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Section Newsletter

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State Estate Tax R.I.P.

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

To the surprise of many of us, and to the great credit of Ray Siderius and his team, the state Supreme Court on February 3rd unanimously ruled in favor of the plaintiff class in the *Hemphill* case. The decision can be found by going to *www.courts.wa.gov/opinions* and following the links.

In a nutshell the Court held that the state estate tax is invalid to the extent it exceeds the federal state death tax credit. Under EGTRRA 2001, that credit was phased out over the last three calendar years, and the credit was eliminated altogether for deaths occurring this year. However, the Washington Legislature did nothing to make the state law conform to the change at the federal level, and the Department of Revenue took the position that the state tax was therefore "de-coupled" from the current federal tax and was instead tied to the Internal Revenue Code as it existed on January 1, 2001 (i.e., prior to EGTRRA).

As a result of the Court's decision, for deaths occurring in 2002 and thereafter, any estate that paid state tax where no federal tax was due will be entitled to a refund of the entire state tax it paid, and estates that paid both state and federal taxes will be entitled to a partial refund. For deaths occurring this year and later, there will be no state estate tax, at least unless and until the Legislature enacts a new tax. The Supreme Court remanded the case to the trial court to order the appropriate refunds. According to press reports, the refunds will total about $150 million.

Late in 2003, the trial court ordered that estates paying tax on or before December 19 of that year would automatically be members of the class, while those paying after that date would be members only if they affirmatively opted in. Two business days after the Court's decision, the Department of Revenue issued an announcement that essentially says that refunds to class members will not be made until the trial court renders its final order and that refunds will be governed by that order. Estates which were not automatically included in the class and which did not opt in may file claims for refund under RCW 83.100.130. The Department reminded practitioners that the statute of limitations for a refund claim is three years after the tax is paid. Given that estates paying before late 2003 are members of the class automatically, the statute of limitations should not be a concern until December 19, 2006. With its announcement, the Department also issued a new (and far simpler) estate tax return, which can be found at *www.dor.wa.gov/Docs/forms/Misc/WAEstateTransfTxRtrn_E.pdf*.

In addition to the estate tax, Washington also had a generation skipping transfer tax, found at RCW 83.100.045, and the Department's position was that the state GST tax was similarly de-coupled from the Federal GST tax. The Court's decision says nothing about the state GST tax, but it does occasionally reference Chapter 83.100 generally. Fortunately it is clear from the new state return that the Department agrees that the state GST tax cannot exceed the federal GST tax credit, which means it too disappears for GST transfers occurring this year and later. It is generally thought that the costs of enforcing and administering the state GST tax far exceed the revenues collected. The Department was probably quite willing to have the Court's decision apply to the state GST tax, even if the Justices may not have been aware that they were dealing with that tax as well.

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Irresistible Force or Immovable Object? The Rights of Unmarried/ Nontraditional Couples in the Distribution of Property

by Darcy L. Boddy, Stafford Frey Cooper PC, Seattle

I. Traditional Estate Planning

There was a time that estate planning essentially consisted of drafting a Will or trust for a married couple who shared children from a first marriage. The marital community owned most assets, and typically husbands contributed the entirety or the bulk of financial support for the family. Upon death of one spouse, the Will clearly identified property owned by the decedent, and distributed it to the remaining spouse, and then to the couple's children.

Both intestacy statutes and community property rules acted as a protective default.

If no estate planning had been completed, intestacy statutes gave property to the remaining spouse and/or children, thus distributing property in a similar manner as the basic Will.[1] By presuming that each spouse owns a one-half interest in the assets of the other, community property rules ignore how assets are titled and divide property accordingly. In a community property state married couples must prove assets are not owned by the community, either because assets were inherited or gifted, or because the couple entered a separate property agreement.

The public-policy reasons justifying both intestacy distribution and community property rules are essentially: a) protection of the family; b) protection of the non-wage earning spouse and children; c) recognition of monetary and non-monetary contributions to the marital community; and d) ease and clarity of estate administration upon the death of the first spouse. [2]

This article questions whether the policy underlying property division rules is still being served in light of the changing face of the American family. By examining the a) legal responses to past societal changes, b) current political/legal debate surrounding extension of marital benefits to same-sex couples and unmarried couples, and c) reasoning of Washington's "just and equitable" division rule, we may anticipate how the arguments for unmarried couples will be won or lost in the future.

II. The Emerging Demographic Trend and Failure of Default Rules

While statistics on the American family differ somewhat, as few as a quarter of all households fit the description of "traditional," that is, a married couple, with or without children from the same marriage. In fact, among "committed householders,"[3] as h igh as sixty percent may be unmarried.[4] Some are not married because of choice, some because they legally cannot get married.

Often, at the end of the relationship either because of death or "divorce," courts are required to divide and distribute property. If all couples drafted Wills, domestic partnership agreements, or contracts, the judicial process would be rather simple. Intestacy statutes exist as an acknowledgment that most people do not make such legal clarifications and that it would burdensome to require it. However, with less than one-quarter of American families fitting the traditional description that so well lent itself to the default rules, the same statutes can now disturb the public policy they were once designed to address.

A. Changing Mores

There is nothing new in the idea of an evolving definition of family. Once people married nearby villagers who shared the same ethnicity, religion and customs. As times changed, people married outside these patterns. Interfaith and interracial relationships became more common. The "non traditional" couple might experience lack of acceptance, threats and isolation. Eventually, if a few incidents became a more significant statistical factor, mores changed and the new behavior found some relative level of acceptance.

Whenever the norm is being challenged, there is a period of resistance by the representatives of traditional values. As Americans, we have our own experience with this. In recent history, many states banned interracial marriages, especially between African Americans and whites.[5] It was also illegal in many states for unmarried couples to live together.

Deviating from the previous "norm," the 1970s saw a rise in the number of heterosexual couples living together in a committed relationship without marriage. One of the first cases to recognize that the trend was becoming a permanent part of American society was *Marvin v Marvin*, [6] the landmark case affirming the application of community property principles to unmarried couples. When the Court extended community property principles that had been reserved for only married couples, it justified its decision by saying:

> "The mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many…" [7]

At the heart of the Court's reasoning was the same public policy that had created community property rules originally; that is, that one party should not be unjustifiably enriched to the detriment of another, simply because the law currently did not recognize unmarried, long term unions. The *Marvin* court recognized that an exact reading of community property laws did not fit the letter of the law, but it did fit the spirit.

B. Struggling for New Legal Definitions- National Debate

In the nearly thirty years after *Marvin*, citizens, legislators and courts struggled to define, expand and limit the definition of families and couples. In 1996, President Clinton signed the "Defense of Marriage Act" (DOMA) into law. DOMA defined "marriage" as the legal union of a man and a woman, that is, a

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husband and a wife. Further, "spouse" was defined as someone of the opposite sex who is either a husband or a wife.[8]

DOMA also invoked the "Effect" clause of Article IV, Section 1 of the Constitution, which in this case allows one state to deny recognition of a same-sex marriage legally recognized in the originating state. Proponents limiting marriage to a man and a woman often support a Constitutional Amendment as a final solution to the debate.

In the 2004 election, voters in eleven states affirmatively denied the rights of same-sex couples to marry, bringing the current total to forty-three states. Those states were Arkansas, Georgia, Kentucky, Michigan, Mississippi, Michigan, Montana, North Dakota, Oklahoma, Ohio, Utah and Oregon. Some states, while not providing for same-sex marriage, will recognize a legal same-sex marriage from another jurisdiction.

Conversely, in 1996, California codified the idea of domestic partnership to address the growing need of unmarried heterosexual and homosexual couples to legally define and organize their financial lives.[9] Currently, only Hawaii, New Jersey, Maine and Washington, D.C., have followed.

In 2001, Hawaii allowed citizens to register as "reciprocal beneficiaries," effectively extending benefits to non-married couples regardless of gender.[10] "The Reciprocal Beneficiaries Act" allows registered reciprocal beneficiaries a) powers that might be granted under a medical directive for a partner, b) inheritance rights and taxation benefits similar to married couples, and c) other rights including standing to bring a wrongful death lawsuit, insurance and other employee benefits, and family leave.[11]

In 2003, Vermont allowed same-sex couples to form "civil unions" granting some of the same powers reciprocal beneficiaries enjoy. In 2004, the Massachusetts Supreme Court affirmed the rights of same-sex couples in that state to obtain marriage licenses. Throughout 2003 and 2004, several municipalities, including Portland and San Francisco, issued thousands of marriage licenses before courts in each state issued injunctions.

While few states are willing to grant equal marital status to same-sex couples, some states do recognize definitions of family to include same-sex partners and their children. Second parent adoption, or co-adoptions, allow a same-sex parent to adopt his or her partner's biological or adoptive child without cutting of the biological parent's legal status as parent.[12] Fifteen states have affirmatively granted second-parent adoptions. [13]

In only three states, Florida, Mississippi and Utah, is second parent adoption barred.

Courts supporting second-parent adoptions cite that it is in the best interests of the child to have certainty and support of two parents.[14] Courts also rationalize the social benefits children gain from the consistency and commitment that adoption provides.[15] It is ironic to note that while children of same-sex partners can establish a legal relationship with each parent, the parents generally cannot establish a legal status between themselves. This begs the question of whether courts may eventually reason that if adoptions provides consistency and commitment for the child, marriage between such parents will enhance the consistency and certainty for all members of the family.

Currently, all major legal commentaries have refrained from taking a position while the national political debate ensues. For example, while the American Law Institute's Restatement (Third) of Property defines "domestic partner," it ends its commentary with a note:

> "As of this date of this publication of this volume of the Restatement, the American Law Institute has not taken a position on the status of a domestic partner."[16]

The BNA Tax Management Portfolio on domestic partners uses the term "unmarried householders" when referring

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to adults sharing a home and commitment. It comments:

> "Despite the growing population of unmarried adults, private companies, courts and legislative bodies have been reluctant to recognize cohabitating unmarried adults as a family unit…Nor does the Internal Revenue Code specifically address cohabitating unmarried adults." [17]

In the absence of a national mandate or a unified collection of state laws defining family, courts must consider public policy, perhaps more than precedent, in crafting future opinions.

C. The Confluence of Public Policy

At the heart of judicial review, most cases dealing with the legality of same-sex marriage ask first whether discrimination against same-sex marriage is constitutional, and if it isn't allowed per se, whether there is a contravening public policy that would otherwise justify discrimination. Here, two important public-policy arguments collide. One argument is for reform of the traditional definition of family in light of changing demographics and mores. If the underlying principles of property division are allegedly represented in intestate statues and community property rules, then shouldn't the definitions of "spouse" change to reflect all groups of committed partners and parents?

The other argument seeks preservation of the traditional social definition of spouse and biological definition of parent. Most proponents cite religious, moral or historical reasons for limiting the definition to opposite-sex unions. When President Bush called for a Constitutional amendment limiting marriage to heterosexual couples, he stated his reasons as:

> "Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society. Government, by recognizing and protecting marriage, serves the interests of all." [18]

While courts have traditionally disfavored unmarried couples in probate and dissolution cases, some courts have recognized that a bright-line rule may unjustly enrich one person in the relationship. To avoid this, courts have developed theories of constructive trust, resulting trust, and equitable lien to allow fair distribution of property that was the product of both parties' efforts. A constructive trust transfers ownership to a trustee and gives the moving party equitable ownership of the property. [19] A resulting trust is an equitable theory that awards rightful ownership, or a part of it, in property that is titled in another's name.[20] In an action for equitable lien, the party with title continues to hold title, but a lien is placed as security to satisfy an outstanding debt. [21]

In community-property states, including Washington, the idea of a fair and equitable division of property has included extending community property-like character on assets acquired during an unmarried couple's relationship. Before extending the rule, courts examine the nature of the couple's relationship to determine if the case warrants such treatment.[22]

A case-by-case approach by the courts does not provide certainty for couples, or estate planning advisors. In an attempt to harmonize the two arguments for and against a new definition of marriage and spouse under the law, several suggestions have been made. Civil unions, reciprocal beneficiaries, and domestic partnership define a legal status short of marriage, but provide more legal certainty to unmarried partners. Electing or registering as a particular status (e.g., "unmarried householders"[23]) where the intestacy statutes, tax regulations and dissolution codes apply, could provide similar certainty and consistency. Additionally, the likelihood of one partner being unjustly enriched diminishes significantly. A registered status requires essentially the same efforts as a civil marriage, and is far less costly than requiring couples to draft contracts and Wills. Moreover, the judicial time and expense of determining the intent of parties is saved.

However, many same-sex couples object to the "separate but equal" attempt these compromises make. A lesser union for them is not the solution. Additionally, unmarried heterosexual couples make the argument that they have a fundamental right to *not* marry and should not have to be forced into marriage in order to enjoy certainty under the law.[24] Finally, while the majority of Americans favor the extension of benefits and intestacy laws to unmarried committed couples,[25] less consensus is found for an extension of a marital-like status to unmarried couples.

III. Washington's Evolving Law

A. The Creasman Presumption

For purposes of determining ownership of property, Washington historically applied community-property rules only to married couples. Under community-property laws, married couples each own one-half interest in property acquired during marriage regardless of how title was held or whether one person had contributed the bulk of the assets. However, courts presumed that property owned by unmarried heterosexual couples belonged solely to the person who held title, even in cases where the evidence suggested otherwise.

This presumption was called the "Creasman presumption" derived from a case where a man and woman had cohabited for over seven years until the woman died.[26] During their relationship, Creasman and Paul held themselves as out as husband and wife. They acquired property exclusively from Mr. Creasman's earnings, which Mrs. Paul subsequently deposited and held in her name alone. Upon her death, the court determined that the property held in her name was her sole property and denied Mr. Creasman any portion despite extensive evidence that Mr. Creasman had been the sole support of both parties during the seven years. Instead, the court reasoned:

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> "…it should be presumed as a matter of law that the parties had disposed of the property exactly as they did dispose of it."[27]

In *Creasman*, the court may have unjustly enriched Mrs. Paul's estate for subtle policy reasons. Mr. Creasman was black and Mrs. Paul was white. It may have offended the court that not only was the couple living together without the benefit of marriage, but that they were an interracial couple as well.

B. Extending Community Property Rules

In 1984, in *In re Marriage of Lindsey*,[28] the court reversed the Creasman presumption. While the Lindseys had originally lived unmarried together, they eventually married before subsequently divorcing. The couple's assets were mostly held in the husband's name, and the wife took care of the home, children from prior marriages, and aspects of a racehorse breeding business. At the termination of the marriage, the wife was eventually awarded the equivalent of her community property interest in their joint assets, including property that had been acquired during the period of cohabitation. In reversing the Creasman presumption, the Lindsey court, quoting from *West v. Knowles*[29] stated:

> "…the rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship." [30]

In reversing Creasman, the court recognized that title alone was not definitive to ownership; that people often through convenience or "cunning" placed assets in the name of only one partner, and that allowing title to control may unjustly enrich one to the detriment of the other, thus violating an important public policy.

Connell v Francisco[31] further developed the meretricious relationship doctrine raised in *Lindsey*. On review in *Connell* was the seven-year relationship of Richard Francisco and Shannon Connell, a couple that had met in Las Vegas while Connell was a show girl and Francisco was expanding his business interests. They eventually began living together, moved to Washington State, and owned and operated an inn on Whidbey Island. They took steps, though unsuccessfully, to have children, and Francisco gave Connell an engagement ring. During the relationship, Francisco increased his wealth significantly while Connell took a small weekly salary from the inn business. At the end of the relationship, these facts added to the court's determination that the relationship was meretricious. Factors that were examined included:

> "…continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties…"[32]

Further, the *Connell* court concluded that "…income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a meretricious relationship is presumed to be owned by both parties."[33]

As a result, each partner was presumed to own an interest in property acquired during their relationship, including an interest in the appreciation of Francisco's wealth. Only by affirmatively proving that Francisco had used his separate property to obtain or increase his assets could he overcome the "community property presumption." Thus, the court effectively shifted the burden to the complaining party to prove that property was not community.

C. Extending Equitable Claims to Same-Sex Couples

The meretricious relationship doctrine rule requires courts to first determine if the relationship was meretricious, that is, "marital like," employing the factors outlined in Connell, without giving greater weight to one factor over the other. Second, if the court determined the relationship was meretricious, it was then required to make a just and equitable disposition of property based upon community property principles, dividing and distributing ownership according to how property would have been divided if the couple had been married.

In 2001, the meretricious relationship doctrine was put to test in *Vasquez v. Hawthrone*.[34] In *Vasquez*, the court was asked to extend community property-like status on property accumulated during a twenty-six year relationship between Frank Vasquez and Robert Schwerzler. The two men had cohabited during the entirety of their relationship with the exception of a two-year period where they had separate apartments in the same building. They had both worked in Schwerzler's at-home recycling business, and also bought and managed apartment buildings together. Vasquez was in charge of tenant relations, collected rents, and either hired help or took care of the buildings himself. He never received a salary for his work in the recycling business or property management business because he and Schwerzler were "life partners." Schwerzler kept title to the joint residence, checking accounts, life insurance and two vehicles in his name. Vasquez stayed with Schwerzler despite his serious gambling problem. Schwerzler gave Vasquez two diamond rings, one on their seventh anniversary and one on their twenty-fifth. Except to Schwerzler's family, they held themselves out as life partners and were known among their friends as such.[35]

Schwerzler died intestate and Vasquez made a claim for his half of the "community property," much the same way Mr. Creasman had. Since Schwerzler's estate consisted of Vasquez's efforts, he employed the meretricious doctrine rule, implied partnership, and the equitable trust doctrine. The administrator of

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the estate denied his claim, citing that Vasquez had merely been a "handy man" for his brother.[36]

Vasquez's summary judgment motion was granted and he was awarded the majority of assets based on the meretricious doctrine rule. However, the Court of Appeals reversed, determining that the meretricious doctrine rule did not apply to same-sex couples because a "marital-like" relationship can only exist between a man and a woman.

The Washington Supreme Court vacated the appellate court and remanded the case to the trial court on the grounds that a genuine issue of fact existed as to the nature of the relationship between Vasquez and Schwerzler. Before sending the matter back to the trial court, the majority opined that equitable claims are not limited by the gender or sexual orientation of the parities. The Court also stated:

> "…Without proof of the facts asserted, it was not possible for the trial court to know the character of the relationship between Schwerzler and Vasquez, the nature and extent of contribution to any property acquired by the parties, and what equitable theories are most appropriate…"[37]

Notably, Justice Sanders' concurring opinion disagreed with the majority on the issue of whether a meretricious claim could be made, essentially stating that a meretricious claim is not available to same-sex couples. In a separate concurrence, Justice Alexander's suggested that the meretricious relationship doctrine is not available when one party is deceased.

On remand is an open question as to whether the trial court will allow any or all of the three equitable claims in Vasquez. However, the Supreme Court appears to have allowed all claims to proceed. If the trial court decides on a theory other than the meretricious relationship doctrine, it will still have extended the *Lindsey* and *Connell* "just and equitable" rules of distribution to probate matters. However, it will not have reached the question of whether Washington will recognize "marital-like" same-sex relationships.

D. Current Cases and Legislation

For the time being, the meretricious relationship doctrine seems to apply only to unmarried, heterosexual couples. However, the landscape in Washington changes dramatically if marriage is extended to same-sex couples. Two cases currently on appeal to the Washington Supreme Court may conclude that DOMA is unconstitutional according to Art 1, section 12 of the Washington State Constitution.[38] In one of the cases, *Andersen v. Sims,* eleven same-sex couples have sued, asking as the only relief the right to enter into a civil marriage. The Court may conclude that the state statute disallowing same-sex marriage is unconstitutional. Of course, the Court may not rule conclusively whether civil marriages can go forward.

In *Baehr v.* Lewin,[39] a case of similar nature, the Hawaii Supreme Court determined that while there was no fundamental right to same-sex marriage, the marriage law denied such couples equal protection under the state constitution. The Legislature answered by adopting the Reciprocal Beneficiaries Act, discussed earlier. However, it is difficult to predict how Washington courts and the Legislature may respond. While Washington recognizes domestic partnership for the purposes of allowing public employee benefits to partners, it does not have a domestic partnership registry. Additionally, the Legislature enacted an anti-gay marriage bill in 1998 with relative ease, raising enough votes to override Governor Locke's veto.[40] The law restricts marriage to heterosexual couples and does not recognize lawful same-sex marriages performed outside the state.

IV. Estate Planning Tools and Resources

For unmarried couples who hire an expert attorney, estate planning options are nearly limitless. By definition, unmarried couples can execute Wills leaving property to whomever they choose, including life partners and their children. While unmarried couples may experience a higher rate of Will challenges by unhappy disinherited heirs, most careful planning will avoid this. Lifetime transfers, inter vivos trusts and beneficiary designations will minimize questions as to the decedent's ownership, intent or beneficiaries. There may even be advantages for same-sex couples under attribution rules in several sections of the Internal Revenue Code precisely because same-sex couples are not deemed to be "related parties." (sections 318, 267, and 453). For a more detailed discussion of estate planning tools, see Wendy Goffe's *Estate Planning for the Unmarried Couple/Non-Traditional Family*, (WSBA CLE Nov. 2004); *Estate and Gift Tax Planning for Nontraditional Families, Probate and Property*, Jerry Chasen and Elizabeth Schwartz p. 6-10, p. 9-10 (ABA Jan./Feb. 2001); and Horwood, Wolven and Zaluda, #813-2nd T.M., *Estate Planning for the Unmarried Adult* (2003), p. A-21-26.

Likewise, unmarried couples can execute a durable power of attorney nominating their partners to make medical and financial decisions for them in case of incapacity or incompetence. For a more expansive list of recommendations, including elder planning for unmarried couples, see Cynthia L. Barrett's *Domestic Partner Life and Estate Planning*, Feb. 2004, (ALI-ABA Advanced Estate Planning Techniques).

Second-parent adoption resources include Sonja Larsen, *Adoption of Child by Same-Sex Partners*, 27 A.L.R. 5th 54 (2003); and Lambda Legal Defense and Education Fund, *Adoptions by Lesbians and Gay Men: An Overview of the Law in the 50 States 1(1996)*, available at *http://www.lambdalegal.org/library/adoption.pdf*). See also *Approaching Same-Sex Marriage: How Second Parent Adoption Cases can Help Court Achieve the "Best Interests of the Same –Sex Family,"* Eleanor Michael, 36 Conn. L. Rev. 1439 (2004).

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V. Legal Analysis of the Fundamental Right to Marry

While unmarried heterosexual couples may complain that the state discriminates against them because it affords legal and financial privileges to married couples that are unavailable them, the option to remedy the situation through marriage is ultimately available to them. This is not so for same-sex couples and makes the issue of equality under the law a very different discussion. While same-sex couples may have commitment ceremonies, raise children together, and in every other way benefit from a stable and loving family relationship, they are currently a class of individuals treated differently under the law except for in a few jurisdictions.

It may soon be decided whether Washington will allow same-sex marriage and hold RCW 26.04.010 invalid. There will likely be legislative responses and challenges to judicial decisions. However, it is unlikely that either judicial or legislative barriers will lessen the growing numbers of same-sex couples in society. The growing acceptance of homosexual couples will impact the law, as have interfaith and interracial marriages, or in another comparison, as has the choice of cohabiting heterosexuals to not marry.

The role of the Legislature and judiciary is quite distinct in this debate. RCW 26.04.010 was doubtless enacted as a legislative effort to reflect the majority opinion in the state on same-sex marriage. The judiciary, however, is asked to scrutinize the law in light of its state and federal constitutionality. While the judiciary must show deference to the Legislature, its unique mission demands:

> "…rather than its own personal preferences, the court is required to apply a consistent, principled and reasoned analysis to evaluating the statute's constitutionality. Through this brilliant design, the constitutions empower the courts to ensure both that no group is singled out for special privileges and also that no minority is deprived of rights to which its members should be entitled…"[41]

Under consideration in particular are Article 1 Section 12 and Article 1, Section three of the Washington Constitution, the former of which reads as:

> "No law shall be passed granting to any citizen, [or] class of citizens…privileges or immunities which upon the same terms shall not equally belong to all citizens…"
>
> Art 1, Section 12

The question then becomes whether RCW 26.04.020(1), which denies the option of marriage to someone other than a male and a female, extends a privilege that is not being made equally available to all citizens under the same conditions. Further,

> "…no person shall be deprived of life, liberty, or property, without due process of law." Art 1, Section 3

This, in turn, leads to the question of whether a liberty interest has been denied under the statute without substantive due process. In answering either question, the judiciary will apply either a rational basis test, deciding that a statute is constitutional if it has a rational basis in a legitimate state goal or purpose, or by applying a heightened scrutiny test if the statute "burdens a fundamental right or a suspect class." [42]

When the U.S. Supreme Court has been asked to analyze similar cases, that Court has focused on the broad right to marry rather than the particular right to marry a person of a different race (*Loving v. Virginia)*[43] ; the right to marry if delinquent on child support payments *(Zablocki v. Redhail)*[44] ; or, the right to inmate marriage (*Turner v. Safley)*.[45] The underlying principle has been to deem marriage a fundamental right. Additionally, it has been the trend of our law and society to value personal autonomy as it relates to matters of the home, family and intimate relationships.

While the debate as to same-sex marriage takes its course in courts across the United States, as well as in the court of public opinion, unmarried couples will need to make proactive efforts to clarify who they deem family and the extent they intend to share property and divide or distribute property at the end of the relationship. Courts, especially in community property states, are likely to employ a multi-factor test to each probate or dissolution in question, supplying what intestacy statutes currently do not produce, that is, a system that reflects the distribution intentions of the majority of citizens.

If our legal definitions of family remain static while our society continues to change, then the law will cease to serve the society it was created for. At death or "divorce" we will find ourselves in pre-*Creasman* days where titling of assets trumps all factors of fairness. Instead, it seems impossible not to recognize, as the *Marvin* court did thirty years ago, that if mores have so substantively changed, then so, too, must the law that reflects society's values. Ultimately, the public-policy justification that underlies property laws should prevail, that is, protection of the family, protection against unjust enrichment and most importantly, personal liberty.

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1 See generally Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts and Estates* 71-157 (2000).

2 Harry M. Cross, *The Community Property Law in Washington*, (Revised 1985), 61 Wash. L. Rev. 13 (1986).

3 Bureau of the Census, Current Population Reports, Series p-20, No. 432.

4 See supra note 3.

5 Denise C. Morgan, Jack Johnson: *Reluctant Hero of the Black Community*, 32 Akron L. Rev. 529 n. 58 (1999). In 1967, seventeen states still have anti-miscegenation laws until the U.S. Supreme Court invalidated them.

6 *Marvin v. Marvin,* 18 Cal.3d 660,557 P.2d 106 (Cal. 1976).

7 *Ibid*. at 684.

8 Codified at *1 U.S.C. 7* (Supp. III 1994) and *28 U.S.C. 1738C* (Supp. III 1994).

9 The first ordinance providing for domestic partners was passed in 1984 by Berkeley, California.

10 Codified at *Haw. Rev. Stat. Ann. §§ 572C-1* to -7 (Michie Supp. 1998).

11 See supra note 10.

12 Karla J. Starr, *Adoptions by Homosexuals: A Look at Differing State Court*

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Joint Ownership Agreements Between Unmarried Couples
"Is That All There Is?"

by Elaine G. DuCharme

I. Introduction

Just as the Peggy Lee song opines, "Is that all there is?" the attorney assisting an unmarried client with a property agreement must inquire, "Is that all there is?" The attorney must fully examine the nature of the client's relationship within the context of Washington's so called "meretricious relationship" law. Further, utilizing a joint ownership agreement as to real and/or personal property without also addressing broader domestic partnership issues, may lead the court to later inquire "Is that all there is?" often to the detriment of your client. Will the court hold that the joint property agreement was intended to cover all relational issues and thus preclude other meretricious relationship claims?

While this article was to address joint ownership agreements between unmarried couples, that task cannot be properly completed without addressing the related potential meretricious relationship claims and the advisability of a broader domestic partnership agreement. It is common for clients to seek a joint ownership or property agreement from counsel and not realize that under Washington's "meretricious relationship" common law, they should utilize an agreement that more fully addresses all of the issues relating to cohabiting, not just the ownership and management issues of the jointly owned home.

The complexity of relationships, as well as the complexity and uncertainty inherent in meretricious relationship case law makes the task of addressing the client needs complex and difficult. Merely creating a joint ownership agreement, however thorough, may not fully deal with future legal issues relating to the cohabitation of the client should the parties separate.

Washington has held that contractual agreements between unmarried cohabitants are enforceable as they have the same rights to dispose of their property by contract as other couples. *Humphries v. Riveland*, 67 Wn.2d 376, 407 P.2d 967 (1965); *Dahlgren v. Blomeen*, 49 Wn.2d 47, 298 P.2d 479 (1956). Unmarried couples should be advised to utilize written contracts similar to, but broader than a pre-nuptial or post-nuptial.

II. What Is a Meretricious Relationship?

In *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995) , the Washington Supreme Court held that the property acquired by the parties during the term of a "meretricious" relationship is subject to equitable distribution by the court upon the dissolution of the relationship.

What is a "meretricious" relationship? It is basically determined based upon the totality of the circumstances. It need not be "long-term," but that is a significant factor. It could be short-term. If so, it must also have a number of other significant and substantial factors present. The factors set forth in *Connell* were further delineated in *In Re Pennington (Chesterfield v. Nash)*, 142 Wn.2d 592, 14 P.3d 752 (2000) to include: continuous

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Irresistible Force or Immovable Object? …

Opinions, 40 ARIZ. L, REV. 1497 (1998).

13 See supra note 12.

14 Eleanor Michael, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases can Help Courts Achieve the "Best Interests of the Same-Sex Family," 36 Conn. L. Rev. 1439* (2004).

15 See supra note 14.

16 American Law Institute, Restatement (Third) of Property, Vol. 1 (*Wills and Other Donative Transfers*)(1999) § 2.2, Comment g, p.64.

17 Horwood, Wolven, and Zaluda, 813-2nd T.M., *Estate Planning for the Unmarried Adult* (2003).

18 Office of the White House, Remarks by the President, February 2004. Also found http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html.

19 *Smith v Smith*, 108 So.2d 761 (Fla. 1959).

20 *Collins v. Davis*, 315 S.E.2d 759 (N.C. Ct. App. 1984).

21 *Marum v. Marum*, 194 N.Y.S.2d 327 (N.Y. Sup. Ct. 1959.)

22 *Connell v. Francisco*, 127 Wash.2d 339, 898 P.2d 831 (1995).

23 This is a term newly introduced by the Bureau of the Census.

24 Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?, 33 Ind. L. Rev. 991* (2000).

25 See supra note 24.

26 *Creasman v. Boyle*, 31 Wash. 2d 345, 196 P.2d 835 (1948).

27 *Ibid*. at 356.

28 *In re Lindsey*, 101 Wash. 2d 299, 678 P. 2d 328 (1984).

29 In *West v. Knowles* 50 Wash.2d 311, Justice Finely attacked the *Creasman* presumption in his concurring opinion.

30 *Ibid.* at 316.

31 *Connell*, 127 Wash.2d 339 (1995).

32 *Ibid.* at 346.

33 *Ibid.* at 351.

34 *Vasquez v. Hawthorne*, 994 P.2d 240 (wash. Ct. App. 2000), reversed and vacated by 145 Wash.2d 103, 33 P.3d 735 (2001).

35 Amanda J. Beane, *One Step Forward, Two Steps Back: Vasquez v Hawthorne Wrongly Denied Washington's Meretricious Relationship Doctrine to Same-Sex Couples, U76 Wash. L. Rev. 475* (2001), discusses the facts in the case prior to the Washington Supreme Court's review.

36 See supra note 35.

37 *Vasquez*, 145 Wash.2d 103, 107.

38 *Andersen v Sims*, King County Superior Court, Cause No. 04-2-04964-4 SEA and *Castle v Washington*, Thurston County Cause No. 04-2-00614-4).

39 *Baehr v. Lewin*, 74 Haw. 645, 852 P.2d 44 (1993).

40 Revised Code of Washington 26.04.

41 Memorandum Opinion and Order on Cross Motions. Hon William Downing.

42 *Ibid.* at page 9.

43 *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817(1967).

44 *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673 (1978).

45 *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987).

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cohabitation, duration of the relationship, intent of the parties, pooling of resources, and purpose of the relationship. Unlike the couple in *Connell*, in *Pennington* the court held that neither couple's relationship constituted a meretricious relationship.[1]

The relationship must be stable. In a marriage, dissolution statutes will apply whether the marriage was stable or not and evidence regarding an affair is not relevant or admissible. Under *Pennington*, an affair or other relationship during a long-term cohabitation may result in a finding that the relationship is not meretricious. There must be continuous cohabitation according to *Pennington*. Please note that in *Warden v. Warden*, 36 Wn. App. 698, 676 P.2d 1037 (1984), the Court of Appeals found the relationship tantamount to a marriage even though one party married another person in Canada and the parties had periods of separation. Even though parties in *Warden* had a child together, under *Pennington*, their relationship may not have been held to be meretricious.

III. Death Rights and Other Potentially Applicable Doctrines

The practitioner must note that in any unmarried couples case, there are other potential theories of recovery such as implied partnership, joint venture, constructive or resultant trust, unjust enrichment, detrimental reliance, estoppel, and implied or express contract.

The Supreme Court held in *Pefflev-Warner v. Bowen*, 113 Wn.2d 243, 778 P.2d 1022 (1989), that the surviving partner to a meretricious relationship is not a spouse for purposes of intestate succession and could not inherit the share of the deceased partner's estate (at least pursuant to the intestate succession laws). The sole issue addressed by the court by certification from the Ninth Circuit was whether Washington law afforded a surviving cohabitant the same status as that of a spouse with respect to the division of decedent's property. Ms. Warner was seeking widow's benefits under the Social Security Act, which the Court held to be not available.

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

IV. Joint or Common Representation: Ethical Issues and Conflict of Interest

The attorney should not represent both parties in a joint ownership or domestic partnership agreement. The potential that an actual conflict of interest exists is high and, quite frankly, inevitable. An attorney representing both sides to a joint ownership, pre-nuptial or domestic partnership agreement may be in violation of the rules of professional responsibility. *See* RPC 1.7. Joint representation may result in the agreement not being enforced by the Court. While the Court has not established a requirement of independent counsel, the lack of independent counsel is a factor in that determination, particularly where one of the parties is giving up certain rights. *Seattle First National Bank v. Whitney*, 16 Wn. App. 905, 560 P.2d 360 (1977).

V. Joint Tenants With Rights of Survivorship; Is It Right For Your Client?

In order to avoid probate and guard against family interference and challenge, unmarried couples commonly utilize joint tenancy with rights of survivorship (JTWROS). However, it can lead to undesirable tax consequences and may thwart estate-planning goals of the client. Property that passes outside of probate is no longer available to fund any bequest the client may wish to leave to children or other family members. The words "with a right of survivorship" must be used in the title.

Gift and estate tax problems may also arise due to JTWROS form of ownership. The gross estate at death includes the value of all property held (with a person other than the decedent's spouse) as JTWROS, except to the extent the funds utilized to acquire the property can be traced to the other joint tenant. 26 U.S.C. § 2040(a). Unless unmarried clients with a taxable estate can trace the acquisition and payments on JTWROS property, the form of ownership should be changed to tenants in common to avoid this problem.

In the case of married joint tenants, transactions creating or terminating joint tenancy interests are generally not subject to gift tax consequences under 26 U.S.C. § 2523(a). For unmarried clients, the creation of a joint tenancy will generally constitute a completed gift for gift tax purposes if the parties did not provide the consideration for the acquisition in proportion to their respective ownership interests. The termination of a joint tenancy will be treated as a gift if the proceeds are not divided in proportions that properly correspond to each joint tenant's interest in the property. The joint tenant's interest in the property should be determined pursuant to state law. The unlimited marital deduction applies if the donee is the spouse.

One joint tenant can convert the joint tenancy to a tenancy in common by conveying his or her interest, even by deeding it to himself or herself, without the consent of the other joint tenant (or tenants) being necessary. RCW 64.28.010 preserves the common law right of a joint tenant to sever the joint tenancy unilaterally.

VI. Domestic Partnership Agreements

A pre-nuptial or property agreement between spouses requires full and fair disclosure of all material facts relating to the amount, character and value of the property of the parties, including assets and income information, together with full knowledge of all facts and circumstances that materially affect the contract, including

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property rights waived. *Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 200 (1972). While it is unclear whether the same criteria would be applied to agreements between unmarried couples, it is advisable to utilize the same requirements (*i.e.*, independent legal advice, full and fair disclosure, and knowledge of the rights waived).

Why is such an agreement advisable? The unmarried couple that continues to cohabitate without benefit of a broad domestic partnership agreement risks the application of meretricious relationship common law upon the demise of his/her relationship.

Unlike in a marriage, where the dissolution remedy is automatically available, the parties dissolving an unmarried domestic partnership face a threshold inquiry into whether a meretricious relationship existed before they even get the inadequate and unequal remedies provided by the meretricious relationship law. This inquiry can turn on factors beyond the client's control and knowledge. For example, in a marriage, a party can have an affair, and yet the statutory framework still applies, they still have a marriage and the courts will protect them and their property interests. In an unmarried domestic partnership, an outside affair, under case law, could well result in a finding that the underlying relationship was not "meretricious." This threshold question as to whether the relationship even exists is absent in marriage cases, and is part of the reason why there is added expense and uncertainty in meretricious relationship cases

Even if a relationship is found to be meretricious or, as a practitioner, you can advise your client that it is likely to be found to be meretricious, the following issues and factors make the process more difficult and the ultimate outcome less predictable and less equitable:

a. No ability to recover attorney's fees.

b. No spousal maintenance (even if a partner has been a stay-at-home parent for years with the parties' children).

c. Division of property based on pro-rata contribution instead of usual 50/50 in short term marriage has been allowed as "fair and equitable."[2]

d. No jurisdiction over separate property of the parties (along with an unanswered question as to whether the court can take the existence of separate property into account in making equitable distribution of joint property).

e. What community property principles will apply? This has not been resolved by case law.

f. Uncertainty as to whether the court has jurisdiction to allocate debts pending trial (some courts have held that they have no jurisdiction over these matters).

g. Lack of access to restraining orders that are routine in dissolutions. The general civil rules require posting of a bond and many judges will not provide temporary restraining orders so parties are free to dissipate joint assets.

Even issues such as who will remain in the family home pending trial may be impossible to resolve on a temporary basis; many judges apply traditional contract concepts, often leaving the parties in the home together, despite a volatile break-up situation. This makes a domestic violence allegation particularly "useful" and susceptible to abuse because parties know or have been told that making such an allegation may be the only way to get the other partner out of the house. The same lack of clarity applies to debt allocation and payment of debts pending dissolution of the relationship, which often means that one person is forced to pay an unfair share of the debts or face jeopardizing his or her credit rating or having assets repossessed.

The courts do not use the same standards in division of property for unmarried couples. By analogy to the dissolution statute, the court is to make a "fair and equitable" distribution of jointly acquired property only. There is no statute as there is for marital dissolutions to provide the factors for division of property in unmarried couples law. As indicated above, this can even result in just a pro-rata return based on contribution during the relationship – an outcome which would not be accepted as fair and equitable in a marital dissolution. Because there are no clear standards, the results can vary significantly.

The fact that retirement benefits, IRAs and other qualified plans cannot be split between unmarried partners under federal law often makes distribution of property issues difficult when one of the parties has acquired a significant interest in such accounts during the relationship. Further, since these assets cannot be split, the risk of bankruptcy after trial is significant and there is no federal ruling on the dischargeability of this award. This issue would not exist in a marital dissolution as you would simply use a Qualified Domestic Relations Order to divide the asset.

The right to receive Social Security disability or retirement benefits may have been acquired by one partner and not the other during a long-term relationship and this disparity is difficult to adjust for, but must be taken into consideration in drafting the agreement. I advise the client to utilize a financial planner to assist in the analysis and options to address the loss of Social Security for a party who has been (or will be) out of the work force raising the children.

What happens to the surviving partner of a meretricious relationship case after the death of one of the partners is even less predictable and fraught with more difficulties than the dissolution process. If the surviving partner of a marital couple is left without the decedent having executed a will, a plethora of protections ensue, including the right to inherit all of the community property,

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the right to inherit a portion of separate property depending upon survival status of other related individuals to the decedent, the right to petition for a family allowance which has priority over other claims, the right to stay in the family home pending probate completion, the right to administer community property even if the decedent named a different Personal Representative in his/her will, and the right to survivor benefits under Social Security. The surviving partner of a same-sex couple cannot take advantage of any of these laws.

The above litany of risks inherent in unmarried couples dissolution law should act as a guideline for addressing issues in the agreement, including: The agreement should deal with their interests in each other's earnings and other income, as well as their property acquired by purchase, gift or inheritance before or during their relationship; their debts owed both before and incurred during their relationship; the understanding they have of how to share their living expenses and household responsibilities; as well as bill paying and tax consequences.

VII. Checklist for Domestic Partnership Agreement

- Characterization of property (including real, personal, tangible, intangible, business interests, income, retirement and pension, IRA, 401(k) and compensation related benefits, life insurance, etc.).
- What is separate property and what is joint property including current and future acquisitions, inheritance, gifts.
- Impact of contributions of joint property, income, labor or services to separate property of a party; impact of separate property contribution to joint property.
- Management of such property during relationship.
- Waiver of right of partition under RCW 7.52 for real property held as tenants in common.
- Distribution of joint property upon dissolution and confirmation of separate property in the party owning same.
- Buy-out of home or other real property (does one party have first right of refusal? Did one party put separate funds into the joint home or property that should be affirmed? What about any increase in value associated with the separate property interest?), terms for buy-out (including establishing fair market value, time to pay amounts due, refinance of mortgage.
- Definition and provision for payment of joint debt and/or encumbrances both during relationship and after dissolution; use of joint credit cards and provision for payment upon dissolution; tax obligations that will be joint.
- Definition and provision for payment of separate obligations and a hold-harmless, tax obligations that will be separate.
- Effect of death of a party (including perhaps duty to leave house to surviving partner-or right to reside therein during probate administration).
- Right to reside in home upon dissolution and who pays mortgage and expenses during sole occupancy; impact of paying mortgage during sole occupancy-credit only for principal reduction or offset against non-paying party for _ of payments made by paying party.
- Right to restraining orders upon dissolution relating to use of home, dissipation of joint assets, etc. and waiver of civil bond in this respect.
- Waiver or confirmation of any support upon separation.
- Attorneys' fee provision.
- Mediation and/or arbitration (binding or nonbinding) provisions.
- Waiver of meretricious relationship rights, except per the Agreement.
- Confirm full and fair disclosure.
- Each party had separate counsel.
- Governing law and jurisdiction.
- Is this an integrated instrument and is it the entire agreement.
- Specify how title to real property is to be held.
- Other matters that might be included: confidentiality and privacy terms, any grant of signature authority by each party to the other, record-keeping duties, insurance, household expenses, counseling agreed upon prior to terminating relationship, remedies for defaults, allocation of duties, management of finances, joint bank account management and establishment.

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1 For a thorough review of the *Pennington* case, see Spring 2003, Real Property, Probate and Trust Newsletter, page 4, article by Alfred M. Falk.

2 In *Sutton v. Widner*, 85 Wn.App. 487, 933 P.2d 1069 (1997), *review denied* 133 Wn.2d 1006, 943 P.2d 664 (1997), the Court of Appeals held that a just and equitable distribution was pro-rata based upon the contributions of the cohabitating partners. *Sutton* appears at odds with the Supreme Court's ruling in *Connell* by allowing wide discretion to the trial court, which in *Sutton* divided the property based on contribution.

An Overview of the Servicemember's Civil Relief Act for the Real Property Practitioner

by Sean Holland

I. Introduction

The venerable Soldiers and Sailors Civil Relief Act of 1940 is no more. On December 19, 2003, it was replaced with the Servicemembers Civil Relief Act (the "SCRA"),[1] which is a wholesale revision of the old act. Gone are outmoded provisions, such as the protection of homestead entry on federal land. Congress has added provisions dealing with issues of contemporary concern, such as automobile leasing, health insurance, and professional liability insurance. Finally, the new act clarifies procedures to be followed and addresses ambiguities under the former act.

This article focuses on situations where the SCRA may affect rights involving real property. Counsel representing protected persons who are unfamiliar with the SCRA may fail to recognize the rights and benefits to which their clients are entitled. Similarly, counsel representing persons adverse to persons protected under the SCRA may fail to dissuade their clients from activities in violation of the SCRA that may result in fines and imprisonment of up to one year.[2]

Issues under the SCRA are likely to arise in the following situations involving real property: (1) litigation (default judgments, stays of proceedings, relief from garnishments, attachments, or executions, and statutes of limitation), (2) termination of leases by servicemembers, (3) non-consensual termination of real property interests (eviction, foreclosure, termination or rescission of a contract to purchase real property, tax sales), (4) the six percent interest cap, and (5) various rights in public lands. The threshold issue in each of the foregoing situations is whether an affected individual is entitled to protection under the SCRA.

II. Protected Persons

The full protection of the SCRA is extended to "servicemembers" and "citizens serving with allied forces." Protections in a more limited set of situations are given to their "dependents" and to individuals who have some liability in connection with a servicemember's obligation.

The SCRA defines a "servicemember" as "a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10, United States Code."[3] The Title 10 definition includes members of the Army, Navy, Air Force, Marine Corps, Coast Guard, and the commissioned corps of both the National Oceanic and Atmospheric Administration (NOAA) and the Public Health Service (PHS). The protections of the SCRA apply during a "period of military service," which includes the following: (a) "active duty, as defined in section 101(d)(1) of title 10, United States Code," for members of the armed forces, (b) "active service" for individuals in NOAA or the PHS, and members of the National Guard serving on active duty for periods of 30 days or more while in their federal capacity.[4] The definition of "active duty" does not include National Guard service under the command of the Washington governor. It should be noted that annual training, typically of just two weeks duration, for members of the reserve branches of the armed forces qualifies as a "period of military service."[5]

American citizens "serving with the forces of a nation with which the United States is allied in the prosecution of a war or military action" are entitled to the same protections as servicemembers.[6] In this article, any further reference to "servicemember" should be understood to include citizens serving with allied military forces.

Certificates confirming no military service for a particular individual, or service dates and other details for servicemembers, can be obtained from the secretary of the relevant federal department.[7] The SCRA provides no guidance on how to confirm the military service of a citizen serving with allied military forces.

"Dependents" of servicemembers are defined as a spouse, child, or "an individual for whom the servicemember provided more than one-half of the individual's support for 180 days immediately preceding an application for relief under" the SCRA.[8]

In litigation, the protections afforded to servicemembers may, in the court's discretion, be granted for the benefit of an individual having some liability in connection with a servicemember.[9] The type of person identified by the statute is "a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily subject to the obligation or liability[,]" or contract, for which the servicemember is obtaining relief.[10] If a court stays proceedings or vacates a default judgment for a servicemember, it may also do so for these individuals.[11]

III. Litigation

The SCRA affects litigation involving servicemembers by (1) protecting them from default judgments, (2) staying proceedings, (3) providing relief from garnishments, attachments, and executions, and (4) tolling statutes of limitation and redemption periods.

A. Default Judgments

In any civil litigation where the defendant does not appear, no default judgment may be entered until the plaintiff has filed an affidavit stating that the defendant is in military service or not, or that the plaintiff is unable to determine the defendant's military status.[12] Where the defendant is in military service, the court must appoint an attorney for the defendant before entering a default judgment.[13] A stay of proceedings for a minimum of 90 days must be granted, either on the motion of counsel or sua sponte, if the court determines either (a) "there may be a defense to the action" that cannot be presented in the defendant's absence or (b) "after due diligence, counsel has been unable to contact the defendant

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or otherwise determine if a meritorious defense exists."[14] Where the affidavits presented leave the court unable to determine the military status of the defendant, the court may require that a bond be posted before entry of judgment.[15] The purpose of the bond is to indemnify the defendant against loss occasioned by the judgment, if it should be set aside.[16]

Where the servicemember has not appeared and a default judgment has been entered, the servicemember may apply to vacate the judgment within 90 days after being released from military service.[17] The court must vacate the default judgment where the servicemember can demonstrate both (a) military service "materially affected … making a defense" and (b) "the servicemember has a meritorious or legal defense to the action or some part of it."[18]

B. Stays of Proceedings

A servicemember who receives notice that an action is pending has an absolute right to a stay of at least 90 days upon submittal of an application that includes the following:

(A) A letter or other communication setting forth facts stating the manner in which the current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is no authorized for the servicemember at the time of the letter.[19]

Once a stay has been granted, a servicemember may apply for an additional stay by submitting another application meeting same requirements as the original application.[20]

However, while the granting of the initial stay is mandatory, the court has discretion to deny a subsequent application.[21] If a subsequent application is denied, the court must appoint counsel for the defendant.[22] While application for a stay "does not constitute an appearance for jurisdictional purposes[,]" if a stay is applied for and denied, the servicemember cannot subsequently claim the protections pertaining to default judgments.[23]

C. Garnishments, Attachments, and Executions

Post-judgment executions and garnishments and attachments at any stage of litigation are subject to stay or vacation. This applies to an action commenced before or during a period of military service, or within 90 after its cessation.[24] Such relief depends upon the court forming the opinion that a servicemember's ability to comply with a judgment or order is materially affected by military service.[25]

D. Statutes of Limitation and Redemption Periods

"The period of a servicemember's military service may not be included in computing any period" within which an action must be brought by or against the servicemember.[26] The statute has no exception for persons making a career of military service, even though such a career typically lasts at least 20 years and for a few individuals may exceed 40 years.

The period to redeem "real property sold or forfeited to enforce an obligation, tax, or assessment" is tolled during a period of military service.[27]

IV. Termination of Leases by Servicemembers

The SCRA permits servicemembers and their dependents to terminate real property leases. Qualifying leases are those for "premises occupied, or intended to be occupied, by a servicemember or a servicemember's dependents for a residential, professional, business, agricultural, or similar purpose[.]"[28] Any lease entered prior to a period of military service may be terminated, as may leases entered during military service, if the servicemember receives orders "for a permanent change of station or to deploy with a military unit for a period of not less than 90 days."[29]

The lessee may terminate by delivering written notice of termination and a copy of the servicemember's military orders to the lessor or its agent.[30] The effective date of termination where the lease requires a monthly rental payment is "30 days after the first date on which the next rental payment is due and payable after the date on which the notice … is delivered."[31] For all other leases, the effective date of termination is "the last day of the month following the month in which the notice is delivered."[32] It should be noted that Washington provides a similar right of termination, but specifies that notice of termination be provided to the landlord no later than seven days after receipt of orders for "reassignment or deployment."[33]

V. Non-consensual Termination of Real Property Interests

The SCRA provides protections to both servicemembers and their dependents in responding to evictions, foreclosures, and termination of contracts to purchase real estate. With evictions, a key factual issue is whether the monthly rent is under the threshold. The date when the tenancy began is irrelevant. In the case of foreclosures and forfeitures, the SCRA provides protection only for obligations entered before commencement of a period of military service.

A. Evictions

The eviction protections apply solely to residential rentals for which the monthly rent is below a specified amount. The limit was set at $2,400 in 2003 and was to be indexed to inflation.[34] In January 2004 the limit for calendar year 2004 was raised to $2,465.[35]

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Servicemembers, or dependents, may invoke the SCRA's protections for evictions occurring during a period of military service.[36] Where the servicemember's "ability to pay the agreed rent is materially affected by military service," a court may stay eviction proceedings for 90, unless justice and equity require a longer or shorter period of time."[37] Where a stay is granted, the court may grant the landlord "such relief as equity may require."[38] The court may order allotments from the servicemember's pay to satisfy an order.[39]

B. Foreclosures

The foreclosure protections apply to obligations secured by a "mortgage, trust deed, or other security in the nature of a mortgage" that were originated before a period of military service.[40] Such obligations cannot be foreclosed during a period of military service, or within 90 days of its end, except through a prior court order or upon the servicemember's waiver of rights.[41] A valid waiver can only be made after commencing military service, which rules out placing the waiver in the original note.[42]

After a hearing, a court may issue a stay "for a period of time such as justice and equity may require" or "adjust the obligation to preserve the interests of all parties."[43] Such relief is mandatory "upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service."[44]

C. Termination of Contracts to Purchase Real Estate

Servicemembers are protected against rescission or termination of contracts for "the purchase of real … property" where "a deposit or installment has been paid by the servicemember" before entering military service.[45] The SCRA applies to both earnest money agreements and real estate contracts. A court order is required to rescind or terminate such a contract.[46] The court has authority to grant the following relief:

(1) [it] may order repayment to the servicemember of all or part of the prior installments or deposits as a condition of terminating the contract and resuming possession of the property;

(2) [it] may, on its own motion, and shall on application by a servicemember when the servicemember's ability to comply with the contract is materially affected by military service, stay the proceedings for a period of time as, in the opinion of the court, just and equity require; and

(3) [it] may make other disposition as is equitable to preserve the interests of all parties.

D. Tax Sales

Real property owned by the servicemember or the servicemember's dependents and "occupied for dwelling, professional, business, or agricultural purposes" may be protected from forced sales to collect any tax or assessment, other than a personal income tax.[47] To qualify for the protection, the property must have been occupied for one of the specified purposes by the servicemember or dependents, or employees of the servicemember, commencing for entry into military service and continuing during the time the tax remains unpaid.[48] The tax must have come due before or during a period of military service.[49] If a property qualifies, then it may not be sold to collect a tax or assessment, except pursuant to court order and following a determination "that military service does not materially affect the servicemember's ability to pay the unpaid tax or assessment."[50] The court may stay any collection proceeding or tax sale during a period of military service and for up to an additional 180 days following a period of military service.[51] Where the property has been sold, a servicemember may redeem or commence an action to redeem during a period of military service, or within 180 of the end of military service.[52]

VI. Six Percent Interest Cap

For any obligation bearing an annual interest rate in excess of six percent, if incurred prior to entry into military service, the creditor must reduce interest rate to six percent upon application by the servicemember.[53] The servicemember must provide written notice to the creditor and include "a copy of the orders calling the servicemember to military service[.]"[54] If the original period of military service is extended, a copy of the extension orders must be provided.[55] The servicemember's application can be submitted up to 180 days after the end of military service, but the interest cap must be applied retroactively to the date of entering military service.[56]

Any interest that would have been incurred, but for the cap, must be permanently forgiven.[57] The amount of any periodic payment must be reduced by the amount of the forgiven interest.[58]

While imposition of the cap is mandatory upon receipt of the servicemember's application, a creditor may seek a court order relieving it from complying with the cap. A court may grant such relief, if the ability of the servicemember to pay interest in excess of six percent "is not materially affected by reason of military service."

VII. Rights in Public Lands

Where a servicemember has acquired rights in federal lands prior to a period of military service, those rights are generally protected during military service.[59] The types of rights that are protected include: grazing rights, desert-land rights, mining claims, and mineral permits and leases.[60] Where the holder of the right is required to perform certain activities or make certain expenditures to maintain the right, the requirements are suspended during a period of military service, and for up to 180 days

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An Overview of the Servicemember's Civil Relief Act …

following military service.[61] In the case of desert-land entries and mining claims, the requirements may also be suspended during a period of hospitalization or rehabilitation due to injuries or disabilities incurred in the line of duty.[62] The servicemember desiring to retain rights under the sections pertaining to desert-land entries, mining claims, and mineral permits must follow the specific filing or notification procedures specified in the respective sections.[63]

1 50 U.S.C.App. § 501 et seq.
2 See, e.g., 50 U.S.C.App. §§ 521(c), 531(c)(1), 532(b)(1), 533(d)(1), 535(h)(1).
3 50 U.S.C.App. § 511(1).
4 50 U.S.C.App. § 511(2).
5 10 U.S.C. § 101(d)(1).
6 50 U.S.C.App. § 514.
7 50 U.S.C.App. §§ 511(7), 582(a), (b).
8 50 U.S.C.App. § 511(4)(c).
9 50 U.S.C.App. § 513(a), (b).
10 Id.
11 Id.
12 50 U.S.C.App. § 521(b)(1).
13 50 U.S.C.App. § 521(b)(2).
14 50 U.S.C.App. § 521(d).
15 50 U.S.C.App. § 521(b)(3).
16 Id.
17 50 U.S.C.App. § 521(g)(2).
18 50 U.S.C.App. § 521(g)(1).
19 50 U.S.C.App. § 522(b)(1), (2).
20 50 U.S.C.App. § 522(d)(1).
21 Id.
22 50 U.S.C.App. § 522(d)(2).
23 50 U.S.C.App. § 522(e).
24 50 U.S.C.App. § 524(b).
25 50 U.S.C.App. § 524(a).
26 50 U.S.C.App. § 526(a).
27 50 U.S.C.App. § 526(b).
28 50 U.S.C.App. § 535(b)(1).
29 Id.
30 50 U.S.C.App. § 535(c)(1).
31 50 U.S.C.App. § 535(d)(1).
32 Id.
33 RCW 59.18.220.
34 50 U.S.C.App. § 531(a)(1), (2).
35 69 Fed. Reg. 1281 (2004).
36 50 U.S.C.App. § 531(a)(1)(A).
37 50 U.S.C.App. § 531(b)(1).
38 50 U.S.C.App. § 531((b)(2).
39 50 U.S.C.App. § 531(d).
40 50 U.S.C.App. § 533(a).
41 50 U.S.C.App. § 533(a), (c).
42 50 U.S.C.App. § 517(a).
43 50 U.S.C.App. § 533(b).
44 Id.
45 50 U.S.C.App. § 532(a).
46 50 U.S.C.App. § 532(a)(1).
47 50 U.S.C.App. § 561(a).
48 50 U.S.C.App. § 561(a)(2).
49 Id.
50 50 U.S.C.App. § 561(b)(1).
51 50 U.S.C.App. § 561(b)(2).
52 50 U.S.C.App. § 561(c).
53 50 U.S.C.App. § 527(a)(1), (b)(1).
54 50 U.S.C.App. § 527(b)(1).
55 Id.
56 50 U.S.C.App. § 527(b)(1), (2).
57 50 U.S.C.App. § 527(a)(1).
58 50 U.S.C.App. § 527(a)(3).
59 See, e.g. 50 U.S.C.App. §§ 562, 563, 564, 565.
60 Id.
61 50 U.S.C.App. §§ 562(a), 563(a), 564(a), (b), 565(a).
62 50 U.S.C.App. §§ 563(a)(3), 564(a).
63 50 U.S.C.App. §§ 563(c), 564(d), 565(b).

Save the Date

The 2005

REAL PROPERTY PROBATE AND TRUST MIDYEAR MEETING AND CLE

is scheduled for June 10-12 at the Davenport Hotel in Spokane, Washington.

Recent Developments

Real Property

by Scott B. Osborne, Preston Gates & Ellis LLP, Seattle

Those Who Cannot Remember the Past are Condemned to Repeat It.

George Santayana, *The Life of Reason* Volume I, 1905.

The stated holding in *Chrisp v. Goll*, 2004 Wash.App. LEXIS 3165 (January 3, 2005), is that it is not possible to "substantially comply" with the "safe harbor" provisions in RCW 64.04.005 dealing with forfeiture of earnest money deposits. Had the Court of Appeals confined its opinion to that issue, *Chrisp* would have very little impact on real estate transactions in Washington, other than requiring certain multiple listing associations to revise their current forms. The Court, however, in an unfortunate choice of comments, provided *dicta* that may form a basis to challenge the validity of every pending residential real estate purchase agreement in the State. In so doing, the Court has retuned full circle to the controversy created over fifteen years ago in *Lind Building Corp. v. Pacific Bellevue Developments*, 55 Wn.App. 70 (1989), *rev. den.* 113 Wn.2d 1021 (1989).

Nancy Chrisp listed her house for sale for $450,000. Claud Goll made a full price offer, and after negotiations the parties entered into a purchase and sale agreement using a pre-printed multiple listing form. On the first page of the agreement, in Specific Term No. 7, there was a "check the box" election as to whether "forfeiture of earnest money" or "seller's election of remedies" was applicable, and on another page of the form, the following language appeared:

> Default. In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then the following provision, as identified in Specific Term No. 7, shall apply:
>
> i. *Forfeiture of Earnest Money*. That portion of the Earnest Money that does not exceed five percent (5%) of the Purchase Price shall be forfeited to the Seller as the sole and exclusive remedy available for such failure.
>
> ii. *Seller's Election of Remedies*. Seller may, as Seller's option (a) keep the Earnest Money as liquidated damages as the sole and exclusive remedy available to Seller for such failure, (b) bring suit against the Buyer for Seller's actual damages, (c) bring suit to specifically enforce this Agreement and recover any incidental damages, or (d) pursue any other rights or remedies at law or equity.

The agreement provided for a $2,000 earnest money deposit. Both Chrisp and Goll signed the agreement, initialed the bottom of every page, but did not specifically initial or sign the provision relating to the forfeiture of the earnest money deposit.

After the agreement was signed, Chrisp vacated the house. The day before closing, Goll invoked the financing contingency in the agreement to terminate the transaction, although Chrisp contended the real reason for the termination was the inability of Goll to obtain permits for desired renovations.

> After Goll's default, the September 11 attacks and economic recession affected the housing market. Without furniture, the house did not show well. Chrisp was unable to sell for six months. Ultimately she sold for $375,000, $75,000 less than Goll's offer, and $75,000 less than Chrisp paid several years earlier.

Chrisp sued for damages. Goll asserted that the agreement limited any damages to the $2,000 earnest money deposit. At trial, Chrisp testified that she knew that the box electing the forfeiture remedy had been checked, but that her realtor advised her that if Chrisp did not initial the specific provision, it would not be effective and that she [Chrisp] "was not giving up any rights or remedies by signing the contract."

At the close of Chrisp's case, Goll moved for entry of judgment as a matter of law on several grounds, "including substantial compliance with the earnest money forfeiture statute. The trial court granted the motion.

> The court concluded the only purpose of RCW 64.04.005 was to give the parties notice of the forfeiture clause. Since both parties were aware of the provision, the court ruled they had substantially complied with the requirements of the statute. The court thus held Chrisp's damages were limited to the amount of the earnest money. Goll then stipulated to forfeiture of the earnest money, and the court dismissed the jury.

The Court of Appeals reversed the judgment and remanded the case for trial. In order to obtain the benefit of the safe harbor forfeiture provisions of RCW 64.04.005 in purchase transactions of personal residences, the provision must meet the following requirements:

> (a) …
>
> (i) The total earnest money deposit to be forfeited does not exceed five percent of the purchase price;
>
> (ii) The agreement includes an express provision in substantially the following form: "In the event the purchaser fails, without legal excuse, to complete the purchase of the property, the earnest money deposit made by the purchaser shall be forfeited to

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the seller as the sole and exclusive remedy available to the seller for such failure.

(iii) If the real estate which is the subject of the agreement is being purchased by the purchaser primarily for the purchaser's person, family or household purposes, then the agreement provision required by (a)(ii) of this subsection must be:

(iv) In typeface no smaller than other text provisions of the agreement; and

(v) ***Must be separately initialed or signed by the purchaser and seller***.

[Emphasis added] RCW 64.04.005(1)

The Court noted that in order for the doctrine of substantial compliance to apply, there must be "actual compliance in respect to the substance essential to every reasonable objective of the statute" [citing *Application of Santore*, 28 Wn.App. 319, 327 (1981)].

> We hold that the plain language of RCW 64.04.005 does not allow substantial compliance, and that, in any event, the circumstances here do not establish substantial compliance with the objective of the statute.

Particularly with respect to consumer transactions, it is not surprising that the Court found that strict compliance with the statute was required. The difficulty with the opinion arises from the language used by the Court in framing the issue presented by the case and *dicta* as to the position of the parties since the agreement did not comply with the safe harbor provisions of RCW 64.04.005(1). According to the Court:

> This case requires us to determine whether the substantial compliance doctrine applies to the earnest money forfeiture statute, ***which provides that a seller of residential property retains all rights and remedies upon the buyer's default and is not limited to forfeiture of earnest money unless the contract so specifies in the way mandated by the statute***.
>
> …
>
> Here, not only did the parties fail to comply with the statute, but Chrisp and her Realtor testified she intentionally *avoided* compliance. ***She did not wish to be bound by the forfeiture clause, and ensured she would not be bound by declining to meet the statutory conditions for the clause to be effective.***
>
> [Emphasis added]

Both statements by the Court could be interpreted in a manner that will lead to a misunderstanding the purpose and an incorrect application of the statute.

The statute, which is referred to in the balance of this article as the "Forfeiture Statute," was enacted in 1991 in order to clarify the application of another case, *Lind Building Corp. v. Pacific Bellevue Developments*, 55 Wn.App. 70, rev.den. 113 Wn.2d 1021 (1989). *Lind* involved the sale of commercial property. The purchase agreement was signed in September 1983. The price was $4,144,085, and the buyer paid $20,000 as a deposit. The closing date could be extended upon the payment of additional deposits, and after several extensions and at least one modification to the agreement, the buyer had paid $250,000 in deposits and extension payments. A final extension payment of $500,000 was due on May 6, 1984, and the buyer defaulted on this payment. The seller retained the payments as liquidated damages and sold the property to another purchaser for $5,150,000, which the seller received prior to the end of 1984. The buyer sued for a refund of the payments. On appeal from a summary judgment dismissing the claim, the Court of Appeals reversed and ordered a refund of the payments, plus interest and attorneys' fees. In so doing, the Court noted that the seller had in fact made $1 million more in profit, and emphasized that it was necessary to establish the fact of loss in order to enforce a liquidated damage provision:

> While there is some authority that an otherwise valid liquidated damages clause is enforceable even if there are no actual damages, the weight of authority and the better-reasoned cases hold that where there is no actual loss, an otherwise enforceable liquidated damages clause is not enforceable because to do so would violate the principle that damages should be compensatory only. *Lind*, pp. 78-79.

This represented something of a departure from prior holdings concerning the law applicable to deposits in real estate transactions, although the Court's position was supported by RESTATEMENT (SECOND) OF CONTRACTS, §356 (1981). In an economic environment in which real estate values tend to rise, the evaluating the validity of a liquidated damages provision in light of actual damage, as opposed to a reasonable estimate of possible damages, created some concern. Members of the real estate transaction bar were concerned that any provision in an agreement calling for the retention of a deposit might be at risk if the value of the property appreciated following a default by the buyer.

In commercial transactions, the concerns created by *Lind* were addressed by changing drafting techniques. If the retention of deposits were of great concern to the seller, then the payments were characterized as option payments or some other consideration for the payments was created.

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Recent Developments: Real Property

In residential transaction, however, the brokerage community was greatly agitated by *Lind*. First, there was the problem that residential transactions relied on pre-printed forms which did not accommodate special drafting for deposit concerns. The language used in the forms emphasized forfeiture of the deposit, and were not drafted as a typical liquidated damages provision. Second, the "fact of damage" argument in a rapidly appreciating residential real estate market presented buyers with a viable defense to the retention of deposits. Brokers were concerned that buyers would be encouraged to walk away from transactions without concern of losing the deposit. After all, the deposit served several functions in a typical residential transaction; (i) the deposit indicated some seriousness on the part of the buyer; (ii) the fact the buyer had some money at risk was a useful tool for the broker when a buyer might experience second thoughts about the purchase; and (iii) the deposit served as at least some partial compensation for the seller and broker in a transaction that failed to close due to the buyer's default; all of the pre-printed forms provided for the broker to share the deposit with the seller.

Acting on these concerns, the brokerage community proposed a legislative "fix" to *Lind* in 1991. The initial draft of the legislation proposed by the realtors was reviewed by the Executive Committee of the RPPT Section, and the author of this column participated in that review and the subsequent drafting of what became the Forfeiture Statute. The original version as submitted by the realtors was viewed by the Executive Committee to overly favor the legal position of the sellers/brokers in any controversy surrounding the forfeiture of the deposit. The initial approach validated the concept that the seller had an election to retain the deposit or sue for damages. This seemed inconsistent with the concept of liquidated damages, which was supposed to establish a pre-determined amount of damages.

After legislative hearings, a compromise was reached. Assuming that the transaction complied with certain safe harbor provisions, the seller could retain the deposit ***without the necessity of proving damages***, so long as forfeiture was the seller's sole remedy. If the transaction did not comply with the safe harbor provisions, the seller had whatever rights it would otherwise have; i.e. it could enforce whatever damage provision to which the buyer and seller had agreed, but the seller might have to prove actual damage to retain a deposit as *Lind* required.

The Forfeiture Statute was intended to address the lack of damage defense emphasized by *Lind*; the statute was not intended to alter the agreement between the buyer and seller as reflected in whatever agreement they had executed. The first section of the statute stated:

> (1) A provision in a written agreement for the purchase and sale of real estate which provides for the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if the purchaser fails, without legal excuse, to complete the purchase, is valid and enforceable, ***regardless of whether the seller incurs any actual damages,*** PROVIDED THAT: … [Emphasis added]

This statement was followed by those conditions creating the safe harbor for the seller. If the transaction was not within the safe harbor provisions, then the seller would be able to pursue whatever rights and remedies it would otherwise have:

> (2) If an agreement for the purchase and sale of real estate does not satisfy the requirements of subsection (1) of this section, then the seller shall have all rights and remedies ***otherwise available*** at law or in equity as a result of the failure of the purchaser, without legal excuse, to complete the purchase.
>
> [Emphasis added]

In light of *Lind*, and the context in which the Forfeiture Statute was drafted, the second section of the statute meant that the seller would be pursuing those remedies as limited by the damage requirement of *Lind*, and whatever other rights or limitations that might arise from the language in the agreement agreed to by the buyer and seller.

As matters progressed, the adverse predictions of the brokerage community concerning the effect of Lind did not come to pass; the case did not turn out to be the *Thorndike v. Hesperian Gardens*, 54 Wn.2d 570 (1954) of Washington real estate law (478 citations and rising). Lind was subjected to some academic criticism in Weisfield, Note: "Keep the change": A Critique of the No Actual Damage Defense to Liquidated Damages – *Lind Building Corp. v. Pacific Building Developments*, 55 Wash.App. 70, 776 P.2d 977 (Div.1), review denied 112 Wash.2d 1021, 781 P.2d 1322 (1989), 65 **Wash. L. Rev**. 977 (October 1990), which concluded that "to preserve the utility of liquidated damages clauses, courts should reject the *Lind* defense and judge enforceability as of the time of contract formation." Weisfield, p. 978.

The Court of Appeals was uncomfortable with the opinion, as well. In *Watson v. Ingram*, 70 Wn.App. 45 (1993), the Court affirmed the forfeiture of a $15,000 in connection with a condominium sale, even though the seller subsequently resold the unit for $25,000 more following the buyer's default. *Lind* was differentiated on a factual basis. Shortly after *Watson*, the Court, in *Wallace v. Groves*, 72 Wn.App. 759 (1994), moved further away from the Lind formulation, at least in real estate transactions, and authorized the seller's retention of $260,000 in deposits as liquidated damages:

> … this court has revised the approach to liquidated damages previously taken in *Lind*. In *Watson v. Ingram, supra*, we

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> questioned the applicability of the last two *Lind* elements to real estate agreements… . In so doing, we reduced the test for determining the validity of a liquidated damages provision to the sole inquiry of whether "the record shows that the amount specified in the agreement was, when the contract was executed, a reasonable estimate of just compensation for the anticipated breach." *Wallace* at p. 767.

The Washington Supreme Court, in companion opinions *Watson v. Ingram*, 124 Wn.2d 845 (1994) and *Wallace v. Groves*, 124 Wn.2d 881 (1994), more or less finished the debate, by affirming the approach articulated by the Court of Appeals in *Watson.*

> In sum, so long as the agreed upon earnest money agreement, viewed prospectively, is a reasonable prediction of potential damage suffered by the seller, the agreement should be enforced "without regard to the retrospective calculation of actual damages or the ease with which they may be proved" [citing *Watson*, 70 Wn.App. at 54]. *Watson*, p. 854

Although *Lind* has never been overruled, *Watson* and *Wallace*, by eliminating the need to prove actual damage as a condition for enforcing a liquidated damage provision, made the Forfeiture Statute somewhat superfluous. Initially, multiple listing forms for residential transactions were drafted to comply with the safe harbor provisions concerning signature or initialing, but in the late 1990s, because of space considerations on the forms and the belief that, in light of *Watson* and *Wallace*, the safe harbor afforded by the Forfeiture Statute was not as important, the forms changed.

Like *Lind*, RCW 64.04.005 was more or less relegated to the code reviser's dust bin of statutes that no longer had a purpose. Other than providing a possible Bar review question on some unique aspect of Washington law, and allowing Washington lawyers to provide a truly local comment when acting as local counsel to New York and Los Angeles lawyers involved in transactions in Washington ("Gee, you might really want to consider the appropriateness of that 6-page, 43 paragraph liquidated damages provision in light of RCW 64.04.005."), the statute created no controversy and virtually no litigation.

The Forfeiture Statute has been cited in three published opinions. *Watson* cited the statute as evidence that the legislature considered a 5% deposit to be a reasonable amount for liquidated damages (significantly, not the upper limit on those damages). In *Meyer v. Consumer Choice*, 89 Wn.App. 876 (1998), the Court reviewed the statute to determine whether certain payments under a purchase agreement were "earnest money" deposits. In *Paradise Orchards v. Fearing*, 122 Wn.App. 507 (2004), which was a legal malpractice case, the Court found that the Forfeiture Statute did not modify a contractual provision that allowed the seller to pursue various remedies following a default by the buyer. None of these opinions substantively construed the Forfeiture Statute.

The Court in *Chrisp* implies that the Forfeiture Statute mandates a specific form of liquidated damages provision in order for the buyer and seller to have a valid agreement limiting damages. This is not what the statute says. To follow the *dicta* in *Chrisp,* would mean that parties to any agreement for the purchase and sale of real estate – whether residential or commercial – could never agree to a liquidated damages provision in excess of five percent (5%) of the purchase price. That position is not supported by *Watson* and *Wallace*, and while those cases involved contracts entered into prior to the effective date of the Forfeiture Statute, the Court was certainly mindful of the Forfeiture Statue in rendering those opinions.

The biggest problem with *Chrisp* is that the statute is really not relevant to the dispute between the buyer and seller. The case had nothing to do with whether the deposit could be forfeited in the absence of damages, which is the sole circumstance to which the Forfeiture State applies. What is at issue in *Chrisp* is whether the parties actually came to an enforceable agreement, since the buyer and the seller had diametrically opposite views of the legal consequences arising from a default by the buyer. The seller admitted to signing the purchase agreement with the belief, based on advice from her real estate agent, that a material term was unenforceable. This was not communicated to the buyer. The relevant inquiry is whether, under those circumstances, the parties formed an enforceable contract, and if they did, what were the terms of that contract relating to the remedies of the parties following a default. The Forfeiture Statute is not relevant to that inquiry and the Court should have allowed the statue to continue its somnambulant existence.

Article Ideas?

Please contact Ken Kilbreath if you are interested in writing an article for the newsletter or if you have ideas for article topics. Ken's phone number is (425) 455-1234 and his email is *kkilbreath@insleebest.com.*

Recent Developments

Probate and Trust

by Colonel F. Betz, Perkins Coie LLP, Seattle

Estate of Jones, 152 Wn.2d 1 (2004)

Summary:

The fiduciary standards for a personal representative remain the same, regardless of whether nonintervention powers have been granted, and a court can remove a personal representative if an interested party invokes the jurisdiction of the court, and the grounds for removal are valid.

Facts:

Marcella Louise Jones died and left a will which transferred her estate in equal shares to her four sons. One of the decedent's sons, Russell Jones, was appointed as the personal representative of the estate with nonintervention powers. Two of Russell's three brothers, Peter and Jeffrey, filed several petitions during the probate proceedings to remove Russell as personal representative and appoint a new personal representative. The two brothers also filed a personal complaint against Russell based on several breaches of his fiduciary duty. The trial court found that Russell breached several of his fiduciary duties, removed Russell as personal representative, and appointed James Woodard as the successor personal representative.

The Court of Appeals reversed and held that the trial court did not have jurisdiction to intervene in the probate proceeding because the alleged misconduct was insufficient to disqualify Russell under RCW 11.68.070 and 11.28.250.

The two brothers appealed to the Supreme Court.

Discussion:

The Supreme Court identified three issues:

1) Under RCW 11.68.070 and 11.28.250, did the trial court have grounds to properly remove Russell Jones as the nonintervention personal representative of Marcella Jones's estate?

Once a decedent dies, the personal representative applies for an order of solvency and the court has jurisdiction to grant or deny the order. Once an order of solvency is entered, the court loses jurisdiction. The court may regain jurisdiction if the personal representative or another person with statutorily conferred authority invokes jurisdiction. The trial court had jurisdiction to remove Russell since his two brothers, as heirs of the estate, had the statutory authority to invoke the jurisdiction and properly did so.

A trial court must have valid grounds for removal of a personal representative and the grounds must be supported in the record.

RCW 11.68.070 allows a court to intervene and remove or restrict the powers of a nonintervention personal representative if the personal representative "has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250." RCW 11.28.250 provides that a court has the power and authority to revoke the letters testamentary if it has "reason to believe that any personal representative…has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary."

The Supreme Court decided that a court may remove a personal representative under the "for any other cause" provision of RCW 11.28.250 only if the conduct is similar to the other grounds listed in the statute.

The Court concluded that Russell's conduct was enough to be considered grounds for removal. In reaching its decision, the Court reviewed the record indicating several breaches of Russell's fiduciary duty. Russell breached his duty by possessing the decedent's residence in an individual capacity before the estate was closed, by failing to use the fair market value of the house during distribution and by failing to pay rent, utilities, property taxes, and insurance while residing in the house.

The ethical standards for personal representatives remain the same, regardless of whether the representative performs his duties with or without nonintervention powers. RCW 11.68.070 and 11.28.250 hold all personal representatives to the same fiduciary duty, and RCW 11.68.070 incorporates all of the grounds listed in RCW 11.28.250 into the nonintervention statutory scheme. Based on the Court's statutory construction, the trial court had jurisdiction to intervene and remove Russell as a personal representative and the grounds for removal were sufficient to support the trial court's decision.

2) If removal was proper, did the trial court properly appoint James Woodard as the new personal representative?

If letters of administration are revoked before the settlement of an estate, the letters shall be granted to whom administration would have been granted if the original letters had not been obtained, or the person obtaining them had renounced administration. Russell's brother, David, was the named successor personal representative.

The right of beneficiaries to have an estate distributed by law is a primary right, and if a particular person serving as a personal representative may interfere with this right, that person should not be appointed. Thus, where a conflict of interest exists which would contravene the rights of the beneficiaries and result in waste of the estate, a potential personal representative should be disqualified.

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David testified that Russell had been "fair and equitable in the distribution of the estate." This evidence, combined with Russell's multiple breaches of his fiduciary duty, supported the trial court's denial of David's appointment based on David's conflict of interest with the estate. Appointing any family member would result in further litigation and a delay in closing the estate. Thus, James Woodard was properly appointed as the new personal representative.

3) Should either party receive attorney fees?

The trial court awarded attorney fees to Peter and Jeffrey. RCW 11.68.070 allows a court to award attorney fees. Further, RCW 11.96A.150 allows costs in probate cases to any party, from any party, and is not limited by RCW 11.68.070. Since the litigation was necessitated by Russell's multiple breaches of fiduciary duty, Peter and Jeffrey should be awarded all reasonable and necessary attorney fees, including those incurred on appeal, and Russell should personally pay such fees.

Williams-Moore v. Estate of Shaw, 122 Wn.App. 871 (2004), Division One

Summary:

A personal representative does not have authority to act on behalf of an estate if she does not file a bond or oath of personal representative as required by the probate statutes and the court's order.

Facts:

Williams-Moore was injured when Shaw's car hit the bus Williams-Moore was driving. Williams-Moore filed a personal injury lawsuit against Shaw on November 7, 2001. Williams-Moore later learned that Shaw died in May 2000. Shaw's will had been filed in superior court, although no probate proceedings had been commenced.

On January 9, 2002, Williams-Moore filed a petition to admit Shaw's will to probate, appoint her as personal representative of his estate, and direct the issuance of letters testamentary. In the petition for appointment, Williams-Moore stated that she was a principal creditor of the estate and as creditor, had to present her claim in the probate proceedings. Williams-Moore did not request nonintervention powers and asked the court to waive the bond requirement.

The superior court commissioner granted Williams-Moore's petition to admit Shaw's Will and appoint her as personal representative, but rejected her request to waive the requirement to file a bond. Instead, Williams-Shaw was ordered to file an oath of personal representative and a $20,000 bond. The commissioner directed the issuance of letters testamentary when the oath and bond were filed.

The same day, January 9, 2002, Williams-Moore filed a creditor's claim against the estate and filed an amended complaint substituting the estate as the defendant.

On January 15, 2002, Williams-Moore filed a declaration wherein she accepted service of the amended summons and complaint on behalf of the estate on January 11, 2002.

Williams-Moore filed the oath of personal representative. Williams-Moore also obtained a bond on January 16, 2002. The bond, however, was not filed or approved until March 12, 2002. Letters testamentary were never requested or issued.

On July 12, 2002, the estate filed a summary judgment motion to dismiss the Williams-Moore personal injury lawsuit on the various grounds. Presumably, a successor personal representative was appointed. The trial court continued the estate's motion and referred the case to the commissioner to decide whether Williams-Moore was qualified to act as the personal representative of the estate and whether her appointment was valid.

Ultimately, the commissioner decided that because Williams-Moore took steps to attempt to qualify as the personal representative, the court's approval of the bond on March 12, 2002 should relate back to her initial appointment on January 9, 2002.

The Court of Appeals granted discretionary review to determine whether on January 11, 2002, Williams-Moore was qualified to act as the personal representative of Shaw's estate and to accept service of process in her personal injury lawsuit.

Discussion:

RCW 11.28.185 requires the personal representative to file a bond in the amount ordered by the court: "unless waived by the court, the personal representative shall give such bond or other security, in such amount and with such surety or sureties, as the court may direct."

RCW 11.28.170 requires the personal representative to file an oath before letters testamentary or letters of administration are issued.

The Court of Appeals identified the question as whether the probate statute requirement to file a bond is a condition precedent to qualifying to act as a personal representative. The Court likened the situation to the similar statutory scheme for appointment of guardians. In guardianship matters, compliance with the bond requirement is a condition precedent for a guardian to have authority to act. In both guardianship and probate cases, the purpose of statutory requirement to file a bond is the same: to protect the interests of the incompetent or the estate. Thus, the appointment of Williams-Moore was not effective until she complied with the statutory and court-ordered requirements to file an oath and bond.

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