, 1990. On June 30, 1994, Patricia, who had been a minor at the time of the probate, applied to have the probate reopened. The trial court determined that Patricia had been entitled to actual notice of probate and set aside the original probate. Patricia then applied for a determination of her rights under the Will. The trial court determined that she was entitled to inherit one-fourth of her grandfather’s interest in the family business. The surviving sons appealed, arguing that Elmer intended that only his sons living at the time of his death were to inherit the family business.

Discussion: The Court of Appeals upheld the trial court’s determination that Patricia should have received one-fourth of her grandfather’s estate. The court reasoned that the trial court’s primary duty in interpreting a Will is to ascertain the testator’s intent, which is determined by the content of the Will alone unless the document is ambiguous. Where uncertainty arises as to the testator’s intent, extrinsic evidence may be admitted to resolve the ambiguity. The Court held that the trial court correctly determined that Elmer’s intent, as apparent from the Will, was for his grandchildren to take by representation the share of a deceased parent. Thus, it was not necessary to go outside the four corners of the Will to hear testimony from Elmer’s three sons concerning the decedent’s intent to disinherit the descendants of his deceased son.

The Court further determined that while the appeal was without merit, it was not frivolous. Because Patricia was held to be a beneficiary under the Will and the litigation benefited the estate, she was awarded reasonable attorney fees on appeal, payable from the estate.

Estate of Lindsay, 91 Wn. App. 944, 957 P.2d 818 (Div. III 1998)

Summary: Spouses entered into a separation agreement waiving all claims to each other’s property and dividing all

continued on next page

from previous page

Recent Developments: Probate and Trust

property, but they never divorced and did not live together after the date of the agreement, except for intermittent short periods of time. They also both executed new Wills leaving nothing to each other. The trial court's finding, after the death of the husband, that the wife waived surviving spouse's award in lieu of homestead, was proper.

Facts: Murray and Cathy Lindsay ("Murray" and "Cathy") married in 1987. In 1991 they entered into a separation agreement dividing their property and waiving any further rights in each other's after-acquired property, but they never divorced. After the date of the agreement, Cathy lived in Murray's home occasionally and for short periods of time.

In 1992, Murray executed a new Will that removed Cathy as the sole beneficiary and instead left everything to his mother. Cathy also executed a new Will excluding Murray as a beneficiary. In 1995, Murray died in a motorcycle accident. Cathy petitioned to probate the earlier Will, which gave her Murray's entire estate. Murray's mother petitioned to set aside the earlier Will and admit the later Will, which named her as beneficiary. Cathy then applied for an award in lieu of homestead if the trial court admitted the later Will.

One of the witnesses at trial could not recall whether Murray's Will had been signed in the presence of the witnesses. Cathy argued that the Will was invalid because it was not properly attested. The trial court found the 1992 Will valid and concluded that Cathy had effectively waived any rights she may have otherwise had to Murray's property, including the award in lieu of homestead. Cathy appealed and the Court of Appeals confirmed the trial court.

Discussion: The Court of Appeals reasoned that a witness is one who has personal knowledge that the Will was signed by the testator. However, RCW 11.12.020 does not require that the testator sign the Will in the presence of the witnesses, nor does it require the witnesses sign in the presence of each other. Thus the trial court's findings that the minimum statutory requirements for the proper execution of a Will had been met was supported by ample evidence. The Court of Appeals also confirmed that a homestead allowance is a high priority in Washington but stated that spouses have the right to intentionally disinherit each other and to waive their statutory rights. The Court of Appeals determined that the separation agreement entered into by the parties clearly reflected an intent to waive their statutory rights, and even if the award in lieu of homestead was not specifically mentioned, it was implied.



Join Us Today!

The officers of the Real Property, Probate & Trust Section urge you to become an active member of this important Section. All members of the Washington State Bar Association are eligible. Simply fill out the coupon below and mail with check for \$15 to: **Real Property, Probate & Trust Section, Attn: Sheri Borgford, Washington State Bar Association, 2101 Fourth Avenue - Fourth Floor, Seattle, WA 98121-2330**

RPPT SECTION MEMBERSHIP FORM

Name _____
 Firm _____
 Address _____
 City _____
 State _____ Zip _____

- Please enroll me as an active member of the Real Property, Probate & Trust Section. My \$15 annual dues are enclosed.
- I am not a member of the Washington State Bar, but I want to receive your informational newsletter. My \$15 is enclosed.

Send this coupon with check to:

Real Property, Probate & Trust Section
 Attn: Sheri Borgford
 Washington State Bar Association
 2101 Fourth Avenue - Fourth Floor
 Seattle, WA 98121-2330

office use only

Date _____
 Check # _____
 Total \$ _____

Recent Developments

Real Property

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

WASHINGTON SUPREME COURT

Jones v. Best, 134 Wn.2d 232, 950 P.2d 1 (1998)

Facts: Jones, a realtor, had an exclusive listing agreement with Best to sell an orchard. Best agreed to sell the orchard for less than the listing price. During the negotiations, Jones indicated that he would be willing to take less than his full share of the commission (\$37,000) on the sale so long as the seller paid the commission owed to another broker in the transaction. Following completion of the sale, the seller claimed that only \$18,000 was owed. The trial court awarded the full commission to the broker, less a \$500 discount to which the broker supposedly agreed would be applicable to his share of the commission. The Court of Appeals reversed the decision and awarded only the amount that the broker had told the seller would be due, even though the seller never paid the other broker in the transaction.

Holding: The Supreme Court reversed the Court of Appeals and also altered the trial court's ruling. The theory of promissory estoppel utilized by the Court of Appeals was rejected. The court found that no amendment to the listing agreement had been consummated and that the broker was entitled to the full \$37,000 commission.

Hazel v. Van Beek, 135 Wn.2d 45, 954 P.2d 1301 (1998)

Facts: A judgment creditor sought to enforce a judgment by foreclosing on real property owned by the judgment debtors. The sale of the property was confirmed by the Superior Court seventeen days following the expiration of the 10-year judgment anniversary date. The Court of Appeal reversed the confirmation on the grounds that all action to complete the sale must be completed within the 10-years following the entry of the judgment.

Holding: The Court of Appeals was affirmed. The judgment debtor's objections to the sale were untimely since they were filed more than 20 days following the sale. However, since all steps in completing the sale were required to be accomplished during the statutory life of the judgment, the court lacked jurisdiction to confirm the sale. The argument that the intervening bankruptcy of the judgment debtor tolled the running of the statutory life of the judgment was rejected.

Davidson v. Henson, 135 Wn.2d 112, 954 P.2d 1327 (1998)

Facts: Henson remodeled Davidson's house. A dispute developed which was arbitrated in accordance with an arbitration provision in the construction contract. At the hearing, evidence was presented as to Henson's contractor registration. The con-

tractor prevailed at the arbitration. Following the hearing, Davidson obtained evidence from the Department of Labor & Industries that Henderson did not have contractor's license. The arbitrator refused to reopen the hearing to admit this evidence and the trial court confirmed the award over the objection of Davidson that the lack of registration rendered the contract illegal. The Court of Appeals affirmed the trial court.

Holding: The Supreme Court affirmed the entry of the award. The Court noted that Washington favored the finality of arbitration decisions, and the objection of Davidson did not relate to any error that was on the face of the award. The presentation of the Department of Labor & Industries evidence was at best an untimely offer and the arbitrator did not have to consider it. The lack of registration did not render the contract illegal, but simply provided an affirmative defense to the owner which the arbitrator rejected.

American Nat'l Fire Ins. Co. v. B & L Trucking and Constr. Co., Inc., 134 Wn.2d 413, 951 P.2d 250 (1998)

Facts: B&L Trucking was held liable under CERCLA for a portion of the cleanup costs of a contaminated landfill. B&L sought compensation from its insurers. The trial court allocated liability between two insurers and the insured on a prorata basis based upon the respective periods their policies were in fore. The Court of Appeals reversed the allocation ruling.

Holding: The allocation of liability was rejected by the Supreme Court. Once coverage was triggered in one or more policy periods, the policies provide full coverage for all continuing damage, without allocation between the insured and the insurer, even if that extends to a time period beyond that which the policy was in effect. If the insurer had wanted to limit its liability to a prorata share of the damages, then its policy could have stated that limitation.

WASHINGTONCOURTOFAPPEALS

Meyer v. Consumers Choice, Inc., 89 Wn.App. 876, 950 P.2d 540 (1998)

Facts: Consumers entered into a real estate purchase agreement which provided for an initial \$10,000 earnest money deposit and an additional \$15,000 deposit upon removal of contingencies. The agreement also contained language from RCW 64.04.005 concerning the forfeiture of the deposit in the event the transaction failed to close. The buyer never closed, but contended that the second deposit of \$15,000 should not be

continued on next page

PROBATE AND TRUST COUNCIL REPORT

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

As we move into 1999, the initial focus of the Probate and Trust Council will be to follow developments of the new legislative session. We will monitor proposed bills that may affect the probate and trust practice area and follow progress of the Section-sponsored Trust and Estate Dispute Resolution Act (TEDRA). As you may recall, TEDRA would expand our existing non-judicial dispute resolution process by providing for party-initiated mediation and arbitration in trust and estate matters.

During the legislative session, we hope to use our Web page (<http://www.wsba.org>) to post information regarding proposed bills that may affect our practice area, track the progress of Section-sponsored bills (TEDRA), and advise members of any positions taken by the Section on proposed bills. We would like this to be a two-way communication and hope that you will let us know any comments you have regarding proposed legislation. We often have to move quickly to comment on proposed bills so please check the Web page on a regular basis during the legislative session. This is our first try at using the Web page for this - your input is encouraged.

In addition to monitoring the 1999 legislative session, the Council will continue work in updating and clarifying probate and trust statutes, as needed. The Holes Committee, under Tom Culbertson's leadership, will focus on the Rule Against Perpetuities, dispositive presumptions for non-employee spouse IRAs, and the power of attorney statute.

Please hold the dates of March 17, 1999 (Seattle) or March 19, 1999 (Spokane) for the Advance Will Drafting seminar. Alan Kane is chairing the seminar and has assembled a program of top rate speakers and topics. You will also want to hold June 4-6, 1999 for the Midyear conference (Wenatchee). Mark Roberts is chairing the meeting and Karen Boxx has agreed to co-chair the probate and trust side. Planning for the Midyear program is well underway and, judging from the proposed presentation topics, will be another excellent program.

The Probate and Trust Council will also continue work on updating our Citizens' Rights pamphlets and on developing liaisons with the Gift and Estate Tax Committee, the judiciary and the Elder Law Section. Our goal is to improve and increase the benefits of your membership. We welcome your involvement and encourage your thoughts and comments.



from previous page

Recent Developments: Real Property

retained by the seller. The trial court awarded the funds to Consumers.

Holding: The trial court was reversed. The agreement clearly denominated the \$15,000 as an "earnest money deposit" and accordingly the forfeiture provisions of the agreement were applicable. Contrary to the contention of Consumers, the payment of these funds did not extend the time for closing. The payment simply committed Consumers to close the purchase as contemplated by the agreement.

Toulouse v. Board of Commissioners, 89 Wn.App. 525, 949 P.2d 829 (1998)

Facts: Five children received a one-quarter tenancy in common interest from their mother's estate. Their father gave them another one-quarter interest. They then purchased the remaining one-half interest. They had the property surveyed and then divided the property among themselves. The County challenged the division of the property when the children attempted to record deeds to the property. The children then sought a declaratory judgment that the division of the property was proper as a testamentary division pursuant to RCW 58.17.040(3). The trial court rejected this claim.

Holding: The division of the property failed to comply with the platting statute. First, an extra parcel was created which was entirely outside of the scope of the bequest of the mother. Second, only part of the property was acquired by the laws of descent. One half of the property was purchased. These conditions required the filing of a plat to divide the property.

Crown Plaza v. Synapse Software, 87 Wn.App. 495, 962 P.2d 824 (1997)

Facts: Crown Plaza sued Synapse for breach of lease. Crown claimed that Synapse abandoned the premises and failed to pay rent. Synapse claimed that it had an oral agreement to terminate the lease. The trial court entered judgment in favor of Crown.

Holding: The Court of Appeals reversed. It was possible to orally amend the lease to provide for an early termination. The existence of an oral agreement is generally a question of fact not appropriately decided on summary judgment. The Court of Appeals also held that a breaching tenant is liable only for rent with respect to the premises subject to the lease. If the landlord re-lets those premises by vacating other premises in the same building, the tenant is not liable for the rent lost with respect to the other premises.



RPPT Newsletter Index of Past Lead Articles (1996-1998)

| <u>Edition</u> | <u>Title</u> | <u>Author</u> | <u>Edition</u> | <u>Title</u> | <u>Author</u> |
|----------------|---|---------------------------------|----------------|---|---|
| January 1996: | "New Risk When Bankruptcy Stays Foreclosure" | David B. Levant | Summer 1997: | "The New 'Check-the-Box' Regulations" | Thomas H. Nelson |
| | "Practitioner's Guide to Creditors' Claims and Nonprobate Assets" | Barbara C. Sherland | Fall 1997: | "Lease Assignment Clauses: The Plight of the (un)Reasonable Landlord" | Camille Taylor Ralston and Scott E. Feir |
| March 1996: | "New Lead-Based Paint Disclosure Regulations Scheduled To Take Effect This Year" | Laura Whitaker | | "IRAs and Underfunded Testamentary Trusts: Are Non-Pro Rata Distributions an Answer?" | Alan L. Montgomery |
| | "Compassion In Dying v. State Of Washington - Ninth Circuit Finds A Constitutional Right To Determine The Time And Method Of One's Death" | Karen E. Boxx | Winter 1997: | "The Commercial Real Estate Broker Lien Act" | Gretchen L. Valentine and Martin J. Strelecky |
| August 1996: | "Digital Signatures: The Washington Electronic Authentication Act" | Linda Mackintosh | | "A Lifetime Gifting Refresher for Clients" | Alfred M. Falk |
| | "Practicing in Cyberspace: Some Thoughts on Digital Documents" | Thomas M. Culbertson | Spring 1998: | "Seller's Disclosure Requirements in Residential Real Estate Transactions and the <i>Edmonds</i> Case" | Nancy Cahill |
| Spring 1997: | "Redevelopment of Contaminated Property Promoted by New Protection for Lenders and Fiduciaries from Cleanup Liability" | Jeff Belfiglio and Warren Koons | | "Understanding the Non-Legislative History of Washington Community Property Law" | Kelly M. Cannon (© 1997 by Kelly M. Cannon) |
| | "ESBT: Two Tangled Trusts: Tool or Trifle" | Livingston Wernecke | Summer 1998: | "An Overview of Washington's 1998 Deed of Trust Act Amendments" | Craig A. Fielden |
| Summer 1997: | "A New Round of Changes to the GMA" | Staci Jeske | | "Sale of Residential Real Property From an Estate: Practical Suggestions and Ways to Limit the Personal Representative's Liability" | Matthew B. McCutchen |
| | | | Fall 1998: | "Formula Marital Deduction Gift Clauses And The IRC §2032A Election" | Alan L. Montgomery |

Editor's Note

You may have noticed several changes and (we hope!) improvements to the Newsletter in the past two editions. Please let us know if you have comments, complaints or further suggestions! You can contact the newsletter editor, Lora L. Brown, or the chair of our Section, John M. Riley III. (See "How to Reach Us!" in this newsletter.) If you would like us to consider an article for publication in the newsletter, or just have a suggestion as to topics that might be of interest to our readers, please contact Lora L. Brown at (206) 626-6000 for articles concerning probate and trust matters, or Maren Gaylor at (206) 340-9632 for articles concerning real estate matters. Articles can range from those of interest to specialists or general practice attorneys.

WASHINGTON STATE BAR ASSOCIATION
Real Property, Probate & Trust Section
2101 Fourth Avenue – Fourth Floor
Seattle, WA 98121-2330

Nonprofit Org.
U.S. Postage Paid
Seattle, WA
Permit No. 2204

HOW TO REACH US!

Visit our new
Section WEB page
at: www.wsba.org

Officers

John M. Riley, III, Chair
Witherspoon, Kelley, Davenport & Toole, P.S.
1100 U.S. Bank Building
Spokane, WA 99201-0390
Phone: (509) 624-5265
Fax: (509) 458-2728
E-Mail: jmr@wkdtlaw.com

Mark W. Roberts, Chair Elect
Davis Wright Tremaine, LLP
1501 Fourth Avenue, Suite 2600
Seattle, WA 98101-1688
Phone: (206) 628-7753
Fax: (206) 628-7699
E-Mail: markroberts@dwt.com

Douglas C. Lawrence, Past Chair
Stokes Lawrence, P.S.
800 Fifth Avenue, Suite 4000
Seattle, WA 98104-3179
Phone: (206) 626-6000
Fax: (206) 464-1496
E-Mail: doug.lawrence@stokeslaw.com

Real Property Council Director
Serena M. Schourup
Bogle & Gates, P.L.L.C.
Two Union Square, 601 University Street
Seattle, WA 98101-2346

Phone: (206) 682-5151
Fax: (206) 621-2660
E-Mail: sschourup@bogle.com

Probate and Trust Council Director
Barbara C. Sherland
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-3197
Phone: (206) 624-0900
Fax: (206) 386-7500
E-Mail: bcsherland@stoel.com

Newsletter

Lora L. Brown, Editor
Stokes Lawrence, P.S.
800 Fifth Avenue, Suite 4000
Seattle, WA 98104-3179
Phone: (206) 626-6000
Fax: (206) 464-1496
E-Mail: lora.brown@stokeslaw.com