13th Annual Trust and Estate Litigation Seminar

Friday, April 22, 2016 Seattle, WA

Presented by WSBA CLE

in partnership with the RPPT Section

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Co-Chairs and Faculty

A Special Thank You to Our Program Co-Chairs and Faculty!

Those who have planned and will present at this WSBA CLE seminar are volunteers. Their generous contributions of time, talent, and energy have made this program possible. We appreciate their work and their service to the legal profession.

Program Co-Chairs

Thomas M. Keller — *Attorney at Law, Seattle, WA*
Janet H. Somers — *Somers Tamblyn King PLLC, Mercer Island, WA*

Program Faculty

Karen R. Bertram — *Kutscher Hereford Bertram Burkart PLLC, Seattle, WA*
Sarah B. Bowman — *K&L Gates LLP, Seattle, WA*
Comm. Nancy Bradburn-Johnson — *King County Superior Court, Seattle, WA*
Craig E. Coombs — *Coombs Law Firm, Bellevue, WA*
Hon. John P. Erlick — *King County Superior Court, Seattle, WA*
Jean L. Gompf — *Counsel, Seattle, WA*
Comm. Henry H. Judson III — *King County Superior Court, Seattle, WA*
Deborah J. Phillips — *Perkins Coie, Seattle, WA*
Catherine W. Smith — *Smith Goodfriend PS, Seattle, WA*
Karen M. Thompson — *Thompson & Howle, Seattle, WA*
Carol S. Vaughn — *Thompson & Howle, Seattle, WA*
Comm. Carlos Velategui — *King County Superior Court, Seattle, WA*
Kathleen A. Wareham — *Washington Arbitration and Mediation Service, Seattle, WA*
Comm. Eric B. Watness (Ret.) — *JAMS, Seattle, WA*

Summary of Contents

Program Schedule

13th Annual Trust and Estate Litigation Seminar

Friday, April 22, 2016

8:00 a.m. **Check-in • Walk-in Registration • Coffee and Pastry Service**

8:25 a.m. **Welcome and Introductions by Program Co-Chairs**
Thomas M. Keller, Attorney at Law, Seattle
Janet H. Somers, Somers Tamblyn King PLLC, Mercer Island

8:30 a.m. **Case Law and Legislative Updates**
Join this summary of significant court case opinions released over the past year regarding trust and estate issues, as well as an overview of recent legislative changes will help inform your practice over the coming year.
Sarah B. Bowman, K&L Gates LLP, Seattle

9:15 a.m. **Trust and Estate Disputes on Appeal**
Catherine W. Smith, Smith Goodfriend PS, Seattle

10:15 a.m. **BREAK**

10:30 a.m. **Tips, Traps and Transitions in Trust and Estate Litigation Practice**
Attorney fees—form of proof required, objections, and factors considered by the court in deciding the request for fees.
Commissioner Nancy Bradburn-Johnson, King County Superior Court, Seattle
Commissioner Henry H. Judson III, King County Superior Court, Seattle
Commissioner Carlos Velategui, King County Superior Court, Seattle

11:15 a.m. **Mediation of Trust and Estate Disputes: Views from Two Professional Mediators**
Kathleen A. Wareham, Washington Arbitration and Mediation Service, Seattle
Commissioner Eric B. Watness (Ret.), JAMS, Seattle

12:00 p.m. **LUNCH on your own**

Schedule continued on next page

Program Schedule (cont.)

1:00 p.m. **Civil Remedies to Combat the Financial Exploitation of Vulnerable Adults**

- vulnerable adult protection order actions to prevent abuse (RCW 74.34)
- civil actions during the vulnerable adult's lifetime for the recovery of assets
- disinheritance under the abuser statute (RCW 11.84) after the vulnerable adult's death
- other remedies

Karen M. Thompson, Thompson & Howle, Seattle
Carol S. Vaughn, Thompson & Howle, Seattle

1:45 p.m. **The Role of the GAL from Appointment through Discharge**

- The probate, litigation, TEDRA, settlement guardian ad litem can't do that, can (s)he?
- The Role for the GAL from appointment through discharge, including GAL authority (and limitations on authority), in various causes of action

Jean L. Gompf, Counsel, Seattle
Craig E. Coombs, Coombs Law Firm, Bellevue

2:30 p.m. **BREAK**

2:45 p.m. **Conflicts of Interest Here, There and Everywhere**
Hon. John P. Erlick, King County Superior Court, Seattle

3:45 p.m. **Illustration of a TEDRA Action from Both Sides**
Karen R. Bertram, Kutscher Hereford Bertram Burkart PLLC, Seattle
Deborah J. Phillips, Perkins Coie, Seattle

4:30 p.m. **Adjourn • Complete Evaluation Forms**

4:30 p.m. **Presentation: The Scott Johnson Award for Best Speaker**

Co-Chair Biographies

Thomas Keller

Thomas Keller's 37 year-old law practice emphasizes complex probates, trusts and guardianships, estate planning and business transactions, and mediation and arbitration related to these areas of law. Keller is a CPA and a past chairperson of the Real Property, Probate & Trust Section of the Seattle-King County Bar Association and the Estate & Gift Tax and Continuing Education Committees of the Washington Society of Certi ed Public Accountants. He also co-chaired the 2003 and 2010 revisions to the King County Probate Manual. Keller was admitted to the state bar in Washington and to the U.S. District Court, Western District of Washington in 1977, the U.S. Court of Appeals, 9th Circuit and U.S. Tax Court in 1979, and the U.S. Supreme Court in 1981. His education was at the University of Washington (B.A., cum laude, 1973; J.D., 1977). He is a member of the Seattle-King County and Washington State Bar Associations, the Washington Society of Certi ed Public Accountants and the Estate Planning Council of Seattle. Mr. Keller's probate, trust and guardianship practice has included the representation of hundreds of parties in probates, trusts and guardianships and mediation and litigation related thereto. Mr. Keller is a frequent speaker on these subjects to members of the Bar and the general public. Mr. Keller's commercial practice includes the formation of corporations, limited liability companies, partnerships, limited partnerships and joint ventures, and all issues related to the on-going business of these entities. Mr. Keller has been named one the best lawyers in Seattle by SEATTLE MAGAZINE in 2001 and 2007, a "Super Lawyer" in the state of Washington every year since 2001 by WASHINGTON LAW AND POLITICS, one of Seattle's Top Lawyers by SEATTLE MET magazine in July, 2010 and 2012, and one of Puget Sound's Top Business Lawyers in the April, 2006 issue of SEATTLE BUSINESS MONTHLY. Mr. Keller is Of Counsel to the law rm of Lasher, Holzapfel, Sperry & Ebberson, PLLC.

Janet H. Somers

Janet H. Somers represents clients in both routine and complex/contested issues regarding Probate, Guardianship, Elder Law including Protection of Vulnerable Adults, Trust and Estate Planning and Trust Administration. Ms. Somers also represents professional duciaries, including banks and agencies. Ms. Somers is Past Chair of the Washington State Bar Association Elder Law Section and was member of the Fred Hutchinson Cancer Research Center's Planned Giving Advisory Board. She has served as Chair of the King County Bar Association Guardianship and Elder Law Section and served as the Grants Committee Chair. She is Past Co-Chair of the Title 11.88 Mandatory Guardian ad Litem Training Program. She is a member of Somers Tamblyn King Isenhour Bleck PLLC, has earned an AV rating from Martindale-Hubbell, been designated as "Superb" by Avvo.com, a Super Lawyer and Top 50 Woman Attorneys in Washington.

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Thank you, WSBA-CLE

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For information, see the following website or contact the WSBA Service Center.
http://www.wsba.org/Licensing-and-Lawyer-Conduct/MCLE/Members/Member-Online-MCLE-FAQs - questions@wsba.org

Seminar Sponsor: WSBA-CLE

Seminar Name: 13th Annual Trust and Estate Litigation Seminar (16498SEA/WEB)

Seminar Date: April 22, 2016

Approved Credits: **6.5 CLE Credits for Washington Attorneys** (5.5 Law & Legal Procedure, 1.0 Ethics and 0.0 Other)

Hours of Attendance:

TIME OF ARRIVAL	TIME OF DEPARTURE

Credits Earned: _____ **L&LP** _____ **Ethics** _____ **Other**

Printed Name: _____ **Bar #:** _____

I hereby certify that I have earned the number of L&LP/Ethics/Other credits inserted above on the Credits Earned line.

Signature: _____ **Date:** _____

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CHAPTER ONE

CASE LAW AND LEGISLATIVE UPDATES

April 2016

Sarah B. Bowman
K&L Gates LLP

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Email: sarah.bowman@klgates.com

SARAH B. BOWMAN is a partner in the Private Clients, Trusts and Estates group in the Seattle office of K&L Gates, LLP. Ms. Bowman focuses her practice on estate planning, estate and trust administration, and resolving estate and trust disputes.

Ms. Bowman counsels and represents clients in all aspects of their estate planning needs, including tax planning, wealth transfer strategies, business succession planning, asset protection, charitable gifting, prenuptial and postnuptial arrangements, and document preparation related to these personal planning matters. She also represents clients in trust and estate administration matters, including probate and non-probate proceedings.

Ms. Bowman also enjoys assisting clients with philanthropic planning. In 2009, she co-founded the Butterfly Guild of Seattle Children's, aiming to support research of rare pediatric disorders.

NEW IRS REQUIREMENT - FORM 8971

On July 31, 2015, the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 ("the Act") was signed into law. The legislation was effective immediately, and requires estate planners to take additional proactive steps for many estates with estate tax returns filed after July 31, 2015.

The Act requires that a beneficiary's basis in property inherited from a decedent will be no higher than the value of such property as determined for estate tax purposes, and as reported on the form 706 estate tax return. The Act provides that beneficiaries will no longer have the option to claim that the fair market value of an asset as of the decedent's date of death was actually more than the value reported on the estate tax return. A goal of the Act is to maintain consistent basis reporting for assets inherited by beneficiaries of large estates.

New Form 8971

The Act requires that a new form, Form 8971, titled "Information Regarding Beneficiaries Acquiring Property from a Decedent," will be filled out by personal representatives or trustees, as appropriate, and sent to the IRS. The Form 8971 has an attached "Schedule A" that is required to be sent to each beneficiary inheriting assets from the estate. The Schedule A must be sent to the beneficiary receiving the assets and also sent to the IRS.

Due Date

For all estate tax returns filed after July 31, 2015, the due date for the submission of the Form 8971 and attached Schedule A is March 31, 2016 or 30 days after the estate tax return is filed - whichever shall occur last. If an estate tax return is amended or if a value of an asset reported on the estate tax return is determined to be different than otherwise initially reported, then an amended Form 8971 may be required.

Who Must File a Form 8971?

If an estate is required to file an estate tax return, then the Form 8971 and attached Schedule A is often required to be submitted. Proposed regulations were submitted by the IRS under Code Sections 1014 and 6035. Taxpayers may rely on the proposed regulations until final regulations are published.

There are some exceptions that allow certain estates to forego filing a Form 8971. Only assets included in an estate that *increase* the value of the estate for estate tax purposes are subject to the new basis reporting requirement. If no federal estate tax is required to be paid due to an exception such as a marital or charitable deduction, then the basis reporting requirement does not apply. In addition, a personal representative or trustee

does not have a file a Form 8971 or send a Schedule A to the estate beneficiaries where the estate tax return is filed solely to: (1) make a generation-skipping transfer tax exemption allocation or election; (2) make a portability election; or (3) make a protective filing to avoid any penalty if an asset value is later determined to be such that an estate tax return would be required. Further, certain assets do not need to be reported on a Form 8971. Such assets exempt from the filing requirement include: cash (other than coins or bills with a value other than face value); income in respect of a decedent; tangible personal property for which an appraisal is not required; and property that is sold or disposed of by the estate that is never distributed to a beneficiary, but for which there is a capital gain or loss.

****Take Away Tip:** If you have an estate for which you or the client's accountant filed an estate tax return after July 31, 2015, review the Act and the proposed regulations to determine if a Form 8971 and attached Schedule A is required. There can be stiff penalties if the reporting requirement is not met.

LEGISLATIVE UPDATE

Washington Directed Trust Act

On July 24, 2015, the Washington legislature signed the new "Washington Directed Trust Act" into law. The new law impacts the prudent investor rule for Washington state trusts, delegation of trustee duties by trustees of a Washington state trust, and standards for authorization and treatment of statutory trust advisors and directed trustees.

RCW 11.96A.030 - "matter" definition expanded

The definition of a "matter" under RCW 11.96A.030 was expanded to include the determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to "the powers and duties of a statutory trust advisor or directed trustee of a directed trust under chapter 11.98A".

RCW 11.96A.030 - "party" definition expanded

The definition of a "party" under RCW 11.96A.030 was expanded to include "a statutory trust advisor or directed trustee of a directed trust under chapter 11.98A".

RCW 11.98.071 - Trustee's delegation of duties

A new section was added to RCW 11.98 regarding a Trustee's delegation of duties. The section, RCW 11.98.071, sets forth express situations when a Trustee may delegate duties. This list should now be consulted when delegation is considered.

New Chapter RCW 11.98A - Trusts - Trustee's Delegation of Duties - Investments - Statutory Trust Advisors

An entirely new chapter was added, RCW 11.98A. The new chapter "applies to a trust only if expressly invoked in a governing instrument, as defined in RCW 11.98A.020, and the trust has its situs in Washington under RCW 11.98.005."

What About Old Trusts or Wills?

If you have an old trust or will that does not expressly invoke RCW 11.98A, then the Washington Directed Trust Act may be invoked by court order or Agreement under RCW 11.96A.220. See RCW 11.98A.020.

Statutory Trust Advisor

The new Chapter sets forth a detailed definition of a "statutory trust advisor" and the role that a statutory trust advisor may play in a trust.

Breach of Fiduciary Duty by Statutory Trust Advisor

A trustee or a beneficiary of a trust may file a petition under RCW 11.96A in certain circumstances set forth in the statute where the trustee or beneficiary believes that a statutory trust advisor has breached a fiduciary duty. The remedies provided by the statute, however, are not exhaustive. The statute now also sets forth parameters for measuring the breach of duty by a statutory trust advisor. See RCW 11.98A.040, .050.

Keeping Beneficiaries Reasonably Informed

Not only Trustee's have a duty to keep beneficiaries "reasonably informed." Now a statutory trust advisor also has a duty to keep beneficiaries "reasonably informed of the administration of the trust with respect to the specific duties or functions being performed by the statutory trust advisor." See RCW 11.98A.070.

Statutory Trust Advisor Subject to Court Jurisdiction

A statutory trust advisor is also expressly subject to the jurisdiction of Washington courts. However, a statutory trust advisor is only a mandatory party to a judicial proceeding or a nonjudicial agreement if the subject matter of the proceeding affects the duties or function of the statutory trust advisor. See RCW 11.98A.080.

Directed Trustees

The new RCW 11.98.100 defines a “directed trustee” and the role a directed trustee may have in a trust.

Statute of Limitation

The chapter reflects that the statute of limitations for an action against a trustee also applies to a statutory trust advisor with respect to the duties and functions being performed by the statutory trust advisor.

CASE LAW UPDATES

Intent of Trustor Remains an Important Factor to Consider:

1. *Guardianship of Jensen*, 187 Wn. App. 325 (Div. 2, 2015).

   The issue in this case was whether estate taxes attributable to non-trust property should be apportioned under the Washington Uniform Estate Apportionment Act (RCW 83.110A.030(1)), and whether apportionment should include gifts made to the beneficiaries during the trustor’s lifetime.

   Upon the trustor’s death, the trustee of the decedent’s trust paid the estate taxes attributable to both trust and non-trust property from the trust assets. The decedent held property in his trust and in pay-on-death (POD) accounts. The beneficiaries of the trust property were different than the beneficiaries of the POD accounts. The beneficiaries of the trust challenged the Trustee’s ability to pay all estate taxes from the trust account rather than apportion taxes among the trust and the POD accounts.

   The trustee argued that the trust authorized her to pay taxes arising from the trustor’s death prior to distributing the principle, and thus, as Trustee, she had discretion to pay taxes attributable to the decedent’s trust and non-trust property from trust assets.

   The court of appeals ruled, however, that where the will evidenced intent to treat estate taxes attributable to trust property differently than estate taxes attributable to non-trust property, and where the plain language of the trust was ambiguous as to that intent, statutory apportionment is required. It further ruled that lifetime gifts made from the trustor’s assets are not subject to estate tax apportionment. This case has not been appealed.

2. *Estate of Hayes*, 342 P3d 1161 (Div. 3, 2015).

The issue here is whether a testator intended to partition a farm lease when she divided the farm and bequeathed individual parcels of the land to her four children, and whether the court was allowed to determine whether one of the beneficiaries had violated the terms of the lease within the scope of the Trust and Estate Dispute Resolution Act (TEDRA).

This case involved a mother who died, leaving behind four children. The mother had a farm that incurred significant debt. In order to keep the family farm and pay the debt, she issued a favorable lease to one of her sons in exchange for him working the farm and paying off the debt. The mother also gifted this one son significant valuable farm equipment. Upon her death, the mother bequeathed the family farm into four distinct parcels, one parcel to each child. She did not make a specific bequest of the lease, however, which favored only one son. Rather, the lease presumably was considered part of the residue.

The parcels of land bequeathed to the children were not all of equal value. At first the children agreed to try and sell all four parcels together to get the highest value for the land. However, the one brother who held the lease then sold his parcel. He then claimed that he still had a lease for the remaining three parcels and wanted his siblings to buy him out of the lease. The three siblings argued that the lease was terminated as a result of the sale of the one parcel of property. If the sibling who sold his parcel were to have his way, he would have inherited over $1 million in value while the three other siblings would have inherited only approximately $100,000 in value.

The court of appeals concluded that the plain language of the will and the testator's intent required that the lease not be partitioned. First, the will specifically divided and bequeathed parcels of the land and provided a residuary clause whereby the residue should pass to the beneficiaries as tenants in common. Further she intended for the children to be treated fairly. The court found that under the contesting beneficiary's construction, he would be permitted to sell his parcel free of the lease and extort his siblings by demanding a lease buyout. The court determined that such a result would not be consistent with the testator's intention to treat the beneficiaries fairly

The court of appeals also ruled that because TEDRA empowers the court with broad authority to settle matters concerning the estates and assets of decedents, and because the lease was bequeathed to the testator's beneficiaries, the trial court did not exceed the scope of TEDRA when it ruled that the contesting beneficiary had violated the terms of the lease.

Procedural Adequacy:

3. *In re Estate of Herrin*, 189 Wn. App 1049 (Div. 3 2015).

   The issue here is whether a creditor's claim against an estate was barred by the statute of limitations. The court held that the creditor's claim was barred by the three-year statute of limitations.

   This case involved a committed intimate relationship in which a couple lived together for two years. Less than one year after the couple separated, Ms. Aguilar filed a complaint against Mr. Herrin for a distribution of assets and liabilities. While that case was pending, Mr. Herrin died. The personal representative for Mr. Herrin's probate estate published notice to creditors in November of 2011. The personal representative did not give actual notice to Ms. Aguilar. However, Ms. Aguilar filed a claim in the probate. Ms. Aguilar claimed an amount that was her "community interest" as determined by the court.

   In May of 2013, the personal representative of Mr. Herrin's estate filed a motion asking the court to approve payment of certain creditor claims and approve closing of the estate. The personal representative argued that Ms. Aguilar did not actually have a claim against the estate but rather had a personal property claim that was the subject of the separate lawsuit. The personal representative argued that Ms. Aguilar failed to substitute the personal representative for Mr. Herrin in the other suit. Ms. Aguilar objected to the closing of the estate.

   The creditor's claim was a claim in equity based on a committed intimate relationship, and so was subject to a three year statute of limitations from the date the relationship ended. Because the creditor waited five years after the relationship ended to file her claim, the court of appeals concluded that it was barred. Further, the court of appeals concluded that Ms. Aguilar's arguments that another claim of hers tolled the statutory period would have provided her with at most another 90 days, not the two years she needed to be within the statutory period, and thus the trial court properly dismissed her claim.

4. *Miles v. Jepsen*, 184 Wn.2d 376, 358 P.3d 403 (2015).

   The issue here is whether a will contestant effectively tolled the statutory period for contesting a will. The court of appeals held that an email to the personal representative of the estate did not toll the statutory four month period for filing a will contest, even though the personal representative failed to raise the lack of personal service as an affirmative defense.

In this case, the son of the testator sought to contest her will. He emailed the petition to the personal representative without her consenting to such service. The personal representative, however, did not raise lack of personal service as an affirmative defense. The Supreme Court of Washington overruled the superior court and the court of appeals' holdings that the statute governing service of petitions contesting a will concerns personal jurisdiction and that the estate waived the defense by failing to raise lack of personal service as an affirmative defense. The Washington Supreme Court held that service under the will contest statute is required when the contestant is commencing the action and, thus it could not be waived.

5. *In re Estate of Tuttle*, 189 Wn. App. 1029 (Div. 2, 2015).

   This issue in this case is whether service of a petition contesting a will was proper. The court of appeals held that service was improper where contestants could provide no proof of personal service.

   The court of appeals concluded that even if TEDRA didn't require personal service on the existing representative of the estate, that RCW 11.24 required such service. Further, it held that TEDRA cannot supersede the requirement of personal service. Thus, it affirmed that the petition contesting the will was properly dismissed.

6. *In re Estate of Hannah*, 188 Wn. App. 1011 (Div. 1, 2015).

   The issue in this case is whether or not a surviving spouse was procedurally precluded from bringing her petition for an award in lieu of homestead when she incorrectly filed it under the probate cause number instead of as a new action as required by TEDRA. The court of appeals held that because the record established that the wife timely filed the petition for an award in lieu of homestead and served the personal representative of the estate but, at the direction of the county clerk, filed the petition under the probate cause of action, there was no showing of prejudice, and her petition for an award in lieu of homestead should not be procedurally barred.

   In this case, the surviving spouse filed her petition within the 18 month statutory period. The clerk mistakenly instructed her attorney to file it under the probate cause number instead of as a new action under TEDRA. The court of appeals reasoned that since TEDRA is intended to supplement not replace other applicable Title 11 law, and because the law favors awards in lieu of homestead as a matter of right, the petition should not have been barred. The court of appeals reversed the superior court's dismissal with prejudice and remanded.

7. *Estate of Harder*, 185 Wn. App. 378 (Div. 2, 2015).

   The issue in this case is whether notice of mediation challenging a personal representative's fees substantially complied with TEDRA, and whether the superior court had jurisdiction to hear the claim. The court concluded that the notice did not substantially comply with TEDRA and that the superior court lacked jurisdiction to review the reasonableness of the personal representative's fees.

   The heirs of an estate challenged the personal representative's fees by filing notices of mediation and arbitration with the superior court under TEDRA, RCW 11.96A.300; RCW 11.96A.310. First, the court of appeals stated that substantial compliance regarding a notice of mediation means informing the recipient that the matter must be resolved using TEDRA mediation procedures unless the recipient objects, including how to object or how to nominate mediators. The court of appeals ruled that the notice in this case failed to inform the personal representative of these requirements, and thus did not comply with TEDRA.

   Second, the court of appeals concluded that the superior court correctly ruled that it lacked jurisdiction to hear the case on the merits. The court of appeals stated that 11.96A RCW supplements chapter 11.68 RCW and requires a party who gives notice of mediation in order to resolve a fee dispute under chapter 11.96A RCW to also file a petition to invoke the superior court's jurisdiction under chapter 11.68 RCW. Since the heirs did not file a petition for accounting of the personal representatives fees, as required by 11.68 RCW, along with their notice of mediation, the superior court had no jurisdiction to decide the issue on the merits.

Accounting of Trust Administration:

8. *In re Estate of Lowe*, 191 Wn. App. 216, 361 P.3d 789 (Div. 3, 2015).

   The issue here is whether a personal representative should have been removed when he sold valuable assets of the testator prior to her death. The court of appeals held that the personal representative need not account for disposal of the testator's assets made by her during her lifetime, and thus he should not have been removed for selling valuable assets of the testator at her request.

   Testator had two sons, one of whom was appointed personal representative of her estate. The other son brought an action for an accounting of the estate and to remove his brother as personal representative because the brother had sold expensive coins while their mother was alive without an appraisal. The court of appeals concluded that the trial court properly declined to remove the brother as personal representative because he had no obligation as personal representative to account for his mother's property while she was alive, and she had personally asked

him to sell the coins. Further, after the testator passed, the brother properly accounted for the estate.

The court of appeals affirmed the trial court.

9. *Estate of Wimberley*, 186 Wn. App. 475, 349 P.3d 11 (Div. 3, 2015).

In this case, two brothers disputed assets in their parents' trusts. The trial court removed one brother, James, as successor trustee of the trusts and as personal representative of the estate of Margaret Wimberley, their mother. The successor trustee, Stephen Trefts, performed an accounting and concluded that James had over distributed assets to himself when James was serving as trustee. Trefts, as successor trustee, petitioned the court for approval of the accounting. The trial court approved the accounting and ordered James to return $254,437.91 to the mother's trust and estate. James appealed. The Court of Appeals affirmed the trial court's upholding of the accounting.

The Court of Appeals upheld the trial court's decision regarding the accounting, in part, because, the Court concluded, the trial court has "full and ample power and authority … to administer and settle … all trusts and trust matters," under RCW 11.96A.020, by issuing orders necessary to resolve a dispute.

James appealed again, but the Supreme Court of Washington denied review. *See In re Estate of Wimberley*, 183 Wn.2d 1023, 355 P.3d 1153 (2015).

Effect of Agreements on Interests:

10. *In re Patricia L. Forsberg Spousal Trust*, 190 Wn. App. 1014 (Div. 2, 2015).

The issue in this case is whether a community property agreement and mutual wills prevented a surviving spouse from making inter vivos gifts to her children. The court of appeals held that the surviving spouse's inter vivos gifts of a substantial portion of trust assets to her own chosen devisees amounted to an attempt to avoid the distribution formula to which she consented under the community property agreement and mutual wills.

A husband and wife each had children from previous marriages but no children together. The couple had kept their nearly $6.8 million as separate property throughout most of their relationship, from their marriage in 1975 until December of 2003 when they executed new estate planning documents. In 2003 they executed a community property agreement and mutual wills. Then, the husband died. Thereafter, the wife made significant gifts to her children, which ultimately changed the disposition of the assets.

The court of appeals concluded that the community property agreement and mutual wills mandated that distributions were to be made only for the surviving spouse's maintenance, and that all further distributions of the combined assets would be made relative to the spouses' individual shares of ownership. Thus, the surviving spouse could not transfer assets to her own children in excess of her percentage ownership of those assets. The court of appeals reversed the trial court's summary judgment in favor of the surviving spouse and enjoined her from making further gifts that were inconsistent with the community property agreement and mutual wills.

Contested Estates:

11. *In re Estate of Thornton*, 189 Wn. App. 1044 (Div. 2, 2015).

The issue here is whether a presumption of undue influence is created by evidence of a confidential or fiduciary relationship between the testator and the beneficiary of the will. The court of appeals held that without evidence of active participation in procuring the will and receipt of an unusually large or unnatural part of the estate, no presumption of undue influence is created.

A son challenged his father's will and alleged that his father's domestic partner exerted an undue influence over him before he died. The court of appeals concluded that although the son presented evidence that the partner accompanied his father to the attorney's office, helped fill out intake paperwork, and attended some meetings, that this did not constitute participation in procuring the will because they met separately and at length with the attorney to discuss the actual terms of the will. The court further concluded that the decedent's decision to leave the majority of his estate to his partner was not unusually large or unnatural considering the testimony given at trial that the decedent intended to take care of his partner, that he had already provided for his son by giving him a house, and that the domestic partnership happened the day after the will was executed.

The court of appeals affirmed the superior court's dismissal of the son's TEDRA petition. The case was appealed, and the Supreme Court of Washington denied review.

12. *Edwards v. Mulvihill*, 189 Wn. App. 1008 (Div. 1, 2015).

The issue here is whether a lawsuit arising from a properly closed probate was barred. The court held that where the probate was properly closed and there was no evidence of fraud showing that the decree of distribution is void, a lawsuit arising from a challenge to administration of the estate was barred.

Here, the court of appeals concluded that the lawsuit was barred by res judicata because it was filed more than 30 days after the filing of the declaration of completion, there were no allegations or evidence of fraud regarding the decree of distribution, and the complaint pertained to the administration of the estate. The court of appeals affirmed the trial court.

13. *In re Estate of Evans*, 2015 WL 9274104, 69214-3-I (Div. 1 2015).

The issue here is whether evidence was sufficient to support a finding that an heir of an estate financially abused his father to the effect that he could not inherit. The court of appeals held that evidence of financial abuse was sufficient to preclude the heir from inheriting.

The court of appeals agreed with the trial court that the testator was unable to care for himself based on testimony from friends, family, and a physician, even though he was adjudicated as competent to attest to his will. The court of appeals further concluded evidence of financial exploitation by the heir was sufficient where the heir converted his father's social security checks, registered his father's vehicles in his name, took unaccounted loans from his father, and sold his father's personal property for the benefit of the proceeds. Finally, the court of appeals held that while RCW 11.84 gives the trial court discretion to allow an abuser to inherit under certain circumstances, the heir didn't raise the issue at trial, and the trial court had no statutory duty to consider that issue sua sponte.

14. *In re Estate of Mooney*, 190 Wn. App. 1049 (Div. 1 2015).

The issue here is whether a petition to contest a will may be served upon the probate attorney of the personal representative of the estate. The court of appeals held that service of a petition contesting a will is not sufficient unless it is made upon the personal representative of the state.

Here, the contestant of the will personally served the personal representative's probate attorney, but not the personal representative. The court concluded that RCW 11.24 requires that service be made upon the personal representative. It further concluded that the probate attorney's failure to inform the contestant that his service was defective was not a basis for equitable estoppel. The court of appeals affirmed the trial court in dismissing his petition.

15. *Estate of Burton v. Didricksen*, 189 Wn. App. 630, 358 P.3d 1222 (Div. 2, 2015).

The issue here is whether a testamentary document is valid when one document was signed and witnessed by one individual and another different document was signed and witnessed by a second individual. The court of appeals held that

because each witness signed and witnessed a different will, the two witness requirement was not met, and the testator died intestate.

Testator had substantial assets and no will when he became gravely ill. Prior to his death, he made two hand-written wills on separate occasions witnessed by different nurses. The court of appeals concluded that having one witness sign a testamentary document and another witness sign a different testamentary document does not constitute signing one document in counterparts. It reasoned that even if the two documents could be viewed as one integrated document, that neither person who signed witnessed the signing of the integrated document because both signed different documents on separate occasions. The court concluded that these facts neither strictly nor substantially complied with the two witness rule, and thus it affirmed the trial court's determination that the testator died intestate.

16. *In re Estate of Barnes*, 186 Wn. App. 1004 (2015) review granted, 183 Wn.2d 1025, 355 P.3d 1154 (2015) and rev'd, 91488-5, 2016 WL 348057 (Wash. Jan. 28, 2016)

The issue here is whether actions of a testator's caretakers constituted an undue influence so as to invalidate her will. The Supreme Court held that the evidence that the testator's caretakers systematically influenced, isolated, and alienated the testator from her family members established undue influence so as to invalidate her will.

The testator was a 94 year-old woman who disinherited family members in favor of her caretakers. The Supreme Court of Washington agreed with the trial court that the testator's family members had established undue influence over the testator in devising her revised will, both by raising a rebuttable presumption of undue influence and by clear, cogent, and convincing evidence: caretakers had power of attorney and signed checks for testator, caretakers drove testator to discuss and sign the revised will; caretakers told lies to testator about her family members; caretakers changed testator's phone plan to make communicating over the phone more expensive; testator completely disinherited her family in favor of the caretakers; the property had been in the family for generations; testator was 94 years old, and testator was completely dependent on the caretakers.

The Supreme Court of Washington overruled the court of appeals because it "reversed based on its own reweighing of the evidence in favor of an alternative theory for upholding the will." *Id*. The Washington Supreme Court ruled that "[t]his was error—the appellate court's role is to review findings supporting the conclusions the trial court did reach, not to look for evidence supporting an alternate conclusion the court could have reached." *Id.*

Liability:

17. *Linth v. Gay*, 190 Wn. App. 331, 360 P.3d 844 (Div. 2, 2015).

The issue here is whether the estate attorney owed a duty to a beneficiary of the trust to properly execute the trust documents. The court of appeals held that the attorney who drafted the trust documents owed no duty to the nonclient beneficiary, and so the beneficiary could not sustain a claim for legal malpractice and negligent preparation.

The court of appeals concluded that there was no attorney-client relationship between the attorney who drafted the trust and the beneficiary, and that the attorney's duty to the personal representative did not extend to create a duty to the beneficiary. The court of appeals affirmed the trial court's summary judgment dismissing all claims against the attorney.

Statutory Interpretation and Preemption:

18. *In re Marriage of Lane*, 188 Wn. App. 597, 354 P.3d 27 (Div. 1, 2015).

The issue here is whether a guardian ad litem in a dissolution proceeding had the authority to waive the rights of an incapacitated person to trial of disputed issues. The court of appeals held that a guardian ad litem did not have the authority to enter into an agreement over the incapacitated spouse's objections and waive her right to a trial on the disputed issues in the dissolution proceeding.

The court concluded that while a guardian ad litem was properly appointed to the incapacitated spouse and could act in her best interest in the litigation; her authority did not extend to waiving the substantial rights of the incapacitated spouse, including her right to trial. The court of appeals reversed the trial court's entry of dissolution.

19. *In re Guardianship of Decker*, 188 Wn. App. 429, 353 P.3d 669 (Div. 2, 2015).

The issue here is whether a commissioner's adjudication that an elderly woman was incapacitated was sufficient under the guardianship statute. The court held that the commissioner's findings on the record constituted an adjudication of her incapacity under the guardianship statute.

The court reasoned that even though the elderly woman consented to the guardianship and there was no adversarial trial as to her capacity, the commissioner's hearing on the record, findings of fact and law, and ruling that she was incapacitated within the meaning of RCW 11.88 constitutes an adjudication under the guardianship statute. The court further concluded that this adjudication

authorized the trial court to reduce the elderly woman's attorney's preadjudication attorney's fees.

The court of appeals affirmed the trial court, and the Supreme Court of Washington denied review. *See In re Guardianship of Decker*, 184 Wn.2d 1015 (2015).

20. *Sloans v. Berry*, 189 Wn. App. 368, 358 P.3d 426 (Div. 1, 2015).

The issue here is whether a niece who had been devised property under her aunt's will was entitled to a proceeding to obtain a judgment establishing her creditor's claim under TEDRA. The court of appeals held that the niece was not a party within the definition of TEDRA and thus should have brought her creditor claim suit as an ordinary civil action.

Here, the niece filed a creditor's claim against the estate. Her claim was rejected, and then she filed a petition under TEDRA to have her claim enforced. The trial court held that the petition should have been filed as a separate civil action - not a TEDRA action, and her case was dismissed with prejudice. The court of appeals agreed that the petition to enforce the creditor's claim should have been brought as a separate civil action, but the court of appeals held that her claim should not be barred so long as she filed in the proper court in a timely manner.

The court explained that while creditors are included within the definition of a party under TEDRA, the niece could not be considered a creditor because she was merely a claimant whose claim had been rejected by the aunt's estate. The court of appeals affirmed the trial court's decision that the niece was not entitled to a TEDRA hearing on her claim. It overruled the trial court, however, as to its dismissal with prejudice. It concluded that the trial court elevated form over substance in dismissing the claim with prejudice because the niece should have filed the claim as an ordinary civil action, she filed within the 30 day statutory limit, she paid the filing fee, the estate received proper notice, and the superior court was the proper court. The court of appeals remanded with instructions to hear the claim as an ordinary civil action.

21. *Estate of Lundy v. Lundy*, 187 Wn. App. 948 (Div. 1, 2015).

The issue here is whether ERISA preempts state law claims to recover post-distribution ERISA benefits where the payee of the benefits was a former spouse of the deceased policy-holder. The court of appeals held that ERISA preempted the estate of the policy holder's claims to account proceeds after distribution to the former wife, absent proof of her agreement to waive her interest.

In this case, the policy-holder and payee of ERISA benefits divorced prior to the policy-holder's death. The dissolution decree awarded both spouses their individual

retirement accounts as separate property. However, the policy-holder failed to remove his former spouse as the beneficiary, and she became the payee of those funds upon his death. The court of appeals reasoned that precedent establishes that ERISA preempts state laws to the extent that those laws frustrate distribution of ERISA benefits to the designated beneficiary, including pre and post distribution laws and other "end runs" around ERISA. *Id.* at 959. The court noted that private waiver of those benefits is a possible exception, but that the divorce decree was not an explicit waiver of ERISA pension benefits so as to contravene federal law.

The Supreme Court of Washington denied review of this case. *See Estate of Lundy v. Lundy*, 184 Wn.2d 1022 (2015).

Jurisdiction:

22. *Onewest Bank, FSB v. Erickson*, 91283-1, 2016 WL 455940 (Wash. Feb. 4, 2016).

The issue here is whether an Idaho court order authorizing a conservator to encumber Washington property with a reverse mortgage was entitled to full faith and credit. The Washington State Supreme Court held that where there was no constitutional or jurisdictional defect in the Idaho court order, it was entitled to full faith and credit.

The Washington Supreme Court determined that a state court has authority to determine parties' personal interests in out-of-state property, even when that court may lack jurisdiction to directly transfer title to the property. It also held that under the full faith and credit clause, once a court has determined that a sister state's court order is free of constitutional and jurisdictional defect, it cannot question the validity of the determinations underlying the order. In so holding, the Washington Supreme Court overruled the court of appeals' dispositive conclusion that the Idaho court lacked statutory authority to authorize a conservator to encumber a Washington residence. *See OneWest Bank v. Erickson*, 184 Wn. App. 462 (Div. 3, 2014). It ordered that OneWest was entitled summary judgment and could proceed with foreclosure.

23. *Young v. Boatman*, 2016 WL 513293 72643-9-I (Div. 1 2015).

The issue in this case is whether beneficiaries have standing to bring a TEDRA action against an attorney-in-fact on behalf of an estate for breach of fiduciary duty and conversion. The court of appeals held that because only the personal representative can bring a claim on behalf of the estate for the actions of the attorney-in-fact, beneficiaries do not have standing to bring a TEDRA action on behalf of the estate.

Siblings and beneficiaries of a will brought claims against their brother, the personal representative of their mother's estate and her attorney-in-fact, for improperly using her funds. They brought these claims on behalf of the estate. The court of appeals determined that while some of the language of TEDRA may be interpreted as granting standing to beneficiaries to bring claims on behalf of the estate, another provision of TEDRA specifically states that it does not supersede any other portion of Title 11, and under RCW 11.48, only the personal representative has the authority to bring claims on behalf of the estate. Thus, it concluded that the sibling beneficiaries could not bring their claims on behalf of the estate.

The court of appeals affirmed the superior court as to standing, but also determined that the accusations against the personal representative and attorney-in-fact created a conflict of interest, and it reversed dismissal of the sibling's TEDRA petition to remove the personal representative and ordered the lower court to appoint an interim personal representative to determine whether to pursue a claim on behalf of the Estate against the attorney-in-fact for breach of fiduciary duty and conversion on remand.

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CHAPTER TWO

TRUST AND ESTATE DISPUTES ON APPEAL

April 2016

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CATHERINE W. SMITH is a principal of Smith Goodfriend, P.S., where her practice is limited to civil appeals and appeal-related matters. Smith Goodfriend's trust and estate appeals include, among others: Estate of Barnes (2016); Anderson v. Dussault (2014); Estate of Haviland (2013); Washington Builders Ben. Trust (2013), and Kwiatkowski v. Drews (2008).

Catherine is a founding member and was the first President of the Washington Appellate Lawyers Association, a former President of the American Academy of Appellate Lawyers, co-editor-in-chief of the Washington Appellate Practice Deskbook, an elected Fellow of the American Law Institute, and serves on the Washington Ethical Judicial Campaign Commission. Dahlia Lithwick, reporting in Slate magazine on argument in the U.S. Supreme Court of Troxel v. Granville, declared "She is one of the finest oral advocates I have ever seen."

Trusts and estates on appeal – special considerations.

The rules governing civil appeals are uniform – the appellate courts decide an appeal from a trial court decision in a case concerning a trust or estate or implicating fiduciary duties on a written record (which the appellant has the obligation to perfect) of the proceedings below, based on the parties' merits briefing and (usually) oral presentations to a panel of judges, who take the matter under advisement and issue a written decision explaining why the trial court erred (or, more often, did not err, or abuse its discretion) in making its decision. These "nuts and bolts" of any appeal are governed by the Rules of Appellate Procedure, which set out the appellate process in a straight-forward, (largely) chronological fashion. The most comprehensive and helpful general guides to Washington appellate practice are the WSBA Washington Appellate Practice Deskbook (4th ed. 2016) and the annotated RAPs in 2A and 3 Washington Practice, and the practitioner is directed to those sources for help in prosecuting or defending an appeal.

This paper instead addresses some special considerations in trust and estate appeals – some rule-, statute-, or case-law based, some reflective of the dynamics of fiduciary relationships – that the author has noticed in handling all kinds of civil appeals over the past 35 years.

Finality – It may be over before it's over.

There is a strong presumption in favor of having the trial court fully dispose of a dispute before the appellate court will consider claims of error. As a consequence, an appeal ("review as a matter of right") can usually be taken only from a final judgment. RAP 2.2(a)(1). In some instances, however, the appellate court will entertain an appeal

before a case is fully resolved by the lower court - usually because the consequence of an order is to effectively terminate the action as to a particular claim or particular party's substantive interests. RAP 2.2(a)(3).

These types of orders arise more frequently in trust and estate cases than in many other types of civil appeals. For instance, the Court of Appeals allowed an appeal from an order removing the personal representative of an estate under RAP 2.2(a)(3) in *Estate of Wood,* 88 Wn. App. 973, 947 P.2d 782 (1997). And, without citing any provision of the rule, the Court of Appeals allowed a personal representative and the trustee of a trust to appeal an order declaring an amendment to the trust and a codicil null and void as a matter of law in *Estate of Bernard,* 182 Wn. App. 692, 332 P.3d 480, *rev. denied*, 339 P.3d 634 (2014).

On the other hand, the Supreme Court *sua sponte* refused to entertain an appeal from an order declaring a son to be disqualified as a beneficiary of his mother's estate under her will when he had been convicted of manslaughter for her death in *Estate of Moore*, 36 Wn.2d 854, 220 P.2d 1079 (1950).

Under predecessor rules, an order for family allowances to the survivors of a decedent was held immediately appealable in a number of cases, including most recently *Estate of Kruse,* 52 Wn.2d 342, 324 P.2d 1088 (1958), on the grounds that "[i]f the parties were compelled to await the entry of a decree of distribution (which might be entered a year or more later), the fruits of the litigation would be lost to the successful party, whether it be the widows or the heirs." *Estate of Schwarzwalter*, 47 Wn.2d 119, 120, 286 P.2d 699 (1955). And an attempt to raise the issue of the trial court's refusal

to grant a widow an additional allowance for maintenance and support in a later appeal was rejected by *Estate of Brown*, 129 Wash. 84, 224 Pac. 678 (1924).

In addition, orders declaring an adult legally incompetent, or establishing a conservatorship or guardianship for an adult, are expressly appealable under RAP 2.2(a)(7) because of their "fundamental impact on the person affected by the decision." Task Force Comment to RAP 2.2, reproduced at Tegland, 2A Washington Practice 127 (8th ed. 2014). This is consistent with pre-RAP authority. *Guardianship of Heuschele,* 34 Wn.2d 414, 208 P.2d 1167 (1949).

Standing –not everyone gets to complain.

As a general rule, any party aggrieved by an order from which review as a matter of right is available may file a notice of appeal. RAP 3.1. Litigants in trust and estate matters, however, often appear in a representative or fiduciary capacity, which may affect both the ability to appeal and the consequence of an appeal to individuals or entities who are not parties to the litigation.

In *Guardianship of Lasky*, 54 Wn. App. 841, 776 P.2d 695 (1989), for instance, an attorney who had been removed as guardian of an incompetent adult was an aggrieved party for purposes of appealing an order imposing sanctions against him, but had no standing to appeal an order removing him as guardian. Division One reasoned that because the guardian had "no interest in the guardianship or Trust estate other than for compensation due him," he could appeal the order denying fees and imposing sanctions, but not the order dismissing an action he had commenced against a trust in which the incompetent was a beneficiary or the order removing him as guardian. *Lasky*, 54 Wn. App. at 848.

The *Lasky* Court relied on two decisions in which estate administrators were not allowed to appeal orders removing them. *State ex rel. Simeon v. Superior Court,* 20 Wn.2d 88, 145 P.2d 1017 (1944); *Cairns v. Donahey,* 59 Wash. 130, 109 Pac. 334 (1910). In *Simeon,* the Court rejected the former administrator's attempt to appeal in an individual capacity, noting that his "representative status" had been terminated by the order of removal. In *Cairns,* the administrator had been removed once a will of the decedent naming another as personal representative was found; the Court noted that the former administrator could have appealed a "final order" on compensation. 59 Wash. at 133.

The same rule may not apply to an executor or administrator who is also the beneficiary of a trust of estate, and/or if the trial court's jurisdiction was invoked by a petition to remove the executor of a nonintervention estate. The Supreme Court, expressly noting that the estate had not been closed, considered the appeal of a personal representative (also beneficiary of the estate) of his removal based on breach of fiduciary duties, in *Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004). The *Jones* Court relied in its substantive decision on *Estate of Beard,* 60 Wn.2d 127, 372 P.2d 530 (1962) and *Estate of Aaberg,* 25 Wn. App. 336, 607 P.2d 1227 (1980), both of which affirmed the removal of executors who were also beneficiaries of the nonintervention estate. In *Beard,* the decedent's widow, as executor, had continued to operate a business without obtaining a decree of solvency. In *Aaberg,* the executor, one of 8 children of the decedent, had failed to provide a proper inventory.

Consistent with the reasoning that an estate beneficiary may have standing when another individual seeking to control an estate would not, a surviving husband was

allowed to appeal an order denying his motion to vacate an order appointing a third party the administrator of the estate of his wife, who died intestate, in *Estate of Sutton*, 31 Wash. 340, 341, 71 Pac. 1012 (1903). But a widow who after obtaining appointment as a personal representative pursuant to will and then had the probate proceeding dismissed, on the ground she was entitled to all community property under a community property agreement, was not a party aggrieved by a determination that the will was properly executed, and had either waived or was estopped from attacking the will in *Estate of Lyman*, 7 Wn. App. 945, 503 P.2d 1127 (1972), *opinion adopted* 82 Wn.2d 693, 512 P.2d 1093 (1973).

Generally, the administrator of an estate has the right to appeal from a probate court order that may diminish the assets of the estate even though he has no interest in the estate except as an appointee of the court. *Estate of Shea*, 69 Wn.2d 899, 421 P.2d 356 (1966). A trustee is aggrieved by a judgment which threatens the continuation of a trust in the form directed by the trustor, whether or not beneficiaries appeal. *Retail Store Emp. Union v. Washington Surveying and Rating Bureau*, 87 Wn.2d 887, 558 P.2d 215 (1976). And a guardian can appeal from a trial court determination that a ward has regained competence. *Estate of Bayer,* 108 Wash. 565, 185 Pac. 606 (1919); *Pfeiffer v. Pfeiffer,* 10 Wn.2d 703, 118 P.2d 158 (1941). However, "where the dispute is about who has a right to receive, and there is no impairment of the estate, the estate itself does not have a right to appeal." *Estate of Cannon*, 18 Wash. 101, 50 Pac. 1021 (1897). And a life insurance company could not appeal from a judgment for the cash surrender value of a policy when the beneficiary did not appeal in *Mende v. Mende*, 148 Wash. 432, 269 Pac. 494 (1928).

RAP 3.2(a) provides for substitution of parties on the death or incompetency of a party. Under previous rules substitution has on occasion been denied, and the appeal dismissed, on the grounds that a right was "personal" to the decedent. *See e.g.*, *Estate of Galber*, 195 Wash. 233, 80 P.2d 772 (1938) (appeal from order vacating appellant's appointment of trustee dismissed on his death because right to act as trustee was purely personal and did not survive his death).

Finally, TEDRA now codifies the common law doctrine of "virtual representation" RCW 11.96A.120. The Supreme Court confirmed in *Anderson v. Dussault*, 181 Wn.2d 360, 333 P.3d 395 (2014) that the doctrine did not bind a minor to notice of accountings provided to her mother, who was alleged to have violated her fiduciary duties as trustee of the minor's trust, because of the mother's conflict of interest. RCW 11.96A.120(4).

Evidentiary and other record considerations – because someone is usually missing.

To state the obvious – estate appeals arise after someone has died. Many appeals in disputes over trusts or fiduciary relationships also feature participants or potential witnesses who are dead, incapacitated, or otherwise compromised in their ability to give relevant evidence. Far more frequently than in other types of civil appeals, the admissibility of evidence is trust and estate cases is called into question by the Deadman's Statute, RCW 5.60.030, or other evidentiary considerations, and a trial court's evidentiary rulings are far more likely to raise a viable issue on appeal. The record and the recital of facts in the briefs in trust and estate appeals also is often affected by whether disputed evidence has been admitted, and under what circumstances.

The practitioner handling a trust and estate appeal thus ignores evidentiary rulings below at her peril – and the peril of her appeal. Conversely, the failure to properly object to or to move to strike evidence, or the submission of other evidence otherwise prohibited by the deadman's statute, will waive the issue on appeal. *Herrin v. O'Hern,* 168 Wn. App. 305, 275 P.3d 1231 (2012); *Kellar v. Estate of Kellar,* 172 Wn. App. 562, 291 P.3d 906, *rev. denied*, 178 Wn.2d 1025 (2012).

Special burdens of proof and standards of review – because everyone else has a story to tell.

The competency of individuals is often at issue in trust and estate determinations. Given the unavailability – by death or otherwise – of critical participants in disputes leading to trust and estate litigation, there is a heightened burden of proof for many factual issues, most notably in will contests alleging undue influence, which must be proved by "clear, cogent and convincing evidence." The Supreme Court recently addressed this burden of proof and the standard of review for decisions made by clear, cogent and convincing" evidence in *Estate of Barnes,* __ Wn.2d __, __ P.3d __ (Jan. 28, 2016).

In *Barnes,* the Court examined the trial court's unchallenged findings and concluded that the Court of Appeals had improperly re-weighed the evidence in reversing the trial court's determination that the testator's will had been the product of the undue influence of a postal carrier who had befriended the testator in the last years before her death. The Court rejected Division Two's requirement that a trial court identify "positive evidence" of undue influence. Earlier holdings recognized that undue influence, which by its very nature is exerted in secret, may be established entirely by circumstantial evidence. *Estate of Kessler*, 35 Wn.2d 156, 162, 211 P.2d 496 (1949)

("[u]ndue influence is not usually exercised openly in the presence of others"); *Foster v. Brady*, 198 Wash. 13, 19, 86 P.2d 760 (1939) ("ordinarily undue influence can be established only by circumstantial evidence"); *Estate of Bush*, 195 Wash. 416, 425, 81 P.2d 271 (1938) ("undue influence can hardly ever be shown in any way other than by circumstantial evidence"). The *Barnes* decision also addresses the interplay of presumptions and the burden of proof.

Statutory interpretation – there's a lot of law out there.

There are 52 separate chapters in Title 11 of the Revised Code of Washington. Various efforts over the decades to recodify and harmonize the statutes governing trusts and estates have resulted in some laws that overlap or have doubtful effect in light of later enactments. Because the appellate courts interpret statutes de novo, many trust and estate appeals raise issues of statutory interpretation. *See, e.g., Anderson v. Dussault*, 177 Wn. App. 79, 310 P.3d 854 (2013), *rev'd*, 181 Wn.2d 360, 333 P.3d 395 (2014), for a recent case addressing the interplay of RCW ch. 11.106 (TAA) and ch. 11.96A (TEDRA). In relying on older cases, it is also important to track changes in the relevant statutes.

Institutional interests and family feuds – David, Goliath, and Anna Nicole.

There are, generally, two types of trust and estate appeals. In the first type, disputes arise among estate or trust beneficiaries. Litigation in these cases can be far worse than the worst divorce – either because the parties have known each other since childhood – *see*, *e.g.*, *Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004), *In re Melter*,167 Wn. App. 285, 273 P.3d 991 (2012) – or because they have no history with one another at all – *see*, *e.g.*, *Estate of Barnes,* __ Wn.2d __, __ P.3d __ (Jan. 28,

2016). Appeals in these types of actions are highly driven by emotions (guilt, jealousy, and/or greed often being the primary ones), and often make little sense for any of the parties from a financial standpoint.

The second type of appeal often pits individual beneficiaries against an institutional fiduciary. Relatively speaking, the individual often has far more at stake financially than the institution. But the institution may want to avoid bad precedent, or may be seeking a particular holding – often one that limit its fiduciary responsibilities, or the potential for liability if it violates a fiduciary duty – that will often far outweigh the minor financial stakes. The resources the institution can bring to bear in those instances drives the litigation (and, sometimes, related legislation). *See*, *e.g.*, *Anderson v. Dussault*, 177 Wn. App. 79, 310 P.3d 854 (2013), *rev'd*, 181 Wn.2d 360, 333 P.3d 395 (2014); *Washington Builders Ben. Trust*, 173 Wn. App. 34, 293 P.3d 1206, *rev. denied*, 177 Wn.2d 1018 (2013). *See also Bank of America, N.A. v. Owens*,153 Wn. App. 115, 221 P.3d 917 (2009), *aff'd in part, rev'd in part*, 173 Wn.2d 40, 266 P.3d 211 (2011), *after remand*, 177 Wn. App. 181, 311 P.3d 594 (2013), *rev. denied*, 179 Wn.2d 1027 (2014). Here, too, appeals may be pursued or defended under circumstances that make little sense financially.

CHAPTER THREE - A

TIPS, TRAPS AND TRANSITIONS IN TRUST AND ESTATE LITIGATION PRACTICE

April 2016

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HON. NANCY BRADBURN-JOHNSON is a Court Commissioner in the Ex parte and Probate Department of King County Superior Court. Prior to her appointment to Ex parte in 2008, she served as a Court Commissioner in the Family Law Department where she covered Family Law Daily Motions, Trial by Affidavit, Mental Illness, and BECCA, calendars. Before coming to the bench, she served as CASA Family Law Program Attorney with King County Superior Court, adjunct faculty for Seattle University School of Law Legal Writing Program, and was in private practice with a small north-end firm. She was admitted to the Washington State Bar in 1983.

Thirteenth WSBA Annual Trust and Litigation Seminar
Attorney Fees
Hon. Nancy Bradburn-Johnson, King County Superior Court, Ex Parte & Probate Department

Topic: Attorney fees — form of proof required, objections, and factors considered by the court in deciding the request for fees.

1. **Costs of litigation** are a concern. *See, e.g.*, WSBA Task Force on the Escalating Costs of Civil Litigation Final Report to the Board of Governors, June 15, 2015.

2. **TEDRA:**
    a. General Attorney's Fees Authority: RCW 11.96A.150
    b. Costs of Mediation: RCW 11.96A.300(8)
        i. Costs to compel mediation: RCW 11.96A.320
    c. Costs of Appeal of Arbitration Decision
        i. RCW 11.96A.310(9)
    d. Interplay between TEDRA and other statutes
        i. VAPO not included in 11.96A.020
        ii. Guardianships: yes
        iii. Trusts: yes
        iv. Probate: yes
        v. Action for accounting: yes, 11.76.070
        vi. POA: no
        vii. Will contests under 11.24: no, see Estate of Marks

3. **Form of proof of fees:**
    a. Narrative declaration/affidavit of attorney with:
        i. Itemized fee statement setting forth specific tasks and time allocations
            1. No block billing: one paragraph with multiple tasks in a block of time
        ii. If objections are filed or expected, perhaps use of expert testimony to defend the fees
            1. If experts are used, expert should address factual issues raised in that case, Larson, *e.g.,* 47.4 hours attorney time to deposit and redeposit funds in 14 separate accounts is unreasonable
    b. Itemized billing should include:
        i. Name and qualifications (education, background, experience) of person who provided the service
        ii. Hourly fee charged
        iii. How much time was spent per task and total billed for task
        iv. Description of work provided
        v. Description of costs
        vi. Include services which were performed but not charged
        vii. Date (month, day, year) work performed
    c. Helpful: include a breakdown of categories, e.g. administrative, travel, court time, legal research on specific issues, TEDRA proceedings, litigation, heir searches
    d. Make it clear: Remember, the court reviews fees often without an opposing party;

e. For Costs of non-attorney:
    i. Services must be legal in nature;
    ii. Performance must be supervised by an attorney;
    iii. Must state qualifications of person performing services in enough detail to demonstrate that the person is qualified through education, training, or work experience to perform substantive legal work;
    iv. Must specify services were more than clerical
    v. Amount of time must be reasonable, just like attorney time
    vi. Amount charged must reflect community standards for charges by like category of personnel. Absher.
f. Costs:
    i. Computer research expenses, so long as reasonably incurred, recoverable as attorney fees since computer aided legal research is norm in contemporary legal practice and if properly used, saves client fees otherwise incurred in more labor intensive forms of legal research. Absher.
    ii. Attorney must give a basis in law for award of fees. Larson.
    iii. Attorney must saw work was reasonable. Larson, Fetzer.
    iv. Non-lawyer personnel, if the following apply:
        1. Services must be legal in nature;
        2. Performance must be supervised by an attorney;
        3. Must state qualifications of person performing services in enough detail to demonstrate that the person is qualified through education, training, or work experience to perform substantive legal work;
        4. Must specify services were more than clerical
        5. Amount of time must be reasonable, just like attorney time
        6. Amount charged must reflect community standards for charges by like category of personnel. Absher.

4. Common objections:

a. No legal basis for fees
b. Insufficient fee declaration
c. Lack of written documentation to support fee request. Wegner.
d. Mathematical error
e. Duplicative work, e.g. billing for attorney conference with paralegal or other attorneys Hallauer.
f. Hourly charge too high for experience of billing attorney or locale or some other relevant reason
g. Attorney charged for administrative tasks, running to bank, trips to IRS to get forms, etc. Larson
    i. Work should have been delegated to someone with lower hourly, *e.g.*, accountant, bookkeeper, secretarial staff, paralegal
    ii. Query: what about attorney in single office who makes his/her own copies, etc.? Cannot charge attorney fee rates: Larson.
    iii. What is legal work, versus clerical work? *E.g.* preparing Notice of Appearance?
    iv. See Larson case: must hire a non-attorney
h. Attorney can't charge for advocacy work. Lamb.
i. Unnecessary work performed
    i. Attorney and associate charged for attending same hearing

ii. Attorney and associate charged for working on same project
iii. Attorney charged for work that would be useful in ancillary or parallel litigation Absher.
iv. Unnecessary investigation by PR. Wegner.

j. Attorney didn't ask for fees at time of hearing/trial
k. Charging for attorney's learning curve spending excessive time on tasks, which with experience are matters that become routine. Larson, at 530.
l. Small, simple estate did not warrant the amount of work performed, e.g. work was not necessary
m. Person seeking fees is not a party under RCW 11.96A.030(4) and does not have an interest in the subject of the particular proceeding.
n. Court order appointing time limits amount of attorney hours. Decker, $135K was requested, court order allowed $12,500, but court ordered $30,000 as a reasonable fee.
o. Blackened out items in itemized billing: may be okay if limited in number and there is an adequate description of the services/charges in general. Beckman.
p. No benefit to the estate. Niehenke.
q. Unreasonable to award fees because party didn't prevail. (But court has broad discretion to award fees – see Evans)
r. Court lacks jurisdiction to award fees because case was voluntarily dismissed under CR 41. *See*, *e.g.* Beckman (court doesn't necessarily lose jurisdiction – it depends on the statute authorizing the fees in the first place)

5. Criteria to be used:

a. Primary under TEDRA: equity (11.96A.150(1))
b. SPR 98.12 may apply
c. Question of whether work done is "reasonable", can look at factors or lodestar (factors are subsumed into lodestar) as "starting points." Absher.
d. Amount and nature of services rendered,
e. Time required in performing services,
f. Diligence with which services have been executed,
g. Value of the estate
h. Novelty and difficulty of the legal questions involved, *see, e.g.* Lamb.
i. Skill and training required in handling the issues,
j. Good faith in which the various legal steps in connection with the administration were taken, and
k. All other considerations which would aid the court in arriving at a fair and just allowance
l. Rules of Professional Conduct at RPC 1.5(a)(1)-(8) may also be considered:
    i. (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill request to perform the legal service properly and the terms of a fee agreement between the lawyer and the client;
    ii. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
    iii. (3) The fee customarily charged in the locality for similar legal services;
    iv. (4) The amount involved in the matter on which legal services are rendered and the results obtained;
    v. (5) The time limitations imposed by the client or by the circumstances;
    vi. (6) the nature and length of the professional relationship with the client;

vii. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
viii. (8) Whether the fee is fixed or contingent; and
ix. (9) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

m. Excessive hours may properly be reduced either by compensating fewer hours then were requested, or by reducing the requested hourly rate, depending on the trial court's assessment of other facts and circumstances. Hallauer, *supra*, at 800.
n. The fiduciary has a duty to defend the estate. Kvande.
o. Failure to fulfill a duty may result in denial of fees. Marriage of Swanson.
p. The court may consider the hourly rate of the opposing counsel. Absher, at 847.
q. Court does not need to reduce fees in proportion to reduction of damages, but this is a factor to be used. Hallauer.
r. Court may reduce hourly charge or may just reduce hours. Hallauer.

6. Criteria not to be used:

a. Fees in defense of attorney fees are disallowed because the attorney, and not the estate, is a real party in interest. Larson, at 532-533.
b. What fees are reasonable involves more than simply multiplying the number of hours spent on a given case times a specific rate. Hallauer, at 800.
c. There is no reason or excuse for charging a client, particularly a guardianship estate under the protection and supervision of the court, for one's own inefficiencies. Hallauer, at 800.
d. Fees awarded need not be reduced in proportion to the amount the damages sought were reduced; this may be a factor considered by the court. Hallauer, at 800. But see Decker, court can reduce fees based on unsuccessful claims.
e. Proportion of fees awarded need not correspond to the proportion of time spent on given issues at trial. This factor may properly be taken into consideration by the trial court. Hallauer, at 800.
f. Fees should be disallowed for duplicative work, services that did not result in a benefit to the estate and fees in excess of the amount necessary to bring the matter to court. Hallauer, at 801.

7. Court's role:

a. Often a wide variety of reasons to award fees or not (like three dimensional chess)
b. Guardianships are creations of law, court has ultimate responsibility for protecting ward's person and estate. Lamb, citing Hallauer. Court's duty to independently decide what is reasonable amount of fees. Fetzer.
c. Fairness is a consideration. RCW 11.96A.150.
d. Making the estate whole is a consideration. Hallauer.
e. Court is mindful of the costs to parties:
    i. Win at Commissioner level: Reconsideration then Revision
    ii. Win at Revision level: Court of Appeals
    iii. Win at C of A: Washington Supreme Court
f. Standard on appeal: abuse of discretion in awarding/not awarding fees
    i. Kvande.
    ii. RCW 11.96A.150(2): express language of statute: court's discretion

8. **Considerations:**
    a. Ethics: attorneys are a self-governing profession: it is incumbent on practitioners to adhere to an ethical obligation of practice.
    b. Burden of proof is on the attorney who is defending reasonableness of attorney's fees Larson.
    c. Analysis of fees must be premised on fundamental principles of attorney-client relations: e.g. in probate attorney owes fiduciary duty to PR. PR owes duty to those beneficially interested in the estate and PR owes utmost good faith and diligence in administering the estate in the best interests of the heirs; when the attorney assists the PR, then the duty also runs to the heirs.
    d. Attorney-client privilege versus transparency and client's fiduciary duty to heirs, beneficiaries, incapacitated persons.
    e. Proper notice given before payment of fees is made, e.g. if request for special notice filed
    f. Determination of fees shouldn't become an "unduly burdensome proceeding for the court or the parties." Absher, 848.
    g. Reasonableness of attorney fees is an independent determination made by the awarding court and depends on the circumstances of each case. Absher.
    h. If fees are reduced by the court, should indicate at least approximately how the court arrived at the final numbers, and explain why discounts were applied. Absher.
    i. Court can order disgorgement of attorneys fees when warranted. Decker.
        i. Including preadjudication fees once determination of incapacity made. RCW 11.88.045(2)

9. **TEDRA and CR 11:** must find that the claim is not grounded in law or fact, attorney failed to make reasonable inquiry or the paper was filed for an improper purpose.

10. **Tips:**
    a. Prepare a proper fees declaration and itemized billing statement
    b. Double check your fee statements:
        i. Was the work necessary? Was the work reasonable?
        ii. Did you charge for a learning curve, either for yourself or your staff?
        iii. Could you have used staff to bill at a lower rate?
    c. Ask for fees from the Judicial Officer at the time of the hearing, not days, weeks or months later
    d. Make timely, specific objections
    e. Prepare a short memo if legal issues exist
        i. To educate the court, yourself and the opposing party
        ii. To make a record
        iii. To create your brief bank for the next time the issue arises
        iv. These same issues apply in Court of Appeals: if you are not compliant, you might have an opportunity to correct your omission or you may not
    f. The Washington Supreme Court requires entry of Findings of Fact in fee decisions. Mahler.

RCW 11.96A.150

Costs—Attorneys' fees.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

[2007 c 475 § 5; 1999 c 42 § 308.]

NOTES:

Severability—2007 c 475: See RCW 11.05A.903.

RCW 11.68.070

Procedure when personal representative recreant to trust or subject to removal.

If any personal representative who has been granted nonintervention powers fails to execute his or her trust faithfully or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, upon petition of any unpaid creditor of the estate who has filed a claim or any heir, devisee, legatee, or of any person on behalf of any incompetent heir, devisee, or legatee, such petition being supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers, the court shall cite such personal representative to appear before it, and if, upon hearing of the petition it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, then, in the discretion of the court the powers of the personal representative may be restricted or the personal representative may be removed and a successor appointed. In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words "Powers restricted" upon the original order of solvency together with the date of said endorsement, and in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the court determines.

[2010 c 8 § 2057; 1977 ex.s. c 234 § 23; 1974 ex.s. c 117 § 19.]

NOTES:

Application, effective date—Severability—1977 ex.s. c 234: See notes following RCW 11.20.020.

Application, construction—Severability—Effective date—1974 ex.s. c 117: See RCW 11.02.080 and notes following.

RCW 11.24.050

Costs.

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

[1965 c 145 § 11.24.050. Prior: 1917 c 156 § 19; RRS § 1389; prior: Code 1881 § 1366; 1860 p 177 § 69.]

NOTES:

Rules of court: *SPR 98.12W.*

Personal representative

allowance of necessary expenses: RCW 11.48.050.

compensation—Attorney's fee: RCW 11.48.210.

SPR 98.12W

ESTATES GENERALLY--FEES

Before compensation shall be allowed to any personal representative, guardian, or attorney in connection with any probate matter or proceeding, or to any receiver or an attorney for a receiver, and before any agreement therefor shall be approved, the amount of compensation claimed shall be definitely and clearly set forth in the application therefor, and all parties interested in the matter shall be given notice of the amount claimed in such manner as shall be fixed by statute, or, in the absence of statute, as shall be directed by the court; unless such application be filed with or made a part of a report or final account of such personal representative, guardian, receiver, or attorney.

Thirteenth WSBA Annual Trust and Litigation Seminar
Attorney Fees

List of Cases

a. Absher Const. Co. V. Kent School Dist. No. 415, 79 Wash. App. 841 (2010)
b. Beckman v. Wilcox, 96 Wash. App. 355 (1998)
c. Estate of Evans, 181 Wash. App. 436 (2014)
d. Estate of Marks, 91 Wash. App. 325 (1998)
e. Estate of Niehenke, 117 W.2d 631 (2014)
f. In re Guardianship of Hallauer, 44 Wash. App. 795 (1986)
g. In re Guardianship of Lamb, 173 W.2d 173 (2011)
h. In re the Guardianship of Decker, 189 Wash. App. 429 (2015)
i. Kvande v. Olsen, 74 Wash. App. 65 (1994)
j. Mahler v. Szucs, 135 W.2d 398 (1998)
k. Marriage of Swanson, 88 Wash. App. 128 (1997)
l. Matter of Estate of Larson, 103 W.2d 517 (1985)
m. Scott Fetzer Co. v. Weeks, 122 W.2d 141 (1993)
n. Wegner v. Tesche, 157 Wash. App. 554 (2010)

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CHAPTER THREE - B

TIPS, TRAPS AND TRANSITIONS IN TRUST AND ESTATE LITIGATION PRACTICE

April 2016

Commissioner Henry H. Judson III
King County Superior Court

Phone: (206) 477-2517
Email: Henry.Judson@kingcounty.gov

COMM. HENRY H. JUDSON was appointed as a Constitutional Commissioner to the King County Superior Court in July 2104. He currently serves in the Ex Parte/Probate Department in the King County Courthouse in Seattle. Prior to his appointment he focused his practice in the areas of Guardianship, Probate, Trusts and Elder Law. He was a certified professional Guardian, and served as a Guardian of the Person and/or Estate of Incapacitated Persons, a Guardian ad Litem, Trustee and Personal Representative of Decedent's estates upon court appointment. From 2007 through 2009 he served as a Co-Chair of the King County Bar Association's Title 11 Guardianship GAL Program.

Commissioner Judson received his B.A. from Pomona College in 1977 and his J.D. from the Northwestern School of Law of Lewis and Clark College in 1980.

THE ROLE OF TITLE 4 GUARDIANS AD LITEM AFTER

In Re Marriage of LANE

Hon. Henry H. Judson, King County Superior Court, Ex Parte & Probate Department

Introduction. The traditional authority of a Title 4 Guardian ad Litem (appointed pursuant to RCW 4.08.060) was impacted by the June 29, 2015 decision entered by Division One of the Court of Appeals in In Re the Marrriage of Lane. That decision will have significant ramifications in virtually any civil matter where one of the parties may not be able to comprehend the nature of the proceedings and may need the assistance of a Title 4 Guardian ad Litem, and highlights ethical concerns for counsel representing both parties as well as the court.

Background. The Lanes married in 1999. In 2013 Mr. Lane petitioned for dissolution and a DVPO. The DVPO was granted for a year. Ms. Lane filed a pro se request for a reasonable accommodation under GR33 and asked the court to appoint an attorney for her as her "disability prevents comprehension of process/proceedings". Her request was granted. Ms. Lane (now represented by counsel) subsequently filed a motion for an order to appoint a GAL "to investigate and report back to the court as to whether or not Ms. Lane is an incapacitated person within the meaning of RCW 4.08.060 and whether or not an RCW Title 11 guardianship proceeding is in her best interests. Ms. Lane's attorney stated that she "may be incapacitated".

The court appointed a GAL and directed her to meet with Ms. Lane, review the court file, and "report back to the court whether or not in the GAL's opinion Ms. Lane was incapacitated pursuant to RCW 4.08.060, and whether a Title 11 guardianship

proceeding would be appropriate. The GAL reported that Ms. Lane did not fully understood the legal proceedings and the potential consequences to her personal and financial well-being, and recommended appointment of a Title 4 GAL to protect her best interests. Ms. Lane opposed the recommendations. The court, following a hearing on the GAL's report, concluded that Ms. Lane was incapacitated within the meaning of RCW 4.08.060 and appointed a litigation GAL to represent her best interests.

Prior to the trial date the parties participated in mediation. The Court of Appeals opinion states that Ms. Lane "actively participated". Mr. Lane, his attorney and the LGAL reached an agreement, to which Ms. Lane and her attorney strongly disagreed – they did not sign the CR2A agreement.

On the date set for trial, the LGAL filed a motion to determine whether she was authorized to enter into the CR2A agreement, whether Ms. Lane had a substantial right to trial on the disputed issues that cannot be waived by the LGAL entering into a settlement agreement over her objections, and if she did have that authority, to determine the "reasonableness and equitable nature of the settlement agreement".

Ms. Lane, through counsel, took the position that the LGAL lacked the authority to enter into the CR2A over her objections and requested the court to continue the matter and reschedule the trial date. Specifically counsel argued that the LGAL did not have the authority to waive Ms. Lane's right to a trial, and that Ms. Lane had "substantial rights" to proceed to trial and seek a better division of property, award of maintenance and parenting plan. The trial court ruled that Ms. Lane did not have a due process right to a trial … that under these circumstances the LGAL had the authority to enter into the CR2A agreement and that she had "reasonably exercised that authority". The trial court

also expressed concern in its oral ruling at the additional time which would be required to conduct a trial and that extending the matter any further could have an impact on Mr. Lane's right to due process. The court concluded that that Ms. Lane did not have a substantial right to proceed to trial on all issues in dispute, that the LGAL was authorized to enter into a settlement agreement, and that the settlement was reasonable and equitable and that the proposed parenting plan was consistent with RCW 26.09 and that that all were consistent with the relevant provisions of RCW 26.09. The trial court thereafter entered final dissolution pleadings.

Ms. Lane appealed, contending that the court erred in its ruling a) that she did not have a substantial right to proceed to trial on disputed issues and b) that the LGAL had the authority to waive her right to trial by entering into a CR2A. The Court of Appeals agreed with her on both points, holding that "the LGAL did not have the authority to enter into the CR2A Agreement over [Ms. Lane's] objections and waive her right to a trial on the disputed issues in the dissolution proceeding. The court therefore reversed entry of the decree of dissolution, findings of fact and conclusions of law, the parenting plan and the child support order and remanded the matter for trial.

Analysis. The Court of Appeals began its analysis by citing the case of Graham v. Graham, 40 Wn.2d 64, 240 P.2d 564 (1952) in support of the court's authority to appoint a GAL if reasonably convinced that the litigant is not competent to understand or comprehend the significance of the legal proceedings and the effect of such proceedings "in terms of the best interests of such party litigant". It distinguished incapacity under RCW 4.08.060 (which it defined as when "the litigant is not competent to understand the significance of the legal proceedings" from that under RCW 11.88

(significant risk of personal or financial harm based on a demonstrated ability to adequately provide for nutrition, health, housing or physical safety, or a demonstrated inability to adequately manage property or financial affairs). It further stated that a Title 4 GAL "has complete statutory power to represent the interests" of the Incapacitated Person and the incapacitated person "can appear in court only by a guardian ad litem or by a regularly appointed guardian. In Re Welfare of Dill, 60 Wn2d 148, 150, 372 P.2d 541 (1962). The Dill opinion also underscored a party's obligation to inform the court of another party's disability "[T]he fact of the wife's civil disability was known to her husband and his attorney. It was incumbent on them to apprise the court of the wife's incapacity".

The court then cited In Re Welfare of Houts, 7 Wn. App. 476, 499 P. 2d 1276 (1972) (which held that though an attorney (emphasis added) is authorized to enter into stipulations and waivers concerning procedural matters to facilitate the hearing, the attorney has no authority to waive any substantial right of his client). "Such waiver, to be binding upon the client, must be specially authorized by "the client". Id. At 481. The court also cited In Re Quesnell, 83 Wn. 2d 224, 517 P.2d 568 (1973), applying the rule stated in Houts to a GAL, who would therefore lack the authority to waive a substantial right of an incapacitated person (in Quesnell the right to a jury trial made by her counsel in a civil commitment proceeding). "Of utmost importance, and consistent with the earlier-stated duty of the guardian ad litem to actively protect the rights of his [or her] client, is the prohibition against waiver of such rights … Even if the appointment is one made after hearing and determination of incompetency, the guardian ad litem is no

more permitted to waive a substantial right of the ward that is an attorney for a competent client".

Finally the court included a quote from Graham, "[T]here is something fundamental in the matter of a litigant being able to us his [or her] personal judgment and intelligence in connection with a lawsuit affecting him [or her], and in not having a guardian's judgment and intelligence substituted relative to the litigation affecting the alleged incompetent… ." Quesnell, at 239, quoting Graham at 66-67.

Note that in Quesnell the trial issue was whether Ms. Quesnell would be found to be gravely disabled under the mental health statutes. Additionally, the GAL involved had just been appointed that day for all defendants on the day's calendar. The Quesnell court stated "[T]he undisputed facts, and as we have found them to be clearly show that the defendant did not have the kind of hearing that she was entitled to under the statute. The guardian ad litem did nothing whatever to protect her rights. He attempted to waive them before had had ever seen or conversed with her, or knew her condition." The court therefore concluded "[U]pon these bases, the right to trial by jury in civil commitment proceedings is clearly fundamental".

Conclusions.

The trial court in Lane, after appointing a GAL for the limited purpose of meeting with Ms. Lane, reviewing the court file, and making recommendations regarding whether Ms. Lane was incapacitated pursuant to RCW 4.08.060, and whether a Title 11 guardianship proceeding would be appropriate, held a hearing at which Ms. Lane was represented by counsel, and after which the court entered an order concluding that Ms. Lane was incapacitated within the meaning of RCW 4.08.060 and that a litigation GAL

should be appointed to represent her best interests. In so doing the trial court followed the provisions of Vo v. Pham , 81 Wn. App. 781, 916 P.2d 462 (1996). Vo held that bizarre behavior by a *pro se* party litigant exhibited at trial (including extreme vocal outbursts, wild gestures and multiple personalities) warranted a separate evidentiary hearing to determine whether the party litigant was mentally competent to comprehend the significant of the legal proceedings or whether a Guardian ad Litem should be appointed. The Vo court, citing Graham, also held that mental competency for the entire proceeding was contemplated (this was based on the trial court's finding that, during the trial, the allegedly disabled party spoke at times rationally and intelligently, and at other times was subject to extreme vocal outbursts and wild gestures, as well as the finding that though she represented herself she was not qualified to do so).

Questions/Issues.

1. Ms. Lane had filed a pro se request for a reasonable accommodation under GR33 and for appointment of counsel as her "disability prevents comprehension of process/proceedings". The trial court thereafter appointed an LGAL following a hearing based on recommendations indicating that Ms. Lane did not fully understand the legal proceedings and the potential consequences to her personal and financial well-being. The LGAL's role was to determine and represent Ms. Lane's best interests, not to advocate for the expressed wishes of her "client".

2. Though traditionally a Title 4 GAL "has complete statutory power to represent the interests" of the Incapacitated Person, who "can appear in court only by a guardian ad litem or by a regularly appointed guardian", after Lane is the LGAL's role

truly relegated to entry into stipulations and waivers concerning procedural matters to facilitate the hearing?

3. Per Quesnell, a LGAL Can't Agree to Waive Substantial Rights without Authorization by "Client". The LGAL was appointed by the court, and his or her authority arguably flows from the court. Was Ms. Lane the LGAL's client?

4. It does not appear that the order finding that Ms. Lane needed the assistance of an LGAL due to her inability to understand or comprehend the significance of the legal proceedings and the effect of such proceedings "in terms of the best interests of such party litigant" was ever challenged. In the face of such an order, what is the benefit of the disabled parties' participation at a trial?

5. What about the effect on the due process rights of the non-disabled party. What would be the effect on other interests of parties in other types of cases (a landlord-tenant case, a contract dispute)?

Solution? Court Process in the event of Allegedly Disabled Party.

a. Appointment of GAL to make recommendations re: ability of allegedly disabled party to meaningfully participate and understand the processes and potential outcomes in terms of their best interests;

b. (If LGAL appointment recommended) - Conduct Vo v. Pham evidentiary hearing (right to counsel of allegedly disabled party) – unless allegedly disabled person objects he or she does not have the right to be heard at this hearing – *see* In Re Marriage of Blakely, 111 Wn. App. 351 (2002);

c. Appointment of GAL - a disabled party cannot appear in a case unless through a guardian ad litem or guardian;

d. If disabled party demands a trial;

i. Go through trial with Guardian ad Litem whose authority may be limited only to “enter into stipulations and waivers concerning procedural matters to facilitate the hearing” [and what would those be – admission of exhibits? Witness not required to appear in person? continuances of trial as a reasonable accommodation to disabled party? - Can the LGAL argue a position contrary to that of the disabled party?];

ii. Commencement of Guardianship proceeding prior to trial – once appointed the Guardian could seek authority to compromise the underlying case pursuant to RCW substitute judgment based on an adjudication of incapacity per RCW 11.88 et seq. However, Guardianship statutes favor other less restrictive options – RCW 11.88.005;

iii. Who is the Petitioner in the Guardianship proceeding (Other party, LGAL with court authority, Adult Protective Services?);

iv. Cost to the parties both as to fees and costs relating to extended litigation (both in Guardianship case but underlying case);

v. What if willing guardian cannot be found?

vi. Additional concerns regarding fees, costs, effect on parties lives and other interests (in Guardianship there is a right to a jury trial if requested).

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CHAPTER THREE - C

WHY TEDRA MAY CONFUSE THE BENCH, ME IN PARTICULAR

April 2016

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King County Superior Court

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COMMISSIONER CARLOS Y. VELATEGUI was appointed to the position of Family Law Commissioner in King County in 1986 and he was subsequently appointed to the position of Constitutional Commissioner in 1998. His assignments as a court commissioner have also included Juvenile Court and the Involuntary Treatment Calendar. He is currently assigned to our Ex Parte Department in Seattle and works in Kent from time to time. He was admitted to the Washington State Bar in 1975.

TEDRA AND TITLE 11 RCW CHAPTERS IN WHICH PETITIONS ARE REFRENCED

11.12.120. Lapsed gift--Procedure and proof

(Relating to the determination of a lapse)

(3) The personal representative of the testator, a person who would be affected by the lapse or distribution of a gift under this section, or a guardian ad litem or other representative appointed to represent the interests of a person so affected may **petition** the court for a determination under this section, and the **petition** must be heard under the procedures of chapter **11**.**96A** RCW.

11.24.010. Contest of probate or rejection--Limitation of action--Issues

Currentness

If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he or she shall file a **petition** containing his or her objections and exceptions to said will, or to the rejection thereof. Issues respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of the last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or a part of it, shall be tried and determined by the court.

For the purpose of tolling the four-month limitations period, a contest is deemed commenced when a **petition** is filed with the court and not when served upon the personal representative. The petitioner shall personally serve the personal representative within ninety days after the date of filing the **petition**. If, following filing, service is not so made, the action is deemed to not have been commenced for purposes of tolling the statute of limitations.

11.24.020. Filing of will contest **petition**--Notice

(Regarding will Contest)

Upon the filing of the **petition** referred to in RCW 11.24.010, notice shall be given as provided in RCW **11**.**96A**.100 to the executors who have taken upon themselves the execution of the will, or to the administrators with the will annexed, to all legatees named in the will or to their guardians if any of them are minors, or their personal representatives if any of them are dead, and to all persons interested in the matter, as defined in *RCW **11**.**96A**.030(5).

11.40.140. Claim of personal representative--Presentation and **petition**--Filing

(regarding PR's claim against the decedent)

If the personal representative has a claim against the decedent, the personal representative must present the claim in the manner provided in RCW 11.40.070 and **petition** the court for allowance or rejection. The **petition** must be filed under RCW **11**.**96A**.080. This section applies whether or not the personal representative is acting under nonintervention powers.

11.42.040. "Reasonably ascertainable" creditor--Definition--Reasonable diligence--Presumptions--**Petition** for order

(Regarding reasonably ascertainable creditors)

(3) The notice agent may evidence the review and resulting presumption by filing with the court an affidavit regarding the facts referred to in this section. The notice agent may **petition** the court for an order declaring that the notice agent has made a review and that any creditors not known to the notice agent are not reasonably ascertainable. The **petition** must be filed under RCW **11**.**96A**.080, and the notice specified under RCW **11**.**96A**.110 must also be given by publication.

RCWA 11.54.080

11.54.080. Exemption of additional assets from claims of creditors--**Petition**--Notice--Court order

. . . . . .

(4) Notice of a **petition** for an order exempting assets from the claims of creditors must be given in accordance with RCW 11.96A.110.

11.54.090. Venue for **petition**--**Petition** and hearing requirements--Notice of hearing

(Regarding a petition for Family Support)

The **petition** for an award, for an increased or modified award, or for the exemption of assets from the claims of creditors as authorized by this chapter must be made to the court of the county in which the probate is being administered. If probate proceedings have not been commenced in the state of Washington, the **petition** must be made to the court of a county in which the decedent was domiciled at the time of death. If the decedent was not domiciled in the state of Washington at the time of death, the **petition** may be made to the court of any county in which the decedent's estate could be administered under RCW **11**.**96A**.050. The **petition** and the hearing must conform to RCW **11**.**96A**.080 through **11**.**96A**.200. Notice of the hearing on the **petition** must be given in accordance with RCW **11**.**96A**.110.

11.68.065. Report of affairs of estate--**Petition** by beneficiary--Filing--Notice--Hearing--Other accounting and information

(Regarding a report of affairs of the estate)

A beneficiary whose interest in an estate has not been fully paid or distributed may **petition** the court for an order directing the personal representative to deliver a report of the affairs of the estate signed and verified by the personal representative. The **petition** may be filed at any time after one year from the day on which the report was last delivered, or, if none, then one year after the order appointing the personal representative. Upon hearing of the **petition** after due notice as required in RCW **11**.**96A**.110, the court

11.68.080. Vacation or restriction of nonintervention powers following insolvency--Notice--Determinations affecting prior grants of nonintervention powers upon **petition**--Endorsement on prior orders

(Regarding Insolvency of an estate)

(2) Within ten days after an estate becomes insolvent, the personal representative shall **petition** under RCW **11**.**96A**.080 for a determination of whether the court should reaffirm, rescind, or restrict

in whole or in part any prior grant of nonintervention powers. Notice of the hearing must be given in accordance with RCW **11**.**96A**.110.

11.92.140. Court authorization for actions regarding guardianship funds

(Regarding expenditure of funds)

The court, upon the **petition** of a guardian of the estate of an incapacitated person other than the guardian of a minor, and after such notice as the court directs and other notice to all persons interested as required by chapter **11**.**96A** RCW

11.94.130. Applicability of dispute resolution provisions to court **petition**

(Regarding the effectiveness of a power of attorney)

The provisions of chapter **11**.**96A** RCW, except for RCW **11**.**96A**.260 through **11**.**96A**.320, are applicable to proceedings commenced by the filing of a **petition** under RCW 11.94.090.

11.96A.100. Procedural rules

(Regarding procedure in Title 11)

Unless rules of court require or this title provides otherwise, or unless a court orders otherwise:

(1) A judicial proceeding under RCW 11.96A.090 is to be commenced by filing a petition with the court;

11.**96A**.250. Special representative

(Regarding appointment of a Representative for certain parties)

(1)(a) Any party or the parent of a minor or unborn party may **petition** the court for the appointment of a special representative to represent a party: (i) Who is a minor; (ii) who is incapacitated without an appointed guardian of his or her estate; (iii) who is yet unborn or unascertained; or (iv) whose identity or address is unknown. The **petition** may be heard by the court without notice.

11.96A.300. Mediation procedure

(Regarding objecting to mediation)

This matter must be resolved using the mediation procedures of RCW **11**.**96A**.300 unless a **petition** objecting to mediation is filed with the superior court within twenty days of service of this notice.

11.96A.310. Arbitration procedure

(1) When arbitration available. Arbitration under RCW 11.96A.260 through 11.96A.320 is available only if:

(a) A party has first **petitioned** for mediation under RCW 11.96A.300 and such mediation has been concluded;

The matter must be resolved using the arbitration procedures of RCW 11.96A.310 unless a **petition** objecting to arbitration is filed with the superior court within twenty days of receipt of this notice. If a **petition** objecting to arbitration is not filed within the twenty-day period, RCW 11.96A.310 requires you to furnish to all other parties or the parties' virtual representatives a list of acceptable arbitrators within thirty days of your receipt of this notice.

(Optional: Our list of acceptable arbitrators is as follows:)

DATED: .....

.....

(Party or party's legal representative)

(3) Objection to arbitration. A party may object to arbitration by filing a **petition** with the superior court and serving the **petition** on all parties or the parties' virtual representatives.

11.96A.320. **Petition** for order compelling compliance

(Relating to Alternative dispute resolution)

If a party does not comply with any procedure of RCW **11**.**96A**.260 through **11**.**96A**.310, the other party or parties may **petition** the superior court for an order compelling compliance. A party obtaining an order compelling compliance is entitled to reimbursement of costs and attorneys' fees

incurred in connection with: The **petition** and any other actions taken after the issuance of the order to compel compliance with the order, unless the court at the hearing on the **petition** determines otherwise for good cause shown. Reimbursement must be from the party or parties whose failure to comply was the basis for the **petition**.

11.98.039. Nonjudicial change of trustee--Judicial appointment or change of trustee--Liability and duties of successor fiduciary

(regarding filling the position of a trustee)

(4) Unless subsection (1), (2), or (3) of this section applies, any beneficiary of a trust, the trustor, if alive, or the trustee may **petition** the superior court having jurisdiction for the appointment or change of a trustee or cotrustee under the procedures provided in RCW **11**.**96A**.080 through **11**.**96A**.200: (a) Whenever the office of trustee becomes vacant; (b) upon filing of a **petition** of resignation by a trustee; or (c) for any other reasonable cause.

(1) consent of the recipient to electronic transmission then in effect under the terms of RCW **11**.**96A**.110, to the beneficiaries a proposed plan to distribute existing trust assets

11.98A.040. Remedies for breach of duty

(Relating to action against Trust Advisor)

(1) If a statutory trust advisor breaches a fiduciary duty with respect to a power granted to the statutory trust advisor in the governing instrument, or threatens to commit such a breach, a trustee or beneficiary of the trust may file a **petition** under chapter **11**.**96A** RCW for any of the following purposes that is appropriate:

1. 1. **11.98A.060. Vacancy--Directed trusts**

...(1) Except as otherwise provided by the terms of the governing instrument, upon learning of a vacancy in the office of statutory trust advisor, (a)the trustee is vested with any fiduciary power or duty that otherwise would be vested in the trustee but that by the terms of the governing instrument was vested in the statutory trust advisor, until such time that a statutory trust advisor is appointed pursuant to the terms of the governing instrument or by a court upon the **petition** of any person interested in the trust; and (b) if the trustee determines that the terms of the governing instrument require the vacancy to be filled, the trustee may **petition** the court to fill the vacancy....

11.98A.080. Statutory trust advisor subject to court jurisdiction

(THIS IS HERE JUST BECAUSE I THOUGHT IT WAS INTERESTING)

(1) By accepting appointment to serve as a statutory trust advisor, the statutory trust advisor submits personally to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and the statutory trust advisor may be made a party to any action or proceeding relating to a decision, action, or inaction of the statutory trust advisor.

(2) A statutory trust advisor is not a necessary party to a judicial proceeding involving the trust under RCW **11**.**96A**.080 or to a nonjudicial agreement involving the trust made under RCW **11**.**96A**.220, unless the matter that is the subject of the proceeding or agreement affects the duties or functions being performed by the statutory trust advisor.

11.98A.090. Statutory trust advisor's right to request information and bring proceedings

(Relating to a TRUST ADVISOR)

(2) Except to the extent that the governing instrument provides otherwise, a statutory trust advisor may file a **petition** under chapter **11**.**96A** RCW for the determination of any matter relating to the specific duties or functions given to the statutory trust advisor under the governing instrument.

11.98A.120. Application of other provisions of probate and trust law

(Regarding application of 11.96A to various chapters of title 11 RCW)

Chapters **11**.**96A**, 11.97, 11.98, 11.100, 11.104A, and 11.108 RCW apply to a statutory trust advisor with respect to the powers, duties, or functions given to a statutory trust advisor in the governing instrument in the same manner as if the statutory trust advisor was acting as trustee with respect to those powers, duties, or functions.

11.103.050. Limitation on action contesting validity of revocable trust--Distribution of trust property

(Regarding notice under 11.96A)

(1) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the trustor's death within the earlier of:

(a) Twenty-four months after the trustor's death; or

(b) Four months after the trustee sent to the person by personal service, mail, or in an electronic transmission if there is a consent of the recipient to electronic transmission then in effect under the terms of RCW **11**.**96A**.110, (**REFRENCES A SUMMONS WHICH REFRENCES A PETITION**) a notice with the information required in RCW 11.97.010 (**REFRENCES 11.96a.030, 110, 120 AND 190**)

11.104A.005. Definitions

(Regarding application of 11.96A) Definitions do not define a petition.

In this chapter:

(12) “Terms of a trust” means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding. The “terms of a trust” shall include without limitation such modifications as may be made from time to time with respect to the trust under chapter **11**.**96A** RCW or otherwise under Washington or applicable federal laws.

11.104A.030
Judicial control of discretionary powers.

. . . . . .

(d) Upon a **petition** by the fiduciary, the court having jurisdiction over the trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by the act will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary

relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

11.104A.040. Power to convert to unitrust

(Regarding various conversion of to or from a unitrust)

(c) The parties, as defined by *RCW **11**.**96A**.030(4), may agree to convert a trust to or from a unitrust by means of a binding agreement under chapter **11**.**96A** RCW.

(d)(1) The trustee may **petition** the court under chapter **11**.**96A** RCW to order a conversion to a unitrust if either of the following apply:

(i) A party, as defined by *RCW **11**.**96A**.030(4), timely objects to the conversion to a unitrust; or

(ii) There are no beneficiaries under (2)(i) and (ii) of this subsection.

(2) A party, as defined by *RCW **11**.**96A**.030(4), may request a trustee to convert to a unitrust. If the trustee does not convert, the party, as defined by *RCW **11**.**96A**.030(4), may **petition** the court to order the conversion.

. . . . . .

(i) The trustee or, if the trustee declines to do so, a beneficiary may **petition** the court:

(1) To change the payout percentage.

(2) To provide for a distribution of net income, as would be determined if the trust were not a unitrust, in excess of the unitrust distribution if such distribution is necessary to preserve a tax benefit.

(3) To average the valuation of the trust's net assets over a period other than three years.

(4) To reconvert from a unitrust.

. . . . . .

(m) If subsection (l)(2), (3), or (5) of this section applies to a trustee and there is more than one trustee or an additional trustee who is appointed by a court order, a binding agreement, or otherwise under chapter **11**.**96A** RCW, a cotrustee to whom subsection (l)(2), (3), or (5) of this section does not apply may possess and exercise the power unless the possession or exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust. If subsection (l)(2), (3), or (5) of this section restricts all trustees from possessing or exercising a power under this section, the

trustee may **petition** a court under chapter **11**.**96A** RCW for the court to effect the intended conversion or action.

11.106.040. **Petition** for statement of account

(Regarding an accounting)

At any time after the later of one year from the inception of the trust or one year after the day on which a report was last filed, any settlor or beneficiary of a trust may file a **petition** under RCW **11**.**96A**.080

11.108.090. Generation-skipping transfer tax--Dispute resolution of federal law application

(Regarding intent trusts and federal tax relief)

The personal representative, trustee, or any affected beneficiary under a will or trust may bring a proceeding under the trust and estate dispute resolution act in chapter **11**.**96A** RCW, to determine whether the decedent intended that the references, presumptions, or rules of construction under RCW 11.108.080 be construed with respect to the federal law as it existed after December 31, 2009, including but not limited to the amendments made to federal law by the federal tax relief, unemployment insurance reauthorization, and job creation act of 2010, federal House Resolution No. 4853, P.L. 111-312.

References in Title 11 chapters to chapter 11.96A

11.12.120. Lapsed gift--Procedure and proof

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11.98A.080. Statutory trust advisor subject to court jurisdiction

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11.98A.110. Statutes of limitation

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CHAPTER FOUR

MEDIATION OF TRUST AND ESTATE DISPUTES: VIEWS FROM TWO PROFESSIONAL MEDIATORS

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KATHLEEN A. WAREHAM, J.D., is a full-time mediator with WAMS (Washington Arbitration and Mediation Service). She mediates disputes, drawing upon thirty years of legal experience in negligence; personal injury; civil rights; wrongful death; and complex probate, guardianship, and trust matters. In addition to mediating formal legal disputes, Ms. Wareham facilitates meetings, including family, fiduciary and business entity meetings, to help participants discuss and resolve or defuse sources of conflict. Ms. Wareham's law degree is from Columbia University and she earned her BA in philosophy, with honors, with a minor in economics, with honors, from the University of Washington. Her mediation and facilitation training includes the Professional Mediation Skills Training Program at the University of Washington School of Law, WAMS Advanced Mediation Trainings, and annual ABA and Northwest Dispute Resolution Conferences. She is a frequent speaker on mediation advocacy skills, conflict resolution skills and mediation ethics. She is the author of Chapter 12 "Washington Mediation Ethics" in the WSBA Washington Legal Ethics Deskbook, 2009.

COMM. ERIC B. WATNESS (Ret.) brings to his ADR practice 16 years of experience as Court Commissioner with the King County Superior Court in their Ex Parte and Probate Department and Juvenile Court Department, and as such, extensive experience handling and settling family law and probate matters. Commissioner Watness presided over Ex Parte and Probate matters, Juvenile Court, Dependency and Termination of Parental Rights and offender matters, Truancy and Family Law Motions, Adult Plea, and Disposition calendar. He conducted trials as Judge Pro Tem and also handled numerous judicial settlement conferences.

Prior to becoming a commissioner, he was in private practice for 13 years with an emphasis on family law, probate, adult guardianship, and adoptions. He began his legal career as an Assistant Attorney General for the Washington State Attorney General where he represented the Washington State Department of Social and Health Services in child support enforcement, parole revocation hearings, juvenile court dependency, and termination of parental rights trials.

At JAMS he has assisted with settlements in a wide range of matters including Will contests, trust, estates and guardianship proceedings, as well as family law, contract enforcement and employment disputes.

CHAPTER 12

WASHINGTON MEDIATION ETHICS

Kathleen Wareham

Summary

Kathleen Wareham, J.D., is a professional mediator. She mediates disputes utilizing her extensive legal background in negligence, personal injury, civil rights, wrongful death, and complex probate, guardianship, and trust matters. Before becoming a full-time neutral, Ms. Wareham was a shareholder and director in a Seattle law firm, MacDonald Hoague & Bayless. Since 2003 she has been a panel member of Washington Arbitration and Mediation Service (WAMS) and she is a Rule 39.1 mediator in federal cases. Ms. Wareham's law degree is from Columbia University (1986) and her B.A. is in philosophy, with honors, with a minor in economics, with honors, from the University of Washington (1983). She is a frequent speaker at continuing legal education seminars on dispute resolution methods and ethics and has served as a guest lecturer for the WSBA ethics school.

The contributions of Peter R. Jarvis to the previous version of this chapter are gratefully acknowledged.

§12.1 INTRODUCTION

Mediation, in the past referred to as a form of "alternative" dispute resolution, has become a common method for helping clients resolve their legal disputes. The Rules of Professional Conduct provide guidance and insight into the ethical duties of lawyers as they consider using mediation and as they then prepare for and participate in mediation. The rules provide a clear direction, guiding lawyers to consider moral, social, political, and economic consequences of litigation, and to consider alternatives to litigation, including mediation. In fact, the rules specifically direct lawyers that when the client's legal matter "is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." RPC 2.1 cmt. 5.

This chapter addresses how the Rules of Professional Conduct (RPCs) affect lawyers' roles in mediation, including how the RPCs interface with the Uniform Mediation Act, Chapter 7.07 RCW. The perspective of this chapter is that of a lawyer representing a client in mediation, not a lawyer serving as a third-party neutral mediator.

Mediation is essentially a facilitated negotiation — a process in which a neutral third-party mediator facilitates communication and negotiation between parties to assist them in identifying issues, generating and evaluating options, and reaching a voluntary, mutually acceptable agreement. The rules most applicable to mediation and addressed in this chapter are RPC 1.1 — Competence; RPC 1.2 — Scope of Representation and Allocation of Authority; RPC 1.4 — Communication; RPC 1.6 — Confidentiality of Information; RPCs 1.7 and 1.8 — Conflicts of Interest; RPC 2.1 — Advisor; RPC 4.1 — Truthfulness in Statements to Others; and RPC 5.5(c)(3) — Multijurisdictional Practice of Law.

Note:	Ethical guidance for lawyers negotiating settlements, both in mediation and in direct negotiation, is also provided by the A.B.A. Section of Litigation, *Ethical Guidelines for Settlement Negotiations* (2002), *available at http://www.abanet.org/litigation/ethics/settlement.html*. Although these guidelines have not been approved by the House of Delegates of the Board of Governors of the ABA, the ABA recommends them as a resource designed to facilitate and promote ethical conduct in settlement negotiations.

§12.2 ROLE OF LAWYERS IN MEDIATION

This section discusses the lawyer's multiple roles in mediation and the lawyer's specific duties in each of those roles.

(1) Multiple roles

The Preamble to the Rules of Professional Conduct describes multiple roles for a lawyer representing a client: advisor, advocate, negotiator, and evaluator. As an "advisor," the lawyer "provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." RPC Preamble [2]. As an "advocate," the lawyer "conscientiously and ardently asserts the client's position under the rules of the adversary system." *Id.* As a "negotiator," the lawyer "seeks a result advantageous to the client but consistent with the requirements of honest dealings with others." *Id.*

Lawyers need to understand these different roles when preparing for mediation and representing clients in mediation. In mediation as well as in litigation, the lawyer is helping the client by advocating and asserting the client's position. In mediation and in unassisted settlement negotiations, the lawyer takes on the role, as negotiator, to seek a result advantageous to the client, and as an advisor, to explain practical implications of a client's legal rights and obligations. The lawyer should explain to the client the lawyer's ethical obligations to fulfill these various roles in representing the client.

(2) Role of lawyers regarding advice to client

The Rules of Professional Conduct specify the duties expected of lawyers in their role as advisors. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." RPC 2.1. These nonlegal factors are part of the lawyer's assessment and advice because pure legal advice, in a vacuum, fails to fully meet the client's needs. As described in one of the comments to RPC 2.1:

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge

> upon most legal questions and may decisively influence how the law will be applied.

RPC 2.1 cmt. 2. The rules encourage client-need-centered guidance and "candid" advice. RPC 2.1. Comment 1 to RPC 2.1 reminds lawyers of the standards they are expected to meet and of the importance of honest, straightforward advice, even when it is difficult to give:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

The lawyer's advice must be candid and based on an honest assessment. The comments acknowledge that this is not always easy. The duty to advocate and assert the client's interests complicates the advisory role even more. By providing broad advice, including moral, economic, social, and political factors, lawyers can strike the appropriate balance and fulfill the duties to clients expected under the rules: both to assert the client's interests through advocacy and also to give honest and candid advice.

(3) Duty to abide by clients' decisions

While endeavoring to both advocate and advise the client toward a resolution of a legal dispute, the lawyer must be mindful of the fact that decisions concerning the objectives of the representation, and the ultimate decision regarding settlement of a legal dispute, are client decisions. The lawyer must also consult with the client about how to pursue the legal objectives. RPC 1.2(a) provides:

> [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

The lawyer's role is to advise the client regarding the possible objectives of representation, the potential means to pursue the objectives, and the pros and cons of particular settlement options. Fulfilling these duties to the client is a complex task. The lawyer must remember that the client is the decision maker under RPC 1.2(a), but also remember

to give the client complete, broad advice pursuant to RPC 2.1, as discussed in §12.2(2).

Mediation is an ideal forum for the lawyer to both advise and advocate. Advising the client about mediation as a means of pursuing the client's legal objectives not only is encouraged by the rules, it is an example of how a lawyer can strike the balance between giving advice and advocating for the client, and between giving advice and listening to the client. Mediation supports these complex communication tasks for the lawyer.

Abiding by RPC 1.2(a) in a mediation context requires, as a baseline determination: Who is the client? And, who speaks for the client? When representing a competent individual as a client, these questions are easily answered. But if the client does not have capacity to participate in litigation, or when the client is an entity, questions arise: Who will speak for the client? Who will attend the mediation? Will a client representative's participation by phone or availability by phone be sufficient? For the lawyer to follow the requirements of RPC 1.2, these questions need to be addressed when setting up the mediation.

Courts have found the failure to bring clients with decision-making authority to mediation raises questions of good faith. In *Nick v. Morgan's Food's Inc.*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000), *aff'd*., 270 F.3d 590 (2001), the court ordered mediation. The defendant's failure to bring to the mediation a claims representative with settlement authority and failure to give the mediator a written submission resulted in sanctions. *See also Francis v. Women's Obstetrics & Gynecology Group, P.C.*, 144 F.R.D. 646 (W.D.N.Y. 1992); *In Re Stone*, 986 F.2d 898 (5th Cir. 1993).

The lawyer who is mindful of the requirements of RPC 1.2 will identify the client or client representative with settlement authority and will ensure adequate ongoing communication with the client so that the lawyer can give the client appropriate advice and abide by the client's decisions regarding the objectives and means of the representation, and the client's ultimate decision regarding settlement.

Practice Tip:	Case intake procedures used by mediators and mediation companies can help assure participation of a client with settlement authority. Case administrators and mediators often ask: "Who is the person with authority to settle? Will she or he participate in person, and if this person is not planning to participate in person, will she or he be available by phone?" Policies and procedures for failure to bring a client or client representative with authority to settle vary with mediators and mediation companies and should be determined in advance.

Practice Tip:	If you are concerned the opposing party or parties may not bring a client representative with settlement authority, work out a specific plan regarding the mediation participants, or obtain a court order authorizing and directing particular participants to attend.

§12.3 COMMUNICATION BETWEEN LAWYER AND CLIENT

Miscommunication is at the heart of many conflicts between lawyers and their clients. The Rules of Professional Conduct set standards for minimum expectations in lawyer-client communications. Understanding and remembering these expectations helps avoid many of the ethical challenges imbedded in the lawyer-client relationship and guides communication between lawyer and client and with the mediator during mediation.

RPC 1.4(a)(1)-(4) provides:

> A lawyer shall[:]
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information[.]

"Informed consent" is specifically defined in RPC 1.0 (e) as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the

material risks of and reasonably available alternatives to the proposed course of conduct."

RPC 1.4(b) further provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The parameters set by these rules should guide lawyers in discussing with clients the material risks of litigation and other options. These communication rules, combined with the RPC 2.1 requirements regarding advice to clients, require full consultation with clients about the means to accomplish the client's objectives, including mediation. In fact, in the comments to the Rules of Professional Conduct, lawyers are specifically directed that when the client's legal matter "is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." RPC 2.1 cmt. 5. The RPC 1.4(b) requirements of consultation with the client about means to reach an objective and of reasonable explanations by the lawyer to allow the client's "informed decisions regarding the representation" means the lawyer needs to communicate with the client regarding the lawyer's analysis of litigation strategy decisions, including whether to mediate, when to mediate, who to select as a mediator, and who will participate in the mediation. The level of detail required concerning means of reaching an objective is a question of perception: What is a reasonable amount of information given the circumstances of the case? The frequency and level of communication that is necessary will vary with the circumstances.

Any client decision requires informed consent. RPC 1.4 cmt. 2. A settlement decision is a client decision pursuant to RPC 1.2, and must therefore meet the informed consent communication requirements of RPC 1.4; and, in addition, the lawyer must follow the advice requirements of RPC 2.1 while representing a client in a mediation or settlement discussion.

Because the lawyer must promptly consult with and secure the client's informed consent regarding settlement, the lawyer who receives a settlement offer from an opposing party or its counsel must promptly inform the client of the substance of the offer, unless the "client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer." RPC 1.4 cmt. 2.

Practice Tip:	Always consult with the client regarding a settlement offer or demand, whether in mediation or in direct negotiations. Do not rely on a client's prior representations regarding settlement authority, as settlement negotiations are dynamic. A client's decision regarding settlement, as well as the lawyer's advice regarding settlement, must take into consideration many factors: legal, moral, social, economic, and political, as discussed in §12.2(2) above. Even in the best lawyer-client relationships, miscommunications happen, and clients sometimes, intentionally or unintentionally, negotiate both with their own lawyers and with the mediator. It is always better to discuss a settlement position thoroughly each time it changes. If the client's previous position has not changed, the only harm done is risking the client's impatience at what may seem to be a repeat conversation. If the client's previous position has changed, failing to discuss the offer or demand again imposes a far greater risk of harm by not meeting the client's ultimate objective of resolution or giving up on a chance to move the negotiations closer to resolution.

Inadequacy of communication, whether real or perceived, can lead to conflict between lawyers and clients. Numerous bar complaints are rooted in client perceptions of inadequate communication. In *In Re Disciplinary Proceeding Against Heard*, 136 Wn.2d 405, 963 P.2d 818 (1998), the Washington Supreme Court found a lawyer had violated the RPCs by negotiating a settlement agreement with worthless interests included for the client, but with cash benefits to the lawyer, without a final accounting to the client and without explaining the implications to the client. This violated both RPC 1.4 requiring adequate communication and RPC 1.1 requiring competence. (See further discussion of the *Heard* court's reasoning on competence in Chapter 8).

The amount and frequency of adequate communications about settlement and the risks of litigation will vary with the circumstances. "Reasonable client expectations" is the guiding principle, described in RPC 1.4 cmt. 5:

> [W]hen there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client

expectations for information, consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation.

Practice Tip:	The amount and type of communication will vary from case to case and client to client. The best practice is to form an intentional plan with the client about communication extent and frequency, and if ever in doubt, to risk erring on the side of more, not less, communication.

Adequate communication with the client leading up to the mediation will minimize the risks of difficult or inadequate communications during the mediation and the risk of client dissatisfaction. As described in the comments to RPC 1.4, "[a] lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation." RPC 1.4 cmt. 4. Communications about both the strengths and weaknesses of the legal case, and about factual developments during discovery that affect the strength or weakness of a case, will help the client come to mediation with realistic expectations and able to participate in mediation in good faith, increasing the likelihood of reaching settlement.

§12.4 COMPETENT REPRESENTATION IN MEDIATION IS AN ETHICAL DUTY

The Rules of Professional Conduct require a lawyer to be competent in representing a client. RPC 1.1 defines this basic ethical duty. It provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The ethical duty of competence in general is discussed in Chapter 8 of this deskbook. As applied to mediation, the legal knowledge needed for the mediation of a particular case is the same as that needed for the other aspects of representation in discovery, hearings, and trial. The skills, thoroughness, and preparation needed for mediation are, however, quite different from the skills, thoroughness, and preparation needed for the other litigation aspects of legal representation.

Competent legal representation in mediation requires an understanding of the mediation process; selecting an effective mediator; preparing a succinct yet thorough submission for the mediator; preparing the client for a participatory role; preparing the lawyer and support

staff for a participatory, problem-solving role; analyzing the legal and underlying issues, including emotional, social, psychological, moral, political, and economic issues; and evaluating the best and worst alternatives to a negotiated agreement. A competent mediation lawyer understands and uses negotiation theory and technique. A competent mediation lawyer considers and evaluates potential mediators for the particular case. The mediator's experience, skills, training, and reputation are some indicators of effectiveness. Subject matter expertise may be helpful in a complex case. Experience with multiparty cases may be helpful when there are multiple stakeholders. Attentive listening skills, patience, and an ability to keep parties on track and moving forward may be particularly important in a case with complex emotional dynamics. Tenacity, persistence, and high energy may be especially important when barriers to settlement seem insurmountable.

A lawyer's training and education in mediation theory and practical skills and experience in representing clients in mediation are factors indicative of the lawyer's skills.

A lawyer's thoroughness in preparing for mediation will vary with the particular case. Timely providing a thorough mediation submission, and conferring with the client and if possible with the mediator in advance of the mediation are good indicators of thorough preparation.

Practice Tip:	Providing the mediator copies of pleadings and briefs is not "thoroughness and preparation reasonably necessary for the representation." A submission should be tailored for the mediator and should summarize the facts and law, identify underlying issues and concerns, describe the procedural posture of the case, discuss the history of any prior settlement negotiations, and identify perceived barriers to settlement. Take advantage of the opportunity to educate the other side about your case by sharing your submission with them. Any confidential information can be included in an addendum for the mediator.

Practice Tip:	Consider having separate litigation counsel and settlement counsel representing the client's interests. If this is not practical, consciously shift perspective from litigation to mediation preparation. Preparing yourself to mediate includes identifying underlying issues, avoiding being positional, remembering the different lawyer roles from the Rules of Professional Conduct (advisor, negotiator, advocate), and remembering negotiation is a dynamic and creative process in which new, different solutions acceptable to your client may emerge.

Practice Tip:	When considering selecting a mediator, talk with potential mediators or their staff about the mediator's experience, approach, and skills. Not all mediators are well suited for all cases.

§12.5 CONFIDENTIALITY AND PRIVILEGE

A cornerstone of the lawyer-client relationship is the lawyer's duty to preserve client confidentiality. This duty continues during mediation.

(1) RPC 1.6 — Confidentiality of Information

RPC 1.6 provides: "(a) A lawyer shall not reveal *information* relating to representation of a client unless the client *gives informed consent, the disclosure is impliedly authorized* in order to carry out representation *or the disclosure is permitted by paragraph (b)*" (emphasis added).

Without the client's informed consent, the lawyer must not reveal information related to the representation.

RPC 1.6 cmt. 2 explains the underlying purpose of the duty to preserve client confidentiality:

> This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

In a mediation and settlement context, the lawyer needs the client's full and frank communication so that the lawyer can give the full,

candid advice required by RPC 2.1 and can competently represent the client's interests as required by RPC 1.1.

The Washington State Bar Association Disciplinary Board has had occasion to consider a client's complaint in which the client's lawyer revealed to the mediator, a federal judge in a settlement conference, the client's position on settlement, without the client's permission. The board concluded this was a violation of RPC 1.6. *See In re Disciplinary Matter of Utevsky*, WASH. STATE BAR NEWS, May 1999, at 53.

In the course of settlement negotiations during mediation, the lawyer can easily find the dynamic process of negotiation and the efforts by the mediator to understand barriers to settlement compel frank communications with the mediator. The honest assessment of a client's case with the client and with the mediator is one of the keys to settlement. The lawyer must be mindful nonetheless of the overriding duty to the client to keep the client engaged in the process and to acknowledge that the client is the decision maker regarding settlement pursuant to RPC 1.2. The lawyer must not disclose the client's position to the mediator unless the disclosure requirements of RPC 1.6 have been met.

The disclosure requirements of RPC 1.6 are satisfied by either explicit client permission to disclose or by implied authorization. RPC 1.6 allows disclosure if "disclosure is impliedly authorized in order to carry out the representation." RPC 1.6(a). Whether the information disclosed without explicit client permission is "impliedly authorized in order to carry out the representation" is determined case by case after the fact, because the question of implied authorization arises only if the lawyer has disclosed information without explicit client permission or without proof of such permission, and therefore arises only after the client has complained that there has been an unauthorized disclosure. As aptly described by Barry Althoff, former WSBA disciplinary counsel, "A lawyer's misplaced reliance on implied authorization in effect guarantees satisfaction to the client." Barrie Althoff, *Ethics and the Law: Confidentiality in the ADR Process*, WASH. STATE BAR NEWS, Aug. 2001 at 41.

Practice Tip:	Do not rely on "implied authorization" to disclose something to a mediator. Always consult with the client privately and engage with the client in a full discussion of the risks and benefits of disclosure and then document your consultation.

(2) Additional privilege and confidentiality requirements

A mediation agreement and the Uniform Mediation Act, Chapter 7.07 RCW, may impose additional disclosure restrictions beyond RPC 1.6. Confidentiality provisions in an agreement to mediate do not obviate the requirements of RPC 1.6 as to the lawyer's own client and may in fact add to the lawyer's responsibilities regarding disclosure of information learned in mediation. A mediation agreement may bind a lawyer not to disclose information from another party disclosed to the mediation participants during mediation. A confidentiality agreement, as part of an agreement to mediate or as a settlement term, may have broad applicability, prohibiting disclosure of settlement terms to the press, government agencies, family members, or others.

The Uniform Mediation Act (UMA), codified at Chapter 7.07 RCW, protects against the use of mediation communications in judicial proceedings, arbitrations, or legislative hearings. This privilege is triggered if a court or an arbitrator orders mediation, if the mediator and parties agree in a writing "demonstrating an expectation" that they intend mediation communications to be privileged, or if the mediation is conducted by someone who holds him- or herself out as a mediator or who mediates through an organization that provides mediation services. RCW 7.07.020.

The privilege under the UMA begins with the first contact with a mediator or mediation organization. It applies to any communication made for the purpose of "considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." RCW 7.07.010(2). The communications covered are any oral or written statements made or nonverbal conduct, such as a head nod, that takes place at any point in the mediation process. RCW 7.07.010(2).

The UMA privilege allows parties to the mediation, nonparty mediation participants, and mediators to refuse to disclose or to prevent others from disclosing mediation communications. The strength, extent, and limits of the disclosure barrier depend upon who is claiming the privilege. A mediation party, defined as a "person that participates in a mediation and whose agreement is necessary to resolve the dispute," RCW 7.07.010(5), may refuse disclosure of any mediation communication and prevent anyone else from disclosing. A nonparty participant, defined as a "person, other than a party or mediator, that participates in a mediation" (such as an accountant, neighbor, caregiver, relative or support person), RCW 7.07.010(4), may only refuse or prevent disclosure of his or her own mediation communications. A mediator may refuse

disclosure of any mediation communication and may prevent disclosure of only the mediator's communications. RCW 7.07.030.

Note:	There are multiple exceptions to these disclosure restrictions. *See* RCW 7.07.050.

§12.6 TRUTHFULNESS DURING MEDIATION

Honesty is a basic ethical expectation in our society. The Rules of Professional Conduct specify and codify a lawyer's duty to be honest and truthful. RPC 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person, or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Mediation provides a confidential opportunity for communications with a neutral and an opportunity to benefit from the mediator's facilitative and evaluative skills. Confidentiality, neutrality, and the facilitation process encourage and support honesty in the process of assessing the strengths and weaknesses of a client's legal position. The potentially evaluative aspects of mediation and the dynamic nature of settlement negotiation may, on the other hand, discourage transparency and honesty. Because a mediator is not a "tribunal," the candor toward the tribunal requirements of RPC 3.3 do not apply. RPC 1.0(m). But does the RPC 4.1 requirement of honesty apply to statements made to a mediator?

RPC 4.1 requires lawyers, in all contexts, including mediation, not to make false statements of material fact or law. The purpose and nature of a statement to the mediator, or to another party in the mediation, determines whether it must be truthful. While any statement of material fact or law must be truthful, representations of settlement position or value are generally considered opinion, not statements of material fact or law. As described in the comments to RPC 4.1: "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category." RPC 4.1 cmt 2.

The Washington State Supreme Court held in *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 599, 48 P. 3d 311 (2002), that under "generally accepted conventions in negotiations" statements regarding settlement amounts and valuation of a claim are not taken as "statements of material fact." The court described material facts as "generally those facts upon which the outcome of the litigation depends in whole or in part." *Id.* at 600.

The ethical requirement of honesty in a mediation context was thoroughly discussed in ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 439 (2006). In the opinion, the Committee states:

> Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

In contrast, if the purpose of a statement in mediation is to provide material facts, such as the applicable limits of an insurance policy, or to reference what the lawyer believes is applicable legal precedent, the statement must be truthful.

§12.7 CONFLICTS BETWEEN CLIENTS

The conflict rules apply with equal measure to mediation and other settlement negotiations. The conflict rules include general provisions governing current and former client conflicts under RPCs 1.7 and 1.9, and a settlement-specific conflict rule, the treatment of aggregate settlements under RPC 1.8(g). Chapter 11 of this deskbook provides a comprehensive discussion of these conflict rules, including a description of joint representation and specifically what is required for permissible concurrent representation under RPC 1.7. When preparing for mediation, a lawyer who has previously satisfied these RPC 1.7 requirements for joint representation may need to review the conclusion that the multiple clients' interests can be ethically represented in mediation. The clients' common interests in litigation may be outweighed by antagonistic interests in settlement negotiation, or their potentially adverse interests in settlement may be outweighed by the benefit of negotiating settlement jointly. Comment 28 to RPC 1.7, concerning non-litigation conflicts, provides:

> "A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them."

Individual clients may find it beneficial to be part of a group when negotiating settlement. In spite of this benefit, there may be a potential for conflict among the clients in perceptions of value or settlement positions, raising RPC 1.7 issues.

As part of the process of satisfying RPC 1.7 requirements during the mediation or settlement process, lawyers should consider the advice described in detail in Chapter 11 of this deskbook, including having a joint representation agreement, and should discuss with the joint clients the potential differences in settlement valuation or settlement position. Comment 13 to RPC 1.8(g) provides: "Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of obtaining the clients' informed consent." And, if negotiation between joint clients is contemplated, Comment 29 to RPC 1.7 provides:

> "A lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated."

Practice Tip:	In preparation for mediation and during mediation, a lawyer representing multiple clients should evaluate and discuss with the clients the implications for a group settlement and the potential advantages and disadvantages of negotiating the individual claims together. The opportunity to seek separate counsel before concluding a settlement on behalf of multiple clients is advised by the ABA Litigation Section Ethical Guidelines for Settlement Negotiations, Section 3.5 "Multiple Clients Represented by the Same Counsel" *http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf*

Practice Tip:	A joint representation agreement can anticipate the potential differences between clients' settlement positions and the material information regarding settlement that must be exchanged among multiple clients. See Chapter 11 in this deskbook regarding joint representation agreements and consider including language recommended by the ABA Litigation Section Ethical Guidelines for Settlement Negotiations, Section 3.5 "Multiple Clients Represented by the Same Counsel," regarding what must be disclosed to obtain each client's informed consent during concurrent representation. *http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf*. See also Comment 13 to RPC 1.8(g), the rule that limits the lawyer's role with aggregate settlements, which advises that "before any settlement offer... is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement ...offer is accepted."

Practice Tip:	If a single lawyer or law firm is representing multiple plaintiffs and one or more of the plaintiffs is a minor or lacks capacity, have a settlement guardian ad litem appointed prior to settlement discussions and prior to mediation, and obtain court permission for the settlement guardian ad litem to participate in mediation.

§12.8 MULTIJURISDICTIONAL PRACTICE

The Rules of Professional Conduct permit a lawyer admitted in another jurisdiction to provide temporary legal services in a jurisdiction where the lawyer is not admitted if those services are "reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution" and if the services "arise out of or are reasonably related to the lawyer's practice" in the jurisdiction where the lawyer is admitted. RPC 5.5(c)(3). However, the lawyer must still determine if the forum requires pro hac vice admission for the services provided and must obtain admission pro hac vice for court-annexed arbitration or mediation. RPC 5.5(c) cmt. 12.

§12.9 CONCLUSION

The Rules of Professional Conduct provide lawyers needed ethical guidance for fulfilling the complex roles of both advocating for a client and advising a client. More than just establishing ethical duties, the rules help promote resolution of clients' legal disputes, the ultimate purpose of litigation, by defining the lawyer's role as both advisor and advocate and by establishing communication, confidentiality, and competence requirements that must be followed during the complex process of litigation. Perhaps mediation has become the paramount method of dispute resolution not just due to economic pressures and crowded court dockets but in part because it best supports the tensions in the litigation process between lawyers' dual roles as advocates and as advisors. Following the ethical guidance of the RPCs when considering, preparing for, and participating in mediation helps lawyers fulfill their duties to their clients and resolve their clients' legal disputes effectively.

§12.10 ADDITIONAL SOURCES

- Barry Althoff, *Ethics and the Law: Confidentiality in the ADR Process*, WASH. STATE BAR NEWS, Aug. 2001, at 41.
- Dwight Golann & Marjorie Corman Aaron, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS Ch. 14 (1996).
- Wash. Law School Found., Wash. State Bar Assoc. Dispute Resolution Section Annual CLE, *What You Need to Know to Get Ready for the New Mediation and Arbitration Acts, Uniform Mediation Act*, September 23, 2005.
- Alan Kirtley, *The Top 10 Reasons for Adopting the New Uniform Mediation Act in Washington*, WASH. STATE BAR NEWS, Nov. 2004, at 18.
- Karl Tegland, 2 WASH. PRACTICE: RULES PRACTICE (6th ed. 2002 & Supp. 2008).
- Ethical Considerations in Mediation, in WASH. LAWYERS PRACTICE MANUAL §12.1.30 (2008).
- A.B.A. Section of Litigation, *Ethical Guidelines for Settlement Negotiations* (2002), *available at http://www.abanet.org/litigation/ethics/settlement.html.*

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Candor and Truthfulness in Alternate Dispute Resolution

By Eric B. Watness

An attorney's fundamental duty to tell the truth is mandated by the Rules of Professional Conduct (RPCs), but the line between impermissible falsehood and legitimate advocacy is often unclear. In the area of alternate dispute resolution, advocates are permitted to shape communications to varying degrees depending on whether the forum is an arbitration hearing or a mediation session with more limited communications required in adjudicatory proceedings. The following strives to more clearly explain the attorney's duty in each of these different contexts.

Candor toward the Tribunal

Under RPC 1.0(m), the arbitrator is defined as a "tribunal" for the purposes of attorney ethics rules. Even though an arbitrator conducts informal proceedings without the trappings of an austere courtroom and black robe, the same duties owed to a judge are also owed to the arbitrator.

This makes sense because judges and arbitrators — third-party neutrals called upon to decide a controversy — are susceptible to misguided appeals. Therefore, the RPCs proscribe making false or prejudicial assertions in an adjudicatory proceeding and unauthorized ex parte contact with the decision maker.

As set forth in RPC 3.3:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (4) offer evidence that the lawyer knows to be false.

Importantly, RPC 3.3(f) requires the advocate to inform the tribunal of all material facts during ex parte proceedings even if adverse to the client.

RPC 3.5 addresses additional ethical duties regarding "impartiality and decorum of the tribunal." It states:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or]
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order....

In re McGrath[1] demonstrates why these two rules exist. Attorney McGrath was engaged in an employment dispute with a former employee who was also a Canadian citizen. McGrath violated RPC 3.5(b) when he sent two letters to the judge ex parte.

The first was a typed letter bearing a handwritten message scrawled on the bottom of the last page: "Your decision is going to effect [sic] American's [sic] — How [sic] are you going to trust & believe — a [sic] alien or a U.S. citizen." The second was a single-page letter entirely handwritten:

> Dear Judge Rogers;
>
> How many jobs do we give to aliens like Dr. Ellison: She was schooled here in the U.S. and refuses to become a U.S. citizen. She needs to go back to Canada.
>
> In that regard, I am asking the Court to freeze all her assets pending the outcome of this case.[2]

In sharply admonishing McGrath, the court explained:

> Ex parte contact of the nature before us is very harmful to the public's view of the integrity of the bar. Unfortunately there are those, particularly those unfamiliar with the working of our judicial system, who are quick to believe that judges routinely have ex parte contacts with parties or their lawyers and are influenced by such contacts. Ex parte contacts intended to influence the judge diminish the integrity of the administration of justice.[3]

In another recent disciplinary decision, *In re Disciplinary Proceeding against Ferguson*,[4] an attorney was disciplined for ethics violations under RPCs 3.3 and 3.5. The genesis of the action was a failed real estate deal. Following several court hearings, the court ordered one party to retain possession of a residence and keep payments current pending trial.

Shortly after the hearing, a new attorney appeared before the judge ex parte arguing that the party who retained

possession of the house had lied at the prior hearing about making the required mortgage payments. At the ex parte hearing, the attorney failed to tell the court that bankruptcy proceedings would favor her clients if they had possessory rights. She also failed to state that prior payments may have been posted after the first hearing, and asserted that exigent circumstances existed because a "vagrant" now occupied the residence, not telling the judge that it was the other party's son.

Without notice, the judge signed the contempt order and writ of restitution. Once the attorney's clients obtained the right to possession, they filed bankruptcy, thereby interrupting state court jurisdiction and damaging the other party's ability to protect their possessory interests in the residence.

In both *McGrath* and *Ferguson*, ex parte communications with the tribunal provided the opportunity for each attorney to make false statements material to the decision. Had the opposition been present, the falsehood would have been brought to the court's attention, resulting in a proper and fair decision.

In fact, avoidance of an incorrect adjudication is the foundation for the rules:

> These rules [RPC 3.3(f) and RPC 3.5(b)] are designed to protect the integrity of the legal system and the ability of courts to function as courts. An attorney's duty of candor is at its highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument. Such a high level of candor is necessary to prevent judges from making decisions that differ from those they would reach in an adversarial proceeding.[5]

Candor toward Third Persons

Lawyers have a duty of honesty toward third parties as well as a tribunal, but the extent of the duty is different. As we saw above, the RPCs do not lump mediators within the definition of a "tribunal."[6] Frankly, this makes sense because mediation does not result in a decision by a third-party neutral.

The mediator, unlike the judge or arbitrator, is a facilitator of settlement negotiations, not an adjudicator. Therefore, ethics rules governing statements to third parties, and not statements to a tribunal, apply to communications made to and through mediators.

As stated in RPC 4.1:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

In re Disciplinary Proceeding against Carmick[7] includes a discussion of the extent of this rule in settlement negotiations. Carmick negotiated a settlement directly with a represented party, but without consent of that party's attorney, the prosecutor. And he presented the settlement to the court without divulging all the relevant facts.

In the course of negotiating a reduced amount for unpaid judgment interest on a child support order, the attorney failed to tell the judgment creditor that $11,000 had been deposited with the clerk toward accrued judgment interest. He also told her the prosecutor was unavailable, not knowing if that was true. Furthermore, he implied that she might have difficulty collecting the interest. As a result, the mother agreed to payment of only $5,000 in judgment interest, leaving $6,000 on the table.

Carmick was disciplined for his improper ex parte court appearance and for improperly communicating with a represented party. Surprisingly, however, the court concluded that Carmick had not violated the RPCs for his statements or omissions made in negotiation.

> Generally, an omission regarding the amount available for settlement does not violate either RPC 4.1(a) or RPC 8.4(c). "A lawyer ... has no affirmative duty to inform an opposing party of relevant facts." Model Rules R. 4.1 cmt. 1. While a misrepresentation can occur by a failure to act, under generally accepted conventions in negotiations "a party's intentions as to an acceptable settlement of a claim" are not taken as statements of material fact. Model Rules R. 4.1 cmt. 2.[8]

Comment 1 to RPC 4.1 helps explain the distinction between disclosure of relevant facts and disclosure of misleading statements. While a lawyer must be truthful, she has no affirmative duty to inform the other party about relevant facts. And misrepresentations "can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

But Comment 2 to RPC 4.1 distinguishes statements made in settlement negotiations:

> This Rule (4.1) refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Although some negotiation statements to third persons are not taken as statements of material fact, some factual assertions during negotiation might still amount to bad faith. Can a party knowingly make a false or misleading statement to a mediator?

Obviously, any process will be contaminated by misrepresentations of fact, but the question remains whether and to what degree our ethics rules protect against the effect when false information is shared. This reflects the notion that "puffing" is permitted by negotiators in the settlement process while lying is not.

Candor and truthfulness are mandated by our ethics rules designed to preserve the integrity of the adjudication process. They also are necessary where parties negotiate a resolution to legal disputes.

However, the extent and quality of mandated disclosure are highest when one party approaches the court unaccompanied and they are lowest when parties are dealing with each other at arm's length. With the increased risk of harm comes the increased expectation of disclosure. ■

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[1] 174 Wn.2d 813, 280 P.3d 1091 (2012).
[2] *McGrath*, 174 Wn.2d at 827.
[3] *Id.* at 829–30.
[4] 170 Wn.2d 916, 246 P.3d 1236 (2011).
[5] Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: Handbook on the Model Rules of Professional Conduct*, § 29.2 at 29-3, 29-4 (3d ed. 2001). *In re Disciplinary Proceeding against Carmick*, 146 Wn.2d 582, 595, 48 P.3d 311 (2002).
[6] *See* RPC 1.0(m).
[7] *See* note 5.
[8] 146 Wn.2d at 599.

Mediation Preparation Practice Tips

A key step toward a successful mediation is preparation. The following practice tips will help you enter the mediation process ready to reach a successful result.

1. Select the right mediator for your particular case. Consider mediator with the style, experience and approach appropriate for the case. Some attributes to consider are legal experience, communication skills, energy level, creativity, work ethic and willingness to prepare. Talk to potential mediators to learn about their approach and background. Ask for references and seek the opinions of former clients.

2. Determine the necessary and helpful participants. Anyone whose decision is necessary for settlement should participate. Persons of influence to a decision-maker should participate or be available to the decision-maker. Participation should be in person for the most effective session. Mediation is a dynamic and difficult to predict process, so it can be difficult to keep a person with settlement authority who is not present in person fully apprised of the factors effecting the mediation process. In person participation is best.

3. Share information in advance of the mediation. If you have information the other party or parties believe they need to evaluate the strengths and weaknesses of the case, don't save it for the mediation. Disclosing pertinent information in advance is an indicator of good faith and provides an opportunity for the other parties to evaluate the case and the risks of continuing the litigation.

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4. Prepare a mediation memorandum. Help the mediator understand the case by providing a summary of the facts and the law rather than attaching pleadings and briefs. Tell the story of the case: who, what, when, where, how. Be succinct but not necessarily brief. The mediator will appreciate the details as summarized in your letter but does need back up documents. For example, tell the mediator of an admission in a party's deposition but don't provide the deposition transcript. Rather, bring the deposition transcript to the mediation if you think you'll need to reference it. Finally, include a discussion of any settlement negotiations.

5. Be timely when submitting the mediation memorandum. If the mediator requests the submission 3 days prior to the mediation, honor that request to enhance the opportunity for the mediator to work for you. The mediator should read all the material submitted and then may have questions prior to the mediation, or may simply want some time to think about the dispute.

6. Meet with your client in advance of the mediation. This will help you prepare yourself and your client for the mediation.

    a. Help your client understand that there will be significant blocks of time where the mediator is working with other parties and encourage the client to bring reading materiel, a laptop computer or other things to help occupy his or her time. This is not simply a matter of courtesy: it helps the client remain sufficiently patient to allow the process to unfold and work.

    b. Help your client think about his or her case from the other party's point of view and from a jury or judge's point of view.

    c. Discuss with your client the realities of litigation: the likely expenses of proceeding to trial, including attorney fees, expert witness fees, etc; the uncertainty of outcome; the risk of fee shifting; the lack of privacy; the risk of appeal; time; the emotional impact on the parties.

    d. Avoid developing the client's position regarding settlement and instead focus on the client's basic needs and interests.

    e. Talk about good faith: even if hope of an acceptable settlement is dim, remind your client that the vast majority of cases settle and encourage your client to work positively and energetically with the mediator's expert help to creatively explore settlement options.

Preparation for Attorney Meeting

1. What background facts are relevant to informing the other attorney and the facilitator in order to help your client and the family deescalate conflict and move forward? Try to describe the background facts as a third party observer would describe them.

2. If you were to describe the family to someone now, how would you describe the current dynamics between the siblings and between the parents and their adult children? What is the same or different than the past dynamics?

3. What are the issues your client would like to see resolved? For example, an agreed, sustainable care plan, an agreed plan regarding lifetime or after death disposition of property, an explanation and accounting of transfers of assets.

4. What are your client's interests as opposed to positions? For example, your client may wish for the best care and quality of life for themselves/parents, family harmony, closure, respect for decisions, or preservation of assets.

5. What do you believe the other parties' interests are, seeing the situation from their perspectives?

6. What are your client's alternatives to a negotiated agreement? What will your client do if the parties can't reach an agreement?

7. What are the other parties' alternatives to a negotiated agreement? What do you think the other party will do if the parties don't reach an agreement? What happens if the parties do nothing?

8. What do you hope will be achieved through the attorney meeting? What do you hope will be achieved through a facilitated family meeting?

Benefits of Early Mediation

The vast majority of civil cases settle before trial. Most settlements are reached through mediation. So, why not try early mediation? Here are some considerations of the benefits of early dispute resolution.

1. Minimize expense. Mediation can be scheduled before significant discovery costs are incurred. If the parties agree to an exchange of information needed for each side to evaluate the case and realistically assess their risks, expensive and time-consuming depositions and written discovery may be able to be avoided.

2. Preserve relationships. If the parties have ongoing relationships, they will increase the chance of preserving those relationships through early dispute resolution. Litigation can increase the risk of hurtful comments and exacerbate differences in perspective. Mediation can help the parties acknowledge points of agreement while protecting and defending points of disagreement, and then help build an understanding of the differences and a resolution all parties can accept. Resolving the legal dispute before the parties make the relationship worse can preserve what foundation is left of the relationship and allow building it back up, sometimes as part of the mediation process, and sometimes in it's own course over time once the legal dispute is resolved.

3. Address immediate, real needs. Litigation is time consuming and slow. Business, public, organizational, family and personal needs often require immediate attention. Early mediation can provide an opportunity to address immediate needs. Even if a legal dispute cannot be completely resolved early, addressing immediate needs shows concern and acknowledgement, two significant good faith steps toward an ultimate full resolution, and helps minimize the conflict and focus the parties' and attorneys' energy and attention.

4. Avoid exacerbation of the conflict. The adversarial system, in spite of its many strengths, tends to polarize the parties, narrow points of view and exacerbate conflict. The sooner the parties sit down with the help of a neutral, experienced mediator to evaluate their legal dispute and consider the risks of litigation, the sooner they will shift into a broader, problem-solving approach. Ongoing discovery and litigation takes a financial and emotional toll on the litigants, and points them toward defending and protecting their own point of view without addressing the other side's point of view. Early mediation provides the parties an opportunity to acknowledge what it is they do agree with from the other party's point of view while still advancing and protecting their own needs and perspectives. Rather than exacerbate the conflict, the mediation gives the conflict room to breathe and the parties' room to work out a settlement.

5. Preserve privacy. Business, organization, family and personal needs are often best addressed privately. Even public policy concerns can benefit by avoiding precedent and addressing a particular case confidentially. Early mediation can best preserve these needs.

6. Increase chance of durable solution. Court remedies are limited and with the passage of time, private, creative solutions may be less likely. When the parties sit down early, they can get a more complete understanding of the competing needs and desires and look for opportunities to creatively and thoroughly address those differences. Exchanging information and collaborating on a solution increases the chance of a durable solution.

If any of these benefits may apply to your case, your case may benefit from a confidential, complimentary inquiry with Kathleen Wareham. She can help you evaluate the risks and benefits of proposing early mediation, and help customize the process to fit the needs of the case.

Professionals: Teaming Up With A Facilitator

Many professional fiduciaries and attorneys assist their clients by using facilitative skills: listening attentively, helping their clients broaden their perspectives, asking probing and clarifying questions, breaking issues down into manageable parts, and showing empathy. If an attorney or fiduciary can apply these and more facilitative skills, why use a facilitator? The benefits to the clients, and to the attorneys and fiduciaries are numerous:

1. The facilitator is neutral: not aligned with any person, or position. This allows a fresh approach, with no history, and no personal impact from the conflict, which helps the discussion move forward toward a positive, problem-solving approach. The facilitator's neutrality enables the family member and professional participants to be acknowledged and to give voice to their concerns.

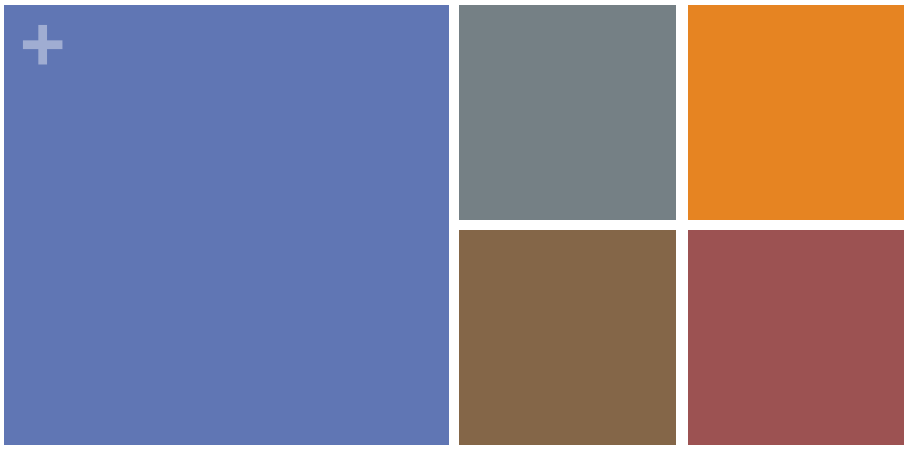
2. The attorney's and/or fiduciary's duties to their client remain uncompromised by the needs and demands of the other family members as the attorney and/or fiduciary participate in discussions with or about their client A guardian, for example, can clearly state his or her opinion as to what is in the best interest of the incapacitated person, and the facilitator can assist the other participants understand and acknowledge the guardian's position. At the same time, the facilitator can help the family members communicate each of their concerns to the guardian, and help the guardian hear and acknowledge those concerns.

3. The facilitator attends to and supports each participant, including the attorney and/or fiduciary. This attention from the facilitator creates a meaningful opportunity to speak directly, to be heard and to understand the issues underlying the dispute or conflict.

4. A facilitated meeting eliminates triangulation: all parties are present and the facilitator helps the participants have direct, open communication among all participants, including the attorney, fiduciary, client and family members.

5. Recommending the use of a facilitator to minimize or avoid conflict helps satisfy ethical and statutory duties. Attorneys have a duty to give clients candid advice. RPC 2.1. In giving such advice, a lawyer "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." RPC 2.1.

   Petitioners and attorneys in guardianship proceedings must consider lesser restrictive alternatives to guardianship. A facilitated family meeting concerning a trust or power of attorney dispute can explore the ability of a trust or power of attorney to meet the needs of an alleged incapacitated person, an important step before deciding to file a lawsuit petitioning for guardianship (RCW Chapter 11.88) or petitioning for an accounting (RCW Chapter 11.94).



Mediation of Trust & Estate Disputes

Views from Two Professional Mediators

Trust and Estate Litigation

Working with people at a stage of crisis

- Illness
- Disability
- End of life
- Overwhelmed/confused
- Vulnerable
- Exploited/exploiting
- Lack of support
- Grieving/loss

Trust and Estate Litigation

People in difficult circumstances

- History of abuse/neglect
- Mental illness
- Family default roles
- Financial strain
- Poor communication
- Heightened emotional reactions
- Inadequate resources

What we see:

Mediating T&E Disputes

Broad range of legal issues

- Property disposition
- Tax planning/consequences
- Healthcare
- Death
- Benefits
- Business succession

Mediating T&E Disputes

Complex

- Multiple parties
- Multiple people of influence
- Long histories
- Different perspectives
- Difficult personalities

Improve & Optimize Results

- **7 Tips**

Tip #1

Recognize all the fairness standards at play

Law is not the only fairness standard

- Legal
- Equitable
- Needs-based
- Faith-based

Tip #1 (Fairness standards)

Tip #2

Pay attention to interests, not just legal issues & positions

Pay attention to interests, not just legal issues & positions

- Positional bargaining
- Conflict from values, beliefs, perceptions
- Client and others' interests
- Look for conflict drivers

Tip #2 (Interests)

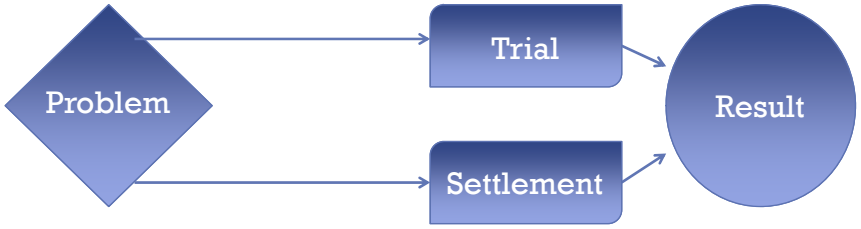
Identify interests so that….

- Barriers can be addressed
- Parties can negotiate trade-offs

Tip #2 (Interests)

Tip #3

Prepare from day one with negotiation and mediation in mind



Tip #3 (Mediation plan)

Opportunities to influence

- Managing client expectations
- Communicating with opposing counsel
- Communicating with unrepresented parties

Tip #3 (Mediation plan)

- Collaboration opportunities
  - Agreed sharing of info and discovery
  - Agreed experts/3rd party resources
- Broaden perspective
- Communicate early & often
- Consider early mediation

Tip #3 (Mediation plan)

Tip #4

Prepare what mediator & opposing counsel *really* need

Mediator needs to know

- Decision makers
- People of influence
- Background facts & law
- Do parties recognize roots of conflict
- Personality challenges
- Negotiation history
- Standards of fairness
- Your ideas

Tip #4 (Prepare)

Opposing counsel needs

- Reliable information
- Receipt of information in time to digest and pivot
- Repeat of information

Tip #4 (Prepare)

Tip #5

Customize the process for your case

Mediation is not an event, it is a process

- Options
  - Structure
  - Participants
  - Timing
- Factors
  - Parties capacity
  - Complexity of legal issues & family dynamics
  - Skills/experience of attorneys & mediator

Tip #5 (Customize)

Tip #6

Understand and manage emotions, family secrets & difficult personalities

Common Emotional Themes & Personalities

- Hurt feelings, anger, protectiveness, resentment, perceptions of favoritism, powerlessness, betrayal, disrespect, inadequate acknowledgement, etc.
- Anti social personality tendencies

Tip #6 (Emotional Intelligence)

Lawyer's Role

- Includes advising and counseling
- Requires emotional intelligence skills and knowledge of neuroscience & psychology

Tip #6 (Emotional Intelligence)

Tip #7

Use mediators as a resource

Talk with mediator early

- Experts in negotiation & settlement
- Help you see options for collaboration and de-escalation
- Help broaden perspective
- Help strategize communications
- Help design process for your case

Tip #7 (Mediator = Resource)

Mediator communications privileged

- Uniform Mediation Act (UMA), at RCW 7.07, protects communications with mediator or potential mediator

Tip #7 (Mediator = Resource)

Work with your mediator

- Don't negotiate with your mediator
- Don't disclose positions prematurely, but, don't mislead
- Identify ranges of options, areas of give & take, and true lines in the sand

Tip #7 (Mediator = Resource)

Mediators like to help

- Think of us as settlement coaches
- We're here to help

Tip #7 (Mediator = Resource)

7 tips:

1. **Recognize all the fairness standards at play**
2. **Pay attention to interests, not just legal issues & positions**
3. **Prepare from day one with negotiation and mediation in mind**
4. **Prepare what mediator & opposing counsel *really* need**
5. **Customize the process for your case**
6. **Understand and manage emotions, family secrets and difficult personalities**
7. **Use mediators as a resource**

Hopefully Helpful Tips

Want you to succeed in this fascinating, challenging area of law

CHAPTER FIVE

CIVIL REMEDIES TO COMBAT THE FINANCIAL EXPLOITATION OF VULNERABLE ADULTS

April 2016

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CAROL S. VAUGHN is an attorney practicing with the elder law firm Thompson & Howle. She has a litigation practice (trial and appellate) focusing on trust, probate, guardianship and vulnerable adult protection cases. She is a graduate of Smith College (1983; magna cum laude) and Harvard Law School (1986). Ms. Vaughn was a legal aid attorney with Evergreen Legal Services and Northwest Justice Project before joining Thompson & Howle. In 2003, she was awarded a Wasserstein Public Interest Fellowship from Harvard Law School. She previously served on and chaired the WSBA Amicus Brief Committee. She is a frequent speaker on topics in her practice areas.

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I. INTRODUCTION

In 1981, the U.S. House of Representatives released the first of several reports on elder abuse.[1] The Select Committee on Aging recommended that states enact elderly protection laws.[2] As a result, the Washington Legislature enacted the Vulnerable Adult Protection Act (VAPA) in 1984, with legislative findings that:

> [T]here are a number of adults sixty years of age or older who lack the ability to perform or obtain those services necessary to maintain or establish their well-being. It is the intent of the Legislature to prevent or remedy the abuse, neglect, exploitation, or abandonment of persons sixty years of age or older who have a functional, mental, or physical inability to care for or protect themselves by providing these persons with the least-restrictive services such as home care and preventing or reducing inappropriate institutional care.[3]

Despite growing public awareness of financial exploitation, reports from medical, legal and public policy studies indicate that financial exploitation of vulnerable adults is prevalent, frequently undetected and/or unreported, and worsening.[4] For example, in November 2015, the *New England Journal of Medicine* reported:

> Recent studies suggest that financial exploitation is emerging as the most prevalent form of abuse; by the time cases are detected, the older adult's financial resources have often been drastically reduced – a fact that makes swift detection and intervention critical.[5]

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[1] Jill Skabronski, *Elder Abuse: Washington's Response to a Growing Epidemic*, 31 Gonzaga L. Rev. 627, 633 (1995) (citing H.R. Rep. No. 277, 97th Cong., 1st Sess. (1981)).

[2] *Id.*

[3] RCW 74.34.010 (1984). These findings were expanded in 1997, and then repealed in 1999 and replaced with RCW 74.34.005.

[4] See, e.g., Shelly Jackson and Thomas Hafemeister, *New Directions for Developing Theories of Elder Abuse Occurring in Domestic Settings*, NATIONAL INSTITUTE OF JUSTICE (June 2013); MetLife Mature Market Institute, National Committee for the Prevention of Elder Abuse, Center for Gerontology at Virginia Tech, *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders* (2011); Shelly Jackson and Thomas Hafemeister, *Financial Abuse of Elderly People vs. Other Forms of Elder Abuse: Assessing Their Dynamics, Risk Factors, and Society's Response,* NATIONAL INSTITUTE OF JUSTICE (August 2010) p. 443 ("Financial exploitation is distinguishable from other forms of maltreatment of elderly persons. It also plays out in a number of different scenarios, potentially making it more difficult to conceptualize, understand, predict, and remediate. In general, it is likely that it is underreported, underinvestigated, and poorly redressed."); S. Moore and J. Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505 (2004); C. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO LAW REVIEW 203 (2000).

[5] Mark L. Lachs, M.D., M.P.H. and Karl A. Pillemer, Ph.D., *Elder Abuse*, 373 THE NEW ENGLAND JOURNAL OF MEDICINE, 1947, 1951 (2015) (citing J.C. Peterson, D.P. Burnes, P.I. Caccamise, *et*

These materials discuss the following civil litigation remedies for addressing the financial exploitation of vulnerable adults: (1) protection orders under the Vulnerable Adult Protection Act, chapter 74.34 RCW; (2) civil causes of action for damages and other relief; and (3) disinheritance under the Slayer and Abuse Act, chapter 11.84 RCW.

II. PROTECTION ORDERS UNDER VAPA, RCW 74.34

The Vulnerable Adult Protection Act (VAPA), chapter 74.34 RCW, provides an expedited civil process for obtaining protection orders to prevent financial exploitation and other types of abuse of vulnerable adults.

A. Legislative History.

As first enacted in 1984, VAPA only required social workers, employees of the Department of Social and Health Services (DSHS), and health care practitioners ("mandated reporters") to file reports with DSHS if they had reasonable cause to believe that a vulnerable adult had suffered abuse, exploitation, abandonment or neglect.[6] Two years later, in 1986, the Washington Legislature amended VAPA to create an expedited judicial process for obtaining protection orders lasting up to one year to prevent and remedy the abuse, neglect and exploitation of older adults unable to care for themselves.[7]

Since 1986, the Legislature has amended VAPA often, reflecting the strong State interest in protecting vulnerable adults. In 1995, the Legislature expanded the definition of "vulnerable adult"[8] and created a cause of action for damages against long-term care facilities and home health, hospice, and home care agencies.[9] In 1997, the Legislature made it a gross misdemeanor for a mandated reporter to knowingly fail to report suspected abuse, neglect or exploitation to DSHS.[10] Amendments enacted in 1999 included a more detailed definition of "financial exploitation"[11] and made it a misdemeanor to "intentionally, maliciously, or in bad faith" make a false report of elder

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al. Financial exploitation of older adults: a population-based prevalence study, 29 J. GEN. INTERNAL MEDICINE, 1615-23 (2014)).

[6] RCW 74.34.030 (1984).

[7] RCW 74.34.110, .120, .130. .140, .150 (1986).

[8] RCW 74.34.020(8)(1995). When first enacted, VAPA defined a "vulnerable adult" as "a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself." RCW 74.34.020(8) (1984). In 1995, the protections of the statute were extended to any "frail elder or vulnerable adult" defined as "a person sixty years of age or older who has the functional, mental, or physical inability to care for himself [including] … persons found incapacitated under chapter 11.88 RCW, or a person who has a developmental disability under chapter 71A.10 RCW, and persons admitted to any long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128, or persons receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW."

[9] RCW 74.34.200 (1995).

[10] RCW 74.34.055(1997).

[11] RCW 74.34.020(6) (1999).

abuse.[12] In 2007, the Legislature required courts to waive the filing fee for commencing VAPA protection order actions,[13] extended the maximum duration of protection orders from one to five years,[14] articulated additional procedures for third party petitions,[15] temporary protection orders,[16] and modification or termination of protection orders,[17] and provided for the creation of standardized forms.[18] Effective January 1, 2012, the Legislature expanded the definition of financial exploitation to its current definition discussed below.[19] In 2014, the Legislature amended VAPA to authorize DSHS, effective April 1, 2016, to report findings of abuse, neglect and exploitation to agencies that provide care and services to vulnerable adults and governmental licensing authorities.[20] In 2015, the Legislature distinguished "personal exploitation" from "financial exploitation."[21]

B. Standing.

A petition for protection order pursuant to RCW 74.34.110 may be brought by:

- the vulnerable adult, RCW 74.34.110, .210; or
- the vulnerable adult's guardian or legal fiduciary, RCW 74.34.135, .210; or
- the Department of Social and Health Services, RCW 74.34.150, .210; or
- "any interested person as defined in RCW 74.34.020." RCW 74.34.110(1), .210.

  "Interested person" is defined as: "a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests." RCW 74.34.020(10). *In re Vulnerable Adult Petition for Knight*, 178 Wn. App. 929, 937 (2014) held that the trial court properly exercised its discretion in finding the son of a vulnerable adult was an "interested person."

[12] RCW 74.34.053 (1999).
[13] RCW 74.34.110(9) (2007).
[14] RCW 74.34.130(2007).
[15] RCW 74.34.135 (2007).
[16] RCW 74.34.120(5)(a)(b) (2007).
[17] RCW 74.34.163(2007).
[18] RCW 74.34.115(2007).
[19] RCW 74.34.020(7) (2011).
[20] RCW 74.34.068 (2014).
[21] RCW 74.34.020(2)(d) (2015).

C. Definitions.

1. Vulnerable Adult.

A "vulnerable adult" is broadly defined to include any person: (a) 60 years of age or older who has the functional, mental, or physical inability to care for himself or herself; (b) Found incapacitated under chapter 11.88 RCW; (c) Who has a developmental disability as defined under RCW 71A.10.020; (d) Admitted to any facility; (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; (f) Receiving services from an individual provider; or (g) Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW. RCW 74.34.020(21).

Endicott v. Saul, 142 Wn. App. 899, 176 P.3d 560 (2008) upheld the trial court's finding that an 80-year old woman with cognitive deficits was a vulnerable adult over the objections of the protected person.

2. Financial Exploitation.

"Financial exploitation" is defined as: "[T]he illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage." RCW 74.34.020(7). "Financial exploitation" includes, but is not limited to:

a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult; or

c) Obtaining or using a vulnerable adult's property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the vulnerable adult lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds. RCW 74.34.020(7).

Typically, financial exploitation cases involve the misuse of liquid assets, improper loans, and breach of fiduciary duty. Financial exploitation is not limited to situations where the respondent benefits from the misuse, however. For example, *Gradinaru v. Dep't of Soc. & Health Servs*., 181 Wn. App. 18, 325 P.3d 209 (2014) held that a caretaker's use of a vulnerable adult's morphine in a failed suicide attempt, even

though self-destructive, constituted financial exploitation because the caretaker's goals were advanced by gaining access to the resident's morphine, the caretaker did not have to spend her own money finding some other source of morphine, and the caretaker's use of the resident's morphine did not profit or advantage the resident. A person engaging in the unauthorized use of a vulnerable adult's property receives an advantage when that use benefits or facilitates the goals of the person using the property, whether or not that goal is wise or healthy.

D. The Petition and Supporting Declaration/Affidavit.

Pattern forms are available at *www.courts.wa.gov. See* RCW 74.34.115. The VAPA petition must allege:

- that the petitioner is a "vulnerable adult" as defined by the statute; and
- that the vulnerable adult has been abandoned, abused, financially exploited, or neglected, or is threatened with abandonment, abuse, financial exploitation, or neglect.

RCW 74.34.110(2).

In addition, the petition must be accompanied by one or more affidavits (or declarations) "stating the specific facts and circumstances which demonstrate the need for the relief sought." RCW 74.34.110(3). If the petitioner is filing as an "interested person," the affidavit or declaration must also include a statement of why the petitioner qualifies as an interested person." *Id.*

The supporting declaration(s) should identify through personal knowledge the facts satisfying the standard for issuance and/or lay the evidentiary foundation for the court to consider documentary evidence such as medical records and bank records.

Consult applicable local rules. For example, King County Local Rules require that any petition seeking a Vulnerable Adult Protection Order shall be filed as a civil matter separate from any guardianship matter. If there is an existing guardianship case or one is filed after the VAPA petition, a copy of the protection order may be filed in the guardianship cause. LCR 98.20.

E. Temporary Protection Orders.

A petitioner may move for a temporary protection order without written notice to the respondent and vulnerable adult if it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage would result to the vulnerable adult before the respondent and vulnerable adult can be served and heard, or that show the respondent and vulnerable adult cannot be served with notice, the efforts made to serve them, and the reasons why prior notice should not be required. RCW 74.34.120(5).

Temporary emergency orders entered without notice must be limited to 14 days pursuant to CR 65(b). Extensions for service of process or other good cause are authorized by RCW 74.34.120 and CR 65(b).

F. Notice and Service Requirements.

The superior court must order a hearing on the petition not later than 14 days from the date that the petition is filed. RCW 74.34.120(1). The respondent must be personally served at least six days prior to the hearing, but the hearing date can be continued if necessary to serve the respondent. RCW 74.34.120(2), (4). When a petition is filed by someone other than the vulnerable adult, notice of the petition and hearing must be personally served upon the vulnerable adult not less than six court days before the hearing, and the hearing can be continued if necessary to serve the vulnerable adult. RCW 74.34.120(3), (4). In addition to copies of all pleadings filed by the petitioner, the petitioner shall provide a written notice to the vulnerable adult using the standard notice form developed by the Legislature. RCW 74.34.120(3).

G. Filing Fee and Bond.

No filing fee may be charged. RCW 74.34.110(9). A bond cannot be required for entry of the protection order at the return hearing, RCW 74.34.110(7), but may be required as security to enter a temporary protection order if advance notice is not provided to the restrained party.

RCW 74.34.120(5) provides that a temporary order of protection may be sought under RCW 7.40. RCW 7.40.080 requires an injunction bond except where a "person's health or life would be jeopardized."

H. Hearing Procedures.

1. Rules of Evidence.

Under Evidence Rule 1101(c)(4), affidavits, declarations and other hearsay evidence are admissible in protection order proceedings.[22] However, the rules of evidence apply to related proceedings under chapter 74.34 RCW that seek money damages or remedies other than a protection order. For example, *Morrissey Warner v. Regent Assisted Living*, 132 Wn. App. 126, 130 P.3d 865 (2006), applied the rules of evidence to exclude testimony from a vulnerable adult offered in support of a damages claim under RCW 74.34.200. The Court of Appeals ruled that statements made by the vulnerable adult while crying two hours after the alleged assault did not fall within the excited utterance exception to the hearsay rule. The Court of Appeals discussed the balance between the need to protect vulnerable elders with the need to assure that hearsay statements are reliable and trustworthy. Notably, mental incapacity of the

[22] *See also* Karl B. Tegland, *Washington Practice Courtroom Handbook on Evidence* (2015-2016) p. 493 (citing *Gourley v. Gourley,* 158 Wn.2d 460, 145 P.3d 1185 (2006)).

declarant was held not to automatically render hearsay statements inadmissible, but, there must be surrounding circumstances to make the statements trustworthy. *Id.*

2. Burden of Proof.

The Act does not specify the burden of proof. Where the vulnerable adult petitions for a protection order, or a third party petitions with the consent of the vulnerable adult, the burden of proof for VAPA claims is preponderance of the evidence. *In re Vulnerable Adult Petition for Knight*, 178 Wn. App. 929, 317 P.3d 1068 (2014). However, as discussed in more detail below, when a third party petitions for protection of a vulnerable adult in opposition to the vulnerable adult's wishes, the Court of Appeals has determined that the burden of proof is clear, cogent and convincing evidence. *Id.*

3. Guardians ad Litem.

Courts may appoint a guardian ad litem to investigate and to make a report to the court with regard to whether a third party petition for vulnerable adult protection order should be granted. RCW 74.34 does not expressly authorize the appointment of a GAL. However, under RCW 74.34.135, the Court has the authority to order interim relief that it deems necessary for the protection of the vulnerable adult. If a guardian ad litem is appointed in a VAPA case, the order should state that the basis for the court's authority to appoint the GAL is RCW 74.34.135 and the Court's plenary powers. The basis for appointment should not be RCW 4.08.060, which requires a finding of incapacity. In cases where a VAPA petition or claim is combined with an action commenced under the Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A.060 may also be a basis for the Court's authority. In cases where a parallel guardianship action has been filed, the Court may authorize the guardian ad litem to investigate the need for the VAPA protection order pursuant to RCW 11.88.090(9).

I. Third Party Petitions.

Protection order petitions may be brought by "interested persons" on behalf of vulnerable adults. *See* RCW 74.34.210 (authorizing petitions by vulnerable adults, guardians, legal fiduciaries, DSHS, and "interested parties" as defined by RCW 74.34.020). Most often, third party petitioners are the vulnerable adult's guardian or attorney-in-fact; however, any person meeting the definition of "interested party" may file a petition for protection of a vulnerable adult. To establish "interested party" status absent a fiduciary relationship, the petitioner must show that "the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests." *Id.*

In all cases, the vulnerable adult is entitled to personal service. Even if the petition is brought by the vulnerable adult's guardian, the vulnerable adult must be personally served with the hearing notice, the petition and supporting affidavits/declarations at least six days prior to the hearing. See RCW 74.34.120(3). The mandatory forms include a notice to the vulnerable adult.

Even though every vulnerable adult is entitled to notice of a third party petition under RCW 74.34, a vulnerable adult's right to object to entry of a protection order does not extend to petitions brought by the full guardian of the person or estate of the vulnerable adult. *See* RCW 74.34.135(1) (2) ("A hearing under this subsection is not necessary if the vulnerable adult has been determined to be fully incapacitated over either the person or the estate, or both, under the guardianship laws, chapter 11.88 RCW.")

If the vulnerable adult opposes entry of the protection order sought by a third party other than the vulnerable adult's full guardian, then the procedures set forth in RCW 74.34.135 govern, which permit the entry of protection orders over the objection of vulnerable adults if certain procedural protections are followed. Notably, when a third party petitions for a protection order on behalf of a vulnerable adult, who opposes entry of the protection order, the burden of proof is clear, cogent and convincing evidence. *In re Vulnerable Adult Petition for Knight*, 178 Wn. App. 929, 317 P.3d 1068 (2014).

When a vulnerable adult objects to entry of a protection order, the court may:

- dismiss the petition or the provisions that the vulnerable adult objects to and any protection order issued under RCW 74.34.120 or 74.34.130;

- or the court may take additional testimony or evidence;

- or order additional evidentiary hearings to determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order.

If an additional evidentiary hearing is ordered and the court determines that there is reason to believe that there is a genuine issue about whether the vulnerable adult is unable to protect his or her person or estate in connection with the issues raised in the petition or order, the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing. RCW 74.34.135)(1).

An evidentiary hearing on the issue of whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order, shall be held within fourteen days of entry of the temporary order for protection. RCW 74.34.135(2). At the hearing, the court shall give the vulnerable adult, the respondent, the petitioner, and in the court's discretion other interested persons, the opportunity to testify and submit relevant evidence. RCW 74.34.135(3).

If the court determines that the vulnerable adult is capable of protecting his or her person or estate in connection with the issues raised in the petition, and the individual continues to object to the protection order, the court shall dismiss the order or may modify the order if agreed to by the vulnerable adult. If the court determines that the

vulnerable adult is not capable of protecting his or her person or estate in connection with the issues raised in the petition or order, and that the individual continues to need protection, the court shall order relief consistent with RCW 74.34.130 as it deems necessary for the protection of the vulnerable adult. RCW 74.34.135(4).

For a case example where a protection order was entered over the objection of the alleged vulnerable adult, see *Endicott v. Saul,* 142 Wn. App. 899, 176 P.3d 560 (2008), where the vulnerable adult's adult children filed a petition for protection order and limited guardianship, the trial court granted the relief requested, and the court of appeals upheld the trial court's decision. Endicott also illustrates how VAPA Petitions can be combined with other claims and actions, which is discussed in more detail below.

J. Remedies.

In ruling on a VAPA petition, the court may order relief *as it deems necessary* for the protection of the vulnerable adult, *including, but not limited to*:

> (1) Restraining respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult;
>
> (2) Excluding the respondent from the vulnerable adult's residence for a specified period or until further order of the court;
>
> (3) Prohibiting contact with the vulnerable adult by respondent for a specified period or until further order of the court;
>
> (4) Prohibiting the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;
>
> (5) Requiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources;
>
> (6) Restraining the transfer of the respondent's and/or vulnerable adult's property for a specified period not exceeding 90 days; and
>
> (7) Requiring the respondent to pay a filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee. RCW 74.34.130.

Restrictions on the transfer of property are limited to 90 days' duration. During this 90-day window, additional claims may be pled or actions filed for the return of property or to quiet title to real estate if the respondent refuses to return the property. Any other final relief granted by an order for protection, other than a judgment for costs, shall be for a fixed period not to exceed five years. *Id.*

The relief identified in RCW 74.34.130 is in addition to other civil or criminal remedies. *See* RCW 74.34.160. In cases where the financial exploitation is clearly documented by objective financial records, it may be possible to obtain an order at the RCW 74.34 hearing requiring the return of the funds and a judgment for the misappropriated amount, but the more common course would be to obtain a protection order that requires an accounting and restrains all property transfers for 90 days, during which time a civil lawsuit would be filed for the return of assets, and a preliminary injunction would be entered to remain in effect pending trial.

K. Attorneys' Fees.

Courts may order "the respondent to pay a filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee." RCW 74.34.130(7). VAPA does not authorize the award of attorneys' fees or costs against petitioners, and immunizes persons who make good faith reports and who testify in judicial or administrative proceedings from liability resulting from the report or testimony. RCW 74.34.050(1).

L. Enforcement.

Vulnerable adult protection orders are entered into the Law Enforcement Information System (LEIS) like domestic violence protection orders issued under chapter 26.50 RCW. Advocates must fill out a LEIS sheet (available on line), which includes identifying information about the vulnerable adult and the respondent. The vulnerable adult's information can be kept confidential. Persons who violate vulnerable adult protection orders are subject to arrest, prosecution and incarceration. RCW 74.34.145.

M. Summary.

In summary, the sequence of filings under RCW 74.34 is typically:

1) File Petition and Supporting Declarations.
2) Obtain Temporary Protection Order (usually at the same time as filing).
3) File LEIS to record Temporary Protection Order in law enforcement system.
4) Serve Respondent and Vulnerable Adult (if Petition is filed by third party) with Petition, Supporting Declarations, Temporary Order, and Hearing Notice for return hearing.
5) Return Hearing to obtain 5-year Permanent Protection Order.
6) File LEIS to record Permanent Protection Order in law enforcement system.
7) Record any judgment for attorneys' fees.
8) Within 90-day window, file civil action and obtain preliminary injunction to maintain status quo pending trial.

III. CIVIL ACTIONS FOR DAMAGES AND RETURN OF PROPERTY

Persons who financially exploit vulnerable adults may be the subject of additional claims and lawsuits for damages, declaratory and injunctive relief, and quiet title, for the purpose of making the victim whole and recovering real property and other assets. In most cases, it is not possible to obtain the return of funds or real property in the VAPA protection order proceeding. However, if the protection order is contested and the hearing on the permanent order delayed, it may be possible to amend or consolidate the VAPA petition with other civil claims and have them heard together. Otherwise, claims for the recovery of assets and real property can be filed and heard after the VAPA protection order is issued. The pattern form permanent order prohibits respondents from transferring their property or the vulnerable adult's property for a period of 90 days, which affords victims an opportunity to file claims for the recovery of assets without further loss before the recovery action can be filed and additional injunctive relief sought.

A. Causes of Action.

The following is a non-exclusive list of common causes of action for remedying the financial exploitation of vulnerable adults.

1. Abuse or Neglect of a Vulnerable Adult.

As discussed above, the VAPA authorizes courts to issue protection orders to prevent the abuse, exploitation, or neglect of vulnerable adults. In addition to authorizing the issuance of protection orders, RCW 74.34.200 creates a cause of action for damages for the abuse, neglect, or financial exploitation by a health care facility or a home care provider.

2. Breach of Fiduciary Duty to Account.

"Inherent in the fiduciary relationship between principal and attorney-in-fact is the duty to account for the assets managed by the attorney-in-fact." *Estates of Palmer*, 145 Wn. App. 249, 264 (2008). An attorney-in-fact has a statutory duty to produce the incapacitated person's "accounts or report the attorney-in-fact's acts" within 60 days after a written request is submitted by the guardian. *See* RCW 11.94.090(1)(b). Chapter 11.94 RCW creates a cause of action against former attorneys-in-fact for failure to account. In addition to the statutory cause of action, the common law authorizes actions against former fiduciaries for failure to account. In addition, RCW 74.34.130(5) also authorizes courts to enter protection orders "[r]equiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources."

The measure of damages imposed against a fiduciary who breaches his or her duty to provide an accounting is the value of the unaccounted for assets or property. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 164, 855 P.2d 680 (1993).

3. Breach of Fiduciary Duty of Loyalty.

Fiduciaries owe "the highest degree of good faith, care, loyalty and integrity" to the persons who are subject to their trust. *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977) (quoting *Monroe v. Winn*, 16 Wn.2d 497, 133 P.2d 952 (1943). A fiduciary's obligation to comply with his duties is absolute. Good faith is irrelevant when a trustee or attorney-in-fact breaches a fiduciary duty. RESTATEMENT (SECOND) OF TRUSTS § 201, comment B (1959); Bogert, TRUSTS AND TRUSTEES, § 543, at 217 18 (2d Rev. Ed. 1993). To recover for breach of fiduciary duty, the plaintiff must prove: (1) the existence of a duty owed; (2) breach of that duty; (3) resulting injury; and (4) that the breach proximately caused the injury. *Micro Enhancement International, Inc. v. Coopers & Lybrand, LLP*, 110 Wash. App. 412, 433-34, 40 P.3d 1206 (2002).

The proper measure of damages for breach of fiduciary duty is the amount necessary to place the estate, trust or principal, in the same position it would be in if the agent had never breached its fiduciary duties. *Gillespie, supra* at 173, citing *Allard v. First Interstate Bank of Wash.*, N.A., 112 Wn. 2d 145, 152, 768 P.2d 998, 773 P.2d 420 (1989) (*Allard II*); *Baker Boyer Nat'l Bank v. Garver*, 43 Wn. App. 673, 686, 719 P.2d 583.

4. Undue Influence.

Undue influence is a claim that can be asserted for the recovery of uncompensated transfers that might otherwise appear consensual by the vulnerable adult to a third party.

Generally, the party claiming that a gift has occurred must prove the elements of a completed gift by clear, cogent and convincing evidence. *See Estate of Lennon v. Lennon*, 108 Wn. App. 167, 29 P.3d 1258, 1266 (2001). The elements of a completed gift are: (1) an intention of the donor to make the gift at the time it occurred; (2) a subject matter capable of passing by delivery; (3) a delivery as perfect as the nature of the property and the circumstances and surroundings will reasonably permit; and 4) acceptance by the donee. *Sinclair v. Fleischman*, 54 Wn. App. 204, 773 P.2d 101, 103 (1989); *Buckerfield's Ltd. v. B.C. Goose & Duck Farm Ltd*., 9 Wn. App. 220, 511 P.2d 1360, 1363 (1973).

In addition, if the recipient of the gift or transfer has a confidential or fiduciary relationship with the donor, the burden shifts to the recipient to prove that a gift was intended and that it was not the product of undue influence. *Id.; Lewis v. Estate of Lewis*, 45 Wn. App. 387, 388-389, 725 P.2d 644 (1986); *White v. White*, 33 Wn. App. 364, 371, 655 P.2d 1173 (1982).

A confidential or fiduciary relationship sufficient to support a presumption of undue influence does not require a traditional fiduciary relationship, such as attorney-in-fact/principal; it may exist where one person has gained the other's confidence and purports to act or advise with the other's interest in mind. *Endicott v. Saul*, 142 Wn. App.

899, 923 (2008); *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970). Such a recipient must prove donative intent and the absence of undue influence by clear, cogent, and convincing evidence. *Endicott v. Saul*, 142 Wn. App. 899, 922, 176 P.3d 560 (2008); *Pedersen v. Bibioff*, 64 Wn. App. 710, 718-720, 828 P.2d 1113 (1992).

5. Conversion.

Conversion is the intentional interference with property of another, either by taking or unlawfully retaining it, thereby depriving the rightful owner of possession." *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 721-22, 197 P.3d 686 (2008); *Lang v. Hougan*, 136 Wn. App. 708, 718, 150 P.3d 622 (2007)). "Money may be the subject of conversion if the defendant wrongfully received it." *Id.; Westview Invs., Ltd. v. U.S. Bank Nat'l Ass'n*, 133 Wn. App. 835, 852, 138 P.2d 638 (2006).

The remedy for conversion is to receive the full value of the property converted. *Butko v. Stewart Title Co.*, 99 Wn. App. 697 (2000).

6. RCW 11.92.185 – Citation for Return of Property.

RCW 11.92.185 empowers the superior court to order the return of an incapacitated person's property even without the commencement of a separate civil action as follows:

> The court shall have authority to bring before it, in the manner prescribed by RCW 11.48.070, any person or persons suspected of having in his or her possession or having concealed, embezzled, conveyed or disposed of any of the property of the estate of incapacitated persons subject to administration under this title.

RCW 11.48.070 provides in pertinent part:

> If such person be not in the county in which the letters were granted, he or she may be cited and examined either before the court of the county where found or before the court issuing the order of citation, and if he or she be found innocent of the charges he or she shall be entitled to recover costs of the estate, which costs shall be fees and mileage of witnesses, statutory attorney's fees, and such per diem and mileage for the person so charged as allowed to witnesses in civil proceedings. Such party may be brought before the court by means of citation such as the court may choose to issue, and if he or she refuses to answer such interrogatories as may be put to him or her touching such matters, the court may commit him or her to the county jail, there to remain until he or she shall be willing to make such answers.

7. Unjust Enrichment.

Three elements must be established in order to sustain a claim based on unjust enrichment: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; (3) and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. *Bailie Communications v. Trend Business Systems*, 61 Wn. App. 151, 810 P.2d 12 (1991). A fiduciary is unjustly enriched if he or she profits from the handling of the ward's property, because such profit violates the duty of loyalty. *See In re Estate of Montgomery,* 140 Wash. 51, 53, 248 P.2d 64 (1926) (involving guardians); *In re Estate of Johnson,* 187 Wash. 552, 554, 60 P.2d 271 (1936) (involving trustees).

The remedy for unjust enrichment is measured by the benefit to the fiduciary rather than the damage to the beneficiary. *See* Dobbs, LAW OF REMEDIES, § 4.1 (West, 1993).

B. Standing.

Civil actions may be commenced by the vulnerable adult, the vulnerable adult's guardian, the vulnerable adult's attorney-in-fact, or the personal representative of the vulnerable adult's estate. If the vulnerable adult is incapacitated, then he or she must appear in the litigation through a guardian or litigation guardian ad litem. *See* RCW 4.08.060.

Guardians must obtain court approval in order to pursue litigation on behalf of incapacitated persons. RCW 11.92.060(1) states in pertinent part: "A guardian or limited guardian of the estate shall report to the court any action commenced against the incapacitated person and shall secure court approval prior to initiating any legal action in the name of the incapacitated person." Obtaining court approval under RCW 11.92.060(1) can become a contested proceeding, if the putative defendant is entitled to notice as an interested party.

C. Statutes of Limitation and Timing Issues.

The passage of time complicates the investigation and filing of civil claims. Financial institutions frequently destroy records after seven (7) years. In addition to the practical difficult of obtaining evidence, claims can be time-barred if legal action is not commenced within the relevant statute of limitations.

Commonly applicable statutes of limitation are as follows:

- Recovery of real property: 10 years
- Enforcement of written contract: 6 years
- Conversion: 3 years
- Breach of fiduciary duty: 3 years

- Enforcement of oral contract: 3 year
- Assault: 2 years

For claims premised on fraud, the cause of action is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. RCW 4.16.150. More generally, under the discovery rule, a cause of action accrues when the plaintiff discovers or, in the reasonable exercise of diligence, should have discovered the salient facts underlying the elements of the cause of action.

D. Application of TEDRA.

A threshold question is whether or not to plead the claims under TEDRA. Frequently, TEDRA can be applied to civil actions brought to remedy the financial exploitation of vulnerable adults, and it is the preference of this author to file the claims under TEDRA when possible.

TEDRA applies to:

- "[D]isputes arising in connection with estates of incapacitated persons[.]" RCW 11.96A.080(2).

- Claims for breach of fiduciary duty against the trustee of an express trust. RCW 11.96A.070.

- Claims for breach of fiduciary duty against an attorney-in-fact. RCW 11.94.130.

- Claims initiated by personal representatives for the return of property or damages against a former personal representative or former attorney-in-fact.

In some instances, TEDRA dictates procedures that differ from the Civil Rules of Procedure, in which case TEDRA prevails over inconsistent civil rules. *See* RCW 11.96A.090(4) ("The procedural rules of court apply to judicial proceedings under this title only to the extent that they are consistent with this title, unless otherwise provided by statute or ordered by the court under RCW 11.96A.020 or 11.96A.050, or other applicable rules of court."). For example, personal jurisdiction is acquired by service of a summons complying with the requirements of RCW 11.96A.100(3), not the content requirements of CR 4, and the deadline for filing an answer is five court days prior to the hearing, rather than 20 days after service. *Cf.* RCW 11.96A.100(5); CR 4. Another example: TEDRA provides that "[t]estimony of witnesses may be by affidavit … [and] [u]nless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law[.]" RCW 11.96A.100(7), (8).

In other instances, TEDRA expressly incorporates the civil rules of procedure. *See, e.g.,* RCW 11.96A.115(1) (After the filing of a judicial proceeding under RCW

11.96A.100, “discovery shall be conducted in accordance with the superior court civil rules and applicable local rules.”).

In some instances, the civil rules of procedure govern implicitly because TEDRA is silent. *In re Estate of Kordon,* 157 Wn.2d at 213 (quoting CR 1 ("These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in Rule 81.") and CR 81(a) ("Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings.")).

E. Contents of the Complaint/Petition and Framing the Relief Requested.

1. Notice Pleading.

Washington allows for “notice pleading,” meaning that the content requirements for a petition/complaint are minimal. Except for certain types of claims discussed below, the petition/complaint must contain a short plain statement of the claim showing that the plaintiff (or petitioner under TEDRA) is entitled to relief and a demand for judgment for the relief. Civil Rule 8(a). Certain claims, including fraud, must be plead “with particularity[.]” Civil Rule 9(b).

2. Purposes of the Petition.

The first and primary purpose of the petition/complaint is to commence the litigation. Although the civil rules allow for simple notice pleading, there are good reasons to put more specificity into the petition/complaint if possible; e.g., to tell their client’s story, explain why the lawsuit was filed, persuade the judge, avoid the possibility of a motion to dismiss, enhance the usefulness of the answer, frame discovery, and/or lay a groundwork for settlement.

3. Framing the Relief.

The prayer or request for relief is an essential part of the petition/complaint. In preparing the petition/complaint, relief in the alternative or of several different types may be demanded. Civil Rule 8(a). Each type of relief requested should be listed in the petition/complaint. Common types of relief that are pled in cases for breach of fiduciary duty and financial exploitation include:

- Injunctive relief; e.g. an order prohibiting the defendant from having any future access to the incapacitated person’s assets, or requiring the defendant to affirmatively account for his or her actions while serving as fiduciary. *See* RCW 7.40.

- Declaratory relief; e.g., an order declaring that the defendant engaged in certain misconduct or violated certain duties or laws. *See* RCW 7.24.

- Return of personal property; replevin. *See* RCW 7.64.

- Quiet title to real property. *See* RCW 7.28.

- Other equitable relief such as constructive trust or equitable lien.

- Damages; e.g., a money judgment for the loss sustained by the incapacitated person as a result of the misconduct. *See supra.*

- Attorney fees and costs pursuant to RCW 11.96A.150 or equitable principals.

F. Damages.

1. Common Law.

In general, courts follow the "make whole" approach to awarding damages against former fiduciaries. The proper measure of damages for breach of fiduciary duty is the amount necessary to place the estate, trust or principal, in the same position it would be in if the agent had never breached its fiduciary duties. *Gillespie v. Seattle-First Nat. Bank,* 70 Wn. App. 150, 173 (1993). In *Gillespie, supra* at 173, the court affirmed that the proper measure of damages for breach of trust was the amount necessary to "make-whole" the trust:

> Because claims for breach of trust are equitable, the trial court may grant whatever relief it deems is warranted, and place the trust in the same position as if the Bank [trustee] had never breached its fiduciary duties. Thus, we find the trial court's "make whole" remedy an appropriate measure of damages in this case.

In *Gillespie*, the Court of Appeals affirmed an award of $945,706 in damages and $75,000 in attorney fees for breach of fiduciary duty, and increased the damages awarded by an additional $175,617 for operating losses on cross appeal. *See also Hubbell v. Ward*, 40 Wn. 2d 779, 787, 246 P.2d 468 (1952); *Allard v. First Interstate Bank of Wash., N.A.*, 112 Wn. 2d 145, 152, 768 P.2d 998, 773 P.2d 420 (1989) (Allard II); *Baker Boyer Nat'l Bank v. Garver*, 43 Wn. App. 673, 686, 719 P.2d 583 (finding make-whole remedy appropriate where trustee mismanages an account by failing to diversify investments), review denied, 106 Wn. 2d 1017 (1986).

2. TEDRA.

RCW 11.96A.060 authorizes courts to "make, issue, and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by this title."

3. VAPA.

In addition to the statutory and common law authority discussed above, the Vulnerable Adult Protection Act (RCW 74.34) also authorizes the award of damages for "injuries, pain and suffering, and loss of property" resulting from abandonment, abuse, financial exploitation or neglect by a health care facility or individual care provider. RCW 74.34.200 provides:

> (1) In addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby. This action shall be available where the defendant is or was a corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW, as now or subsequently designated, or an individual provider.

G. Attorneys' Fees.

If the plaintiff prevails at trial on the breach of fiduciary duty/financial exploitation claims, the defendant will often be ordered to pay the guardian's attorney fees pursuant to RCW 11.96A.150, RCW 11.94.120, and/or RCW 74.34.130(7). A judgment for attorney fees accrues interest at 12%.

IV. DISINHERITANCE UNDER THE SLAYER AND ABUSER ACT, RCW 11.84

In 2009, Washington's legislature amended what was formerly known as the Slayer Statute, chapter 11.84 RCW, and related statutes, to authorize courts to prohibit individuals found to have financially exploited vulnerable adults from inheriting from their victims. A handful of other states had similar laws.[23] Effective July 26, 2009, RCW 11.84.020 provides: "No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following."

[23] The other states that have enacted legislation authorizing the disinheritance of individuals who financially exploit vulnerable adults are Oregon (2006), Arizona (1996), Illinois (2004), and California (1998). See Ore. Rev. Code §112.457, Cal. Prob. Code 259, Ill. Comp. Stat. 5/2-6.6 and Ariz. Rev. Code 46-456. In addition, Maryland's criminal code includes a provision for mandatory disinheritance of individuals who are convicted of financial crimes against vulnerable adults. MD Code Ann. Crim. Law §8-801(c) (2009).

A. Standing Requirements.

Petitions for disinheritance filed under RCW 11.84 are "matters" under TEDRA. *See* RCW 11.96A.030(2)(e). Any person defined as a "party" may file a petition for a judicial proceeding under TEDRA. RCW 11.96A.080. RCW 11.96A.030(5) defines parties under TEDRA as each of the following persons who has an interest in the subject of the particular proceeding:

> (a) The trustor if living;
>
> (b) The trustee;
>
> (c) The personal representative;
>
> (d) An heir;
>
> (e) A beneficiary, including devisees, legatees, and trust beneficiaries;
>
> (f) The surviving spouse or surviving domestic partner of a decedent with respect to his or her interest in the decedent's property;
>
> (g) A guardian ad litem;
>
> (h) A creditor;
>
> (i) Any other person who has an interest in the subject of the particular proceeding;
>
> (j) The attorney general if required under RCW 11.110.120;
>
> (k) Any duly appointed and acting legal representative of a party such as a guardian, special representative, or attorney-in-fact;
>
> (l) Where applicable, the virtual representative of any person described in this subsection the giving of notice to whom would meet notice requirements as provided in RCW 11.96A.120;
>
> (m) Any notice agent, resident agent, or a qualified person, as those terms are defined in chapter 11.42 RCW; and
>
> (n) The owner or the personal representative of the estate of the deceased owner of the nonprobate asset that is the subject of the particular proceeding, if the subject of the particular proceeding relates to the beneficiary's liability to a decedent's estate or creditors under RCW 11.18.200.

Notably, it is not enough to fall into one of the above-listed categories to have standing under TEDRA. The petitioner must also have a pecuniary stake in the outcome of the case. *Estate of Bernard*, 182 Wn. App. 692, 723-4 (2014), held that party standing under RCW 11.96A.030 was not satisfied merely because the person fell within one of the categories listed in RCW 11.96A.030. A present interest in the subject matter of the judicial proceeding was also required for standing. Therefore, remainder

beneficiaries of a revocable living trust lacked standing in a TEDRA action relating to the trust because they had no "legally cognizable" interest prior to the death of the trustor. In *Estate of Haviland,* 177 Wn.2d 68, 255 P.3d 854 (2011), the disinheritance petition was filed by the Personal Representative and the Decedent's heirs filed a joinder and participated as parties in the litigation.

B. Definitions.

1. Decedent.

The Slayer and Abuser Act defines "decedent" to include "[a]ny deceased person who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser." RCW 11.84.010(2).

2. Abuser.

"Abuser" is defined as "any person who participates, either as a principal or accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult." RCW 11.84.010(1).

3. Financial Exploitation.

To define "financial exploitation" and "vulnerable adult," the 2009 amendments to RCW 11.84 incorporated the definitions from the Vulnerable Adult Protection Act (RCW 74.34). *See* RCW 11.84.010(3)(6).

4. Willful.

The definition of "abuser" incorporates the requirement that the conduct be deemed "willful." *See supra.* Two reported decisions discuss the definition of "willful" in the context of chapter 11.84 RCW.

In re Estate of Kissinger, 166 Wn.2d 120, 206 P.3d 665 (2009) was decided before the abuser amendments were added to chapter 11.84 RCW. *Kissinger* disinherited a son who killed his mother even though he was found not guilty by reason of insanity for the murder of his mother, because a finding of not guilty by reason of insanity did not make an unlawful homicide lawful. The son's actions were willful and unlawful when he killed his mother, even though he could not stand trial due to his mental incapacity. The Supreme Court held that the term "willful" under the slayer statute is to be given its "ordinary, everyday meaning and what it was understood to have meant at common law." *Id.* at 131. In the context of the Slayer Statute, willful means "intentionally and designedly.

In *Parrott-Horjes v. Rice*, 168 Wn. App. 438, 276 P.3d 376 (2012), the personal representative of the estate of a woman who was killed by her domestic partner sought a determination that the slayer statute prevented the domestic partner from receiving

money as the beneficiary of the decedent's federal employee life insurance policy. The personal representative also argued for a constructive trust on the life insurance proceeds for the benefit of the decedent's children. The Court of Appeals upheld the trial court rulings that dismissed the constructive trust claim on summary judgment and denied the petition to disinherit. Although the defendant committed battery against the decedent and such battery was the proximate cause of the decedent's death, the defendant had acted in self-defense and did not intentionally or recklessly cause the decedent's death. The finding of self-defense negated the unlawfulness of the killing under the slayer statute.

C. The RCW 11.84 Petition.

Chapter 11.84 RCW does not specify the contents of the disinheritance petition; therefore, the general pleading requirements of RCW 11.96A and Civil Rule 8 should be followed. The RCW 11.84 Petition should state a basis for venue, identify the parties, allege facts sufficient to establish standing and state a claim for disinheritance, and specifically identify the relief requested.

D. Burden of Proof.

In determining whether a person is an abuser, the court must find by clear, cogent, and convincing evidence that: "[t]he decedent was a vulnerable adult at the time the alleged financial exploitation took place"; and "[t]he conduct constituting financial exploitation was willful action or willful inaction causing injury to the property of the vulnerable adult." RCW 11.84.160. "Any record of conviction … for conduct constituting financial exploitation against the decedent … shall be admissible in evidence against a claimant of property in any civil proceeding arising under this chapter [RCW 11.84]." RCW 11.84.130. To meet the clear and convincing standard, the evidence must establish that the fact in issue is "highly probable." Notably, "[a] finding of abuse by the department of social and health services is not admissible for any purpose in any claim or proceeding under [RCW 11.84]." RCW 11.84.160(2).

E. Procedures.

A judicial proceeding under TEDRA must be commenced as a new action, and cannot be filed under the probate cause number; however, the TEDRA action and the probate can be consolidated after the action is commenced. *See* RCW 11.96A.090. The court's jurisdiction over the abuser is obtained by service of a summons that conforms to the requirements of RCW 11.96A.100. Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law. RCW 11.96A.100(8). In most cases, the RCW 11.84 Petition will require an evidentiary hearing or trial due to disputed issues of fact.

F. Remedies.

When an individual is adjudicated to be an abuser, the court is authorized to prevent the abuser from receiving assets that would otherwise be distributed to the abuser due to the vulnerable adult's death. Unlike slayers, abusers are not automatically disinherited. An abuser may still receive benefits from their victim, if the court finds there was clear, cogent, and convincing evidence that the decedent knew of the financial exploitation and "subsequently ratified his or her intent to transfer the property interest or benefit to that person." RCW 11.84.170(1). Courts also have discretion to "allow an abuser to acquire or receive an interest in property or any other benefit described in this chapter in any manner the court deems equitable." RCW 11.84.170(2). To determine what is equitable, courts may consider among other things the decedent's dispositive scheme, the decedent's likely intent, and the "degree of harm resulting from the abuser's financial exploitation of the decedent." *Id.*

In re Estate of Evans, 181 Wn. App. 436, 326 P.3d 755 (2014) discussed application of the disinheritance remedy. The testator's fourth child was deemed to have predeceased the testator under RCW 11.84 on the basis that he "abused" the testator by financial exploitation. The plaintiff other children subsequently petitioned to prevent application of the anti-lapse statute in favor of the Abuser's four children. The appellate court held that the anti-lapse statute can apply when a beneficiary under a will is deemed to have predeceased the testator due to financial abuse of the testator and the language of the testator's will did not show an intent to preclude application of the anti-lapse statute.

G. Attorneys' Fees.

Attorneys' fees may be awarded pursuant to RCW 11.96A.150(1), which provides:

> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

In *Estate of Evans,* discussed *supra,* the court of appeals held that the trial court did not abuse its discretion by awarding attorney fees to both competing beneficiary

groups and assessing those fees against the estate under RCW 11.96A.150(1) because the statute allows a court to consider any relevant factor and does not limit fee awards only to a prevailing party; rather, it states that a court may award fees to "any party" from the "assets of the estate."

V. PROTECTING ASSETS PENDING TRIAL

A. Freeze Funds.

RCW 30.22.210 gives a financial institution authority to freeze funds ("withhold payment") if it has been notified in writing that there is a dispute about the ownership of the funds. In 2010, RCW 30.22.210 was amended to add protections for vulnerable adults: "If a financial institution reasonably believes that financial exploitation of a vulnerable adult, as defined in RCW 74.34.020, may have occurred, may have been attempted, or is being attempted, the financial institution may refuse a transaction as permitted under RCW 74.34.215." RCW 30.22.210(2).

B. TROs and Injunctions.

Where there is a risk of irreparable harm prior to trial, the petitioner should seek a TRO or preliminary injunction freezing disputed assets pending trial pursuant to CR 65, chapter 7.40 RCW, chapter 74.34 RCW, and RCW 11.96A.060. A pretrial injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury. *Tyler Pipe Industries v. Department of Revenue*, 96 Wn.2d 785, 796, 638 P.2d 1213 (1982). Therefore, a party seeking an injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. *Washington Federation of State Employees, Council 28 v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983).

C. Lis Pendens.

Filing a *lis pendens* clouds title preventing sale to a bona fide purchaser for value. A *lis pendens* can be filed at the time a complaint is filed or thereafter. RCW 4.28.320. Because damages and reasonable attorney fees can be awarded to persons aggrieved by the wrongful filing of a *lis pendens,* RCW 4.28.328, caution should be exercised.

VI. STATE ACTION

A. Working With The Prosecutor, APS And The Department Of Health.

In addition to civil actions, persons who financially exploit vulnerable adults may be subject to criminal prosecution,[24] Adult Protective Services findings,[25] and, if they are

[24] *See, e.g.,* RCW 9A.56.020(1) (theft); RCW 9A.60.020 (forgery); RCW 9.35.020 (identity theft); RCW 9A.60.030 (obtaining signature by deception or duress); RCW 9.38.020 (false

licensed caregivers or health care providers, Department of Health licensing termination[26].

1. Suggestions from the Criminal Justice System.

Do not wait until your civil case has concluded to report it to law enforcement. The sooner the potential crime is reported to law enforcement, the better their ability to successfully prosecute it.

2. APS Referrals.

Adult Protective Services (APS) is a division of DSHS with the responsibility for investigating allegations of abuse, neglect, abandonment, or exploitation of a vulnerable adult.[27] APS is required to initiate a response to a report of abuse, abandonment, neglect, or financial exploitation no later than 24 hours after knowledge of the report.[28] When the initial report or investigation by APS indicates that the alleged abandonment, abuse, financial exploitation, or neglect may be criminal, it must immediately report the matter to the appropriate law enforcement agency, and if the report of abuse, neglect or financial exploitation is substantiated, APS has the authority to provide protective services and petition for a VAPA protection order.[29] In some cases, APS and/or law enforcement will be the first responder, and initiate the VAPA protection order process. In other cases, they may receive a referral of abuse, neglect or exploitation after the VAPA protection order is already in place, and use the information gathered through the civil protection order process to pursue criminal prosecution and/or an administrative finding.

3. Department of Health Complaints.

If the abuser is a licensed caregiver or health care provider, a finding of financial exploitation by the superior court or APS may be grounds for suspension or revocation of the abuser's license by the State of Washington Department of Health.[30]

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representation regarding title); RCW 9A.56.140 (possession of stolen property); RCW 9A.60.040 (criminal impersonation); RCW 9A.60.050 (false certification); RCW 9A.72 (perjury); RCW 9A.72.110, .120 (witness intimidation/tampering). *See also* State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009) (upholding conviction for witness tampering where the alleged abuser made a videotape of the vulnerable adult purporting to approve the abuser's conduct).

[25] RCW 74.34.063(1) (2).

[26] RCW 18.130.180(1); RCW 18.130.160.

[27] The "department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults." RCW 74.34.005(5).

[28] RCW 74.34.063(1).

[29] RCW 74.34.063(2).

[30] RCW 18.130.180(1) (defining unprofessional conduct to include the "commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not."); RCW 18.130.160 (authorizing sanctions including suspension or revocation of license).

B. Civil Immunity For Good Faith Reporting And Penalties For False Reporting And Failure To Report.

1. Protections for Good Faith Reporting.

RCW 74.34.050 provides immunity for good faith reporting. The statute provides:

> (1) A person participating in good faith in making a report under this chapter or testifying about alleged abuse, neglect, abandonment, financial exploitation, or self-neglect of a vulnerable adult in a judicial or administrative proceeding under this chapter is immune from liability resulting from the report or testimony. The making of permissive reports as allowed in this chapter does not create any duty to report and no civil liability shall attach for any failure to make a permissive report as allowed under this chapter.
>
> (2) Conduct conforming with the reporting and testifying provisions of this chapter shall not be deemed a violation of any confidential communication privilege. Nothing in this chapter shall be construed as superseding or abridging remedies provided in chapter 4.92 RCW.

2. Penalties for False Reporting and Failure to Report.

However, VAPA imposes penalties for both false reporting and failure to report by mandated reporters. RCW 74.34.053 provides:

> (1) A person who is required to make a report under this chapter and who knowingly fails to make the report is guilty of a gross misdemeanor.
>
> (2) A person who intentionally, maliciously, or in bad faith makes a false report of alleged abandonment, abuse, financial exploitation, or neglect of a vulnerable adult is guilty of a misdemeanor.

CHAPTER SIX

THE ROLE OF THE GAL FROM APPOINTMENT THROUGH DISCHARGE

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These materials are intended to provide general information and represent the views of the speakers. They are not intended as legal advice with regard to any particular situation.

13th Annual Trust & Estate Litigation Seminar
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Session: The Probate, Litigation, TEDRA, Settlement Guardian ad Litem can't do that, can (s)he? The role of the Guardian ad Litem from appointment through discharge, including Guardian ad Litem authority (and limitations on authority) in various causes of action.

I. INTRODUCTION

Our comments are general and represent our views of what Guardians ad Litem (GAL) may or, perhaps, should not do. Many of our comments are case specific. What a GAL may or may not do is debatable. Practices sometimes vary from county to county. For example, in some counties, for the purpose of reviewing trust accountings, Special Representatives are appointed instead of GALs. In some counties GALs are given specific discharge authority for Alleged Incapacitated Persons (AIP's) prior to the appointment of a guardian. In other counties the practice may be prohibited as not being authorized by statute or case law. Our attempt is to illustrate some of these situations in the context of trust and estate litigation and possible choices. Because of the difference in counties with regard to the practice of appointing a Guardian ad Litem to review trust accountings, we have included some of the law on Special Representatives' appointments. This is for illustrative purposes only. Our presentation deals only with the appointment of a GAL for the purpose of reviewing a trust accounting per the Washington State Supreme Court ruling in *Anderson v. Dussault*, 181 Wn.2d 360, 333 P.3d 395 (2014).

II. GOVERNING LAW FOR APPOINTMENT OF GUARDIANS AD LITEM AND SPECIAL REPRESENTATIVES

A. Plenary Power of the Court as Applied to Trusts and Estates. The law governing the jurisdiction and responsibility of the Court to appoint a Guardian ad litem ("GAL") is extensive under Washington law. The broad power of the Superior Court to appoint a GAL is derived from the Washington State Constitution, Article 4, Section 6, the Revised Code of Washington, Titles 4, 11, 13, and 26 among others; and common law.

Article 4, Section 6 of the Washington State Constitution provides in pertinent part:

> Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve . . . in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, . . . of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for.

In *Shelley v. Elfstrom*, 13 Wash. App. 887, 538 P.2d 149 (1975), the Court specifically recognized that this constitutional foundation gives the Court inherent jurisdiction to protect the estates of incapacitated persons. "[T]he welfare of incompetent persons and the care of their property are objects of particular care and attention on the part of the Courts." *In re Mignerey*, 11 Wn. 2d 42, 49, 118 P.2d 440 (1941). See also *Shelley* at 889; *In re Clawson*, 3 Wn. 2d 509, 101 P.2d 968 (1940); *In re Kelly*, 193 Wash. 109, 74 P.2d 904 (1938).

The legislature codified its intent to make the Court's powers as broad as possible in RCW 11.96A.020, the title of which states, "General power of courts – Intent – Plenary power of the court." Webster's Dictionary defines plenary as "full, complete, and absolute." The Revised Code of Washington goes on to further specify legislative intention in giving such absolute power to the Court:

(1) It is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle:

   a. All matters concerning the estates and assets of *incapacitated*, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this title; and

   b. All trusts and trust matters.

(2) *If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court*

> *seems right and proper*, all to the end that the matters be expeditiously administered and settled by the court. RCW 11.96A.020 (emphasis added).

RCW 11.96A.060 further specifically empowers the Court to make, issue, and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by this title.

Chapter 11.88 RCW also supports the proposition that the court's authority to appoint a guardian ad litem for virtually any reason is plenary.

> **(1)** Nothing contained in RCW 11.88.080 through 11.88.120, 11.92.010 through 11.92.040, 11.92.060 through 11.92.120, 11.92.170, and 11.92.180 shall affect or impair the power of any court to appoint a guardian ad litem to defend the interests of any incapacitated person interested in any suit or matter pending therein, or to commence and prosecute any suit in his or her behalf.
>
> Rev. Code Wash. (ARCW) § 11.88.090

Failure to appoint a GAL may be fatal to the entry of a final decree or judgment. Washington law supports the conclusion that if the Court does NOT appoint a GAL for an incapacitated person who is a party to a suit, the Court loses jurisdiction over the case and may not enter a judgment. *Hayward v. Hansen*, 97 Wn.2d 614, 647 P.2d 1020 (1982), states in relevant part, "failure to serve the child deprived the court of jurisdiction to enter judgment." (Title 26 paternity action) But see also *Newell v. Ayers,* 23 Wash. App. 767, 598 P.2d 3 (1979). The Court must find the interests of the child or incapacitated persons were protected or the judgment is later voidable (Personal representative sued to recover gifts of money decedent made before his death to minor grandchildren).

The interests of an incapacitated person, whether through minority or through other circumstances, are so paramount that in no less than twenty-one (21) different sections of the Revised Code of Washington there is authority for appointing a GAL. In addition to the RCW, Special Proceeding Rule 98.16W directly addresses the situation of the settlement of the interests and claims of a minor or incapacitated person. In probate when the personal representative has non-intervention powers, there may be an attorney for the estate or a personal representative who may think that the matter should be free of oversight by the Court and that a GAL should not be appointed. However, the jurisdiction of the Court remains in such circumstances and is of benefit to

the parties by providing a forum for review of the matter. In *Janssen v. Topliff*, 110 Wash. App. 76, 38 P.3d 396 (2002), the Court of Appeals for Division Three found an attorney for a Guardian to be liable for the breaches of fiduciary duty of a parent who was the Guardian of a minor child. The parent/guardian absconded with the minor child's settlement funds. A GAL was not appointed when the petition to appoint a Guardian was filed. The Court appointed a parent as the Guardian upon the petition of an attorney for the proposed Guardian. The order appointing the Guardian did not require the Guardian to post a bond or block a guardianship account, despite statutory provisions. The Appellate Court concluded that the attorney for the Guardian was liable because he knew of the statutory requirements but had failed to obtain an order requiring the funds be blocked or a bond to be obtained.

Attorneys for a personal representative or trustee have a duty and responsibility to inform the Court that there are minor and/or incapacitated heirs or beneficiaries. At that point the Court has both the responsibility and the authority, in the exercise of the Court's broad, plenary powers to protect the interests of a minor or incapacitated person. The appointment of a GAL or Special Representative can help to insure that the interests of the minor or incapacitated person are represented and protected before the fiduciary is discharged or takes an action that could compromise the interests of a minor or incapacitated person.

See when the appointment of a GAL in probate is mandatory (p.7).

B. **Probate GAL**. RCW 11.76.080, RCW 11.96A.160, and SPR 98.16W govern the appointment and duties of GALs in probate proceedings.

C. **Special Representative**. RCW 11.96A.250 is the governing law regarding the appointment of Special Representatives. As our presentation deals with Guardians ad Litem we are not generally commenting upon appointments of Special Representatives. We only touch on the statute pertaining to the appointment because in at least one county Special Representatives are appointed to review trust accountings instead of Guardians ad Litem. Of note is RCW 11.96A.160(2) which provides that the court-appointed Guardian ad litem supersedes the Special Representative if so provided in the court order.

D. **Settlement Guardian ad litem (SGAL)**. The appointment and duties of an SGAL is found in SPR 98.16W. However, there is an exception to the appointment under Wash. SPR 98.16W(c)(2), below:

> " . . . if by written finding the court determines a guardian ad litem, a guardian, or limited guardian has been previously appointed or if the court affirmatively finds that the affected person is represented by independent counsel, so long as

the guardian ad litem, guardian, limited guardian, or independent counsel has the qualifications which would be required for a Settlement Guardian ad litem and neither has nor represents interests in conflict with those of the affected person which would not be allowed for a Settlement Guardian at Litem."

QUERY: Does the attorney fee agreement present a conflict of interest precluding the attorney from acting as independent counsel?

No. Independent counsel's fee interest in the claim, if allowed by the Rules of Professional Conduct, is not a disqualifying interest. SPR98.16W(c)(2).

E. Guardian ad litem for Purpose of Trust Accounting Review. When a trust beneficiary is incapacitated and there is no virtual representative to represent such incapacitated person or there is one with a conflict of interest, the court may appoint a GAL to review the trust accounting on behalf of such individual. See RCW 11.96A.120, RCW 11.96A.160, and *Anderson v. Dussault*, 181 Wn.2d 360, 333 P.3d 395 (2014). As stated earlier, in some counties a Special Representative is appointed to review trust accountings pursuant to RCW 11.96A.250(2)(c). We mention this because of the overlap in duties of the reviewer. However, the focus of our presentation in this section is on Guardians ad Litem only, based upon appointments pursuant to the Supreme Court ruling in *Anderson v. Dussault*, *supra*.

F. Chapter 11.88 RCW GAL in Guardianship. A Guardianship Guardian ad Litem is required to be appointed upon the filing of a Petition for the appointment of a Guardian or limited Guardian, except as may be provided by statute, pursuant to RCW 11.88.090(3).

Practice Tip. Notice of the appointment of an SGAL or a guardian must be given to the minor if he/she is over the age of 14 years, or to the minor's custodial parent if the minor is under age 14 years. *In Re McGill*, 33Wn. App. 265, 654 P 2d 705 (1982). See RCW 11.88.040.

III. WHEN A GAL APPOINTMENT MIGHT BE EXPECTED IN A PROBATE

A. Discretionary Appointment. At any state of a probate proceeding, the Court may appoint a GAL to represent the interests of "any alleged incapacitated person as defined in RCW 11.88.010, who is interested in the estate, and who has no legally appointed Guardian or Limited Guardian." RCW 11.76.080(1). The duty of the PGAL

appointed under this statute is not well defined. The Court may also make a discretionary appointment pursuant to RCW 11.96A.160.

B. Mandatory Appointment. For hearings held under RCW 11.54.010 (Family Support); RCW 11.68.041 (Petition for Nonintervention Powers); RCW 11.68.100 (Closing Estate); RCW 11.76.050 (Hearing on Final Report); or for an entry of an order adjudicating testacy or intestacy when no personal representative is appointed to administer the estate, the Court shall appoint a GAL to represent the interests of any alleged incapacitated person, who is interested in the estate, and who has no legally appointed Guardian or Limited Guardian. A mandatory appointment is also required for alleged incapacitated persons finding themselves the subject of a guardianship petition filed pursuant to the provisions of Chapter 11.88 RCW.

When a surviving spouse or surviving domestic partner is the sole beneficiary under the terms of a will, the court may grant a motion by the personal representative to waive the appointment of a guardian ad litem for a person who is the minor child of the surviving spouse or surviving domestic partner and the decedent and who is incapacitated solely for the reason of his or her being under eighteen years of age. See, RCW 11.76.080(2).

IV. APPOINTMENT PURSUANT TO RCW 11.96A.160.

A. General Appointment. On its own motion or on the request of a required party to the dispute, the Court may appoint a GAL at any stage of a judicial or non-judicial dispute resolution proceeding to represent the interests of "a minor, incapacitated, unborn, or unascertained person, a person whose identity or address is unknown, or a designated class of persons who are not ascertained or are not in being." RCW 11.96A.106(1). The Court may appoint the GAL at an Ex Parte hearing, or the Court may order a hearing as provided in RCW 11.96A.090 with notice as provided in this section and RCW 11.96A.110.

The GAL may bring on for hearing any issue that a person interested in the estate could raise under RCW 11.96A.080 that in the GAL's opinion is necessary to secure the proper administration of the estate, or that is necessary to protect the interests of the incapacitated person on whose behalf the GAL is appointed.

B. Appointment Specifically for Purpose of Reviewing Trust Accounting. In situations where a trust beneficiary is incapacitated and there is no appropriate virtual representative to review a trust report, a GAL may be appointed to review the trust report upon behalf of the beneficiary. Procedural legal authority may include the plenary power of the Court under RCW 11.96A.020 and RCW 11.96A.160.

Procedural authority may include *Anderson v. Dussault*, 181 Wn. 2d 360, 333 P.3d 395 (2014).

The *Anderson* case involved "Rachel," who became the beneficiary of a Special Needs Trust at age six. At all times relevant, the Trustee adhered to the Trust and the Trustees Accounting Act ("TAA") RCW 11.106 RCW by filing annual accountings/reports and obtaining court approval of the same. However, after turning 18, Rachel took issue with how her trust had been administered, and filed suit alleging breach of fiduciary duties and legal malpractice.

During her minority, Rachel did not have a court-appointed guardian or a guardian ad litem, and a conflict of interest existed between her and her later appointed legal guardian, her mother. The conflict of interest existed because of disbursements from Rachel's Special Needs Trust that benefited her mother directly and/or indirectly.

At issue for the Court was whether the superior court's approval of annual accountings of Rachel's Special Needs Trust under the TAA barred Rachel's current suit, which was timely filed under the Trust and Estate Dispute Resolution Act ("TEDRA"), Chapter 11.96A RCW.

In considering this matter, the Washington State Supreme Court stated the following:

> Here, Rachel did not have a guardian ad litem and never personally received notice of any of the accountings that occurred during her minority. Her mother's notice of the accountings cannot qualify as virtual representation because of the existing conflict of interest between Rachel and her mother. Accordingly, Rachel never received proper notice of the ongoing accountings. Though respondents are correct that the appointment of guardians is discretionary under both the TAA and TEDRA, there must be a consequence for initiating an accounting proceeding without one. Just as a minor does not have notice of her ability to bring a TEDRA breach of trust claim if she does not have a guardian, we hold that minors without an appointed guardian or other valid virtual representative lack notice of any ongoing accounting proceedings.

The Court finalized the ruling as follows:

> We hold that the TAA does not bar Rachel's claims. Because she did not have a guardian ad litem when her trust

> accountings were filed with and approved by the court, she did not have the required notice of those proceedings and so cannot now be barred by them. TEDRA's three-year statute of limitations is tolled for minors without guardians, and Rachel's claims are timely under this provision. (emphasis added)

A sample of the model order appointing a GAL to review trust accountings, developed by Joshua Brothers and Thomas Keller, is attached as **Exhibit A.**

C. Factors the GAL May Consider When Reviewing a Trust Report and Accounting.

(1) The trust document.

a. Does it provide guidance regarding payment of fees?

b. Is the trustee held harmless when exercising discretion if the decision is made in good faith?

(2) The report and accounting.

a. Does the accounting balance?

b. Are disbursements within the scope of the Trustee's authority?

c. Are special needs trust disbursements for the sole benefit of the beneficiary. If not, is the benefit only incidental?

d. Are Trustee fees reasonable? See *Powell's Estate*, 68 Wn.2d 38, 411 P.2d 162 (1966).

Elements to be considered are (1) The amount of risk and responsibility involved, (2) the time actually required of the trustee in the performance of the trust, (3) the size of the estate, (4) the amount of income received, and (5) the manual and over-all services performed. See, also, Restatement (Second), Trusts § 242; Bogert, Trusts & Trustees §§ 975, 977 (2d ed.); 3 Scott, Trusts § 242 (2d ed.).

(3) Has the Trustee disclosed sufficient information for the beneficiary to be on notice of a possible breach of trust?

a. Check RCW 11.96A.070(1)(b) disclosures.

(4) Is the trust being administered solely in the interests of the beneficiaries?

a. See Trustee Duty of Loyalty, RCW 11.98.078.

(5) Are assets being invested and managed as a prudent investor would?

a. See Prudent Investor Act, RCW 11.100.020.

(6) General principles.

a. A court may not control the trustee's exercise of discretion absent an abuse of a trustee's discretion. *Templeton v. People Nat'l Bank of Wash.,* 106 Wn. 2d 304, 722 P.2d 62 (1986).

b. "What constitutes an abuse of discretion depends upon the terms and purposes of the trust, and particularly on the terms and purposes of the powers and any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty." Restatement (Third) of Trust § 87 cmt. b.

c. A court should not intervene just because the court would have exercised the discretion differently. Restatement (Third) of Trust § 87 cmt. b.

d. A court's focus in applying the prudent investor rule is the trustee's conduct, "not the end result." *In re Estate of Cooper,* 81 Wn. App. 79, 88, 913 P.2d 383 (1966).

e. The test of prudence is one of conduct not of performance. Restatement (Third) of Trust § 77 cmt. a.

f. A trustee has a duty to diversity the trust's assets in order to minimize the risk of large losses. RCW 11.100.047. See also *Baker Boyer Nat'l Bank v. Garver,* 43 Wn. App. 673, 679-80, 719

P.2d 583 (1986) (citing Restatement (Second) of Truste § 228 cmt c, f).

(7) For an interesting discussion of a Trustee's discretion with regard to investments, see *In Re Fowler*, 2011 Wash. App. LEXIS 358, an unpublished opinion (Under RCW 2.06.040, unpublished opinions have no precedential value and under GR 14.1 they may not be cited as authority).

V. APPOINTMENT AS PROBATE GAL

A. General Duties of Probate GAL (Chapter 11.76 RCW). The statute does not provide much guidance with regard to the duties of a probate GAL. Each probate is different. However, at a minimum, the probate GAL should investigate and evaluate the adequacy of a proposed distribution in light of the terms of the Will, Trust, or laws of intestate succession, and to report and make recommendations to the Court concerning the nature or form of the proposed distribution in light of the needs and best interests of the minor or incapacitated person.

For illustrative purposes, a sample Order Appointing Probate GAL is attached as **Exhibit B.** It is the King County model form.

B. Factors the Probate GAL May Consider.

(1) Specific directions or tasks as set forth in the Order of Appointment.

a. Appointment for the a very limited purpose such as just making sure a trust for a minor is properly funded and/or fees of the attorney or personal representative are reasonable.

b. Appointment for a general monitoring of the actions of the personal representative and to make a recommendation to the court regarding distribution of the incapacitated person's bequest if not specified by will.

(i) Review the final accounting

(ii) Participate in court hearings unless excused by Court order pursuant to GALR 2 (l).

(iii) Review receipts for funds to be placed into a blocked account or trust.

(2) Circumstances unique to a specific probate.

a. Mediation – should the probate GAL request authority to participate?

b. TEDRA proceedings – should the probate GAL be given authority to sign on behalf of an incapacitated beneficiary?

c. Is a trustee named in a will unable to serve? If so and there is no alternative what are the options for a successor trustee? Professional trustee? Family member? Are they qualified? Any potential conflicts of interest?

d. If there is a UTMA distribution and a custodian has not been designated what are the options? If the property to be distributed exceeds $30,000 and no custodian is named, the court must approve the appointment of the custodian and the transfer. RCW 11.114.060. The court may require the custodian to account. RCW 11.114.190(3).

C. <u>Representation of Several Persons by Probate GAL</u>. A GAL may represent several persons or interests as long as no conflict of interest is present.

D. <u>Probate GAL Compensation</u>. A GAL is entitled to reasonable compensation for his or her services, and the compensation is to be paid from the estate or trust whose beneficiaries are interested. The GAL shall comply with SPR 98.12W in applying to the Court for reasonable compensation, authorized under RCW 11.76.080, and the Court shall allow reasonable compensation for services of the GAL from the assets of the estate. The Court has discretion to order the fee paid from the gross estate or the share of the beneficiary. See RCW 11.96A.150 and .160. See *In Re Estate of Becker*, 177 Wn. 2d 242, 298 P3d 720 (2013) for discussion regarding GAL fees and scope of GAL authority.

QUERY: Can the probate GAL act as SGAL?

Yes. This is often seen when the "estate" consists of wrongful death and survival causes of action. The PR is the sole entity with standing to pursue these claims RCW 4.20.010, RCW 4.20.046, RCW 4.20.060.

QUERY: Can the GAL appointed in a probate proceeding pursuant to RCW 11.76.080 engage in discovery, attend depositions, etc.?

Check the order of appointment for prohibitions and/or time limits. Authority is implied in RCW 11.76.080 wherein it states such an appointed GAL, on " . . . behalf of the alleged incapacitated person, may contest the same as any

other person interested might contest it, and who shall be allowed by the court reasonable compensation for his or her services." But see GALR 2(j). A GAL shall not provided services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties.

QUERY: Can the probate GAL bring a Petition for Family Allowance?

Always check the scope of the Order Appointing Probate GAL as GAL Rule 2(j) states "the guardian ad litem shall comply with the court's instructions as set out in the order appointing guardian ad litem, and shall not provide or require services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment."

Though RCW 11.76.080 states the appointment of a GAL is mandatory for hearings held under RCW 11.54.010 (Family Award) that does not in and of itself authorize a GAL to bring a Petition for Family Award.

Practice Tip: Petition the Court for Instructions and/or Authority to File and Pursue A Family Award if, after investigation and written report, you believe this to be in the best interests of person(s) for whom you were appointed.

Caveat: Earlier form Order(s) Appointing Probate GAL pursuant to RCW 11.76.080 often contained the following language:

> Good cause having been shown, the Court grants the Motion for Order Appointing Guardian ad Litem and appoints _____, a suitable disinterested person, as Guardian ad Litem for _____, to represent their interests in these proceedings and, on their behalf, to contest any matter in these proceedings as any competent person might contest it.

Appointment of a GAL under RCW 11.96A.160(1) and RCW 11.96A.080 does not supersede but rather supplements other provisions of the RCWs unless it is clearly stated they do not apply.

Practice Tip: When seeking appointment of a GAL, specify GAL responsibilities required/requested to avoid PGAL "unchained".

E. Options for Protection of Funds Going to Minor Beneficiary and/or Incapacitated Beneficiary.

A Probate GAL may consider the following options to protect funds going to minor:

- Blocked Account
- Guardianship
- Custodianship, UTMA, RCW 11.114
- Trust

See, RCW 11.76.095, SPR 98.16W.

VI. APPOINTMENT OF A LITIGATION GUARDIAN AD LITEM (LGAL)

In re Marriage of Lane, 188 Wn. App. 597, 354 P.3d 27 (2015), has, for many, transformed what it means to be a Litigation Guardian ad litem appointed under RCW 4.08.060. That statute is set forth below.

> **Appointment of a Guardian ad litem for an Incapacitated Person**
>
> When an incapacitated person is a party to an action in the superior courts he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem. Said guardian shall be appointed as follows:
>
> **(1)** When the incapacitated person is plaintiff, upon the application of a relative or friend of the incapacitated person.
>
> **(2)** When the incapacitated person is defendant, upon the application of a relative or friend of such incapacitated person, such application shall be made within thirty days after the service of summons if served in the state of Washington, and if served out of the state or service is made by publication, then such application shall be made within sixty days after the first publication of summons or within sixty days after the service out of the state. If no such application be made within the time above limited, application may be made by any party to the action.

A simple reading of the statute seems to imply the appointment could be made *sua sponte* by the Court. Early procedural controversies sometimes centered upon how the appointment was made. All adults are presumed to be competent to manage their

own affairs, including the defense of civil legal matters. See, RCW 11.88.090; *Binder v. Binder*, 50 Wn. 2d 142, 149, 309 P.2d 1050 (1957); *Vo v. Pham*, 81 Wn. App. 781, 784, 916 P.2d 462 (1996). However, when the court is placed on notice that a party to a proceeding is incompetent to represent his or her own interests in the proceeding, then the court has and independent obligation to inquire as to that party's competence. See, *In re the Marriage of Blakely*, 111 Wn. App. 351, 44 P.3d 924 (2002), pet. for rev. denied, 148 Wn. 2d 1003, 60 P.3d 1211 (2003); *Vo*, supra, at 786. Any person who is alleged to be incompetent or incapacitated is entitled to a full panoply of due process protections, including notice and the opportunity to be heard, when he or she opposes the appointment of a GAL to "represent" his or her interest in a civil legal proceeding. See, *Graham v. Graham*, 40 Wash. 2d 64, 65-68, 240 P.2d 564 (1952) (holding that a GAL should not be appointed by the court unless the alleged incompetent person is given a full and fair opportunity to defend and be heard and therefore, the adjudication of incompetency must proceed, or at least be contemporaneous with, the appointment of a GAL). We put the word "represent" in quotes because of the *Lane* case.

Title 4.08.060 and Title 11.88 provide different definitions of incapacity. The threshold is lower for having a LGAL appointed under RCW 4.08.060 than it is for having a Guardian appointed under Chapter 11.88 RCW.

One is "incapacitated" under Title 11 if he or she is at significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety (incapacitated as to the person) and/or is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs (incapacitated as to the estate). See RCW 11.88.010.

The threshold question/legal standard for determining incapacity under Title 4 is lower: The Court should appoint a GAL for a litigant when it is reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the best interests of such party litigant. See *Graham v. Graham*, 40 Wash.2d 64, 65-68, 240 P.2d 564 (1952).

Assuming a LGAL is appointed, *Lane*, in a nutshell, held that LGALs may not waive fundamental or substantial rights of an incapacitated person. In *Lane*, the Court specifically stated that the LGAL did not have the authority to enter into a CR 2A Agreement over the "incapacitated" person's objections and waive her right to a trial on the disputed issues.

Even with a lower threshold incapacity requirement under Title 4, in view of *Lane*, supra, it is questionable how effective a LGAL appointment would be if the person for whom the LGAL was appointed objected to any of the LGAL's suggestions/settlement options short of trial.

QUERY: What statutory authority supports payment of an LGAL?

None.

Practice Tip: Define the scope of representation and source of payment and confirm in a court order early to reduce risk of non-payment.

QUERY: If a court is convinced a party is not competent to understand or comprehend the significance of legal proceedings and the effect of such proceedings why not appoint a guardian or limited guardian of the estate?

QUERY: If a guardianship proceeding was commenced and dismissed without the appointment of a guardian why not let the alleged incapacitated person make his/her own decisions?

Practice Tip: Rather than run the risk of a voidable settlement or no viable option for resolution short of trial consider seeking the appointment of a Guardian or Limited Guardian of the Estate. Washington State Rules of Professional Conduct ("RPC") 1.14(b), quoted below, provides for such situations.

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

QUERY: Can a LGAL engage in discovery or attend a deposition?

Probably. A GAL appointed pursuant to RCW 4.08.050 and .060 under the procedures of Title 11 would have seemingly implied authority to engage in discovery and attend a deposition.

But see the discovery limitations of RCW 11.96A.115.

Discovery: In all matters governed by this title, discovery shall be permitted only in the following matters:

(1) A judicial proceeding that places one or more specific issues in controversy that has been commenced under RCW 11.96A.100, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules; or

(2) A matter in which the court orders that discovery be permitted on a showing of good cause, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules unless otherwise limited by the order of the court.

QUERY: May a LGAL retain counsel to file litigation or defend on behalf of a minor or incapacitated person in a lawsuit?

Yes, with Court authority.

QUERY: If counsel were appointed, from whom would counsel take direction?

Prior to *In re Marriage of Lane*, 188 Wn. App. 597, 354 P.3d 27 (2015), if a guardian ad litem was appointed for an incapacitated person pursuant to RCW 4.08.060 it was possible, with court instruction and authority, for the LGAL to instruct counsel on behalf of an incapacitated person and even enter into settlement agreements. RCW 11.96A.080. Rules of Professional Conduct 1.14. Cmnt. 4.[1] *Lane,* supra, has changed this dynamic.

VII. SETTLEMENT GUARDIAN AD LITEM

In every settlement of a claim, whether or not filed in court, involving the beneficial interest of an un-emancipated minor or a person determined to be disabled or incapacitated under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it. SPR 98.16W(a).

The court shall appoint a Settlement Guardian ad Litem to assist the court in determining the adequacy of the proposed settlement…SPR 98.16W(c)(1).

The court may dispense with the appointment of an SGAL only if a GAL, a guardian or limited guardian was previously appointed, or if the affected person is represented by independent counsel, and such GAL, guardian, limited guardian has the qualifications required for an SGAL and neither has nor represents any interest in conflict with the affected person. SPR 98.16W((c)(2).

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[1] [4] [Washington revision] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rules 1.2(d) and 1.6(b)(7).

Wash. RPC 1.14

A sample Order Appointing Settlement GAL is attached as **Exhibit C.**

A. <u>Options for Protection of Funds Going to Minor and/or Incapacitated Person</u>.

In accord with SPR 98.16W(j):

(1) $25,000 or less, after deduction for approved fee, bills, expenses:

a. Blocked account at an insured financial institution for the benefit of the affected person; OR

b. The money or property be paid to a duly qualified guardian or limited guardian; OR

c. The money be placed in trust, subject to the conditions in subsection (3).

(2) More than $25,000.

a. If there is an existing of newly created guardian who approves, require that the money be placed in a bank or trust company or invested in an account in an insured financial institution for the benefit of the affected person, subject to withdrawal only upon order of the court handling the guardianship;

b. If there is no guardian or limited guardian,…the court shall require either a guardian or limited guardian be appointed, OR

c. The money or property be placed in trust, subject to the conditions set forth in subsection (3).

(3) Conditions for Use of Trust, the following are required:

a. The selection of the trustee(s) and the terms of the trust shall be subject to the court's approval;

b. No family member of the affected person, or other potential residual beneficiary of the trust shall be approved as sole trustee;

c. A bonded or insured fiduciary shall be designated as sole or co-trustee with principal responsibility for financial management of the trust estate;

d. The fiduciary shall prepare an annual statement of income, expenses, current assets, and fees charged and shall present the same to the court for review and approval;

e. No family member or potential residual beneficiary who serves as co-trustee shall exercise discretionary authority over individual expenditures from the trust that would bring direct or indirect benefit to that individual; and

f. The administration of the trust shall be subject to the continuing jurisdiction of the appropriate court.

The SPRs apply to Settlement Trusts and to Special Needs Trusts. The process of establishing a trust in this context requires SGAL Report/Recommendation regarding disposition of funds going to the minor/incapacitated person; Court authority to retain an attorney to draft the trust; petition to the court for approval of the trust when drafted and appointment of the trustee; and finally an Order Approving Trust.

Another option is an annuity or structured settlement.

QUERY: Can the SGAL represent all of the injured minors?

A guardian ad litem may not continue to represent several minors in a claim when the interests of each child are not substantially identical and such difference is potentially detrimental to any of them. *In Re Lauderdale*, 15 Wn. App.321, 549 P.2d 42 (1976).

King County LGALR (Local Guardian ad Litem Rules) apply to guardians ad litem appointed pursuant to Title 11, Title 13, Title 26, and to guardians ad litem appointed pursuant to SPR 98.16W, RCW 4.08.050 and RCW 4.08.060. The KCGALRs do not apply to guardians ad litem or Special Representatives appointed pursuant to RCW 11.96A. LGALR 6 states a guardian ad litem may represent the interests of two or more persons in the same family or class when expressly permitted by court order. Such multiple representation may be reviewed by the court upon request of the guardian ad litem…..such as when a conflict, actual or apparent, arises among those whose best interests are represented by the GAL.

Of note, the State GALRs specifically "shall not be applicable to guardians ad litem appointed pursuant to SPR 98.16W and 11.96A RCW." GALR 1. The State GALR, while silent regarding the representation of two or more family members/members of the same class, does address conflicts of interest at GALR 2 (e).

QUERY: Can the Personal Representative settle a wrongful death claim on behalf of minor beneficiaries?

The personal representative of a deceased's estate does not have the authority to settle and release a wrongful death action on behalf of a minor beneficiary without the prior appointment of a guardian ad litem and without court approval; such a release will not bind the minor beneficiary, unless an independent guardian has been appointed, and the court has approved the settlement. *Wood v. Dunlop* 83 Wn. 2d 719, 521 P 2d 1177 (1974). The personal representative in whose name a wrongful death action is brought acts merely as a statutory agent or trustee of the beneficiaries. No benefits flow to the estate of the decedent. A settlement of a vested claim of a wrongful death beneficiary is subject to vacation if the beneficiary neither authorized nor consented to it. *Ebsary v. Pioneer Human Services* 59 Wn. App. 218, 796 P. 2d 769 (1990).

QUERY: Can the Settlement GAL object to attorneys fees?

Yes. SPR 98.16W(e)(12) requires the SGAL to include in her report to the court "a discussion and recommendations regarding the fees and expenses for which payment is requested". King County's form Order Appointing SGAL also contains this provision. For a discussion of the role of the SGAL in evaluating the reasonableness of attorneys fees in the context of a minor settlement, see *In Re the Settlement of AGM and LMM*, Minors, 154 Wn. App. 58 (2010). The SGAL recommended a reduction in plaintiffs' counsel one-third contingent fee. The Court agreed and reduced the attorneys fees. Plaintiffs' counsel appealed. The Court of Appeals affirmed the reduction in fees, holding SPR 98.16 accorded the court discretion to modify the attorney's fee agreement.

An attorney claiming fees incident to representation of a minor or incapacitated person is required to file a declaration in support of his/her fees. SPR 98.16W(g).

See, also, RCW 4.25.005 allowing a party charged with the payment of fees in a tort action to petition the court for a determination of reasonableness.

QUERY: Can the probate GAL act as the Settlement GAL?

Yes. Best practice is to get an Order Appointing Settlement GAL for clarity regarding scope of appointment and responsibilities.

QUERY: Is a Settlement GAL's file Confidential?

No. Best practice is to keep this in mind and limit sensitive information which is put in the SGAL report.

Practice Tip: If the SGAL is authorized to participate in mediation consider only receiving sensitive information after all of the parties have signed a mediation agreement containing a confidentiality clause in which all parties agree that the information provided in mediation sessions is privileged and confidential and neither subject to discovery nor admissible as evidence in a proceeding unless waived, authorized by RCW 7.70.050 (exception to privilege) or precluded by RCW 7.07.040.

QUERY: May a SGAL's report be filed under seal pursuant to GR 22?

No. GR 22 does not apply to SGAL reports which may be filed in the underlying action under a type "2" cause number. A formal petition must be filed to seal a SGAL report. Such petitions are not favored.

VIII. GUARDIAN AD LITEM APPOINTED PURSUANT TO CHAPTER 11.88 RCW.

The duty of a GAL appointed pursuant to Chapter 11.88 RCW is to obtain a written medical report and to provide a recommendation to the Court with regard to the appointment of a guardian. There are other GAL Certification CLE's which focus in depth upon the duties and responsibilities of GAL. This section will not contain an in-depth analysis of topics covered in the annual trainings. This section will instead discuss some of the frequently asked questions which sometimes arise.

DOES THE GAL HAVE THE AUTHORITY TO:

1. Record a *lis pendens* to prevent the property for an AIP from being sold during the pendency of the guardianship action?

a. Authority Against: No statutory authority. No case law. RCW 4.28.320 dealing with *lis pendens* affecting title to real property provides that the ". . . the plaintiff, the defendant, or such a receiver may file . . . a notice of the pendency of the action. . ." There is no mention of a GAL.

b. Authority For: The broad power of the Superior Court derived from the Washington State Constitution, Article 4, Section 6, the Revised Code of Washington, Titles 4 and 11, and the common law, may convince a court to issue an order authorizing the GAL to record a *lis pendens*.

c. Caveat: The potential liability of a claimant who does not prevail for damages, costs, and attorneys' fees pursuant to RCW 4.28.328.

Practice Tip: With court authority, record a Notice of Pending Guardianship setting forth the guardianship cause number and the legal description of the property.

2. <u>Note depositions? Attend depositions</u>?

a. Possibly. There is no express authority in Chapter 11.88 RCW. GALR 2 and GALR 4 do not give a GAL appointed pursuant to RCW 11.88 the authority to engage in discovery and attend depositions as those appointed pursuant to RCW 13.34 or RCW 26.26. A GAL shall comply with the court's instructions as set out in the order unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment. GALR 2 (j). If not set forth in the original order of appointment, an order on a motion for instruction may authorize discovery and the attending of depositions.

b. Seemingly implied. Authority for a Title 11.88 GAL is implied in *In re Guardianship of Matthews*, 156 Wn. App. 201, 232 P.3d 1140 (2010), where it is stated that once a trial court accepts a guardianship petition for review, the petitioner's role in the process essentially ends leaving the prosecution of the case to the GAL.

c. Caveat: *Matthews,* while not overruled, is not a favored case.

d. Caveat. The guardian ad litem shall not advocate on behalf of a party or advise any party so as to create in the mind of a reasonable person the appearance of representing that party as an attorney. GALR 2 (a).

3. Force the Alleged Incapacitated Person ("AIP) to attend CR 35 medical exam?

a. It depends. One may argue the authority is implied because RCW 11.88.045(4) requires the court to consider a medical report before a guardianship may be established. The argument to the contrary is found in *State ex rel Nelson v. Superior Court for King County*, 15 Wn.2d 407, 131 P.2d 144 (1942). In that case the court held that, unlike a plaintiff in a personal injury action, there was no statutory authority for requiring such an examination of a person who was not a voluntary participant in the guardianship proceedings adverse to her.

b. QUERY: is a GAL appointed under RCW 4.08.060 to determine if a person needs a guardian ad litem authorized to obtain medical records or request a CR 35 medical exam for the purpose of determining if the person has capacity?

4. Request Medical Records of the AIP?

a. Yes, supported by *In re Guardianship of Atkins*, 57 Wn. App. 771, 790 P.2d 210 (1990). The physician-patient privilege found in RCW 5.60.060(4) does not apply in guardianship proceedings.

5. Consent to medical treatment?

a. Only if "emergency lifesaving medical services". RCW 11.88.090(8).

b. Arguments made to the contrary, frequently by hospitals: the plenary power of the court.

6. Authorize discharge from a medical facility, consent to placement in a residential facility and sign contracts with the facility?

a. No statutory authority. No case law.

b. Arguments made to the contrary, frequently by hospitals: the plenary power of the court. But see RCW 11.92.190 "Detention of person in residential placement facility against will prohibited—Effect of court order…"

7. <u>Attend mediation, cross-examine witnesses (at trial or deposition)</u>?

a. Possibly: Authority for a Title 11.88 GAL is implied in *In re Guardianship of Matthews*, 156 Wn. App. 201, 232 P.3d 1140 (2010), holding that once a trial court accepts a guardianship petition for review, the petitioner's role in the process essentially ends, leaving the prosecution of the case to the GAL. **Caveat:** this case, while not overruled, is not favored and is not considered good law by some.

b. Authority for a Title 11.88 GAL to attend mediation might be implied from RCW 11.88.090(2) which authorizes a GAL to motion the court for an order requiring the parties to participate in mediation.

8. <u>Attend hearings and trial</u>?

a. Yes. In Title 11 RCW proceedings, the guardian ad litem shall appear at all hearings unless excused by court order. GALR 2(l). Attendance at trial is expected but the court may limit the testimony of a GAL in a jury trial if it is deemed prejudicial. *In re Guardianship of Stamm*, 121 Wn. App. 830, 91 P.3d 126 (2004).

b. As an Advocate. Maybe, as a GAL appointed pursuant to RCW 11.88, if *Guardianship of Matthews*, 156 Wn. App. 201, 232 P.3d 1140 (2010) takes hold. *Matthews* is a Division II Court of Appeals case not favored and considered by some to be bad law. Also see *Barr v. Day* infra.

9. <u>Exceed the Scope of Authority In the Order of Appointment without Risk</u>?

When the GAL acts within the scope of the appointment, the GAL acts as an arm of the court and is entitled to quasi judicial immunity from civil liability. *Barr v Day*, 124 Wash 2d 318, 879 P.2d 912 (1994).

A GAL may be compensated in a proceeding governed by TEDRA only insofar as the guardian's actions were appropriately within the scope of the appointment. *In re Estate of Becker*, 177 Wn 2d 242, 298 P. 3d 720 (2013).

10. Testify as a Expert Witness?

The guardianship GAL is not a traditional expert, but becomes an expert on the status of the AIP and the dynamics of his situation to offer an independent and common sense perspective to the court. The court has discretion under ER 702 to permit a GAL to testify to his or her opinions if the court is persuaded the testimony will be of assistance. There are limits to that testimony. The court is free to ignore the GAL's recommendations if they are not supported by the evidence or the court finds other evidence more convincing. *In re Guardianship of Stamm*, 121 Wn. App. 830, 91 P.3d 126 (2004).

11. Object to attorneys fees?

See *In Re Guardianship of Beecher*, 130 Wn. App. 66, 121 P. 3d 743 (2005). The petitioner and GAL in a guardianship proceeding disputed attorney fees and costs charged by the attorney hired by the AIP to represent her in a guardianship proceeding. The AIP was never adjudicated to be incapacitated. The Court of Appeals held the trial court had no authority to review the attorney fees where the AIP was never adjudicated to be incapacitated. Further, neither the petitioner seeking guardianship nor the court appointed GAL in the proceeding had standing to initiate a dispute over fees (under RCW 11.88.045(2)) unless and until the AIP is adjudicated to be incapacitated. However, once there has been an adjudication of incapacity, the guardianship statute's plain language permits the court to reduce pre-adjudication attorney fees.

See *In re Guardianship of Decker*, 188 Wn App 429, 353 P. 3d 669 (2015), also citing RCW 11.88.045(2) for the proposition that both appointment of an attorney for an AIP and payment of reasonable attorney fees to the attorney representing the AIP "must be overseen by the court". The court's authority is not limited to the post-adjudication phase only. A court is not required to conduct a lodestar analysis when determining an attorney's compensation under RCW 11.88.045(2) in a guardianship proceeding. Unlike *Beeche*r, a limited guardian was appointed in *Decker*.

12. Move for a Temporary Restraining Order?

Yes. RCW 11.88.090(9) authorizes the GAL in a guardianship proceeding to move for temporary relief under RCW 7.40 to protect the AIP from abuse, neglect, abandonment, or exploitation…or to address any other emergency needs of the AIP.

IX. GAL'S CESSATION OF DUTIES.

The duties of the GAL, unless otherwise ordered by the Court, shall cease upon the entry of an order resolving the controversy in the matter for which a special-purpose appointment was made, or upon entry of a final order, in the case of appointment as continuous GAL. Unless directed by the Court to the contrary, the appointment of a GAL shall terminate when the incapacitated person attains competency, is restored to competency or is deceased. In such event the GAL shall make application for compensation and discharge.

Caveat: Always obtain an Order Discharging (S)GAL.

APPENDIX

EXHIBIT A: Order Appointing Guardian ad Litem and Notice of Hearing (RCW 11.106.060)

EXHIBIT B: Order Appointing Probate Guardian ad Litem

EXHIBIT C: Order Appointing Settlement Guardian ad Litem (SPR 98.16W)

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In Re TRUST OF _____	No. ORDER APPOINTING GUARDIAN AD LITEM AND NOTICE OF HEARING RCW 11.106.060 (CLERK'S ACTION REQUIRED Paragraph 2.3)

THIS MATTER having come on for hearing on the petition of _____, by and through their attorney, _____, to appoint a Guardian ad Litem for the beneficiary, the Court hereby enters the following:

I.
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence presented to the Court, the Court finds and concludes that:

1.1 The trustee filed intermediate accounts for the trust in accordance with the Trust Accounting Act, RCW 11.106, SPR 98.16W(j)(3)(D) and the terms of the trust, for the following calendar years: 1993 through 2014.

1.2 Pursuant to RCW 11.106.060 and RCW 11.96A.160(1), the Court has discretionary authority to appoint a Guardian ad Litem to represent the interests of the beneficiary.

1.3 The following entity exists for the beneficiary:

☐ Guardian: _____

EXHIBIT A

☐ Agent(s): _____

☐ Personal Representative(s): _____

☐ Trustee(s): _____

☐ Parent(s): _____

1.4 The entity identified in Paragraph 1.3 above has an apparent conflict of interest which may prevent the entity from virtually representing the beneficiary's interest pursuant to RCW 11.96A.120(4) as the beneficiary's guardian, agent, personal representative, trustee, and/or parent.

1.5 The intermediate accounts filed for the calendar years _____ through _____ were previously approved by Court Order. However, the interests of the beneficiary were not represented by a Guardian ad Litem for such intermediate accounts.

1.6 The appointment of a Guardian ad Litem pursuant to RCW 11.106.060 and RCW 11.96A.120 to represent the interest of the beneficiary regarding the intermediate accounts identified in Paragraph 1.1 above and at a hearing to review and approve said intermediate accounts is appropriate.

1.7 Compensation of a Guardian ad Litem to represent the interest of the beneficiary as provided herein is an appropriate expense to the Trust.

II.
ORDER

The Court having made the foregoing Findings of Fact and Conclusions of Law, now, therefore, it is hereby ORDERED, ADJUDGED AND DECREED that:

2.1 The following individual is appointed as Guardian ad Litem pursuant to RCW 11.106.060 and RCW 11.96A.120 to represent the interest of the beneficiary, regarding the intermediate accounts identified in Paragraph 1.1 above, and at the hearing to review and approve said intermediate accounts:

☐

or

☐

The Guardian ad Litem's primary purpose is to review intermediate accounts to identify any objections or exceptions to said intermediate accounts, including any breach of trust, and as otherwise directed by the Court herein.

2.2 The Guardian ad Litem shall prepare a statement of qualifications, including disclosure of any potential conflicts of interest, which he or she shall file and personally serve or mail to all parties within five (5) days of his or her appointment. If no party files an objection to the Guardian ad Litem's qualifications within five (5) days of receipt of the statement of qualifications, the Guardian ad Litem is presumed to be qualified to perform the duties provided for herein.

2.3 The hearing on the intermediate accounts identified in Paragraph 1.1 is set for _____, at _____ ___.m., in the Ex Parte Department, King County Superior Court, _____, Washington 98_____.

2.4 The Guardian ad Litem shall conduct an investigation which is appropriate to size and complexity of the Trust and intermediate accounts identified in Paragraph 1.1.

2.5 No later than five (5) business days prior to the hearing to review and approve the intermediate accounts identified in Paragraph 1.1, the Guardian ad Litem shall file a report which contains the following:

2.5.1 A description of the investigation conducted by the Guardian ad Litem and the persons interviewed and documents reviewed by the Guardian ad Litem.

2.5.2 A description of any objections and/or exceptions to the intermediate accounts identified in Paragraph 1.1, which have been identified by the Guardian ad Litem, including any breaches of trust which the Guardian ad Litem believes have occurred.

2.5.3 A description of the efforts made by the Guardian ad Litem before filing his or her report to communicate with the Trustee or the Trustee's counsel regarding any potential objections and/or exceptions to the intermediate accounts identified in Paragraph 1.1, which have been identified by the Guardian ad Litem.

2.5.4 A recommendation of whether the intermediate accounts identified in Paragraph 1.1 should be approved and the proposed Order approving said intermediate accounts should be entered.

2.5.5 A statement of the Guardian ad Litem's fees and costs.

2.5.6 Other: _____

_____

_____

_____.

2.6 If the Guardian ad Litem identifies any potential objections and/or exceptions to the intermediate accounts identified in Paragraph 1.1, in the course of his or her investigation, the Guardian ad Litem shall make reasonable efforts to communicate with the Trustee or the Trustee's counsel before filing his or her report in an attempt to resolve, address or further explain the potential objections and/or exceptions.

2.7 The Guardian ad Litem is authorized to expend up to a maximum of _____ hours at his or her regular hourly rate, without further advanced approval of the Court.

2.8 The Guardian ad Litem shall be compensated from the Trust assets after Court approval of his or her fees and costs, unless otherwise ordered by the Court.

2.9 Other: _____

_____

_____

DONE IN OPEN COURT this _____ day of _____, 2015.

_____
Judge/Court Commissioner

Presented By:

By_____
WSBA No. _____
Attorney for _____

Optional Paragraph for Order Appointing Guardian ad Litem and Notice of Hearing
(RCW 11.106.060)

The deadline for obtaining the Order Approving the Trustee's Report and Accounting is extended from _____, 2016, sixty (60) days after the filing the Trustee's Report and Accounting and Petition for Approval, to _____, 2016, to allow the Guardian ad Litem sufficient time to complete his or her investigation and file his or her report.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

IN THE ESTATE OF:

NO.

ORDER APPOINTING PROBATE GAL

(Clerk's Action Required)

On the court's own motion or upon a Petition for Appointment of a Probate GAL having been filed herein, the Court finding that the court has jurisdiction over this matter and that a Probate GAL is required to investigate and evaluate a proposed distribution or otherwise protect the interests of a minor or adult incapacitated person; now therefore,

THE COURT ORDERS

A. Unless otherwise ordered, a hearing on the Report of GAL shall occur in the Ex Parte & Probate Department at 10:30 a.m. on (date): _____, or upon the filing of a Declaration of Completion or a Petition for Decree of Distribution or to Approve Final Report:

☐ KNT Cases: Room 1-J of the Regional Justice Center, 401 Fourth Avenue North, Kent, Washington 98032.

☐ SEA Cases: Room W-325 of the King County Courthouse, 516 Third Avenue, Seattle, Washington 98104.

B. Probate GAL: _____ is found or known by the court to be a suitable, disinterested person having the requisite knowledge, training and expertise to perform the duties required by RCW Title 11 and SPR 98.16W, and is hereby appointed to represent the interests of the minor(s) or incapacitated person named:

_____.

IMPORTANT MESSAGE FOR THE PROBATE GAL:

C. Duties. The ***Probate GAL*** shall have the following duties:

1. To investigate and evaluate the adequacy of the proposed distribution in light of the terms of the Will, Trust, or laws of intestate succession; and to report and make recommendations to the court concerning the nature or form of the proposed distribution in light of the needs and best interests of the minor or incapacitated person.

EXHIBIT B

2. To review written or oral reports from the attorneys, guardians, and medical providers necessary to permit a complete report as required by SPR 98.16W.

3. To provide the court with a written report, which shall include a description, **in depth appropriate to the proposed distribution** of the following information, as a minimum:

a) Summary: State the amount of the distribution that is proposed by the Personal Representative, that you are recommending, and form in which the net proceeds will be applied.

b) Appointment of Probate GAL: State your name, date of appointment, and the date that you started working on this matter. Give a brief statement of your experience and qualifications as pertain to serving as a probate GAL, or attach a Curriculum Vitae. Describe your relationship, if any, with the deceased, and any family member, guardian, or attorneys involved in this proceeding or facts from which it arose.

c) Investigation: Describe the investigation you conducted, the persons interviewed, and the documents you reviewed.

d) Law: Describe of the applicable provisions of the Will or laws of intestacy.

e) Assets Available: State the nature and extent of all assets available to satisfy the distribution.

f) Other Claims: Identify all other claims of the incapacitated person arising within or outside of this estate.

g) Apportionment: Indicate the amount, basis, and justification for allocating the gross distribution among the heirs or beneficiaries of the estate.

h) Fees and Expenses: Discuss and evaluate the reasonableness of the attorney's fees requested, costs to be reimbursed, GAL fees and any other deductions from the proceeds of the estate and/or the share of the incapacitated person.

i) Disposition of Net Proceeds: Set forth your determination of the distribution to which the incapacitated person is entitled, and your recommendation as to the form of the distribution and the name of the fiduciary to whom it should be transferred. Give your reasons and recommendations as to how the funds should be placed. If a legal guardianship is required, state the nominee and the terms that you recommend. If you recommend an annuity or structured settlement, state why that option is preferred; the specific pay out schedule recommended and how it relates to the specific needs of the incapacitated person; and a statement which includes the cost of the structured portion, the interest rate received, and the name and financial rating of the company providing the annuity. If you or any party recommend the creation of a trust as recipient of the distribution, give your recommendation as to the special needs of the incapacitated person and how they would be served by having a trust; specific provisions that ought to be included or omitted from the trust; and your nomination of professional to draft the trust, and a recommended fee therefore.

j) Probate GAL Fees: Attach a declaration of your time and services, giving your professional rate and the amounts sought. Indicate who you recommend pay the fees and costs.

k) Presence at Hearing: State whether the incapacitated person, the Probate GAL, and any other person(s) should be present at the hearing to approve the distribution.

l) Settlement Approval Sought in Other Jurisdiction: State whether the distribution has been submitted for approval in any other court or jurisdiction.

4. The Probate GAL shall file a report with the court within forty five days after appointment and provide a copy to each party, or to their counsel, if they are represented.

5. To accomplish all other duties specifically required under SPR 98.16W and any order of the court filed herein.

D. The cost of this proceeding and the Probate GAL's fee will be paid as approved as a part of the distribution, or is reserved for determination at the time the estate is ready to be closed.

E. A court's working copy of the report and supporting documentation shall be delivered to the Ex Parte & Probate Department of the proper case assignment area, not later than 7 days preceding the hearing.

F. The Probate GAL shall not employ or retain counsel or experts to assist in these duties except as authorized in advance by the court, and shall promptly advise the court if others have retained such a person without court authorization, including, but not limited to the retention of counsel to initiate litigation or draft a trust.

G. The Probate GAL may seek further instruction from the court upon petition and notice to all parties, in accordance with court rules.

H. ☐ The Clerk of the Court, ☐ counsel or ☐ the party requesting this appointment is directed to provide a copy of this order to the Probate GAL appointed by this order, within the next three days.

I. Approximate anticipated distribution: $ _____.

J. Other: _____

_____

DATED and signed in open court, this _____ day of _____, 2003.

_____

Judge/Court Commissioner

Presented/ Copy Received by:

Signed: _____

Printed Name: _____ Bar No.: _____

APPENDIX

EXHIBIT A: Order Appointing Guardian ad Litem and Notice of Hearing (RCW 11.106.060).

EXHIBIT B: Order Appointing Probate Guardian ad Litem.

EXHIBIT C: Order Appointing Settlement Guardian ad Litem (SPR 98.16W).

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

IN THE SETTLEMENT / GUARDIANSHIP OF:	)	
	)	NO.
	)	
	)	**ORDER APPOINTING SETTLEMENT GUARDIAN AD LITEM** (SPR 98.16 W)
	)	
_____	)	
Minor or Incapacitated Person	)	(Clerk's Action Required)
_____	)	

A Petition for Appointment of Settlement Guardian ad Litem having been filed on behalf of the above-named minor or incapacitated person, the Court finding that the facts set forth give the court jurisdiction over this matter and that pursuant to SPR 98.16W, a Settlement Guardian ad Litem or independent attorney is required to investigate and evaluate the proposed settlement; now therefore,

THE COURT ORDERS

A. Unless otherwise ordered, the hearing on the Petition shall occur at 10:30 a.m. on (date): _____, in the Ex Parte / Probate Department:

☐ KNT Cases: Room 1-J of the Regional Justice Center, 401 Fourth Avenue North, Kent, Washington 98032.

☐ SEA Cases: Room W-325 of the King County Courthouse, 516 Third Avenue, Seattle, Washington 98104.

☐ Other:_____.

B. Settlement Guardian ad Litem: _____ is a person found or known by the court to be a suitable, disinterested person having the requisite knowledge, training and expertise to perform the duties required by RCW 11.88.090 and SPR 98.16W, and is hereby appointed to represent the interests of the named minor or incapacitated person.

EXHIBIT C

C. Presumptive Fee Limit. The Settlement Guardian ad Litem shall be paid at an hourly rate not to exceed $200 per hour up to a maximum of ten (10) hours, unless ***further Court approval*** is given ***in advance*** for additional fees or time.

IMPORTANT MESSAGE FOR THE SETTLEMENT GUARDIAN AD LITEM:

D. Duties. The Settlement Guardian ad Litem shall have the following duties:

1. To investigate and evaluate the adequacy of the offered settlement in light of the needs and best interests of the minor or incapacitated person.

2. To review written or oral reports from the attorneys, guardians, and medical providers necessary to permit a complete report as required by SPR 98.16W.

3. To provide the court with a written report, which shall include a description, **in depth appropriate to the magnitude of injuries and the amount offered**, of the following information, as a minimum:

a) Summary: State the amount of the settlement that you are recommending, and how the net proceeds will be distributed. Include the name and contact information of parents and another relative: List the name and address of each parent of the minor and another relative. This information will be used in the event the court needs to contact the minor upon turning age 18 or if the court needs to contact the parent for a missing report if required.

b) Appointment of Settlement Guardian ad Litem: State your name, date of appointment, and the date that you started working on this matter. Give a brief statement of your experience and qualifications as pertain to serving as a Settlement Guardian ad Litem, or attach a Curriculum Vitae, with this information. Describe your relationship, if any, with involved parents, guardians, insurers, or attorneys.

c) Investigation: Describe the investigation you conducted, the persons interviewed, and the documents you reviewed.

d) Description of Incident and Cause of Action: Describe the incident and the affected person's legal claims.

e) Injuries: Describe the injuries, diagnosis, course of treatment, and prognosis for future disability. Attach a copy of a recent supporting medical report or medical record.

f) Damages: Describe the special and general damages that are potentially recoverable.

g) Liability Issues: Describe the factors bearing on each potential defendant person or entity's liability, including issues of primary negligence, contributory or comparative negligence, causation and probable chance of recovery.

h) Insurance & Assets Available to Satisfy Claim: State the nature and extent of all insurance coverage or assets available to satisfy the claim, whether maintained through the defendant, the family, or available through government entitlements.

i) Liens and Subrogation: Identify all liens, subrogation, and reimbursement claims. Make a recommendation regarding how those claims are to be resolved including a recommendation regarding retention in any attorney's trust account of the full amount claimed until the final resolution of the claim.

j) Other Claims: Identify all other claims arising out of the same occurrence. State whether another family member has a claim arising out of the same occurrence, and whether any family member is or could be a plaintiff or defendant in any action based upon the minor's claim or the occurrence from which it arose.

k) Apportionment: Indicate the amount, basis, and justification for allocating the gross settlement to be paid among the various claimants of the same family or unrelated claimants, if any. State whether the minor or incapacitated person was independently represented at the time the proposed apportionment was determined.

l) Proposed Settlement: Discuss and evaluate the reasonableness of the proposed settlement amount, stating the basis for your valuation of the claim. Also discuss the form the settlement might take (e.g. blocked account, guardianship, structured settlement, or trust) and the proposed settlement documents.

m) Expenses and Fees: Discuss and evaluate the reasonableness of the attorney's fees requested, costs to be reimbursed, and any other deductions from the proceeds of the claim.

n) Disposition of Net Proceeds: Set forth your calculation of the net proceeds of the claim. Begin with the proposed offer and subtract attorney's fees and costs, liens and subrogation reimbursements, and settlement guardian ad litem fees.

Give your reasons and recommendations regarding as to how the funds should be placed. If a legal guardianship is required, state the nominee and the terms that you recommend. If you recommend a structured settlement, state why that option is preferred; the specific payout schedule recommended and how it relates to the specific needs of the minor; and a statement which includes the cost of the structured portion, the interest rate received, the name and financial rating of the company providing the annuity. If you or any party recommend the creation of a trust as recipient of the settlement funds, give your recommendation as to the special needs of the incapacitated person and how they would be served by having a trust; specific provisions that ought to be included or omitted from the trust; and your nomination of professional to draft the trust, and a recommended fee therefore.

o) Settlement Guardian ad Litem Fees: Attach a declaration of your time and services, giving your professional rate and the amounts sought. Indicate who you recommend pay these fees and costs.

p) Presence at Hearing: State whether the minor or the Settlement Guardian ad Litem, or which other person(s) should be present at the hearing to approve the settlement.

q) Settlement Approval Sought in Other Jurisdiction: State whether the settlement has been submitted for approval in any other court or jurisdiction.

r) Conclusion: Give your recommendation as to the adequacy of the offered settlement, and the steps to be followed if you recommend that the settlement not be approved.

4. The Settlement Guardian ad Litem shall file a report with the court within forty five days after appointment and provide a copy to each party, or to their counsel, if they are represented.

5. To accomplish all other duties specifically required under SPR 98.16W and any order of the court filed herein.

E. The cost of bringing this proceeding and the Settlement Guardian ad Litem's fee will be paid as approved as a part of the settlement, or is reserved for determination at the time the settlement is submitted to the court.

F. A court's working copy of the report and supporting documentation shall be delivered not later than 7 days preceding the hearing to the Ex Parte Department of the proper case assignment area who will be hearing the matter.

G. The Settlement Guardian ad Litem shall not employ or retain counsel or experts to assist in these duties except as authorized in advance by the court, and shall promptly advise the court if others have retained such a person without court authorization, including, but not limited to the retention of counsel to initiate litigation or draft a trust.

H. The Settlement Guardian ad Litem may seek instruction from the court upon application and notice to all parties. If records or portions of the report contain confidential information which may adversely affect the settlement or trial of the claim, the Settlement Guardian as Litem shall seek direction from the court.

I. Counsel or party requesting this appointment is directed to provide a copy of this order to the Settlement Guardian Ad Litem.

J. ☐ The SGAL is authorized to participate in mediation and/or other negotiations which may lead to a settlement of the claim of the minor or adult incapacitated person named above.

K. Approximate settlement amount: $ _____.

L. Other: _____

DATED and signed in open court this _____ day of _____, _____.

_____
JUDGE / COURT COMMISSIONER

Presented/ Copy Received by:

Signed: _____

Printed Name: _____

Bar No.: _____

Attorney for: _____

CHAPTER SEVEN

CONFLICTS OF INTEREST HERE, THERE AND EVERYWHERE

April 2016

Hon. John P. Erlick
King County Superior Court

Phone: (206) 477-1623
Email: john.erlick@kingcounty.gov

JUDGE JOHN ERLICK was first elected to the King County Superior Court in September 2000 and is currently on the Superior Court's Executive Committee. He previously served as Chief Civil Judge for King County Superior Court and now presides over principally civil cases. He serves as a judicial and Executive member on the State Commission on Judicial Conduct, is a member of the Superior Court Judges' Association (SCJA) Education Committee, and served as chair of the SCJA Ethics Committee from 2005-2014. He is on the Executive Committee and is President Emeritus of the William L. Dwyer Inn of Court. Judge Erlick was the Dean of the Washington State Judicial College in 2014-15.

Judge Erlick is dedicated to the training and teaching of judges and law professionals in legal ethics. Since 2007, he has been an adjunct professor in professional responsibility and the judicial externship program at Seattle University School of Law, where he received the Outstanding Adjunct Faculty Award in 2011. Judge Erlick graduated from the international law training program at the Center for International Legal Studies (CILS), in Salzburg, Austria, has served as a Visiting Professor at the Far Eastern Federal University, in Vladivostok, Russia, and is a member of the Academic Committee of the International Organization for Judicial Training (IOJT). He has also been involved as a coach and instructor in countless mock trial and moot court competitions. In addition to authoring numerous articles on professionalism and ethics, Judge Erlick has also lectured on these and other topics at judicial conferences, bar association meetings, and law schools, and is the consulting editor for Washington Trial and Post-Trial Civil Procedure (Lexis-Nexis.) Judge Erlick previously was the SCJA appointee to the State's Ethics Advisory Committee and also served as the chair of the King County Superior Court Ex Parte and Probate Committee, and on the Jury Committee, Governance Committee and King County Bench/Bar Efficiencies Task Force. He was the 2004 judicial co-chair of the King County Bench-Bar Conference. Prior to his election in 2000, he was in private practice, concentrating on defense of professional liability cases.

Judge Erlick graduated from Harvard College in Cambridge, Massachusetts with honors and from the Georgetown University Law Center with honors. He is a graduate of the National Judicial College general jurisdiction program.

Conflicts of Interest

Here, There, and Everywhere

Presented by

Judge John Erlick

13th Annual Trust and Estate Litigation Seminar

RPC 1.7
CONFLICT OF INTEREST: CURRENT CLIENTS

- **(a)** Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a *concurrent conflict of interest*. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that representation of one or more clients will be materially limited by the lawyer's responsibilities to
- another client,
- a former client or
- a third person or
- by a personal interest of the lawyer.

But…lawyer may represent a client if:

(1) lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to *each* affected client;

(2) not prohibited by law;

(3) does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives

- ❖informed consent,
- ❖confirmed in writing

FACTORS

Relevant factors in determining whether there is significant potential for material limitation include:

- the duration and intimacy of the lawyer's relationship with the client or clients involved,
- the functions being performed by the lawyer,
- the likelihood that disagreements will arise and
- the likely prejudice to the client from the conflict. The question is often one of proximity and degree.

WHO's THE CLIENT????

- Estate?
- Fiduciary?
- Beneficiaries?
- Attorney as fiduciary?

E.g.: DPOA for non incapacitated person

- **14**. **Waiver of Privilege.** Any third party from whom my Agent may request information, records or other documents regarding my affairs may release and deliver all such information, records and documents to my Agent. I hereby waive any privilege and/or confidentiality that may apply to the release of such information, records, or documents. I specifically authorize and instruct my Agent to communicate directly with my attorney regarding all of my affairs and waive any attorney/client privilege applicable to my attorney as to such communication with my Agent.

- *Thanks to Janet Sommers*

RPC 1.7, comment 27

- In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

Being clear on roles, duties and responsibilities

- **Professional fiduciary**: It is important for you to know that I will represent BANK in your fiduciary capacity. I do not represent the beneficiary(s) of the trust. This representation agreement applies to all employees or designated agents of BANK and applies to all trust/estate matters in which BANK engages our services. [Optional: It is important to note that my fees will be submitted to the Court for approval and must be in compliance with Washington state law governing attorneys' fees in fiduciary matters.]
- **To an attorney-in-fact acting on behalf of a now incapacitated client:** It is important to be clear about my representation. Selma is my client and I will be representing you in your fiduciary capacity as her attorney-in-fact. My duty of loyalty is to Selma. However, I am glad to advise you so long as there is no conflict in that representation, for example, if you were to discuss a gifting program to position her for Medicaid eligibility. In that case, I would refer you to independent counsel for that advice. We have set forth the terms of our representation below.
- **To Co-Personal Representatives:** It is important for you to know that I will represent you both in your fiduciary capacities as Personal Representatives of the Estate. I do not represent the Estate or beneficiaries of the Estate. You will both be my clients. In the unlikely event that a dispute or conflict arise between the two of you, I will have to withdraw and refer you both to individual counsel.

Thanks to Janet Sommers

Compensation, confidentiality and loyalty

- RPC 1.8 (f) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.

Duties may be owed to other than clients

A duty is not owed from an attorney hired by the personal representative of an estate *to the estate* or to *the estate beneficiaries*.

Trask v. Butler, 123 Wn.2d 835, 845, 872 P.2d 1080, 1085 (1994)

BUT

The general rule is that only an attorney's client may file a claim for legal malpractice. *Trask v. Butler,* …But an attorney may owe a nonclient a duty even in the absence of this privity. …

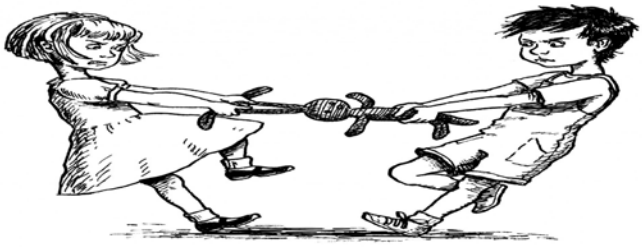
Estate of Treadwell ex rel. Neil v. Wright, 115 Wn. App. 238, 243, 61 P.3d 1214, 1216 (2003)(guardian's attorney owes an incompetent ward a duty to establish the guardianship consistent with the requirements of guardianship statutes)

HYPOthetical

- Attorney A represents Son (S) in his fledgling tech company. A also has prepared S's will and estate plan leaving his entire estate to his parents (M&D).

- M&D have done well and their estate has expanded over the years. They tell S that they would like to update their wills and plan on leaving everything to their beloved S.

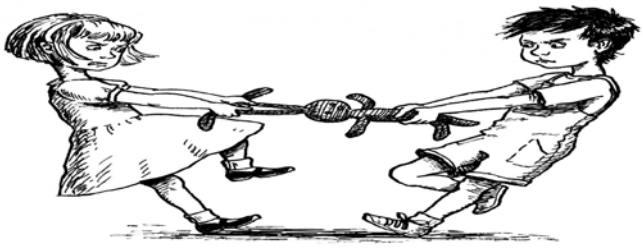
- S introduces M&D to his attorney, A. Pursuant to their instructions, A drafts M&D's new wills mutually leaving each spouse's estate to the other, and upon the demise of both to beloved S.



- CONFLICT OF INTEREST????

- POTENTIAL CONFLICT OF INTEREST????

- S's business flourishes.
- M goes dancing. D doesn't like to dance.
- M dances the tango.
- M meets new tango partner.
- M&D divorce,
- D remarries. D goes to A to change his will to leave his estate to new W. If she predeceases him, then to S.



- CONFLICT OF INTEREST????
- POTENTIAL CONFLICT OF INTEREST????

RPC 1.7

- [27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.

Disclosure to M? To S?

- First, can A draft new will?
- If she does, must she disclose to her other "clients?"
- Could this have been avoided?

RPC 1.6 CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to the representation of a client unless
- the client gives informed consent,
- the disclosure is impliedly authorized in order to carry out the representation
- or … permitted by paragraph (b)

RPC 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

- (a) …a lawyer shall abide by a client's decisions concerning the objectives of representation and, …shall consult with the client as to the means by which they are to be pursued.

RPC 1.4 COMMUNICATION

(a) A lawyer shall…

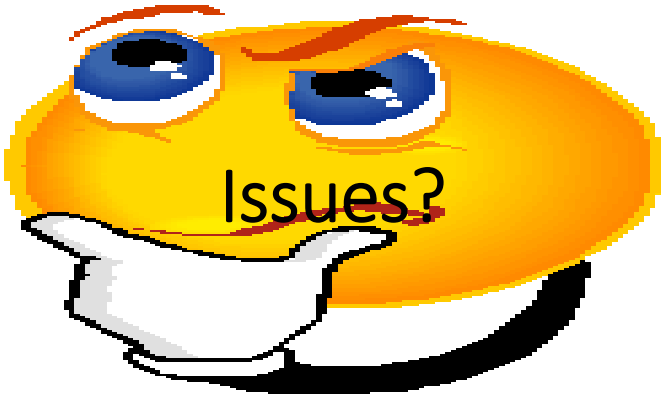
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

…

Next HYPO: S, M&D – Part II

- M&D happily married.
- M does not like to dance. Neither does D.
- One day, D gets a phone call from an old "friend."
- She advises that for the past 22 years, she has been raising D's and her daughter. She is ill and wants D to meet daughter.
- D meets daughter, get along famously. He wants to leave her a "little something" in his will.
- D goes to A to revise will to bequeath ½ of his part of the community to daughter.



- **Is there a conflict of interest?**
- Can A revise D's will with bequest to daughter?
- Must A disclose bequest to M and to S?
- Even if A chooses not to redraft D's will, what should she do?
- What must she do?

RPC 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) …a lawyer shall not represent a client or, where representation has commenced, shall, …withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

Could a waiver have been obtained?

(1) lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to *each* affected client; and …

(4) each affected client gives

- ❖informed consent,
- ❖confirmed in writing

INFORMED CONSENT

- RPC 1.0 (e) "Informed consent" …agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Another HYPO!!!: Representing the Estate

- Driver gets in motor vehicle accident and is at fault, seriously injuring P. Driver dies.
- Driver's Estate has minimal assets but has an auto insurance policy.
- P's attorney obtains court appointment of PR. P's attorney sues PR/Driver's Estate.
- Insurance company appoints attorney to defend PR representing Driver's Estate.

- Insurance company also hires attorneys to represent the "Estate."
- "Estate attorneys" believe that PR is acting against interest of the Estate
- Estate attorneys petition the court to remove the PR.

- Who is the "Estate Attorneys' " client?
- What are the conflicts/potential conflicts here?

Attorney as Fiduciary

- Testator hires A to draft her will.
- Testator wants to name A as the Personal Representative of her Estate.

- What could (possibly) go wrong????

Attorneys and PRs serve as checks and balances for each other.

- Trask v. Butler
- *See generally* ABA Formal Op. 02-426 (May 31, 2002);
- RPC 1.6 (b)(7)

RPC 1.6

- (b)(7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

ABA Formal Op. 02-426

One of a lawyer's important responsibilities in providing estate planning for his client is to help her select an appropriate personal representative to administer her estate and a trustee to manage any trust established by the will.

The lawyer is required by Rule 1.4(b) to discuss frankly with the client her options in selecting an individual to serve as fiduciary.

- This discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary;
- the fiduciary's desired skills;
- the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members; and
- the benefits and detriments of using each, including relative costs.

When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary. The lawyer must not, however, allow his potential self interest to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries.

California

A drafting lawyer who is unrelated to the client is subject to removal unless (1) an independent attorney certifies on a statutory form that the appointment was not the product of fraud or undue influence before the document is executed or (2) the court finds that it is

consistent with the settlor's intent that the trustee continue to serve and that the appointment was not the product of fraud or undue influence.

Cal. Prob. Code § 15642(b)(6).

ACTEC Commentary on MRPC 1.7

A lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rule of MRPC 1.7,and the appointment is not the product of undue influence or improper solicitation by the

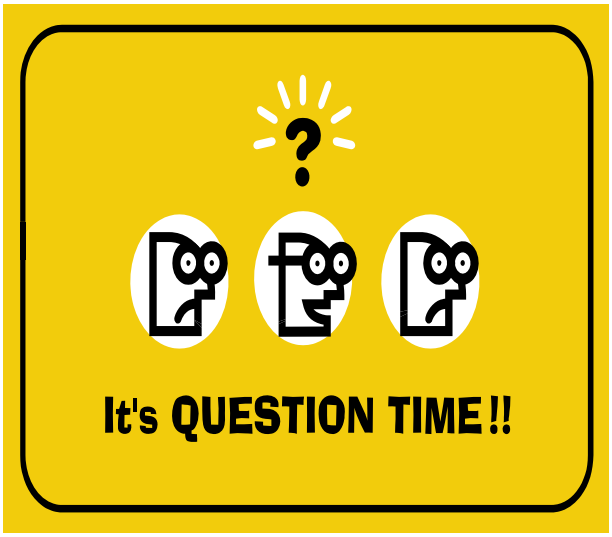
lawyer."

The Commentaries note that:

"a client is properly informed if the client is provided with information

regarding the role and duties of the fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary."

- What type of work are you doing?
  - Administrative or legal?
  - No business dealings!!! (RPC 1.8)
  - Self-dealing, related entities, liability for referrals


It's QUESTION TIME!!

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CHAPTER EIGHT

ILLUSTRATION OF A TEDRA ACTION FROM BOTH SIDES

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KAREN R. BERTRAM is a founding member of the firm of KUTSCHER HEREFORD BERTRAM BURKART PLLC in Seattle, Washington. Her practice focuses on trusts and estates, including estate planning, trust and probate administration and resolution of trust and estate disputes. Ms. Bertram is a Fellow of the American College of Trust and Estate Counsel and a former member of the Executive Committee of the Washington State Bar Association Real Property, Probate and Trust Section. She is listed in Best Lawyers in America, has been named a Top Lawyer by Seattle Magazine, has been designated by her peers as a Super Lawyer every year since 2000 and has been named one of the top 100 lawyers and top 50 women lawyers in Washington by Washington Law & Politics.

DEBORAH J. PHILLIPS is a partner with Perkins Coie LLP and has practiced with the firm since 1987. She is in the firm's Litigation practice and also works closely with the firm's Personal Planning lawyers. She has been a member of the WSBA's RPPT TEDRA Taskforce since 2003 and has chaired the group since 2009. In 2010 she became a fellow of the American College of Trust and Estate Counsel. Before joining Perkins she was the Senior Appellate Attorney and a deputy prosecutor in the criminal division of the King County Prosecutor's Office. She received her J.D., cum laude, from Georgetown University Law Center and her undergraduate degree, with honors, from the University of California, Berkeley.

TEDRA: LOOKING AT A CASE IN THE REAR VIEW MIRROR

Chapter 1: The Estate Plan and the Death of Mr. Jones

Mr. and Mrs. Jones married in 1985, a second marriage for both. Both had grown children from their prior marriages. The families tolerated each other during most of the marriage. The relationship deteriorated at the end of Mr. Jones' life when a guardianship was filed by his children and contested by his wife as his mental and physical health declined.

When they got married, Mr. and Mrs. Jones each owned assets similar in value. There was no prenuptial agreement. Many years into the marriage they executed a trust. The basic plan was to put all their assets in the trust, declare all the assets to be community property, and then to divide the assets into two trusts when the first spouse died. All six of their children were beneficiaries of Trust #1. Trust #1 did not provide for any distributions to the children of income or principal until the surviving spouse died. The surviving spouse was not a beneficiary of Trust #1. The surviving spouse was the beneficiary of Trust #2, and upon her death all the children were equal residuary beneficiaries of that trust. However, Trust #2 allowed the surviving spouse, who was also the trustee, to distribute income, principal and/or all the assets outright to the survivor.

After Mr. Jones died, Mrs. Jones distributed all the assets from Trust #2 to herself and immediately made gifts of those assets to her two children and terminated Trust #2.

She then proposed a TEDRA agreement to distribute the assets from Trust #1. Even though she was not a beneficiary of that trust, she proposed that she receive $100,000 and that the six children split the balance. She did not tell her husband's four children that she had already distributed the assets from Trust #2 to herself and then to her children. Mr. Jones' children, represented by counsel, signed off on the TEDRA Agreement.

The TEDRA Agreement provided that all the parties waive any claim, then or in the future, to any interest in the Estate of Mr. Jones or in any trust for which he was the grantor.

TEDRA THROUGH THE REAR VIEW MIRROR

1. What would you have done differently if you were representing Mrs. Jones?

2. What would you have done differently if you were Mr. Jones' children?

Chapter 2: The First Dispute

Mrs. Jones dies. Her children, named as the PRs of her estate, discover she had created a new brokerage account after terminating Trust #2, with the documents referring to it as a Trust #2 account. The account held about $750,000 in stocks and bonds. The brokerage would not release the account to the children as PRs of their mother's estate as the account was titled as a trust account. Mrs. Jones' son and one of Mr. Jones' daughter were successor co-trustees of Trust #2 according to the original trust documents. Mrs. Jones' son will not agree that the account was supposed to be a trust account and will not agree to have the brokerage provide any information to Mr. Jones' daughter.

Mr. Jones' children sue Mrs. Jones' children. The account is awarded to Mrs. Jones' estate. Everyone, including the broker, seeks legal fees. No one is awarded fees.

As a result of this lawsuit, Mr. Jones children learn that Trust #2 no longer exists and Mrs. Jones' children have all those assets. The families now strongly dislike each other.

TEDRA THROUGH THE REAR VIEW MIRROR

1. *What would you have done if you were representing Mrs. Jones' children?*

2. *What would you have done if you were Mr. Jones' children?*

3. *What would you have done if you were representing the brokerage?*

Chapter 3: The Long Lost Asset

Several years go by. With the wonders of the internet, Mr. Jones' children learn their grandfather retained a very small interest in mineral rights in Colorado. With the wonders of fracking, there are royalties to be paid out.

The grandfather's estate was never probated as no one thought he owned any real property or frankly any property that required probate. Grandpa Jones had six children, and the one surviving child opens a probate in Colorado to deal with the mineral rights. Grandpa Jones died without a will, so each of his children or their heirs will receive a 1/6th share of his estate.

Both Mr. and Mrs. Jones' children each believe their "side" of the family is entitled to 100% of the mineral rights. The 1/6th share of the royalties is under $15,000/year, and there is about $60,000 waiting to be distributed from several years of fracking. However, hopes are high the oil and gas will generate royalties for many years, the price of crude oil had risen steadily in the prior ten years and in 2012 it hit an all-time high.

1. Filing A Petition: Who has standing to file a petition?

Any beneficiary named in Mr. Jones' estate planning documents?

The personal representative named in Mr. Jones' will?

Mrs. Jones is deceased. Can the personal representative of her estate file?

Could anyone on the statutory list of potential personal representatives file and ask to be appointed?

2. What should the petition ask for?

Should a personal representative for Mr. Jones' estate be appointed?

Should a special administrator be appointed?

Should the petition propose a distribution of the asset in question?

3. Where should the petition to be filed?

If Mr. Jones died in Washington, should the petition be filed here?

Since the asset is mineral rights, should the petition be filed in Colorado?

If so, what should happen in Washington?

4. Lawyers for the Parties

If the Personal Representative is a Beneficiary, does she need a separate lawyer for herself as a beneficiary?

Can the Personal Representative use estate funds to pay for her lawyer?

Do the beneficiaries need their own lawyer?

Who pays the legal fees?

Who has a claim for fees when the dispute is resolved?

5. Should the first hearing be a hearing on the merits?

6. Discovery: What discovery is permitted?

RCW 11.96A.100(9): A party may move the court for an order relating to . . . discovery . . . in the original petition, answer, response, or reply, or in a separate motion, or at any other time

RCW 11.96A.115(1): Discovery shall be permitted only in the following matters:

(1) A judicial proceeding . . . commenced under RCW 11.96A.100, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules; or

(2) A matter in which the court orders that discovery be permitted on a showing of good cause, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules unless otherwise limited by the order of the court.

7. What discovery is productive?

8. Mediation?

9. Pretrial Motions

Are there summary judgment motions? Why or why not?

10. What About The Earlier Settlement Agreement?

How does the earlier TEDRA Agreement affect the claims in this case? It provided that all the parties waived any claim, now or in the future, to any interest in the Estate of Mr. Jones or in any trust for which he was the grantor.

11. Trial

12. Fees From Trial

13. Appeal

14. Fees From Appeal

CHAPTER NINE

RULES OF PROFESSIONAL CONDUCT

WASHINGTON'S RULES OF PROFESSIONAL CONDUCT (RPC)

(with rule changes through April 14, 2015)

(Originally adopted effective 9/1/85. Substantially revised (with addition of comments) effective 9/1/06.)