Real Property, Probate & Trust

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The Washington Uniform Real Property Transfer on Death Act

by Al Falk – Harlowe & Falk LLP

Introduction to the TOD Deed

Until now, it has been possible in Washington to transfer at death almost any type of property a person might own without probate – except for real property. Retirement accounts, life insurance and annuities, all controlled by beneficiary designations, transfer outside of probate, as well as pay on death ("POD") bank deposits and transfer on death ("TOD") securities accounts. In light of this, it seemed a bit anomalous that the transfer of real property, often not even a person's most valuable asset, still required a probate.

Twenty-five years ago, it finally occurred to someone that a state could authorize "transfer-on-death" deeds, just like TOD accounts. In 1989, Missouri adopted a statute providing for deeds that transfer title on the grantor's death. Twelve other states had enacted something in the way of a TOD deed statute by 2009. Then a uniform act was adopted by the Uniform Law Commission in 2009. The Uniform Real Property Transfer on Death Act has been enacted in 13 jurisdictions. Thus, roughly half of all U.S. jurisdictions now have laws authorizing some form of a transfer-on-death deed.

Washington is one of the 13 jurisdictions that have adopted the uniform act. This year, the legislature enacted Second Engrossed Substitute House Bill 1117 ("HB 1117"), adopting the uniform act with some Washington-specific modifications and additions.[1] The Governor signed it and the law went into effect on June 12, 2014.

A TOD deed is a deed that is made and recorded while the owner is alive, but that does not transfer title until the grantor's death. Because title does not transfer until the grantor's death, the transfer is treated for income tax basis purposes the same as any other transfer occurring at the death of the property owner. Thus, basis in the hands of the grantee is adjusted to the fair market value of the property

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at the date of the grantor's death – or at the alternate valuation date if that is used for federal estate tax purposes.

Uses for TOD Deeds

TOD deeds will have significant advantages over other real property transfer mechanisms in certain situations. They show particular potential in funding revocable living trusts. Because title does not pass until death, the grantor will not need to get lenders' consents or title policy endorsements. In addition, if the grantor wants to refinance the property designated for a revocable trust, it won't be necessary to convey title out of the trust first, then reconvey to the trust once the financing transaction is completed.

Another benefit of the deed will be to avoid probate while also avoiding many of the drawbacks of other common probate avoidance methods. For instance, unlike a deed creating a joint tenancy or a deed reserving a life estate, the grantor can revoke a TOD deed. If after recording the deed, the grantor decides to change grantees or later determines that a trust would be helpful, the TOD deed can be revoked or a new one recorded to supersede the old deed. Also, the grantor will not need to worry during his or her lifetime about complications arising out of the grantees' creditor or marital problems.

Despite these benefits, however, TOD deeds may make our lives a little more miserable too. The TOD deed is susceptible to the same abuses as other nonprobate devices. Duress, undue influence and fraud – to name a few – are easier to commit without the protections inherent in the use of testamentary documents. And self-helpers will no doubt botch the job from time to time.

The Mechanics of TOD Deeds

The mechanics of a TOD deed could not be easier. The grantor makes a deed that recites that the deed is not effective until the grantor's death, specifying who the real property is to pass to on death. Then the grantor records the deed. It's that simple. A sample form of TOD deed can be found at the end of this article.

Until the grantor's death, title remains in the grantor. The grantee has no interest in the property until the grantor dies. The grantor can freely revoke the deed at any time. There is a sample form of a revocation at the end of this article as well.

Note that when the grantor dies, the grantee must file a death certificate, just like a surviving joint tenant must do when one of the joint tenants dies.

There is the matter of the Real Estate Excise Tax. Unless a TOD deed is given for consideration, it will not give rise to an excise tax. The Department of Revenue issued an emergency rule requiring that the Real Estate Excise Tax Affidavit ("REET Affidavit") be filed by the grantee after the grantor's death, not by the grantor when recording the deed. You should expect some confusion at your county treasurer's office about this until they get familiar with receiving TOD deeds.

The statute says that the grantee's signature is not needed on the REET Affidavit – only the grantor must sign. The reason for this is that it was thought that the REET Affidavit would be filed when the deed is recorded. However, the Department of Revenue rule says that the grantee signs it "on behalf of the grantor." It's reasonable to assume that when the opportunity arises, the statute will be amended so that such a convoluted rule will not be needed.

Questions Raised by TOD Deeds

What if the grantor sells the property after recording a TOD deed? That would have an effect similar to revocation of the TOD deed. But instead it would be ademption by extinction.[2]

What if the grantor records a second TOD deed on the same property, naming a different grantee? That revokes the first TOD deed, by implication.[3]

What if the grantor records a TOD deed, but later makes a will giving the property to someone else? The deed will prevail over the will.[4] The will does not affect the TOD deed any more than the will could override the grantor's JTROS deeds or beneficiary designations for life insurance, annuities, and retirement accounts. This is true even if the will includes a superwill clause.

What if the grantor doesn't want the grantee to know about the TOD deed? There is only so much you can do there. The grantee might find out. Real property records are now widely available online, and even where they are not, a grantee could always run a title report or go check the index in the auditor's office. If keeping a TOD deed private is an overriding concern, the grantor should consider using a revocable trust instead.

What if there are claims against the grantor's estate? Can the creditors get at real property conveyed by a TOD deed? In short, yes. Property conveyed by a TOD deed is fully subject to the creditors claim processes in Title 11.[5]

What if the grantee of a TOD deed doesn't want the property? It is subject to disclaimer. Under Washington law, the grantee has only nine months after the date of the grantor's death to effect a disclaimer.[6] There is no formal mechanism to give notice to the grantee. That opens the TOD deed to possible manipulation to cause injury. A vengeful grantor could leave polluted property to someone as retribution for a real or perceived wrong. It is remotely possible that this Section's Probate and Trust Legislative

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Committee will look at the Uniform Disclaimer Act. The Uniform Act places no time limit on disclaimers. Keep in mind that a disclaimer only helps someone who figures out that the property has a problem before accepting some benefit of the gift. The real answer to this problem lies with the environmental law practitioners.

Can a person's agent under a power of attorney make and record a TOD deed of the principal's property? Yes, but only if specifically authorized in the power of attorney.[7]

What if the property conveyed by a TOD deed is collateral for a debt? First, because the transfer does not take effect until the grantor's death, recording the deed should not violate a due-on-sale clause in the lender's mortgage or deed of trust. Second, the beneficiary takes title subject to the lien securing the debt, but does not become personally liable on the debt.

What if the grantee dies before the grantor? Then the interest of the grantee lapses. The anti-lapse statute does not apply to TOD deeds. However, the grantor of a TOD deed can provide for an alternate grantee. The form of deed at the end of this article has such a provision. If the grantor intends for the property to pass to the grantee's issue if the grantee predeceases the grantor, then the grantee's issue can be designated as alternate grantees.

That raises the question whether a TOD deed should be used to make a gift to a class of grantees. Technically, that can be done, but it is not recommended. A grantor who uses a TOD deed to make a gift to a class should expect that a title company may require some form of an adjudication of heirship or similar proceeding. The grantor would be wise to consider using a simple form of revocable living trust, then use a TOD deed to fund the trust.

What if a grantor records a TOD deed naming the grantor's spouse as grantee and they later divorce, but the grantor forgets to revoke the deed? The TOD Deed was added as an item subject to the revocation-by-divorce statute.[8]

What if the grantor and grantee of a TOD deed die within a short time of each other? TOD deeds were also incorporated into the minimum-survival statute, so parties with an interest in devolution of the property will need to determine whether the grantee survived the grantor by at least 120 hours.

What if the grantor of a TOD deed uses Medicaid benefits for long-term care? It had been anticipated that the Department of Social and Health Services ("DSHS") lien would apply to these deeds just by reason of the normal lien provisions in RCW Titles 41 and 43. However, the DSHS raised last-minute questions. As a result, language was added to the bill at the last minute. The language seems to say that no matter what you do, DSHS has 24 months to record its lien. The language used does not seem to allow a shortening of the lien-filing period to four months by sending DSHS the standard form of Notice to Creditors. The RPPT Section had no opportunity to voice its concerns about the added language before the bill was passed, but it is possible that an amendment to the statute may provide clarity.

What if a grantor alone records a TOD deed of the grantor's half of community real property owned with the grantor's spouse? On the grantor's death, that half interest will pass to the grantee and the spouse will now be a tenant-in-common with the grantee. That is the same result that would have occurred if the grantor had used a will to leave the half interest in the property to someone other than the spouse. If the spouse predeceases the grantor, leaving the spouse's interest in the property to the grantor, and the grantor dies later without revoking the TOD deed, the grantee would receive the whole property.

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What if both spouses record a TOD deed to the same person? On the death of the first spouse, the TOD deed will not affect title. On the second death, however, title passes to the grantee.

What if both spouses record a TOD deed, but later one of them alone records a revocation? The revocation will not be effective if both spouses are alive, but will be effective if made by the surviving spouse.

Suppose that two spouses sign a community property agreement providing that (1) all separate property owned by the two spouses is converted to community property upon the death of the first of them to die, and (2) upon that first death all property passes to the survivor. What if one of them later records a TOD deed of just the grantor's interest in a piece of community real property? Does it make a difference whether the property conveyed by the later TOD deed was instead a piece of the grantor's separate real property? What if the grantor's TOD deed was recorded before the community property agreement was signed? The bill enacting the Uniform Act does not provide answers to these questions. Instead, we will need to look to the existing body of case law involving community property agreements for those answers.

Other Considerations

The possibility that a decedent recorded a TOD deed makes it more advisable than ever to obtain some form of title report on property the decedent owned. The personal representative needs to know whether the real property is a probate asset or not. Also, conveyance by a TOD deed will be a specific gift for purposes of determining abatement of assets.

You may want to add a question to your estate planning interview checklists inquiring whether the client has ever recorded a TOD deed. That information will be necessary to be sure you prepare documents that effectively implement the client's overall objectives.

Conclusion

While the TOD deed will present us with some challenges, it should be a welcome addition to our estate planning tool box.

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File for record and return to:

____
____
____

REVOCABLE TRANSFER ON DEATH DEED

Grantor: ____
Grantee: ____
Legal Description (abbreviated): ______________________________
Complete Legal Description on Pages: __________________________
Assessor's Tax Parcel ID#: ________________________________
Reference Nos. of Documents Released or Assigned: ________________________

GRANTOR. The Grantor is ________________, whose mailing address is ________________________ ________________.

LEGAL DESCRIPTION. The real property that is the subject of this Revocable Transfer on Death Deed is situate in the County of __________, State of Washington, and it is legally described as follows:

[legal description].

PRIMARY BENEFICIARY. The Grantor designates the following primary beneficiary if the primary beneficiary survives the Grantor: __________________, whose mailing address is ____________________.

ALTERNATE BENEFICIARY. If the primary beneficiary does not survive the Grantor, the Grantor designates the following alternate beneficiary if the alternate beneficiary survives the Grantor: __________________, whose mailing address is ____________________.

TRANSFER ON DEATH. The Grantor transfers all of the Grantor's interest in the described property, including without limitation any after acquired title of the Grantor, to the beneficiaries as designated above. Before the Grantor's death, the Grantor has the right to revoke this deed.

REAL ESTATE EXCISE TAX EXEMPTION. The recording of this Revocable Transfer on Death Deed is not a "sale" as defined in RCW 82.45.010(1) and is therefore not subject to real estate excise tax. The transfer that will occur under this Revocable Transfer on Death Deed at the time of the Grantor's death is exempt from the Washington Real Estate Excise Tax by reason of RCW 82.45.010(3)(b) and WAC 458-61A-202(7).

DATED this ___ day of ______________, 20__

STATE OF WASHINGTON)
): ss.
COUNTY OF ______________)

On this ____ day of ___________, 20__, before me personally appeared ____________________, to me known to be the individual that executed the within and foregoing instrument and acknowledged the said instrument to be his/her free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this ____ day of __________, 20__.

____
Type/Print Name:____________________
Notary Public in and for the State of Washington
residing at ____________________
My Commission expires ______________

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File for record and return to:
____
____
____

REVOCATION OF TRANSFER ON DEATH DEED

Grantor: ______________________
Grantee: ______________________
Legal Description (abbreviated): ______________________
Complete Legal Description on Page(s): ______________________
Assessor's Tax Parcel ID#: ______________________
Reference Nos. of Document(s) Revoked: ______________________

GRANTOR. The Grantor is ______________________, whose mailing address is ______________________
______________________.

LEGAL DESCRIPTION. The real property that is the subject of this Revocation of Transfer on Death Deed is situate in the County of ____________, State of Washington, and it is legally described as follows:

[legal description].

REVOCATION. The Grantor revokes all of the Grantor's previous transfer on death deeds relating to all or any part of this real property.

DATED this ___ day of ________________, 20__

STATE OF WASHINGTON)
): ss.
COUNTY OF ________________)

On this _____ day of _____________, 20__, before me personally appeared ______________________, to me known to be the individual that executed the within and foregoing instrument and acknowledged the said instrument to be his/her free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this ____ day of ____________, 20__.

____
Type/Print Name:______________________
Notary Public in and for the State of Washington
residing at ______________________
My Commission expires ______________________

1 Second Engrossed Substitute House Bill 1117, 63rd Leg., 2014 Sess. (WA 2014).
2 2.E.S.H.B. 1117, Sec. 11(4)
3 2.E.S.H.B. 1117, Sec. 11(1)(a)(i)
4 2.E.S.H.B. 1117, Sec. 20
5 2.E.S.H.B. 1117, Sec. 18
6 2.E.S.H.B. 1117, Sec. 14
7 2.E.S.H.B. 1117, Sec. 23
8 2.E.S.H.B. 1117, Sec. 19

Recent Cases Regarding Washington's Deed of Trust Act

by Andrew Yates – Lane Powell PC

INTRODUCTION

In recent years, Washington courts have issued several decisions involving Washington's Deed of Trust Act, RCW 61.24 ("DTA"), that significantly impact how banks, loan servicers, foreclosure trustees, and other entities must handle claims arising out of nonjudicial foreclosure proceedings against real property. More decisions with precedential value will be issued this year, including in the related area of a junior lienholder's right to redeem a condominium unit where the condominium association has judicially foreclosed its super-priority lien for delinquent assessments and the unit has been sold at a Sheriff's sale. This article focuses primarily on residential cases, but includes a brief description of some recent commercial cases as well.

Practitioners need to be aware of both the changes in the law created by the cases that have already issued and the potential ways in which the law could change again when the next wave of decisions is issued.[1] Below is a brief summary of some of the most recent cases, and a quick look at some upcoming cases set to be decided in the near future.[2]

WASHINGTON SUPREME COURT CASES

Frizzell v. Murray, 179 Wn.2d 301, 313 P.3d 1171 (2013) Issued: December 5, 2013

The Facts:

Plaintiff Tamara Frizzell borrowed $100,000 from the Murrays, secured by a deed of trust on her real property. The dealings between Frizzell and the Murrays differ substantially from the more common loan origination scenario in which individuals borrow money from an institutional lender to purchase their home or refinance existing debt secured by the property. Frizzell originally wanted a loan of $20,000 in order to pay past-due bills, but she decided to take out a larger loan in order to get a better interest rate. Under the terms of the loan, Frizzell received about $88,000, representing $100,000 minus $12,000 in fees that went back to the Murrays. Monthly payments were set at $1,000, with full repayment due in three years. Frizzell's loan application listed her monthly salary as only $1,600. The Murrays claimed they were only offering the loan for business purposes, but it did not appear that Frizzell's stated "wheelchair and scooter" business ever actually existed. Rather, it appears that the claimed business was a fictitious enterprise invented to obtain the loan. The trial court noted that Frizzell had been characterized as being "like a child" in regard to financial matters. After making three payments, Frizzell defaulted on the loan, and the Murrays initiated nonjudicial foreclosure proceedings against her home.

Prior to the sale, Frizzell filed a complaint against the Murrays alleging claims of common law and statutory fraud in the course of a residential mortgage loan, civil conspiracy, unconscionability, violations of the Consumer Protection Act, RCW 19.86 ("CPA"), that the loan was actually a de facto sale, that the loan was for noncommercial use, that Mr. Murray lacked a real estate license, and that the underlying deed of trust was invalid because of Frizzell's lack of capacity to consent. Frizzell also filed a separate motion to enjoin the trustee's sale. The court enjoined the sale conditioned upon Frizzell's payment of $15,000 into the court registry and $10,000 towards a bond. However, Frizzell did not make the payment and the sale took place. Ms. Murray purchased the home.

The trial court dismissed all of Frizzell's claims on summary judgment, based on her failure to obtain pre-sale injunctive relief. The appellate court reversed, holding the failure to obtain presale relief did not waive the claims because it would be inequitable to assume she waived her claims in light of the facts of the case.

The Washington Supreme Court granted review and addressed the issue of whether obtaining an order to enjoin a nonjudicial foreclosure sale conditioned upon remittance of payment to the court, and then failing to make such payment, should result in a waiver of claims under the DTA's waiver provisions in RCW 61.24.040(1)(f)(IX) (where the notice of sale includes a provision stating that failure to bring a lawsuit may result in a waiver of any proper grounds for invalidating the sale) and RCW 61.24.127 (noting the few causes of action that are not waived by failure to enjoin a sale).

The Decision:

The Washington Supreme Court found that Frizzell did waive her right to contest the nonjudicial foreclosure sale under the waiver test cited in *Plein v. Lackey*.[3] Under that test, waiver occurs when "a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale."[4] The court found that Frizzell received notice of the right to enjoin the sale. She had knowledge of a defense to the foreclosure prior to the sale as shown by the claims she made in her original complaint. She filed a motion to enjoin the sale but she did not obtain an order restraining the sale because the order she received was conditioned on a payment to the court that she did not make.

Although Frizzell was granted an order restraining the sale, differentiating this case from *Plein* and *Brown v. Household Realty Corp.*,[5] the court held that RCW 61.24.130(1) is clear that the order is conditional upon payment, and

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Frizzell did not make that payment. Because she did not satisfy the statutory requirements under RCW 61.24.130, she did not actually obtain an order enjoining the sale.

The court noted that this waiver determination furthers the goals of the DTA: "(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles."[6] The court concluded that conditioning an injunction upon payment of a sum of money actually promotes efficiency by making it clear what a party must do to restrain the sale and promotes stability of land titles by clarifying and narrowing the circumstances when a nonjudicial foreclosure sale can be contested.

The court then went on to discuss the applicability of RCW 61.24.127.[7] First, it reaffirmed that the waiver doctrine only applies to actions to vacate the sale, and not to damages actions, citing *Schroeder v. Excelsior Mgmt. Grp., LLC*.[8] Then, it discussed the interplay between RCW 61.24.127 and RCW 61.24.040(1)(f)(IX). RCW 61.24.127 applies where the borrower fails to bring a pre-sale action to enjoin foreclosure, and in this case might impact Frizzell's remaining claims of fraud, damages under the Mortgage Broker Practices Act (RCW 19.146), mortgage lending and home ownership laws, and the CPA. The Murrays argued that RCW 61.24.127(4) precludes exemption of Frizzell's claims because the deed of trust was used to secure a commercial loan, and that "[t]his section does not apply to the foreclosure of a deed of trust used to secure a commercial loan." The trial court did not address this argument, and the court subsequently remanded this issue to the trial court to determine the impact of this section on Frizzell's claims and whether the loan was for owner-occupied residential property, or a commercial loan.

The court reemphasized that insofar as any of Frizzell's remaining claims attempted to unsettle the deed of trust and invalidate the foreclosure sale, they were subject to the waiver provision, but that any claims falling under the waiver exceptions to RCW 61.24.127 would still be viable.

Through this opinion the court has strengthened the waiver doctrine by clarifying that even when an owner moves to enjoin a sale prior to the nonjudicial foreclosure sale, that owner may still waive her claims if she does not follow the conditions of the injunction and the sale takes place. It also shows that the court will continue to strictly construe the plain language of the DTA, as in previous opinions.

Schroeder v. Excelsior Mgmt. Grp. LLC, 177 Wn.2d 94, 297 P.3d 677 (2013)
Issued: February 28, 2013

The Facts:

The property at issue in this case was a 200-acre farm owned by the plaintiff's family since 1959. It historically had been used primarily for farming and logging. In 2007, Steven Schroeder borrowed money from Excelsior Management Group LLC and secured the loan with a deed of trust against the property. Schroeder defaulted and the trustee began nonjudicial foreclosure proceedings. Schroeder's attorney negotiated a settlement involving a new loan and a new deed of trust on the property, including an agreement and order of dismissal stating that the property was not agricultural for the purposes of a nonjudicial foreclosure.

In 2009, Schroeder defaulted on the new loan and the lender began nonjudicial foreclosure proceedings. Days before the scheduled trustee's sale, Schroeder brought claims for damages and injunctive relief under the Washington Mortgage Broker Practices Act, the CPA, the Real Estate Settlement Practices Act, and claimed unconscionability and civil conspiracy. Schroeder claimed he was unaware that the settlement agreement increased the balance due on this loan and sped up the time in which to pay it, as well as contained a clause waiving the argument that his land was agricultural for purposes of nonjudicial foreclosure. He also claimed predatory lending with the lender changing material terms of the loan and inserting a security interest in the timber into the new loan, preventing him from harvesting his timber, among other issues.

The Decision:

Consistent with its other recent DTA decisions, the court strictly applied the DTA requirement that "[i]t shall be a requisite to a trustee's sale… that the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes" both on the day the deed of trust is created and the date of the sale. The court held that parties may not alter by contract the DTA's requirement that land must be primarily nonagricultural in character to be sold via a nonjudicial foreclosure. The *Schroeder* decision is a strong signal from the Washington Supreme Court that the DTA will be construed strictly, in the borrower's favor, and that its requirements can rarely if ever be altered, even by agreement of the parties to a deed of trust. The court characterized the DTA's requirements as limits on the trustee's power to foreclose without judicial supervision, instead of rights held by a debtor, which may

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be waived. It compared this decision to previous holdings where the requirements of the DTA could not be waived contractually, such as the inability to waive the statutory requirement that the beneficiary hold the note or other instrument of indebtedness, as held in *Bain v. Metropolitan Mortgage Group.*[9]

The court held that the borrower's failure to exercise presale remedies and give the five-day notice required under the DTA to seek an injunction restraining a trustee's sale did not preclude access to injunctive relief. It noted that if Schroeder's land was agricultural, then the trustee did not have authority to proceed with a nonjudicial foreclosure under the statute in the first place, and because the trustee did not have authority to proceed, the five-day notice requirement did not apply.

Klem v. Washington Mut. Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013)
Issued: February 28, 2013

The Facts:

Plaintiff Dianne Klem was the court-appointed guardian of the Estate of Dorothy Halstien, the incapacitated borrower and grantor of the subject deed of trust. To cover health care costs, the guardianship sought to sell Halstien's house, which was her only significant asset. The sale was delayed for various reasons, and in the meantime the loan became delinquent and the guardianship did not have sufficient funds to cure the default, which was less than $2,000.

The guardianship received a purchase and sale agreement for $235,000 for the property on February 19, 2008, with a closing date set for March 28, 2008, a month after the originally scheduled sale date. Despite numerous requests by the guardian, the trustee proceeded with the trustee's sale on February 29, 2008. The home sold for $83,087.67, a dollar more than the total amount due on the loan. The buyer resold the house for $235,000 shortly after the sale. The evidence at trial was that the trustee refused to postpone the sale because it had a policy of not doing so unless the beneficiary expressly authorized a continuance.

The guardianship sued Washington Mutual Bank, the lender ("WaMu"), and the trustee, Quality Loan Service Corporation of Washington, Inc. ("Quality").

The jury found for the guardian on her claims for negligence, violations of the CPA, and breach of contract, awarding damages of $151,912 (the difference between the foreclosure and the resale price). The trial court awarded attorney's fees on the CPA claim but denied an injunction against Quality. The appellate court affirmed the negligence verdict but reversed the breach of contract verdict and the CPA judgment. The guardian successfully petitioned for review to the Washington Supreme Court. The court reversed in part and restored the award based on the CPA.

The Decision:

The Washington Supreme Court held that the trustee's deference to the beneficiary, WaMu, and the failure to exercise independent discretion was an "unfair or deceptive act or practice" under the CPA. In doing so, it discussed whether conduct that was not proscribed by a statute could form the basis of a CPA claim, holding "a claim under the Washington CPA may be predicated upon a *per se* violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest."[10] The court declined to define "unfair act."

The court also held that the trustee's act of falsely dating and notarizing the Notice of Trustee's Sale satisfied the first three elements of a CPA claim as (1) an unfair or deceptive act or practice (2) that impacts the public interest and (3) occurs in trade or commerce. The other two elements of a CPA claim are (4) injuring the plaintiff in his or her business or property, and (5) proximate causation, but the court did not address those elements and remanded. Importantly, the court stated in a footnote that if the beneficiary so controlled the trustee as to make it the beneficiary's *agent*, the beneficiary could be vicariously liable for the acts of the trustee. The court also suggested that the DTA's waiver doctrine applied only to challenges to the sale itself, although the doctrine had previously barred most post-sale claims for damages and challenges to a sale's validity.

Further, the court hinted that there may be some constitutional and equitable challenges to a trustee who does not act independently.

Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 276 P.3d 1277 (2012)
Issued: May 24, 2012

The Facts:

Christa Albice and Karen Tecca (collectively "Albice") defaulted on a loan they had obtained on their property. Albice entered into a forbearance agreement with the loan servicer, and though they tendered each payment late, the servicer accepted them, except for the last payment. The servicer rejected the last payment, declared it a breach of the forbearance agreement, and scheduled a trustee's sale. The sale was continued six times and eventually took place more than 120 days after the originally scheduled sale date. The property, which had been appraised at $950,000, was

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sold for $130,000. Further, the notice of trustee's sale listed the amount in arrears as $1,228.03.

The buyer filed an unlawful detainer action to remove Albice, and they counter-claimed for quiet title and to set aside the sale. On cross motions for summary judgment, the buyer prevailed. The court of appeals reversed and set the sale aside. The buyer appealed and the Washington Supreme Court granted review.

The Decision:

The court addressed two issues: (1) whether a trustee's sale taking place beyond the 120 days permitted by RCW 61.24.040(6) warrants invalidating the sale, and (2) whether, under the circumstances of this case, a borrower waives the right to bring a post-sale challenge for failing to utilize the presale remedies under RCW 61.24.130.

The Court noted that a plain reading of RCW 61.24.040(6) permits a trustee to continue a sale, but unambiguously limits the trustee from continuing the sale past 120 days. Reiterating that strict compliance is required under the DTA, it found that the trustee held the sale 161 days from the original sale date in violation of the statute and therefore was divested of its statutory authority to sell. Thus, the court held that the sale was invalid.

The court also considered whether Albice waived claims relating to the sale where presale remedies were not pursued. The court held there was no waiver. First, the borrowers did not know of the alleged breach in time to restrain the sale based on the conduct of the lenders in continuing to accept late payments and because no notice was received. Further, the borrowers had no grounds to challenge the underlying debt because they had entered into a "Forbearance Agreement." The court indicated that there was no indication that the parties were "'sleeping on their rights."

This opinion is an example of circumstances where the court allowed plaintiffs to pursue their claims despite failing to enjoin the sale. However, in light of *Frizzell*, which is the more recent opinion, this result is unlikely in most post-sale cases except perhaps in the most extreme cases where the facts presented would make it inequitable to bar the plaintiffs from pursuing their claims, or there is a defect in the sale itself that renders it void.

WASHINGTON COURT OF APPEALS CASES

Walker v. Quality Loan Service Corp., 176 Wn. App. 294, 308 P.3d 716 (2013)
Issued: August 5, 2013

The Facts:

In 2007 Doug Walker obtained a $280,000 loan with Credit Suisse Financial Corporation. He secured the note with a deed of trust naming Ticor Title Company as the trustee, Credit Suisse as the lender, and Mortgage Electronic Registration Systems, Inc. ("MERS") as "a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." Walker defaulted. A loan servicer, acting as "the Beneficiary," appointed Quality Loan Service Corporation ("Quality") as the successor trustee. Over a month later MERS assigned the deed of trust to the servicer. Quality then recorded a notice of trustee's sale on the property and Walker subsequently filed suit and obtained a temporary restraining order on the sale. The trial court later granted the defendants' CR 12 motion for judgment on the pleadings. Walker appealed.

The Decision:

The Court of Appeals recognized a presale cause of action for damages against a trustee for material failures to comply with the DTA and actions taken without proper authority. The court also held that a beneficiary may be vicariously liable for the trustee's actions and applied a low standard for alleging the injury and causation elements of a CPA claim in a holding that is arguably at odds with other important CPA cases. However, the change in law represented by *Walker* may be short-lived. Whether the DTA supplies a presale claim for damages, and if so, what principles govern the claims under the DTA and CPA, are questions certified to the Washington Supreme Court from the Western District of Washington in *Frias v. Asset Foreclosure Services, Inc.*[11] (see below). Courts analyzing statutory damages claims in presale cases will have new guidance soon.

Bavand v. OneWest Bank, FSB, 176 Wn. App. 475, 309 P.3d 636 (2013)
Issued: September 9, 2013

The Facts:

Marisa Bavand borrowed $722,950 from IndyMac Bank, FSB and secured the loan with a deed of trust encumbering her property. The deed of trust named IndyMac as the

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"Lender" and Mortgaage Electronic Registration Systems, Inc. ("MERS") as the "beneficiary under this Security Instrument" and "as nominee for Lender and Lender's successors and assigns." After Bavand defaulted on the loan, OneWest Bank, FSB appointed Regional Trustee Services Corp. ("RTS") as successor trustee in the stated capacity of the "present beneficiary." One day later, MERS, acting as nominee and agent for IndyMac, executed an assignment of the deed of trust in favor of OneWest. RTS then commenced the nonjudicial foreclosure proceeding. Eight days before the sale date, Bavand sued OneWest, MERS, RTS and others seeking declaratory and other relief. RTS postponed the sale once it learned of the suit. Bavand obtained an order restraining the sale, conditioned on her providing a monthly bond. She did not meet this condition of the order, and RTS sold the property. The trial court later granted the defendants' CR 12 motion to dismiss, and validated the trustee's sale. Bavand appealed.

The Decision:

On appeal, the court held that based on the record before the trial court, neither OneWest nor MERS was authorized to appoint the successor trustee and thus the trustee lacked the authority to exercise the power of sale in the deed of trust, and therefore invalidated the sale. Because RTS was not properly appointed as successor trustee, it did not have any of the powers given to trustees under the DTA, and therefore could not conduct a nonjudicial foreclosure and trustee's sale of Bavand's property.

The court also stated its view that where a trustee's actions in a nonjudicial foreclosure are unlawful, waiver of claims cannot occur. The court noted that Bavand's failure to provide the security payment required by the statute and the trial court's order would not, by itself, constitute a waiver of her right to relief. However, the effect of this part of the court's opinion must be considered in light of *Frizzell*, which was published three months later.

Consistent with *Walker* and *Klem*, the *Bavand* court held that the borrower could state a CPA claim against MERS and a loan servicer arising out of the allegedly defective appointment of a successor trustee and the subsequent trustee's sale. Specifically, the court stated that subject to pleading and proof requirements, OneWest's *ultra vires* appointment of a successor trustee was arguably an unfair and deceptive act and actionable under the CPA.

Rucker v. Novastar Mortg., Inc., 177 Wn. App. 1, 311 P.3d 31 (2013)
Issued: August 5, 2013

The Facts:

Plaintiff Marion Rucker took out two loans from NovaStar Mortgage to help fund the purchase of a home for his daughter and son-in-law. The deeds of trust securing the loans named ("MERS") as the beneficiary in a nominee capacity for NovaStar and its successors and assigns.

NovaStar assigned the loans to J.P. Morgan Chase Bank and J.P. Morgan Trust Company (collectively "Chase"). The loans were securitized into a trust with the Chase entities serving as cotrustees of the trust. NovaStar retained responsibility for servicing the loan pursuant to a pooling and servicing agreement. The pooling and servicing agreement specifically allowed NovaStar to foreclose in its own name but also stated that at least for some purposes NovaStar was an independent contractor of Chase rather than its agent.

Rucker defaulted and a nonjudicial foreclosure proceeding was initiated on the second position loan. NovaStar appointed Quality Loan Services ("Quality") as trustee who sent the notice of default in its capacity as "agent for NovaStar Mortgage, the beneficiary." However, NovaStar did not actually hold the promissory note when it appointed Quality, having already assigned it to Chase. MERS subsequently executed an assignment of the deed of trust in favor of NovaStar. Rucker did not bring a presale action to enjoin the foreclosure. The sale took place and the property was sold to NovaStar.

Rucker filed suit seeking to quiet title and invalidate the trustee's deed. The trial court eventually dismissed Rucker's claims on summary judgment. Rucker appealed and the appellate court reversed and remanded.

The Decision:

Based on the facts that NovaStar did not hold the note when it appointed Quality and the independent contractor language in the pooling and servicing agreement, the court held that there were issues of material fact as to whether NovaStar had the proper authority as an agent of Chase to appoint Quality, and as a result whether Quality was authorized to conduct the sale. The court remanded to determine whether NovaStar was acting as Chase's agent when it appointed Quality, and therefore whether the trustee's sale should be vacated, and whether Rucker waived his right to challenge the sale's finality.

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Watson v. Northwest Trustee Services, Inc., 321 P.3d 262 (Wn. Ct. App. 2014)
Issued: March 18, 2014

The Facts:

Daniel Watson and his wife purchased a home and executed a promissory note that was eventually acquired by CitiMortgage. CitiMortgage appointed Northwest Trustee Services, Inc. ("NWTS") as successor trustee.

In February 2011, NWTS sent the Watsons a notice of default. In March 2011, NWTS recorded a notice of trustee's sale. In June 2011, the Watsons filed for bankruptcy, which caused the trustee sale to be postponed and then canceled. On July 22, 2011, the DTA was amended to provide for a foreclosure mediation program and attendant preforeclosure notice requirements.

The bankruptcy court eventually discharged the Watsons' debts and in November 2011, NWTS recorded an amended notice of trustee's sale with a new sale date. NWTS did not send a new notice of default before recording this notice. A third party purchased the Watsons' house at a trustee's sale in December 2011. The trustee's deed recorded by NWTS referred to the March 2011 notice of trustee's sale, which described the notice of the sale that was ultimately canceled, but did not mention the notice recorded November 2011.

The Watsons filed a lawsuit against NWTS and CitiMortgage for wrongful foreclosure and to quiet title, and later amended the complaint to include a claim for violation of the CPA. The trial court dismissed all claims against CitiMortgage, dismissed the Watsons' CPA claim, and denied NWTS's motion for summary judgment. NWTS appealed and the Watsons sought review of the court's dismissal of their CPA claim.

The Decision:

The court dismissed NWTS's petition for review because it found that the new notice requirements of the DTA applied and were not followed. When NWTS labeled its second notice an "amended" notice of trustee's sale, that notice actually scheduled an entirely new sale. NWTS failed to comply with the new notice requirements before recording its November 2011 notice of trustee's sale, and therefore the Watsons demonstrated issues of material fact regarding the lawfulness of NWTS's nonjudicial sale of the Watsons' property.

Further, the court found that because the amended DTA applied to NWTS's November 2011 notice, it also concluded that the amended provisions addressing the CPA applied. Therefore the trial court erred when it dismissed the Watsons' CPA claims and the appellate court reversed and remanded for further proceedings.

***Trujillo v. Northwest Trustee Services, Inc.*, 2014 WL 2453092 (Wn. Ct. App. 2014)**
Issued: June 2, 2014

The Facts:

In March 2006, Rocio Trujillo obtained an $185,900 loan secured by deed of trust on her real property. Trujillo defaulted on the loan in November 2011. The original lender assigned the deed of trust to Wells Fargo in February 2012. In March 2012, Wells Fargo executed a statutory beneficiary declaration stating under penalty of perjury that it was the actual holder of the promissory note or had the requisite authority under RCW 62A.3-301[12] to enforce the note. Northwest Trustee Services Inc. ("NWTS") sent a Notice of Default to Trujillo on May 30, 2012, identifying the owner of the note as Federal National Mortgage Association ("Fannie Mae") and the loan servicer as Wells Fargo.

NWTS recorded the Notice of Trustee's Sale in July 2012. In February 2013 Trujillo brought this action against NWTS and Wells Fargo for violations of the DTA, CPA, and Criminal Profiteering Act (RCW 9a.82), intentional infliction of emotional distress, and injunctive relief to restrain the sale of her property. NWTS moved to dismiss the complaint and the trial court granted that motion. Trujillo appealed. Wells Fargo was not a part of the appeal.

The Decision:

The appellate court affirmed the trial court's granting of NWTS's motion to dismiss. It addressed the issue of whether a successor trustee under a deed of trust securing a delinquent note breached its duty of good faith under the DTA. It found that NWTS was entitled to rely on the beneficiary declaration of Wells Fargo for its authority to schedule a trustee's sale of the property because the declaration satisfied the requirements of RCW 61.24.030(7)(a),[13] and therefore NWTS did not violate its duty of good faith.

Significantly, the appellate court rejected Trujillo's argument that a beneficiary declaration stating Wells Fargo was the actual holder failed to satisfy the requirements of RCW 61.24.030(7)(a). The appellate court disagreed with Trujillo that Wells Fargo had to prove it was the "owner" of the note, and held that the statue only required that Wells Fargo establish it was the "holder" of the note. The court explained that the "holder" of a note is entitled to enforce it under Article 3 of the Uniform Commercial Code, and because Wells Fargo had holder status by virtue of its possession of the note, as evidenced by the valid beneficiary

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declaration, it was entitled to initiate foreclosure proceedings and appoint NWTS as successor trustee.

WASHINGTON COURT OF APPEALS CASES – COMMERCIAL

As noted at the outset, this article is primarily concerns cases arising out of residential foreclosures. However, it is worth briefly noting some important developments in the commercial foreclosure arena. Below is a brief summary of some recent cases. A more thorough treatment of commercial cases is outside the scope of this article and practitioners will want to consult other sources.

First-Citizens Bank & Trust Co. v. Reikow, 177 Wn. App. 787, 313 P.3d 1208 (2013)
Issued: November 13, 2013

This case addressed a guarantor's fair value defense under RCW 61.24.100(5). The Court of Appeals held that a court has discretion to determine the fair value of the property even if a guarantor has waived any right to request a judicial determination of the fair value. It affirmed the trial court's dismissal of the case in favor of the defendants, holding the fair value of the property exceeded the amount owing on the loan and therefore the bank could not collect a deficiency amount from the defendants.

Washington Fed. v. Gentry, 319 P.3d 823, 2014 WL 627817 (Wn. Ct. App. 2014) and *Washington Fed. v. Harvey*, 2014 WL 646746 (Wn. Ct. App. 2014) (unpublished)
Issued: Feb. 18, 2014

These two opinions are discussed together as they are largely identical (although the unpublished *Harvey* opinion considers and rejects a few additional arguments not relevant here). The opinion in *Gentry* is published, so it will serve as precedential and binding authority on trial courts – albeit tempered by the conflicting opinion issued in *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC* case, discussed below, and the defendants' pending petitions for review.

Division I of the Court of Appeals reversed the trial court and held that the lender could pursue a deficiency action against its guarantors under RCW 61.24.100(3)(c), notwithstanding the lender's foreclosure of a commonly used form of deed of trust that the guarantors alleged secured their guaranties.

The Court of Appeals found that RCW 61.24.100(3)(c) is an exception to the rule prohibiting deficiency actions following nonjudicial foreclosure, and it allows a bank to bring such an action against the guarantor of a defaulted commercial loan even if the deed of trust also secured the guaranty. It refused to find that RCW 61.24.100(10) prohibits a deficiency action where a guaranty is secured by the foreclosed deed of trust. The court alternatively ruled that the form of deed of trust at issue in the case did not secure the defendants' guaranties.

First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC, 178 Wn. App. 207, 314 P.3d 420 (2013)
Issued: Dec. 3, 2013

The Division I opinion in the *Gentry/Harvey* cases above conflicts squarely with the Division II opinion in *First-Citizens*.

In *First-Citizens*, Division II of the Court of Appeals held that RCW 61.24.100(10) created the *only* exception to the general prohibition in RCW 61.24.100(1) against deficiency judgments following a trustee's sale under a deed of trust securing certain commercial loans. In other words, the court held that a nonjudicial foreclosure satisfies all of the secured obligations including any guaranty that is secured by the nonjudically foreclosed deed of trust.

The *First-Citizens* court found that in this case, RCW 61.24.100(10) prohibited the bank from obtaining a deficiency judgment against the guarantors because the deeds of trust that the bank nonjudicially foreclosed to satisfy the borrowers' underlying debt also secured the guarantor's commercial guaranty under the express terms of the guaranty, promissory notes, and deeds of trust. It held that where a guaranty is secured by the foreclosed deed of trust, the lending bank cannot sue the guarantors for any deficiency remaining after the trustee's sale of the secured property. It therefore reversed the trial court's deficiency judgment against the guarantors.

This split in authority between Division I and Division II of the Washington Courts of Appeal may result in review by the Washington State Supreme Court. As of this writing the issue has not been accepted for review.

Washington Federal v. Mark A. McNaughton, et al. ___ Wn. App. ___, 325 P.3d 383 (Wn. Ct. App. 2014),
Issued: May 19, 2014

The Court of Appeals recently issued a decision regarding a commercial loan guarantor's "fair value" defense under RCW 61.24.005(6)[14] and RCW 61.24.100(5)[15] of the DTA and its relation to "upset price" under RCW 61.12.060[16] of the Foreclosure of Real Estate Mortgages and Personal Property Liens Act.

Plaintiffs Mark A. and Marna L. McNaughton were real estate developers who signed a promissory note for an $11.7 million commercial loan on behalf of their company. The loan was secured by a deed of trust on two parcels of

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property. The McNaughtons also personally guaranteed repayment of the loan. Following the default on the loan and the nonjudicial foreclosure of the properties, the bank sought a deficiency judgment against the McNaughtons as guarantors of the debt. The court granted the bank's motion for summary judgment and entered a judgment against the McNaughtons for the remaining amount owed on the debt. The McNaughtons appealed, arguing the bank did not meet its burden on summary judgment of establishing the fair value of the properties sold at the nonjudicial foreclosure sale. The McNaughtons asserted that the appraisals the bank relied on to make a bid at the nonjudicial foreclosure sale did not analyze "fair value" or take into account the factors to determine an "upset price" under RCW 61.12.060. "Upset price" is used in the judicial foreclosure context. There, the debtor is permitted to ask the court to set an upset price, which sets the fair value of the property for purposes of determining the deficiency. Under the terms of the upset price statute and case law, a court is arguably permitted to take into account current economic conditions and set an upset price that may protect the debtor from paying a large deficiency when the reasons for the depressed property value are tied to a general economic downturn.

In this case, Division I of the Court of Appeals affirmed the lower court's summary judgment ruling in favor of Washington Federal, holding that (i) guarantors have the burden of proof on a "fair value" defense, (ii) the concept of "fair value" is consistent with the property's market value in an arm's-length transaction at the time of the trustee's sale, and (iii) the factors relevant to "upset price" in the context of a judicial foreclosure (such as the state of the economy and local economic conditions, future value, type of property, etc.) do not apply to determination of "fair value" in the context of a non-judicial foreclosure.

WESTERN DISTRICT OF WASHINGTON RULINGS INVOLVING RECENT DTA CASES

Federal district courts, and more specifically, the Western District of Washington, continue to dismiss CPA and DTA claims even in the wake of recent Washington state court cases. Their reasoning is often based on a failure to show injury or causation.

For example, in *Babrauskas v. Paramount Equity Mortgage*,[17] where the plaintiff brought a CPA claim under the theory that MERS was not a lawful beneficiary, the court found that to show a violation of the CPA in relation to MERS, the plaintiff needed to allege an injury arising from the deceptive act. However, the plaintiff did not allege facts that showed but for MERS's identification as a beneficiary on the deed of trust and its ineffective assignment of interest, plaintiff would not have suffered the adverse impacts he complained of. The court noted that the costs and fees alone incurred in litigating a CPA claim cannot satisfy the "injury to business or property" element of a CPA claim. Therefore, the plaintiff could not assert a viable cause of action under the CPA in relation to the representation that MERS was a beneficiary.

Also in that case, the plaintiff brought DTA claims against all of the defendants. However, he did not allege a nonjudicial foreclosure had been initiated or was imminent, and therefore the claims under the DTA failed as a matter of law.

In another Western District of Washington case, *Massey v. BAC Home Loans Servicing LP*,[18] the plaintiff could not maintain an action under the CPA where it was established the bank held the note at all relevant times. The court reiterated that one party may hold and enforce a note on behalf of a second party without it being a deceptive or unfair practice or act. The plaintiff also could not show any injury due to MERS's presence on the deed of trust and assignment to satisfy the "injury" element of the CPA. Therefore the court found summary judgment of all claims was proper.

FORTHCOMING DECISIONS

Frias v. Asset Foreclosure Services, Inc., C13-760-MJP, 2013 WL 6440205 (W.D. Wash. Sept. 25, 2013)

In April 2010, Judge Robart of the United States District Court for the Western District of Washington held that a residential mortgage loan borrower could not bring a claim for "wrongful foreclosure" damages where a foreclosure sale had been scheduled but had not yet occurred. *Vawter v. Quality Loan Serv. Corp. of Wash*.[19]

Then, in April 2012, the Washington Court of Appeals issued a ruling directly contradicting *Vawter*. The court held that the borrower's claim for presale "wrongful foreclosure" damages would survive Civil Rule 12 dismissal where the claim was based on allegations that the successor-lender did not have authority to act because such authority was based on documents executed by MERS. *Walker v. Quality Loan Serv. Corp. of Wash*.[20] This ruling was a consequence of the Washington Supreme Court's ruling in *Bain v. Metro Mortg. Gp., Inc*.[21] (holding MERS may not act as "beneficiary" of deed of trust where it never holds the note evidencing the secured obligation).

As a result, Chief Judge Pechman of the Western District certified two questions to the Washington Supreme Court on September 25, 2013, asking it to resolve a conflict in Washington law regarding presale "wrongful foreclosure" damages claims. The certified questions are:

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Under Washington law, may a plaintiff state a claim for damages relating to a breach of duties under the Deed of Trust Act and/or failure to adhere to the statutory requirements of the Deed of Trust Act in the absence of a completed trustee's sale of real property?

If a plaintiff may state a claim for damages prior to a trustee sale of real property, what principles govern his or her claims under the Consumer Protection Act and the Deed of Trust Act?

BAC Home Loans v. Fulbright, 178 Wn. 2d 1001, 308 P.3d 642 (2013)

Another related case waiting in the wings is *BAC Home Loans v. Fulbright*. This case was granted review on September 4, 2013. It concerns whether a bank may redeem a condominium unit where a superpriority condo assessment lien is foreclosed upon but the bank recorded its deed of trust before the condo fees became delinquent.

In that case, a condominium association judicially foreclosed on a condo unit due to the owner's delinquent condominium assessments. The unit was encumbered by a deed of trust for a loan from Bank of America for the original purchase price.

Michael Fulbright bought the unit at public auction for the amount of delinquent assessments plus $100 (for a total of $14,481.83). Almost a year later, but within the statutory time limit for redemption, Bank of America attempted to redeem the unit from Fulbright. Fulbright objected that the bank was not a qualified redemptioner. Bank of America sued Fulbright seeking a declaratory judgment that it was authorized to redeem the property and Fulbright counterclaimed for an order quieting title. The court quieted titled in Fulbright and the bank appealed, claiming the court erred in its interpretation of the condominium assessment lien statute (RCW 64.34.364) as it applies to the redemption statute (RCW 6.23.010).

The Court of Appeals affirmed the trial court. It held that a condominium association's superpriority lien for unpaid assessments for common expenses arises after the deed of trust lien on the unit, not before – notwithstanding RCW 64.34.364(7).[22] It found that the assessments did not become a lien until they were *due*, which in this case was after the bank's deed of trust against the property. The bank was given proper notice of the foreclosure proceedings and did not step in to pay the delinquent assessments to avoid having its own lien eliminated. Because it was not "subsequent in time" to the association's lien, the redemption statute did not offer the bank a second chance to protect its lien.

The Washington Supreme Court has granted review to determine whether the Court of Appeals' application of RCW 64.34.364(7) was correct in determining whether a bank may redeem a condominium unit where a superpriority condo assessment lien is foreclosed upon but the bank recorded its deed of trust before the condo fees became delinquent, and also whether a 2013 amendment to RCW 6.23.010(b), the redemptioner statute, applies retroactively to permit the bank to redeem the property.

Winnie Lyons v. U.S. Bank National Association, et al., No. 89132-0 (Wn. Sp. Ct.).

The Washington Supreme Court heard oral argument in this case on May 27, 2014. The trial court previously granted summary judgment in favor of Northwest Trustee Services, Inc. and denied a motion for reconsideration. The plaintiff filed an appeal and requested direct review by the Washington Supreme Court.

The main issues as identified by the court include: whether under the DTA a beneficiary's declaration of debt ownership must state that the beneficiary is the actual holder of the note, such that a declaration is insufficient if it states that the beneficiary is the actual holder *or* has the requisite authority to enforce the note; (ii) whether the trustee in a nonjudicial foreclosure action violated its fiduciary duty to the parties by refusing to immediately cancel a trustee's sale after the borrower advised the trustee of its view that the beneficiary no longer owned the note foreclosed upon; and (iii) whether in Washington an action may be brought for wrongful initiation of foreclosure in the absence of a foreclosure sale.

CONCLUSION

This article is meant to serve as a brief overview of recent decisions involving the DTA and related lien foreclosure statutes that have the potential to impact how banks, loan servicers, foreclosure trustees, and other entities must handle claims arising out of nonjudicial foreclosure proceedings against real property. Practitioners need to be aware of both the changes in the law created by the cases outlined above and the potential ways in which the law could change again when the next wave of decisions is issued. Practitioners should be on the lookout for more decisions with precedential value issued this year.

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1 As explained in more detail below, this is especially the case with respect to claims based on the DTA and the CPA arising out of nonjudicial foreclosure activities against properties that have not been sold.

2 Much has already been written about the Washington Supreme Court's 2012 decision in Bain v. Metropolitan Mortg. Group, Inc., 175 Wn.2d 83, 285 P.3d 34 (2012), and a full discussion of the Bain decision is outside the scope of this article.

3 Plein v. Lackey, 149 Wn.2d 214, 67 P.3d 1061 (2003).

4 *Id*. at 227.

5 Brown v. Household Realty Corp., 146 Wn. App. 157, 171, 189 P.3d 223 (2008).

6 Plein, 149 Wn.2d at 225.

7 RCW 61.24.127 states in part:

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Paying Rent for Living With Your Spouse During Marriage in the Marital Residence?

The Problem of Applying Rental Offsets When Reimbursing a Surviving Spouse for Contributions to a Spouse's Separate Property.

by Carl J. Carlson – Tousley Brain Stephens PLLC

In all community property jurisdictions, upon death or divorce, a spouse is generally entitled to some credit for contributions that spouse or the marital community made, in the form of money or the spouse's uncompensated labor (which is considered a community contribution), to the other spouse's separate property.[1]

Some states treat the contribution like an *investment* in the separate property.[2] In those states the contribution gives rise to an ownership interest in the separate property, converting that property in whole[3] or in part[4] to community property. The other community property states, including Washington, immutably fix the character of the property as community or separate at the time of acquisition, and generally treat subsequent contributions of a different character like a loan.[5]

In those states, the contributing party has a claim for reimbursement of their contribution supported by an equitable lien on the benefitted property. When the contribution is in the form of money, the amount of reimbursement is generally the dollar amount contributed, while when the contribution is in the form of labor the amount of reimbursement could be either the value of the labor, or the amount by which the labor increased the value of the property.[6]

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"(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

(b) A violation of Title 19 RCW;

(c) Failure of the trustee to materially comply with the provisions of this chapter; or

(d) A violation of RCW 61.24.026."

8 Schroeder v. Excelsior Mgmt. Grp., LLC, 177 Wn.2d 94, 297 P.3d 677 (2013).

9 Bain v. Metropolitan Mortgage Group, 175 Wn.2d 83, 285 P.3d 34 (2012).

10 *Id*. at 787.

11 Frias v. Asset Foreclosure Services, Inc., C13-760-MJP, 2013 WL 6440205 (W.D. Wash. Sept. 25, 2013).

12 RCW 62A.3-301 states:
"'Person entitled to enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

13 RCW 61.24.030(7)(a) states:
"That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection."

14 RCW 61.24.005(6) states:
"'Fair value' means the value of the property encumbered by a deed of trust that is sold pursuant to a trustee's sale. This value shall be determined by the court or other appropriate adjudicator by reference to the most probable price, as of the date of the trustee's sale, which would be paid in cash or other immediately available funds, after deduction of prior liens and encumbrances with interest to the date of the trustee's sale, for which the property would sell on such date after reasonable exposure in the market under conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under duress."

15 RCW 61.24.100(5) states in part:
"In any action against a guarantor following a trustee's sale under a deed of trust securing a commercial loan, the guarantor may request the court or other appropriate adjudicator to determine, or the court or other appropriate adjudicator may in its discretion determine, the fair value of the property sold at the sale and the deficiency judgment against the guarantor shall be for an amount equal to the sum of the total amount owed to the beneficiary by the guarantor as of the date of the trustee's sale, less the fair value of the property sold at the trustee's sale or the sale price paid at the trustee's sale, whichever is greater, plus interest on the amount of the deficiency from the date of the trustee's sale at the rate provided in the guaranty, the deed of trust, or in any other contracts evidencing the debt secured by the deed of trust, as applicable, and any costs, expenses, and fees that are provided for in any contract evidencing the guarantor's liability for such a judgment."

16 RCW 61.12.060 states in relevant part:
"The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.
The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. If an upset price has been established, the plaintiff may be required to credit this amount upon the judgment as a condition to confirmation. If the fair value as found by the court, when applied to the mortgage debt, discharges it, no deficiency judgment shall be granted."

17 Babrauskas v. Paramount Equity Mortgage, C13-0494RSL, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013).

18 Massey v. BAC Home Loans Servicing LP, No. C12–1314JLR, 2013 WL 6825309 (W.D. Wash. Dec. 23, 2013).

19 Vawter v. Quality Loan Serv. Corp. of Wash., 707 F. Supp. 2d 1115 (W.D. Wash. 2010).

20 Walker v. Quality Loan Serv. Corp. of Wash., 303 P.3d 716 (2013).

21 Bain v. Metro Mortg. Gp., Inc., 175 Wn.2d 83, 285 P.3d 34 (2012).

22 RCW 64.34.364(7) states:
"Recording of the declaration constitutes record notice and perfection of the lien for assessments. While no further recording of any claim of lien for assessment under this section shall be required to perfect the association's lien, the association may record a notice of claim of lien for assessments under this section in the real property records of any county in which the condominium is located. Such recording shall not constitute the written notice of delinquency to a mortgagee referred to in subsection (2) of this section."

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The kinds of contributions that are entitled to be credited vary among jurisdictions. For example, some states allow a party to be reimbursed for contributions to mortgage interest and property taxes as well as principal, while others will reimburse only the payment of mortgage principal.[7] Washington cases have allowed reimbursement for contributions of community labor,[8] payment of mortgage principal,[9] and property taxes;[10] and a pro rata share of the increase in value due to inflation/market factors.[11]

When the contributing party has received benefits from the separate property, such as by sharing in income or rents generated by the property, "loan theory" jurisdictions, such as Washington, will allow benefits to be offset against the reimbursement to which the contributing party is entitled.[12] But the concept of "offset" does not seem to apply in states where contributions give rise to an ownership interest in the separate property, perhaps since the contributing party, as a co-owner, would be entitled to a pro rata share of such rents and income.

Offsetting of benefits against contributions intuitively seems fair when the property is land or a business that generates actual income for the marital community or non-owner spouse.[13] But Washington (as well as some other states) allows offsets to be applied when the separate property is the marital community's *residence*, and the benefit the non-owner spouse receives is the rental value of living in the home.[14] In this author's opinion, charging a non-owner spouse with rent for living in the marital residence in probate cases (as opposed to divorces) is likely to be contrary to a married couple's expectation or intent, and is bad policy.[15]

Some jurisdictions reject the concept of offsetting rent against a spouse's or marital community's credit for contributions made to a residence characterized as the other spouse's separate property. As noted above, the issue simply does not appear to come up in those jurisdictions that treat contributions like investments in the subject property. Texas prohibits courts by statute from charging a spouse or marital community with the rental value of living in the marital residence.[16]

In the seminal 1984 case of *Miracle v. Miracle*, Washington's Supreme Court expressly addressed whether, "[i]n a *dissolution proceeding*, the trial court [may] offset the community's beneficial use of one spouse's separate asset against the amount of community funds expended toward that property?"[17] The Court of Appeals had held that it could not. The Supreme Court reversed, holding that a court may do so. *Miracle* involved a seven-year marriage, during which time the parties lived in a house that was the wife's separate property. The community had paid $124-$151 per month on the real estate contract buying the house, while the reasonable rental value was found to be $250-$300 per month. No funds had been expended to improve the property, nor had Mr. Miracle performed any labor contributing to its value. With no discussion about the parties' expectations or any factors other than a simple comparison of dollars paid vs. rental value, the court's analysis of why Mr. Miracle should be charged with rent for occupying a house he was partly paying for consisted of:

> [T]he community had been adequately compensated for its expenditures by its beneficial use of the premises. An equitable lien is a remedy intended to protect one party's right to reimbursement. [*Citations omitted.*] A right to reimbursement may not arise if the contributing spouse received a reciprocal benefit flowing from the use of the property…. In that case, equity will find that the contributing spouse has already been reimbursed.[18]

It appears that all cases citing *Miracle* for the rule that rental value can be offset against contributions have been divorce cases [except the unreported case of *Capps v. Capps,* discussed below], although probate cases discuss the same issue without citing *Miracle.* When applying an offset, cases generally follow the *Miracle* "analysis" of simply adding up the rental value of living in the community residence, and deducting that amount from the reimbursement the non-owner spouse receives for his or her contributions to the property.[19]

Particularly in the case of a long-term marriage, the rental value of living in a house can eventually exceed everything the "non-owner" spouse or community may have contributed over the course of decades to help pay for and maintain the home, leaving a surviving spouse with nothing from what is often a marital community's largest asset. That was the case in the unreported case of *In re Estate of Capps*.[20]

In *Capps,* Larry bought a house in 1975 for $24,100 with a $9,000 downpayment.[21] He and Linda married the next year, and lived in the house for 30 years, until the day Larry died. When Larry died the house was unencumbered and worth over $700,000. Larry's children by a prior marriage successfully claimed ownership of the house under a decades-old (but post-marriage) will bequeathing his separate property to his children. Linda sought reimbursement for her and the marital community's contributions to buying and supporting the house. Finding that the rental value of the house during the 30 years she and Larry lived in it to have been $286,560, the trial court held that the benefit of free rent offset everything that Linda and the marital com-

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munity had contributed and awarded Linda $0. The Court of Appeals, Division II, affirmed. Finding that Linda had failed at trial to prove that she or the marital community had contributed anything to the house,[22] the court declined to address Linda's argument that it was inequitable and contrary to the parties' intent to charge her and the marital community rent for living in the marital residence.

Whether to award a spouse or marital community reimbursements, and whether to offset benefits received against contributions made, is a purely equitable matter in Washington in both divorce cases and probate proceedings. Most cases dealing with the issue are divorce cases,[23] and those cases that deal with probates fail to discuss any distinction between the two situations, or whether different factors or policy goals should be considered in probate proceedings.[24] In divorce cases the court has before it all of the parties' property, and is required to take into account (1) the nature and extent of both community and separate property, (2) the duration of the marriage, and (3) the economic circumstances of each spouse at the time the division of property is to become effective.[25] In probate proceedings the court has no authority to redistribute a decedent's estate generally to balance the equities. Stating only the rule that courts are to take "all circumstances" into account,[26] probate cases offer no direction for what factors should be considered nor any theoretical basis for charging the marital community with rent.

Most often, charging the non-owner spouse with rent for living in the martial home while both parties are alive is not even considered. For example, in the early case of *Legg v. Legg*, the husband died after a 25-year marriage.[27] The wife continued to occupy the marital home (which was the husband's separate property) after his death. The court awarded Mrs. Legg a lien for the community's improvements to the property, offset by the rental value of the home for the period she occupied it *after* husband's death, but there was no discussion of charging her with rent for the time the marital community lived in the house. Similarly in *In re Hickman's Estate*, another probate case, a husband and wife lived in the wife's separate property before she died.[28] The husband continued living there after she died, making contributions to the property for which he later claimed reimbursement for his post-death contributions. The court held he was entitled to reimbursement, and charged him with the rental value of living on the property *since* the date his wife's will was admitted to probate, but there was no suggestion that he should have been charged rent for living in the house with his wife while she was alive.

When the issue of offsetting rent is addressed—whether in divorce or probate cases—the courts offer only ad hoc rationales for their decisions, grounded in no consistent theory. For example, in *In re Marriage of Carrillo*, Tracy and Johnny lived in and contributed to a house, which Johnny inherited from his parents, over the course of a 10-year relationship.[29] The Court of Appeals upheld the trial court's refusal to offset the rental value of living in the house against the reimbursement awarded to the wife, citing "intangible factors [that] outweighed the community benefit from living in the house," including:

- Tracy was left without a house she had lived in for over a decade and had grown to consider her home;
- Tracy had devoted significant emotional investment in the home; and
- Johnny retained the home where he was raised.

No other cases have discussed similar intangible factors in assessing whether is it equitable to charge a non-owner spouse for living in the marital residence.

In *In re Marriage of Welton*, a married couple had lived in a home owned by an LLC that was the husband's separate property.[30] In rejecting the husband's claim that the rental value of living in the house should be offset against any reimbursement for the wife/community's contribution to the property, the Court of Appeals noted that whether to grant an offset "is discretionary; there is no requirement that a court offset the lien if it will result in a distribution that is not fair and equitable." The only reasons given for not charging the wife with rent were that

- the same benefit was provided to at least one employee of the LLC; and
- the separate estate of the husband had grown by between $305,704 and $413,694.[31]

The factors relied on bythe courts in *Carillo* and *Welton* (other than an employee also being given the benefit of living in the house) are likely to exist in virtually all cases of a long term marriage—yet are not discussed in other cases evaluating the equities of charging rent.

Washington's approach is based on two premises that are contrary to the fundamental policy of community property law: (1) regardless of how little equity one spouse may have in a residence at the time of marriage, regardless of how much the other spouse/community may subsequently pay toward the residence, and regardless of how long the marriage may have lasted, it is considered equitable in the first place to give 100 percent of the home's value to just one spouse, requiring the other spouse to prove otherwise; and (2) it may be proper to charge the community/non-

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owner spouse full rent for living in a residence he or she partly paid for (while charging the owner spouse nothing for the *pro rata* share of the residence the community / other spouse paid for). Then, unlike in California and some other jurisdictions, when the marriage ends by death or divorce the other spouse has no *legal* right to any share of the marital home's value, and is entitled to only what a judge might decide to award as a matter of *equity*, in his or her discretion, reviewable only for abuse.

Washington courts should revisit the issue of whether, in probate proceedings, when determining if a surviving spouse is entitled to reimbursement for the value he or she or the community added to a home characterized as the other spouse's separate property, it is good policy to permit rental value to the contributing party's contributions. Washington's failure to consider the policies underlying the community property system, and to take into account the expectations of married couples while they are alive, can lead to seriously inequitable results in probate proceedings. California and Texas have it right: one spouse should not be charged rent for living in the marital residence, even if it was acquired before marriage and is therefore considered one party's separate property.

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1 The same rules apply when one spouse's separate property is contributed to property characterized as community property.

2 California, Nevada, New Mexico and, recently, by statute, Wisconsin. *See* Elizabeth Barker Brandt, *The Treatment of Community Contributions to Mortgage Payments (Including Principal and Interest) on Separate Property*, 30 Idaho L. Rev. 697 (1994).

3 Wisconsin: W.S.A. 766.63 ("mixing marital property [i.e., community property] with property other than marital property reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced").

4 California: In re Marriage of Moore, 28 Cal. 3d 366, 371-72, 618 P.2d 208, 210 (1980) ("the rule developed through decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds").

5 In Washington, however, the contributing party may also be entitled to a *pro rata* share of a property's increased value caused by inflation and market factors. Marriage of Elam, 97 Wn.2d 811 (1982). In this respect Washington treats the contributions more like an investment, allowing the contributing party to share in market gains (and theoretically losses, although no case has expressly reduced a reimbursement by a pro rata share of a property's decline in value). *See* Harry M. Cross, *The Community Property Law (Revised 1985)*, 61 Wash. L. Rev. 13 (1986).

6 Cross, *supra*, note 5.

7 *See, e.g.*, In re Marriage of Moore, supra, note 4. ("Appellant argues that interest and taxes should be included in the computation because they often represent a substantial part of current home purchase payments. We do not agree. Since such expenditures do not increase the equity value of the property, they should not be considered in its division upon dissolution of marriage…. Amounts paid for interest, taxes and insurance do not contribute to the capital investment and are not considered part of it").

8 Legg v. Legg, 34 Wash. 132 (1904); Estate of Trierweiler, 5 Wn. App. 17, 486 P.2d 314 (1971).

9 Marriage of Harshman, 18 Wn. App. 116 (1977); Merkel, 39 Wn.2d at 102.

10 *See*, Trierweiler *supra* note 7; but cf. Merkel, *supra* note 7 (denying reimbursement for mortgage interest, tax and upkeep payments made by the community on the ground that they "represent no more than reasonable rental for the use of the land").

11 Elam, *supra* note 5; Marriage of Pearson-Maines, 70 Wn. App. 860 (1993).

12 Marriage of Miracle, 101 Wn.2d 137 (1984); Marriage of Pearson-Maines, *supra*, note 11; Brandt, *The Treatment of Community Contributions*, *supra* note 2.

13 *E.g.*, in Woodburn's Estate, 190 Wash. 141 (1937), the parties were married for 48 years prior to the husband's death. During their marriage they had improved and "for some years" lived on property the husband had bought two years before the marriage, which was apparently a farm and generated rentals that "were far in excess of the total of all expenditures for any improvements, taxes, and assessments" on the property. Because the property generated income exceeding its costs, "the benefit and use of which was enjoyed by the community," the court denied the wife's claim for reimbursement of contributions made to the property.

14 Miracle, *supra*, note 12; *see, generally* Brandt, *The Treatment of Community Contributions, supra* note 2.

15 The only intent that seems to be addressed in the cases is whether the contributing spouse intended to make a gift of the contribution. *See, e.g.*, Hickman's Estate, 41 Wn.2d 519 (1952).

16 Tex. Fam. Code § 3.402

17 Miracle, *supra* note 12.

18 *Id.*

19 *See, e.g.*, Merkel, *supra* note 9; Pearson-Maines, *supra* note 10.

20 Estate of Capps, 173 Wn. App. 1037 (2013).

21 This author handled the *Estate of Capps* appeal, and some of the facts recited here are not contained in the Court of Appeals' opinion.

22 In reaching this conclusion Division II selectively cited the facts and evidence at trial, and disregarded the presumptions that apply to income received and payments made during a marriage.

23 *E.g.*, Miracle, *supra* note 12; Elam, *supra* note 9; Merkel, 234 P.2d at 857; Marriage of Marshall, 86 Wn. App. 878 (1997); Pearson-Maines, *supra* note 11; Marriage of Harshman, *supra* note 9, abrogated by Elam, *supra* note 9; Marriage of Welton, 31073-6-III, 2014 WL 1514595 (2014) (unreported); Marriage of Carrillo, 116 Wn. App. 1020 (2003) (unreported).

24 *E.g.*, Hickman's Estate, *supra* note 15; Legg, *supra* note 8; Woodburn's Estate, *supra* note 13; Binge's Estate, 5 Wn.2d at 446; Trierweiler, *supra* note 9.

25 RCW 26.09.080.

26 Marshall, *supra* note 23; Miracle, *supra* note 12.

27 Legg, *supra* note 8.

28 Hickman's Estate, *supra* note 15.

29 Carrillo, *supra* note 23.

30 2014 WL 1514595 (Wn. Ct. App. 2014) (unreported).

31 *Id.*

Recent Developments

Real Property

by Brian Lewis – Ryan, Swanson & Cleveland, PLLC

Tenant's Liability for Condominium Assessments

In *Granville Condominium Homeowners Association v. Kuehner*, 177 Wn. App. 543 (2013), Division II of the Court of Appeals considered whether the tenant of a condominium unit was obligated under either the condominium's declaration or state law to pay monthly assessments charged against the unit. The court concluded there was no basis under either the declaration or the Washington Condominium Act to make the tenant liable for assessments.

The Kuehners occupied a residential condominium unit under an unwritten agreement with the unit owners. The arrangement between the parties was intended to resolve a debt the owners owed to the Kuehners. Under the arrangement, the Kuehners were permitted to occupy the unit rent free, presumably until such time as the debt was satisfied. When the Kuehners took occupancy, the owners were delinquent in their monthly assessments and the unit was subject to a recorded lien for unpaid assessments. During the Kuehners' occupancy, neither the Kuehners nor the unit owners paid the monthly assessments and the delinquency grew to approximately $13,000.

In late 2011, the condominium's homeowners association ("Association") sued the Kuehners to collect the unpaid assessments. The Association alleged that the Kuehners were liable for $5,671.80 of assessments accrued during their occupancy because they had used and consumed various utilities without paying for them.

The Kuehners obtained summary dismissal of the Association's claims on the grounds that neither the condominium declaration nor the Washington Condominium Act made them liable for assessments. On appeal, the court analyzed the condominium's declaration and the rights and remedies described in RCW 64.34.364 and concluded that the Kuehners were not liable for assessments.

RCW 64.34.364(10) entitles a condominium association to obtain the appointment of a receiver to take possession of a rented condominium unit when the association is pursuing an action to foreclose an assessment lien. The receiver is authorized to collect the rent and, if the rent is not paid, take possession of the unit and refurbish it for rental. Rents collected by the receiver are to be applied in the order of priority established by the statute. The Kuehners successfully argued before the trial court that RCW 64.34.364(10) provides the only appropriate remedy an owners' association may pursue against a tenant for collection of outstanding assessments.

RCW 64.34.364(12) makes the grantee of a condominium unit liable for unpaid assessments where the grantee takes title from the grantor in a "voluntary conveyance." The Washington Condominium Act does not define the term "voluntary conveyance." However, after reviewing the balance of the statute, the court concluded that the term is intended to distinguish between a voluntary unit purchaser and a foreclosing mortgage lender who takes title to the unit through foreclosure. The statute makes the voluntary purchaser liable for unpaid assessments at the time of conveyance, but not the foreclosing lender. The court concluded that the unwritten arrangement between the Kuehners and the unit owners was not a "voluntary conveyance" for purposes of the statute and merely made the Kuehners tenants at will. Therefore, the Kuehners were not liable for unpaid assessments under RCW 64.34.364(12).

The court also analyzed and rejected the Association's claim under quantum meruit and both parties' claims for attorney fees. No fees were awarded after the court determined that the issues raised were issues of first impression in Washington.

Disposition of Surplus Foreclosure Proceeds

Division III of the Court of Appeals recently confirmed that the priority established by RCW 61.12.150 for disposition of surplus foreclosure sale proceeds does not provide for payment of property taxes and assessments and is generally not subject to negotiation by private litigants.

In *Worden v. Smith*, 178 Wn. App. 309 (2013), the Wordens obtained judgment against the Smiths for $894,762 and a decree of foreclosure entitling the Wordens to judicially foreclose a mortgage they held against the Smiths' property. At the foreclosure sale, the sheriff sold the property to KAL Farms for $1,625,000. After paying amounts owed to the Wordens, the sheriff deposited $710,780 into the Superior Court's registry. At the time of sale, the property was encumbered by statutory liens securing approximately $66,000 in unpaid property taxes and storm water assessments and a junior deed of trust in favor of Columbia Bank.

Negotiations commenced among the Wordens, Smiths and Columbia Bank regarding distribution of the surplus proceeds. The parties presented an agreed order in Superior Court. Pursuant to the agreed order, the unpaid taxes and assessments were paid in full and the balance was then paid to the Wordens (until their judgment was fully satisfied) then to Columbia Bank.

Columbia Bank and its counsel later realized that RCW 61.12.150 did not require that delinquent taxes and assessments be paid from surplus foreclosure proceeds. Because the lien for taxes and assessments was senior in priority to the Wordens' mortgage lien, it was unaffected

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by the judicial foreclosure proceedings and should have continued as a lien against the property. As a result of the parties' agreement to pay the liens, however, Columbia Bank received approximately $66,000 less than it was entitled to under the statute.

Columbia Bank moved for relief from the agreed order under both CR 59 and CR 60. The trial court denied relief, and concluded that the parties' agreed order constituted the law of the case. Columbia Bank then appealed.

While the appeal was pending, the Smiths assigned their redemption rights to Granite Farms. In its redemption notice, Granite Farms asserted that the cost to redeem the property should not include the $66,000 paid to the county for taxes and assessments because RCW 6.23.020 only requires that the redemption amount include any taxes paid by the foreclosure sale purchaser (KAL Farms) after sale and prior to the redemption. KAL Farms asked the court to include the $66,000 in the redemption amount and Columbia Bank's law firm (as assignee of the bank's claim) joined in that request. The thrust of their argument was that Granite Farms should not realize a windfall by taking the property free and clear of tax liens that should have survived the foreclosure sale but were erroneously paid from the surplus proceeds. That motion was denied and the bank and law firm appealed. Both appeals were then consolidated.

The Court of Appeals first analyzed the effect of the foreclosure sale on the tax liens and concluded that tax liens were entirely unaffected because they were senior to the mortgage lien foreclosed. The court then considered the law of the case doctrine and, specifically, whether the parties' agreed order was properly determined to be the law of the case. Under the law of the case doctrine, an appellate holding enunciating a principle of law will be followed in subsequent stages of the same litigation. Because there had been no appellate holding, however, the doctrine was not applicable and was incorrectly applied by the trial court.

The court then analyzed the language of the agreed order and concluded that the parties intended to make a distribution "pursuant to" RCW 61.12.150. However, the order failed to do so because it provided for payment of the tax and assessment liens which were not required to be paid under the statute. Citing *State v. Drum*, 168 Wn.2d 23 (2010), the court noted that a stipulation by parties to the law does not bind a trial court or the Court of Appeals. Accordingly, although the order was presented as agreed, it was error for the trial court to treat the parties' stipulation of law as binding and the bank's motion for reconsideration should have been granted. Specifically, the Court of Appeals identified CR 59(a)(7) and (9) as proper grounds for reconsideration.

Finally, the court considered whether Granite Farms (as a redemptioner) should have been required under equitable principles to increase its redemption price by the amount of taxes and assessments erroneously paid under the agreed order. Relying on the doctrine of equitable subrogation, the court concluded that it should. The liability for taxes and assessments were "in rem" obligations that followed ownership of the land. Accordingly, a redemptioner such as Granite Farms would be unjustly enriched if the taxes were paid in contravention of RCW 61.12.150. To prevent unjust enrichment, the court determined that Columbia Bank (and its law firm, as assignee) should be equitably subrogated to the county's lien for taxes and assessments. The court then ordered the imposition and foreclosure of an equitable lien against the property in favor of the law firm as Columbia Bank's assignee.

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Recent Developments

Probate and Trust

by Anna M. Cashman – Kutscher Hereford Bertram Burkart PLLC and Steven J. Schindler – Perkins Coie LLP

Estate of Evans, 326 P.3d 755, 2014 WL 2198374 (Wn. Ct. App. Div I) May 27, 2014. ***Antilapse Statute Applies When Beneficiary is a Financial Abuser and Deemed to Have Predeceased***

The issue of whether Washington's antilapse statute, RCW 11.12.110, applies when a beneficiary under a will is deemed to have predeceased the testator, because he or she financially abused the testator under chapter 11.84 RCW, was an issue of first impression for Washington Courts. The Court of Appeals, Division I, held that the antilapse statute is triggered, raising a presumption in favor of its application absent evidence of the testator's clear intent to the contrary.

Calvin H. Evans, Sr. ("Cal Sr.") was unmarried and had four children: Kenneth, Vicki, Sharon, and Cal Jr. Cal Sr. suffered from a medical condition that caused a thickening of his blood, which caused him to suffer his first stroke in 2000. In 2003, Cal Sr. purchased a 40-acre ranch in Sultan, Washington, and purchased a 70-acre parcel nearby. At Cal Sr.'s request, Cal. Jr. and his family moved to the ranch to care for Cal Sr. in early 2005.

In March 2005, Cal Sr. was hospitalized with another stroke and was diagnosed with dementia. Cal Sr.'s health continued to deteriorate over the year. During this time, while living on the ranch, Cal Jr. made several large purchases using his father's money, including $20,000 to purchase a dump truck, $75,000 to make improvements to the ranch, and $15,000 to buy a mobile home. On December 28, 2005, Sharon filed a guardianship petition in Snohomish County alleging Cal Sr. was incapacitated and needed a guardian. Cal Sr. did not want to be subject to a guardianship and was angry at Sharon for filing the petition. No guardianship was ever obtained.

Early in 2006, Cal Jr. and his wife prepared a will for Cal Sr. that left his Sultan ranch and Cessna airplane to Cal Jr. Cal Sr.'s other real properties were to be distributed equally to Kenneth and Vicki, but not Sharon. Sharon received a specific bequest of $25,000. The residue of the estate was to be held in trust with distributions to be made annually to Cal Sr.'s children and grandchildren, except Sharon. The will was executed and witnessed in March 2006 by Cal Sr.'s attorney and law partner. The law partner questioned Cal Sr. privately and believed that he had testamentary capacity. The attorney was named as personal representative.

Cal Sr. died on April 5, 2011. At that time, the only real property he owned was the Sultan ranch, as the rest of the property had to be sold to pay for his care. The will was admitted to probate with Cal Sr.'s attorney serving as personal representative.

In July 2011, Sharon, Kenneth, and Vicki (collectively known as Eaden, after Sharon's last name), filed a petition under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. Eaden argued that Cal Sr. lacked testamentary capacity and was acting under fraudulent representations and undue influence from Cal Jr. The petition also asserted that Cal Jr. was a financial abuser because he participated in the willful and unlawful financial exploitation of his father, a vulnerable adult under RCW 74.34.020. Therefore, Eaden argued that Cal Jr. should be treated as predeceased under RCW 11.84.020, and the estate should pass to Cal Sr.'s three other children.

The trial court upheld the will, denying Eaden's request to declare the will invalid due to a lack of testamentary capacity or undue influence by Cal Jr. However, the trial court did find Cal Jr. to be a financial abuser under RCW 11.84.010(1). Therefore, the trial court deemed Cal Jr. to have predeceased Cal Sr. and was accordingly disinherited.

After the trial court's ruling, Eaden filed a second TEDRA petition requesting that the court not apply Washington's antilapse statute, RCW 11.12.110, in favor of Cal Jr.'s children. Instead, Eaden argued that it was Cal Sr.'s testamentary intent that any bequests made to Cal Jr. should pass to the residue of the estate. The trial court denied Eaden's second TEDRA petition and held that the antilapse statute applied, giving any assets that would have passed to Cal Jr. to his children. Eaden appealed.

At the Court of Appeals, Eaden advocated for an equitable exception to the antilapse statute because to allow an abuser's family to profit would frustrate the testator's intent and only exacerbate the effect of the abuse. The Court of Appeals examined the presumption of application of the antilapse statute when a child predeceases the testator. The court also examined the express language of the financial abuser statute. RCW 11.84.030 and 11.84.040 provide that an "abuser shall be deemed to have predeceased the decedent" and that any property which would have passed to the abuser "shall be distributed as if he or she had predeceased the decedent." The court found the statutory language unambiguous and that the financial abuser statute provides an express method for distributing an abuser's inheritance.

The antilapse and financial abuser statutes, when read together, provide a roadmap of the distribution of a decedent's property. If a beneficiary is found to be an abuser, he or she is deemed to predecease the testator. RCW 11.84.030. Any property the abuser would have inherited must be distributed as if the abuser predeceased the testa-

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tor. RCW 11.84.040. The antilapse statute then provides for the division of property when a beneficiary predeceases the testator. RCW 11.12.110. The court noted that there is nothing in the financial abuser statute that indicates the term "predecease" means anything different than it does in the antilapse statute. The consistent use of the term "predecease" in the financial abuser statute triggers the antilapse statute, even though it is not explicitly referenced.

The Court of Appeals also examined the policy behind the financial abuser statute. As discussed in *In re Estate of Haviland*, 177 Wn.2d 68, 76, 301 P.3d 31 (2013), the financial abuser statute is not intended to be penal. The financial abuse slayer statute only affects those persons who both abuse a vulnerable adult *and* are beneficiaries of the abused person. The innocent descendants of the abuser do not meet the above criteria, and therefore should not be punished. Any incidental benefit to the abuser does not warrant denying benefits to an abuser's innocent heirs.

Once the antilapse statute is triggered, there is a presumption in favor of its application, but the presumption can be rebutted by showing the testator's clear intent to preclude its operation. If a testator uses words of survivorship indicating an intention that the devisee only take if he or she survives the testator, or if the testator provides for an alternate disposition, then the antilapse statute does not apply. Here, there was no clear intent in Cal Sr.'s will to preclude application of the antilapse statute. Cal Sr. did not condition inheritance on the survival of Cal Jr. or of the other beneficiaries. Further, Cal Sr. provided for distributions from the trust holding the residue of his estate be made to his grandchildren, indicating his intent to provide for Cal Jr.'s children. Therefore, the Court of Appeals upheld the trial court's ruling applying the antilapse statute when a financial abuser has been deemed to predecease the testator.

Both Eaden and Cal Jr.'s children were awarded attorney fees and costs to be paid from the estate by the trial court. The estate objected to the award of fees to Eaden because (1) the litigation did not result in substantial benefit to the estate, and (2) awarding attorney fees to the losing party was manifestly unreasonable. Prior case law generally requires that litigation result in a substantial benefit to the estate for fees to be assessed the estate. Subsequent to that case law, in 2007, the TEDRA fee statute was revised to permit courts to 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." RCW 11.96A.150(1). The court questioned the continuing vitality of the "substantial benefit" requirement and affirmed the trial court's assessment of Eaden's fees against the estate, satisfied that the court properly applied relevant factors such as that the issue was novel and that Eaden's argument was reasonable and made in good faith.

Estate of Bernard, 325 P.3d 400, 2014 WL (Wn. Ct. App. Div I) May 19, 2014. ***Filed Memorandum of TEDRA Agreement Substantially Complies With Court Order Requirement; Personal Representative and Trustee Generally May Appeal Rulings to Uphold Will or Trust***

Consistent with the purpose and policies of the Washington Trust and Estate Dispute Resolution Act (TEDRA) Chap. 11.96A RCW, and as with any contract, two parties who enter into a nonjudicial agreement under TEDRA generally may revise the terms of that agreement with a subsequent TEDRA agreement (subject to the amendment procedures, if any, imposed by the first agreement). Moreover, to the extent a court order is required for any action, a valid TEDRA agreement, coupled with a court filing of the agreement or a memorandum of its terms, will generally constitute substantial compliance with the requirement for a court order. These are the two core legal conclusions drawn by Division I of the Court of Appeals in the course of reversing summary judgment that had declared a first codicil to a will and a revocable trust amendment to be null and void for having failed to comply with procedures required under a TEDRA agreement.

In 2008, James Bernard filed a petition for guardianship of his father, Tom Bernard, alleging that Tom lacked capacity and was vulnerable to financial exploitation. In March 2009, James and Tom determined that a revocable trust arrangement for Tom would be a mutually acceptable and less restrictive alternative to a guardianship proceeding to resolve disputes regarding the current management and future disposition of Tom's assets. Accordingly, Tom and James entered into a nonjudicial binding agreement under RCW 11.96A.220, to which they were the only two parties, under which Tom agreed to establish a will and revocable trust with agreed-upon terms. Tom also agreed that modifications to either document would be null and void unless Tom first petitioned the court for approval of the modifications, gave summons to James of the hearing on the petition, and obtained a court order approving the modification. A memorandum of the March agreement was filed with the court. Tom then executed a will and revocable trust (the "Will and Trust") in accordance with the agreement, and the court dismissed the guardianship petition.

The terms of Tom's Trust provided that the residue would pass to James or his issue, or if James predeceased Tom without surviving issue, a significant percentage of the residue would pass to two nephews and a niece and the remainder to various charities. The terms of the Trust also stated that Tom's right to modify the Trust was "subject to" the nonjudicial binding agreement (the "March agreement") between Tom and James. The Trust further provided that, in the event the March agreement was unenforceable, the

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terms of the agreement itself would be incorporated into the Trust by reference. Tom contemporaneously executed a simple pourover will.

Within five months, Tom's niece and nephews had fallen out of favor with Tom and James, so Tom and James entered into a second nonjudicial binding agreement (the "August agreement"). The August agreement approved changes to Tom's estate plan. James or his issue remained as primary beneficiaries, but in the event James predeceased Tom without issue, the new plan reduced the amount passing to the niece and nephews to small, specific bequests. The residue of the estate was to be divided among three new individual beneficiaries and charities. Pursuant to the August agreement, Tom executed a trust amendment and a first codicil to manifest the approved changes. Tom and James acknowledged the trust modification requirements under the March agreement and stated that the August agreement would satisfy the requirement that Tom petition for a court order, give summons of the hearing to James, and obtain a court order approving the changes. A memorandum of the August agreement was filed with the court, giving the agreement the effect of a binding court order under RCW 11.96A.230.

James died 13 months later without any surviving issue, and Tom died shortly thereafter. Disgruntled about their reduced shares under the first codicil and trust amendment, the niece and nephews petitioned, among other things, to set aside the first codicil and trust amendment to restore their beneficial interests under the earlier Will and Trust. They argued that the first codicil and trust amendment were invalid because Tom failed to comply with the petition, summons, and court order requirements under the March agreement. The trial court agreed, on summary judgment (upon reconsideration of an earlier denial of summary judgment), that the first codicil and trust amendment were null and void. The trial court also ruled that the trustees and personal representative did not have the right to appeal the order granting summary judgment.

The Court of Appeals reversed. Noting that neither Tom's capacity nor the question of undue influence were matters on appeal, the Court of Appeals limited its review to whether the first codicil and trust amendment were null and void.

Tom reserved the right to modify the Trust, but the Trust also stated that his modification right was "subject to" the March agreement. A trustor may impose conditions on himself for the revocation of his trust, and Tom could have required himself to obtain a court order in the Trust, either by incorporating the requirement explicitly by reference or by copying the language into the Trust. Instead, Tom made his right to modify subject to, or conditioned upon, compliance with the March agreement. This would include compliance with the March agreement as it then existed or as subsequently amended by its parties. In other words, Tom and James apparently could have agreed to revise or set aside altogether the petition-summons-court procedure in a subsequent nonjudicial agreement, in which case Tom's modification would have been "subject to" the March agreement as subsequently amended.

After concluding that Tom and James could have bypassed the petition-summons-court procedure, the Court of Appeals determined that Tom and James did not do so in the August agreement. Instead, Tom and James expressly intended for the August agreement to satisfy the procedure set forth in the March agreement. By application of the doctrine of substantial compliance, the Court of Appeals concluded that they successfully satisfied the March agreement procedure. Most notably, with respect to the requirement for a court order, the Court of Appeals emphasized that a memorandum of the August agreement was filed with the court, which, under RCW 11.96A.230, caused the agreement to be the equivalent of a final court order. The Court of Appeals suggests, but does not state explicitly, that the failure to file the memorandum could have resulted in an entirely different outcome. One imagines that the Court might have concluded under that scenario that Tom and James had, in fact, agreed to bypass the petition-summons-court procedure to revise Tom's disposition scheme. There seems to be no question that they both wanted to achieve the revision in the August agreement, notwithstanding the agreement's language expressing an intention to satisfy the March agreement procedure.

In rejecting several arguments advanced by the niece and nephews, the Court of Appeals noted that the niece and nephews, as contingent remainder beneficiaries, would not have been parties to Tom's petition to modify his first codicil and trust amendment during his lifetime. Even if Tom had complied precisely with the requirement for a court petition and hearing to approve his proposed modification, the niece and nephew would have had neither an opportunity nor the authority to object.

The Court of Appeals also reversed the trial court order purporting to preclude the personal representative and trustees from appealing summary judgment invalidating the first codicil and trust amendment. Under Washington law, a personal representative and a trustee generally have a duty, and not merely a right, to take appropriate action to uphold the will or trust, including codicils and amendments. Finally, the Court of Appeals rejected the fee request filed by the niece and nephews because they offered no persuasive reason to grant the request.

Practice Tip: Whether You are a Trustee of a Trust that Owns a Life Insurance Policy or an Individual Owner of a Life Insurance Policy, a Life Insurance Policy Review is in Order.

by Peter T. Noone, J.D., M.B.A.*

(Financial Representative with the Principal Financial Group®, Des Moines, IA 50392, located in Seattle, WA)

For more than a decade, premiums on life insurance policies have been on a downward trend. That trend, combined with the general downward trend in interest rates since the late 1980s, has caused many life insurance policies to be noncompetitive and, in many cases, in danger of lapsing without either an infusion of cash or a reduction in the death benefit or both.

Once issued, too many life insurance policies are ignored or forgotten. As a general rule, life insurance companies are not obligated to let the policy owner know that a better deal may be possible. In fact, life insurance companies may be better off financially by collecting above-market premiums on older policies. It is up to the policy owner or financial professional to conduct a review of the policy to see if it is noncompetitive given current market conditions.

For policies in danger of lapsing and having coverage disappear, mainly "permanent" (cash value) life insurance policies (as opposed to term life insurance policies), life insurance companies have notification requirements. Unfortunately, by the time the policy owner gets notification, the choices are often undesirable.

How did the life insurance market get to where it is today? What should individual owners of life insurance policies and their advisors do to address changing market and regulatory conditions? What should trustees of trusts that hold life insurance policies do to fulfill their fiduciary duties?

Decreasing Cost of Life Insurance

The primary reason for lower costs of life insurance is that people on average are living longer. The health care system in the U.S. is still the envy of the world. Advances in medicine are phenomenal. When Social Security was introduced in 1936, the average life expectancy was about 60 years. In 1980, the average man was expected to live to 70. In 2010, it was 76. For women, life expectancies are longer than men and also going up. With longer lives, life insurance companies are able to collect more premiums, invest longer, and pass those savings on to consumers.

A second factor is regulatory changes at the state level. In 2002, the National Association of Insurance Commissioners approved new actuarial tables to replace actuarial tables from 1980. The tables are used for, among other purposes, determining the reserves that life insurance companies must hold against future claims. Washington adopted the new tables in 2004. Although life insurance companies determine premiums based on their own mortality tables, experience and reinsurance rates, the lowering of required reserves has, in effect, lowered life insurance companies' cost of capital ,enabling them to offer more competitive rates.

A third factor is the increased underwriting capability of the life insurance industry. With the ability to collect, interpret, and more effectively utilize "Big Data," life insurance companies are better able to categorize each individual's particular risk and put them into one of a larger number of risk classes. Compared to the past, today there are many more risk classes ranging from Super Preferred to numerous substandard classes. This enables life insurance companies to better align premiums to actual risks, resulting in lower rates for healthier people.

The Effect of Lower Interest Rates

"Permanent Life Insurance Policies" are meant to last for the insured's lifetime. The three basic forms of permanent life insurance policies are Universal Life, Whole Life, and Variable Universal Life. Each is designed to build up some tax–deferred cash value that can be used for premiums or withdrawn by the policy owner.

Universal Life Insurance Policies have an interest paying component . Many of these policies were issued in the 1980s and 1990s. When originally issued, many expected generous interest rates to be paid so that the cash value would build up through compounding, and premiums would be deducted from the cash value. This would help in the policies' later years when the owners did not plan on paying premiums in their retirement years. The problem started when interest rates went on their downward trend, and the cash values did not rise as anticipated, while the cost of life insurance went up each year as the insured got older. As a result, many of these older Universal Life Policies do not have sufficient cash values today to support the premiums. This may leave the owners with three basic unattractive choices: 1) adding cash into the policy; 2) lowering the death benefit; or 3) letting the policy lapse.

Whole Life Insurance Policies, which often have a dividend-paying component, also have been negatively impacted by the low interest rate environment. With lower interest rates, insurance companies' returns on their fixed-income investments have been lower which, in turn, has negatively impacted their dividend rates. Buyers of Whole Life Insurance Policies in the 1980s and 1990s had higher projected dividend rates than were actually experienced. Buyers often expected the dividends to purchase additional insurance coverage or to be used to pay up the policy sooner. Therefore, Whole Life Insurance Policy owners may also be facing three basic unattractive choices: 1) continue paying

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Notes from the Chair

by Joseph P. McCarthy – Stoel Rives, LLC

I am honored to be the new Chair of the Real Property, Probate and Trust Section. I will serve in this capacity until the 2015 Midyear Meeting when Heidi Orr succeeds to the Chair.

Our 2014 Midyear Meeting and Conference was held on June 6 -8, 2014 at the Tulalip Resort Hotel. Tulalip was a new venue for the meeting. We chose the Tulalip in response to the results of our 2013 member survey. A majority of our members expressed a preference to have the Midyear Meeting in the Seattle area. In the event, registrations for the Midyear Meeting were down by about 10 percent compared to the last two years. If you have feedback on Tulalip as a location, please feel free to share them with any member of the Executive Committee. If you don't know any of the members, please email me at jpmccarthy@stoel.com. I will be happy to talk with you. Next year the Midyear Meeting will be held on June 12-14 at the Davenport Hotel in Spokane.

The Executive Committee is focused on using advances in technology to improve the services that the Section provides to its members. In the upcoming year, the Executive Committee will implement several improvements to our website and newsletter. We will be moving our listserve and our website to a new hosting company. This will improve their reliability, provide users with enhanced search ability and control, and improved performance. Later this year, we will modernize and improve the design and content of our Section's website. Finally, starting with the current issue of the newsletter, the articles will contain links to case law. In the upcoming year, the Executive Committee will also try to provide some new services and opportunities for young lawyers.

As a WSBA entity, the RPPT Section uses the Bar Association's fiscal year, which ends on September 30th. Our Section charged dues of $25 to each member for the fiscal year ending September 30, 2014. WSBA charged the RPPT Section $17.75 for each member to cover the cost of services that WSBA provides to the Section, such as CLE programming, communication, contracting and financial services. That left the Section with $7.25 of per-member dues revenue for the year. WSBA recently advised its Sections that it will not increase the per-member charge for the fiscal year ending September 30, 2015. As a result, the RPPT Section will not increase its membership dues in the upcoming fiscal year.

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Practice Tip

premiums; 2) lower the death benefit; or 3) terminate the policy and withdraw the cash value.

What Should Individual Owners of Life Insurance Policies and Their Advisors Do?

Individuals should review their policies annually. Estate Planning attorneys, accountants and financial professionals should encourage this practice. Individuals have grown accustomed to refinancing their home mortgages when conditions make it desirable. They should look at their life insurance policies in the same light. Why pay more than you have to? If it is a cash value policy, be on the lookout for any existing or potential problems.

What Should Trustees of Trusts with Life Insurance Policies Do?

Trustees should be reviewing the life insurance policies annually. A trustee has a duty to protect the assets of the trust, and insurance policies are assets. A trustee of a trust with investment securities would certainly monitor the securities for performance and fit within the overall portfolio of assets. The trustee should do the same with life insurance assets. A buy and hold passive custodial approach to life insurance assets is not sufficient.

In addition, it may behoove the trustee to consult with a financial professional or life insurance professional to assist in the review of the life insurance policies.

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