Fall Probate and Trust Seminar: Updates, Planning and Disputes

Tuesday, December 6, 2016, Seattle, WA

Presented by WSBA CLE
in partnership with the RPPT Section

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Co-Chairs and Faculty

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

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

Program Co-Chairs

Jessica C. Allen — *Workland Witherspoon, Spokane, WA*
A. Paul Firuz — *Miller Nash Graham & Dunn LLP, Seattle, WA*
Tiffany Gorton — *Kutscher Hereford Bertram Burkart PLLC, Seattle, WA*

Program Faculty

James T. Anderson — *Aviation Law Group PS, Seattle, WA*
Julie E. Dickens — *Gordon Thomas Honeywell, Seattle, WA*
Rochelle L. Haller — *Garvey Schubert Barer, Seattle, WA*
Robert F. Hedrick — *Aviation Law Group PS, Seattle, WA*
Barbara A. Isenhour — *Somers Tamblyn King Isenhour Bleck PLLC, Seattle, WA*
Sean Russel — *Stokes Lawrence Velikanje Moore & Shore, Yakima, WA*
Stephanie R. Taylor — *Randall Danskin PS, Spokane, WA*
Ann T. Wilson — *Law Offices of Ann T. Wilson, Seattle, WA*

Summary of Contents

Program Schedule

Fall Probate and Trust Seminar: Updates, Planning and Disputes

Tuesday, December 6, 2016

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

8:25 a.m. **Welcome and Introductions**
Tiffany Gorton, Kutscher Hereford Bertram Burkart PLLC, Seattle
Jessica C. Allen, Workland Witherspoon, Spokane

8:30 a.m. **Medicaid and Special Needs Planning: Practice Tips When a Client is Elderly or Disabled**
If a client, spouse or child is elderly or disabled what are the essential provisions that should be in a power of attorney or Will to facilitate the ability to qualify for Medicaid long term care benefits if needed. When is it appropriate to consider transfers of assets to qualify for Medicaid benefits and what are the estate planning tools helpful to implement an asset protection plan? What provisions should be included in a Will or special needs trust to protect a beneficiary's eligibility for government benefits and what drafting mistakes should be avoided? Are there any options to protect government benefits in the probate context if the estate plan failed to do so?
Barbara A. Isenhour, Somers Tamblyn King Isenhour Bleck PLLC, Seattle

9:30 a.m. **Modern Family: Wrongful Death Considerations in Probate**
This session will have an overview of the basic requirements for bringing and defending wrongful death and related actions for probate attorneys, issues that can affect recovery of damages including will contests and other post-death intra-family litigation, what to do if the personal representative does not want to commence an action, apportionment of damages, and other considerations for attorneys advising personal representatives and litigating claims.
Ann T. Wilson, Law Offices of Ann T Wilson, Seattle
James T. Anderson, Aviation Law Group PS, Seattle
Robert F. Hedrick, Aviation Law Group PS, Seattle

10:30 a.m. **BREAK**

Schedule continued on next page

Program Schedule (cont.)

10:45 a.m. **Real Property Practice Tips for Estate Planning and Probate Attorneys**

Learn practical tips and potential traps for dealing with real estate in your estate and probate practice. Should you get a title endorsement when you convey real estate into a revocable trust? What can you do to help title companies recognize a Transfer on Death Deed or a JTWROS deed? Should you convey out of state real estate into an LLC? What should you tell your Personal Representative about listing and selling real estate from an estate? Learn the answers to these questions and take away real estate insights that can help you be a better estate planning attorney for your clients.

Julie E. Dickens, Gordon Thomas Honeywell, Seattle

11:45 a.m. **LUNCH on your own**

The RPPT Section is hosting a New Lawyers mentorship luncheon in the Mountain rooms for those who have pre-registered.

1:00 p.m. **Trust and Estate Disputes - TEDRA**

Sean will provide a brief introduction to TEDRA then dive into the specifics to highlight the procedural aspects of the Act. This session will focus on the estate planner and include recent updates to case law and how those decisions will affect your practice.

Sean Russel, Stokes Lawrence Velikanje Moore & Shore, Yakima

2:00 p.m. **Powers of Attorney, Digital Assets, and Partnership Audit**

Rochelle Haller will discuss the newly enacted Washington Uniform Fiduciary Access to Digital Assets Act, Durable Power of Attorney Act and the IRS's new partnership audit rules and how they may affect your clients and your practice. She will also discuss and advise how the Acts and rules should be addressed in estate planning and business succession planning documents.

Rochelle L. Haller, Garvey Schubert Barer, Seattle

3:00 p.m. **BREAK**

3:15 p.m. **An Ethical Review of Representing Trusts and Estates: Who is the Client?**

In an ever-changing legal environment, attorneys assisting in the administration of an estate or trust face new and unique questions regarding the attorney's duties to fiduciaries and beneficiaries alike. This hour long discussion will focus on the following: who is the client; what type of obligation does an attorney have to beneficiaries; is the information discussed with the fiduciary subject to attorney client privilege.

Stephanie R. Taylor, Randall Danskin PS, Spokane

4:15 p.m. **Adjourn • Complete Evaluation Forms**

Co-Chair Biographies

Jessica C. Allen

Jessica C. Allen is a partner in the firm of Workland & Witherspoon, PLLC in Spokane, Washington. Her practice focuses primarily on the areas of estate planning and probate, business and commercial law, public finance, and taxation. Ms. Allen is a member of the Washington State Bar Association, the Idaho State Bar, and the U.S. District Court, Eastern District of Washington. She serves on the Executive Committee of the Washington State Bar Association Real Property, Probate and Trust Section. Ms. Allen also serves on the board of the Blood Center Foundation of the Inland Northwest, serves as International Chair of the South Spokane Rotary Club, and is on the Spokane Symphony Planned Giving Advisory Committee. She is a member of the Spokane Estate Planning Council and the National Association of Bond Lawyers. Ms. Allen was selected as a Washington Rising Star Attorney in Estate and Probate for 2014 and has been awarded an AV peer rating review by Martindale Hubbell from 2014 to the present.

A. Paul Firuz

A. Paul Firuz is an associate with Miller Nash Graham & Dunn in Seattle, Washington, and is a member of the firm's tax and trusts and estates teams. His practice includes helping clients to envision, establish, and revise estate plans that make sense for their families, whether the goal is to protect future generations, transfer assets efficiently, plan around state or federal tax laws, or plan for the succession of a business. Paul also helps clients navigate the complexities of trust & estate litigation, including advising clients regarding the rights and responsibilities of beneficiaries, fiduciaries, and creditors of estates. Paul is a Fellow with the Real Property Probate and Trust section of the WSBA, was recently named as part of Washington Leadership Institute's class of 2017, and has been named by his peers as a "Rising Star" in Super Lawyers magazine for three years in a row.

Tiffany R. Gorton

Tiffany R. Gorton is an associate with the firm of Kutscher Hereford Bertram Burkart in Seattle, Washington. Her practice focuses primarily on the areas of trust and estate litigation and tax and estate planning. Ms. Gorton is a member of the Washington State Bar Association and the State Bar of Michigan. She is a frequent lecturer and author on estate planning, trust and probate issues. Ms. Gorton previously taught Drafting Estate Planning Documents at the University Of Washington School of Law. She serves as the President of the Washington State Bar Association Tax Section; member of the Estate and Gift Tax Committee of the Washington State Bar Association; editorial board member of the TEDRA subcommittee, Washington State Bar Association Real Property Probate and Trust Newsletter; the Vice President of Washington Women in Tax and is a member of the planned giving board of the Seattle Humane Society. Ms. Gorton has been named by her peers as a "Rising Star" in Super Lawyers Magazine and Seattle Met Magazine.

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

Seminar Sponsor: WSBA-CLE

Seminar Name: Fall Probate and Trust Seminar: Updates, Planning and Disputes (17497SEA/WEB)

Seminar Date: December 6, 2016

Approved Credits: **6.00 CLE Credits for Washington Attorneys** (5.0 Law & Legal Procedure, 1.0 Ethics and 0.0 Other)

Hours of Attendance:

TIME OF ARRIVAL	TIME OF DEPARTURE

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

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

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

Signature: _____ **Date:** _____

CHAPTER ONE

MEDICAID AND SPECIAL NEEDS PLANNING: PRACTICE TIPS WHEN A CLIENT IS ELDERLY OR DISABLED

December 2016

Barbara A. Isenhour
Somers Tamblyn King Isenhour Bleck PLLC

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BARBARA A. ISENHOUR is a partner in the law firm of Somers Tamblyn King / Isenhour Bleck. She graduated from the University of Washington School of Law in 1973 and was a staff attorney with Evergreen Legal Services and its predecessor from 1973 to December of 1995. She has been in private practice since 1996 where she continues to focus on legal issues for the elderly and disabled.

TABLE OF CONTENTS

LONG TERM CARE MEDICAID RULES

I. OVERVIEW OF PROGRAMS THAT PAY FOR LONG TERM CARE

A. THE MEDICARE PROGRAM

Medicare is the federal health **insurance** program for people who paid into the social security system while working and are either over 65 or under 65 and determined to be disabled by the Social Security Administration. Medicare only pays for a small percentage of the cost of nursing home care in the state of Washington and the amount of the benefit is very limited. Medicare will only pay for "therapeutic skilled nursing care." This means the resident is getting physical or occupational therapy at least 5 days per week or skilled nursing care for 7 days per week. The resident must have been hospitalized for at least 3 days within the 30 days prior to admission to the nursing home.

Even for those who meet the rigid criteria for payment of nursing home expenses under Medicare, the amount of the benefit is very limited. Medicare will only pay 100% of the cost of nursing home care for the first 20 days. From day 21-100, the resident must pay co-insurance of $161 per day. Medigap policies generally will pay this co-insurance. Neither Medicare nor Medigap policies will pay for nursing home care after day 100.

B. THE MEDICAID PROGRAM

Medicaid is a state and federally funded medical assistance program for certain people, including the elderly and disabled, who have income and assets below a certain amount. The Centers for Medicare and Medicaid Services (CMS) of the Department of Health and Human Services (HHS) administers Medicaid at the federal level. The federal statute is found at 42 U.S.C. §1396 *et seq*. (A chart listing the federal statutes applicable to the Medicaid institutional program is attached as Appendix A.) The federal

regulations are at 42 C.F.R. §430 *et seq*. CMS promulgates program instructions and guidelines to the states in a series of transmittals collectively entitled the "State Medicaid Manual," which can also be found at the CMS website http://www.cms.hhs.gov/home/regsguidance.asp.

States are generally prohibited from using eligibility criteria for the Medicaid program that is more restrictive than that used by the Supplementary Security Income program. 42 U.S.C. § 1396a(a)(10)(C). Because of this, guidance on various Medicaid issues can be found in the federal SSI statute, 42 U.S.C. § 1381-1383, the federal SSI regulations, 20 C.F.R. § 416 *et seq*. and in the federal SSI policy manual entitled the Program Operations Manual System (POMS). The website where the POMS can be found is: http://policy.ssa.gov/poms.nsf/aboutpoms.

The Health Care Authority (HCA) of the Department of Social and Health Services (DSHS) administers Medicaid at the state level for Washington. Each state has a Medicaid agency that administers the program for that state. The state Medicaid program is authorized by RCW 74.09.500 *et seq.* Most of the state regulations for the Medicaid nursing home program are promulgated at WAC 182-500 *et seq*. Many of the details of the Medicaid regulations are found in the A-Z Manual, promulgated by the Washington Health Care Authority. The A – Z Manual is at the DSHS website at https://www.dshs.wa.gov/esa/manuals/eaz.

C. NURSING HOME CARE (WAC 182-513)

Unlike Medicare, **Medicaid** will pay for custodial nursing home care and there is no limit on the number of days of coverage. Medicaid will pay the nursing home at its Medicaid reimbursement rate for that particular nursing home. Every nursing home has its own reimbursement rate. In addition to paying for the cost of care in the facility, Medicaid provides coverage for most medical expenses such as physician bills and durable medical equipment. Medicaid is the payer of last resort, however, so it will only pay after Medicare or private insurance have paid its required share.

D. COPES PROGRAM (WAC 182-515)

COPES is a Medicaid program designed to help persons avoid institutionalization. It covers long-term care delivered at home, in adult family homes, and in assisted living facilities. It is operated under a waiver from the federal Center for Medicare and Medicaid Services, meaning that limits are placed on the program which are different than those for other Medicaid services.

With a few exceptions, which are described below, COPES has the same financial eligibility rules as the Medicaid nursing home program. In addition, applicants must either (1) currently be in a nursing home or (2) establish that they are likely to be

institutionalized without COPES but can safely reside at home (or in a non-institutional residential facility) with COPES services. DSHS makes the assessment as to whether a person's care needs qualify for COPES, and this can be done on a "fast track" basis for those who face imminent institutionalization.

For eligible persons residing in their own home, COPES will pay an hourly wage for someone to come into the home to provide assistance in daily living activities and personal care, such as bathing, toileting and dressing, and some household maintenance tasks. COPES may pay an additional amount for other services including home delivered meals, home health aids, skilled nursing care, night support, and training.

COPES can also cover care in a licensed Adult Family Home, Congregate Care Facility, Boarding Home or Assisted Living facility. The reimbursement rate depends upon the level of care required when the Department does a level of care assessment and it depends upon whether the applicant lives in a metropolitan area or not. As with institutional coverage, COPES recipients get coverage for most medical expenses not covered by Medicare.

There is no retroactive COPES coverage. Coverage begins only when a plan of care and provider contract are approved by DSHS.

E. MEDICAID EXPANSION LTC COVERAGE (WAC 182-509-0305)

For persons who qualify for services under the Medicaid expansion authorized by the federal Affordable Care Act, generally persons who do not qualify for Medicare and have income under 138% of the federal poverty level, coverage is available for care in a skilled nursing facility or for personal care assistance at home. For this category, coverage is not available in adult family homes or assisted living facilities.

F. COMMUNITY FIRST CHOICE (WAC 182-513-1210, -1215, -1220)

Community First Choice (CFC) is Medicaid long-term care program that is authorized by Section 1915(k) of the Social Security Act and was implemented in the state of Washington on July 1, 2015. The federal government pays a 6% higher proportion of the costs for this program than it does for other Medicaid services.

CFC services include personal care provided at home, in adult family homes and in assisted living facilities. For many persons who are eligible under the COPES rules for personal care in those settings, CFC will pay for their personal care services after July 1, 2015. CFC also pays for personal emergency response systems, caregiver management training, and for other assistive technology. Unlike COPES recipients, CFC recipients remain subject to Medicare Part D (prescription drug coverage) Premiums and Co-payments, which makes COPES preferable for those on Medicare.

The financial eligibility rules for CFC are similar but not identical to the COPES financial eligibility rules. For income, the CFC standards are much lower: recipients at home can have no more than the Medically Needy Income Level (currently $713) and recipients in adult family homes and assisted living facilities must have income that is below the Medicaid Special Income Level (currently $2,199) and below the state contracted rate at the facility plus $38.84.

For resources, the CFC standards are similar to COPES with a couple of notable differences. The retirement assets of a spouse (like IRA or 401(k) funds) are completely disregarded for CFC eligibility. Also, the transfer of asset rules that apply for most long-term care services do NOT apply to CFC.

CFC is not subject to the post-eligibility participation rules that apply to COPES. Generally, CFC recipients in facilities will have to pay all income in excess of the applicable personal needs allowance (usually $62.79) to the facility. Notably the deductions from participation for spousal support, guardianship expenses and taxes are not available for CFC recipients.

II. MEDICAID ELIGIBILITY RULES FOR A SINGLE PERSON

A. INCOME (WAC 182-513; WAC 388-450)

In a nursing home, a single individual's income must be less than the private pay rate in the facility plus the applicant's regularly recurring monthly medical expenses. WAC 182-513-1315. If an applicant's income is above the Medicaid rate and below the private pay rate, the applicant will be certified as eligible for Medicaid and will only have to pay the Medicaid rate. In this case, however, the applicant must spend down the excess income over the Medicaid rate on medical costs before they will be eligible for Medicaid coverage for other medical expenses. There is an income cap for the Medicaid COPES program of $6,381 per month.

If residing in a nursing home, adult family home or assisted living facility, most of a single person's income will be paid to the facility and Medicaid will then pay the difference up to the Medicaid reimbursement rate for the facility. This income payment or co-payment is called “participation.” The applicant’s income must be less than the private pay rate for the facility plus regular recurring medical expenses (medications, health insurance premiums, etc.). WAC 182-513-1315.

If receiving in-home caregiver benefits in the home, a single person can keep up to $990 of monthly income for expenses and the balance of the individual’s income is a co-payment towards their care costs.

B. RESOURCES (WAC 388-470)

Non-exempt resources for a single person must be below $2,000 by the first day of the month in which the applicant is applying for Medicaid. Resources are valued based upon fair market value, not tax assessed value.

The following assets are considered to be exempt resources and are disregarded in determining if a person qualifies for Medicaid:

1. The **home** (including a mobile home) where the applicant resides or used to reside before moving to a care facility. WAC 182-513-1350(8)(a)(ii) imposes a $552,000 limit on the exempt home equity of a Medicaid applicant. The home equity limit does not apply if the home is occupied by a disabled child, blind child or child under 21.

If the applicant has moved out of the home it retains its exempt character if the applicant states that he/she intends to return home. A home includes all contiguous property, even if there are several lots or tax parcels, and includes all out-buildings on the property. (There may be a Medicaid lien against the property at the death of the Medicaid recipient. Medicaid liens are discussed below at Section VIII.).

DSHS is going to adopt a new regulation which will result in the home losing its exempt status if title is in the name of a revocable trust.

2. A **vehicle** of *any* value.

3. **Household furnishings and personal effects** of any value.

4. **Burial plot** for the applicant and his/her immediate family is exempt.

5. **Burial Fund** of $1,500. The fund must be separate from other accounts and designated as a burial fund. The amount that can be set aside for burial will be reduced by the cash surrender value of any life insurance policy with a face value of less than $1,500. In lieu of the $1,500 burial fund, the single person can establish an irrevocable burial trust or can purchase burial insurance in an amount sufficient to pay for anticipated burial expenses.

6. **Cash surrender value of life insurance** if the face value is less than $1,500. The amount that can be set aside for life insurance is reduced by the amount of any burial fund described in paragraph 5 above.

7. **Property that cannot be liquidated within 20 days** will be *disregarded* while the applicant is making a good faith effort to sell or liquidate the property. The proceeds from the sale of such resources are not exempt and will often

make the Medicaid recipient ineligible in the month following the sale unless spent or invested in exempt resources. However, such ineligibility is prospective only; the recipient is not required to pay Medicaid back for coverage provided before the proceeds were received.

8. **Sales contracts** executed before December 1, 1993 are considered exempt; payments received under such contracts (including both income and principal) are counted as income in the month of receipt. Sales contracts entered into after December 1, 1993 are exempt only if the contract was for the sale of the applicant's principal place of residence, the principal amount equals the fair market value of the property sold, the contract carries a market interest rate, and the term of the contract does not exceed 30 years. For sales contracts executed on or after June 1, 2004, the contract will only be exempt if the contract was for the sale of the applicant's residence on the date of the applicant's institutionalization and if the contract does not exceed the actuarial life expectancy of the applicant.

9. **Jointly owned property, if the joint owner refuses to sell,** will not be counted as a resource for initial eligibility but the Medicaid applicant's interest in the joint property will be subject to a Medicaid lien at death.

10. A fixed term, immediate **annuity** will not be treated as a resource as long as the State of Washington is named as the contingent beneficiary. WAC 182-561-0201. If the term of the annuity exceeds the actuarial life expectancy of the person, the excess term will be treated as a gift and be subject to the Medicaid transfer of asset rules discussed below. The periodic payments from the annuity will be treated as "income" and will be included in the client's participation under the Medicaid income rules. For that reason an annuity is usually not advisable for a single person contemplating application for Medicaid nursing home or COPES benefits. The annuity term cannot be less than five years unless the annuitant's actuarial life expectancy is less than five years and the annuity must name the State of Washington as the primary beneficiary up to the amount of Medicaid benefits paid on behalf of the Medicaid recipient.

11. **A Long-Term Care Partnership Insurance Policy** can increase the amount of exempt resources that can be protected at the time of application and protected from Medicaid estate recovery. For instance, if one purchases a $100,000 Long-Term Care Partnership policy, and the policy pays $100,000 for actual long-term care expenses for the policy holder, $100,000 in otherwise non-exempt assets will be deemed exempt at the time of application for Medicaid and will not be subject to Medicaid estate recovery at death.

Examples of countable resources include retirement accounts such as IRAs, vacation property, boats, additional vehicles, the cash surrender value of life insurance, and conventional resources such as stocks, bonds and bank accounts. Assets held in a

revocable living trust will not be sheltered in determining Medicaid eligibility. Income such as social security or a pension deposited into a bank account in the month of application is treated as “income” not as a resource.

III. MEDICAID ELIGIBILITY RULES FOR MARRIED COUPLES

A. OVERVIEW

The Medicaid eligibility rules for a married couple apply when one spouse is in the nursing home or applying for COPES or Community First Choice (CFC). If both spouses are in the nursing home or one is in the nursing home and the other is on COPES or CFC, they will each be treated as though they are single and the Medicaid rules for single persons, discussed below, will apply. If both spouses are in a nursing home assets can be transferred to one spouse and the other spouse can apply for Medicaid under the eligibility rules for a single person.

In the process of determining financial eligibility for Medicaid, resources are considered separately from monthly income. *All* of the resources of both spouses are taken into account in determining Medicaid eligibility, regardless of whether the property is considered to be separate or community property. DSHS will not recognize prenuptial agreements or separate property agreements.

All but $2,000 in non-exempt resources must be transferred into the name of the community spouse before the first regularly scheduled eligibility review, which is usually 12 months after initial eligibility is determined. (This subsequent transfer may require a guardianship where the institutionalized spouse is incompetent and lacks a durable power of attorney.) Thereafter, the non-exempt resources of the nursing home spouse must always remain below $2,000. However, after eligibility for one spouse is established, that eligibility is unaffected if the non-exempt assets of the community spouse later exceed the applicable resource limit. (This is often referred to as the "snapshot" approach to eligibility.)

B. INCOME (WAC 182-513-1325-1350 & 1395; 42 U.S.C. 1396r-5(b), (d))

The income of the spouse applying for Medicaid benefits must be less than the private pay rate for the facility plus regular, recurring medical expenses. If the applicant spouse’s income is above the private pay rate, Medicaid will take into account one half of the total income of both spouses. If that amount is less than the private pay rate for the facility plus regular, recurring medical expenses, then the applicant will meet the income standard for qualifying for Medicaid. There is no income limit for the community spouse.

In order to qualify for COPES benefits the applicant spouse’s income must be below $6,381. There is no income limit for the spouse not receiving COPES, although this may affect cost participation, as explained below.

For Community First Choice, the monthly income of the CFC spouse is the sum of all income paid in that spouse's name plus one-half of all community income. If the CFC spouse is at home, income cannot exceed the Medically Needy Income Level, now $733. If the CFC spouse is in an adult family home or assisted living facility, income cannot exceed the Medicaid Special Income Level, currently $2,199, and cannot exceed the state contracted rate at the facility plus $38.84.

The couple income limit for eligibility under the federal Affordable Care Act Medicaid expansion (Washington Apple Health)is 138% of the federal poverty level, currently $1,832.

C. RESOURCE ELIGIBILITY (WAC 182-513-1350; 42 U.S.C. 1396r-5(c),(f))

If one spouse is in a nursing home, the asset limit for a married applicant is the higher of $56,726 or one half of the couple's non-exempt resources in the month when the spouse entered a medical institutional or nursing home, but not to exceed $121,220. In order to take advantage of this enhanced resource standard, the couple must submit a "HCS Community Resource Declaration" to DSHS for the month in which the first spouse is institutionalized although the Resource Declaration can be submitted at any time up to the time of the actual application for Medicaid. If the Resource Declaration is submitted, the resource standard will then be increased to one-half of the couple's non-exempt resources as of the date the first spouse is institutionalized, up to a maximum of $121,220.

For the COPES program the resource limit is $56,726. The resource limit is increased periodically by CMS.

In order to take advantage of the enhanced resource standard above $55,016, the couple must submit a form called "HCS Community Resource Declaration" with the Medicaid application. This form is used to establish the couple's non-exempt resources as of the month of institutionalization for the applicant spouse. One-half of that amount, but not to exceed $119,240, will be the couple's resource limit. Again, the enhanced resource limit does not apply to the COPES program.

Because the Medicaid programs look at the assets of both spouses, transfers between spouses does not help in the application process.

In determining resource eligibility, certain resources are considered to be exempt resources and are disregarded in determining if a person qualifies for Medicaid:

1. The **home** (including a mobile home) where the community spouse resides. There is no dollar limit on the value of the home. If the applicant has moved out of the home it retains its exempt character if the applicant states that he/she intends to return home. The limit on home equity of $552,000 for a single person does not apply to a married couple as long as the community spouse resides in the home.

2. One **vehicle** of *any* value.

3. **Household furnishings and personal effects** of any value.

4. **Burial Fund** of $1,500 for each spouse or, alternatively, prepaid burial arrangements for each spouse.

5. **Sales contracts, property that cannot be liquidated in 20 days, and jointly owned property** where the joint owner will not agree to sell are disregarded, as discussed above for single people.

6. **Business assets** needed by the community spouse for employment or self-employment.

7. Purchasing an **annuity** for the community spouse with excess resources will be treated as income to the community spouse, not as a countable resource as long as the annuity meets the requirements of WAC 182-561-0201. The annuity term cannot exceed the annuitant or spouse's actuarial life expectancy. A non-qualified annuity must have a minimum term of five years. There is no minimum required term for a qualified (IRA) annuity. The annuity must name the state as the beneficiary upon the death of the community spouse for the total amount of medical assistance paid on behalf of the individual if a community spouse is the annuitant. The annuity must be non-assignable and non-transferrable. The annuity must be irrevocable at the time of application which means any free look period required by state law has elapsed.

Because the annuity is treated as income of the community spouse, it may reduce or eliminate income of the applying spouse that otherwise would be allocated to the community spouse.

Some couples with very low monthly income may be allowed a higher resource allowance for the community spouse. WAC 182-513-1350(5)(b)(i).

IV. TRANSFER OF ASSETS RULES

A. BASIC GIFT RULE (WAC 182-513-1363;182-513-1364;182-513-1365; 42 U.S.C. 1396p(c))

Transferring assets is a concern for those single or married individuals who have assets in excess of the allowed amounts discussed above. Unless indicated otherwise in the materials, the rules on transfer of excess assets applies equally to single persons and married couples.

Giving away assets for the purpose of qualifying for Medicaid may impact **when** a person is eligible for benefits. Depending upon the circumstances of the transfer, a

person may have to wait a certain number of months before he or she will be eligible for Medicaid benefits. This is referred to as the transfer penalty.

The following are the basic elements of transfers or gifts that may affect Medicaid eligibility:

1. The transfer was by the Medicaid applicant or his or her spouse;

2. The transfer was a gift or was for less than fair market value;

3. The transfer was to someone other than a **spouse or a disabled child**;

4. The transfer was for the purpose of qualifying for Medicaid;

5. The transfer was during the "look-back period."

There are some transfers that will not cause a Medicaid transfer penalty. Those are discussed below.

B. LOOK BACK PERIOD

Only transfers within a certain period of time before application is made, called the “look-back period,” are subject to the transfer penalty. The look-back period is the **60 months** before the month in which an application is made. WAC 182-513-1363(5)**.**

Transfers not within the look-back period have no effect on Medicaid eligibility. The look-back period is the 60 month period before the month of application, so if a lump sum gift of $400,000 was made on April 1, 2014 the individual would need to wait until May of 2019 to apply because the look back period would be April of 2014 through the end of April of 2019.

C. METHOD TO CALCULATE PENALTY

The fact that a person transferred assets for the purpose of “spending down” their assets to qualify for Medicaid benefits does not necessarily mean they will be ineligible for Medicaid benefits for the entire look-back period. The exact number of months of ineligibility for Medicaid benefits will depend upon *when* the asset was transferred and the *amount* transferred.

1. Default Ineligibility Period when Assets are Transferred (WAC 182-513-1363) : If assets are transferred for the purpose of qualifying for Medicaid within the look-back period (and the exceptions above do not apply), the resulting period of ineligibility for Medicaid is 60 months from when the gift was made, regardless of whether the transfer is an outright gift or a transfer to an irrevocable trust. If sequential

gifts are made, the 5 year ineligibility period begins with the most recent gift. .

2. Shortening 5 Year Transfer Penalty for Person not Currently on Medicaid (182-513-1363(7): It is possible to shorten the ineligibility or penalty period in some cases by taking the steps below.

If an applicant not yet on Medicaid transfers assets within the 5 year look back period and is "otherwise eligible for Medicaid" but for the gift, the transfer penalty can be shortened.

- The applicant's assets must be below the applicable resource limit ($2,000 for a single person or $56,726 or up to $121,222 for a couple).
- The applicant must be in a facility that will accept Medicaid if applying for adult family home, nursing home, or assisted living Medicaid benefits.
- The applicant must meet the level of care requirement to qualify for Medicaid.
- The applicant must demonstrate that care can be paid for during the resulting penalty period from funds other than the funds gifted. WAC 182-512-0250.

The applicant must submit an application for Medicaid showing that the above criteria is met and document the gift made within the look-back period. The gift is divided by the number 297 to get the number of days of ineligibility for Medicaid. On a monthly basis the divisor is 9,038. This number changes every year for applications submitted after September of the year. Using the monthly divisor, a gift of $50,000 will create a 5.5 month eligibility period. There is no penalty for gifts of less than $297 in a given month.

3. Shortening 5 Year Transfer Penalty for Person Currently on Medicaid.

For a person already on Medicaid, the transfer penalty will begin on the first of the month following the transfer, with an application not required to start the period of ineligibility. The gift is reported to DSHS with a request to terminate Medicaid benefits because of the gift. The penalty period is calculated as described above, dividing the gift by 9,038 to determine the resulting number of months of ineligibility for Medicaid. Because the Medicaid recipient does not need to gift assets to come below the applicable resource limit, the resulting penalty period can be shorter and funds can be retained by the Medicaid recipient to pay for care during the penalty period.

Examples of Gifts and Resulting Gift Penalty Period

If a single person gifts $1,000,000 in November, 2011 and applies in December, 2016, there will be no period of ineligibility because the gift was outside the look-back period.

If a single person gives away $10,000 in June and is left with less than $2,000 on July

1, submitting a Medicaid application on July 1 would cause the 33 day period to begin July 1 and run through August 2 ($10,000÷297=33 days).

A single person has $180,000 in cash and owns a house worth $180,000 and the person currently needs long-term care. The single person then gifts $180,000 in cash and applies for Medicaid. An applicant can be "otherwise eligible for Medicaid" and still own their home they reside in or intend to return to. As long as the single person's countable assets do not exceed $2,000, a 20-month period of ineligibility will be established (180,000 ÷9,038). If the house is then sold and used to pay for care for the 20- month period of ineligibility, the single person can qualify after the 20-month ineligibility period when the house sales proceeds have been spent down to $2,000. If the house proceeds turn out to be sufficient to fully cover the cost of care for the 20-month period, the "net gift" would be the $180,000 in cash initially gifted.

Single person under 65 has $360,000. The single person then gifts $180,000 and puts $180,000 into a special needs trust meeting the requirements of WAC 182-561-0100(7)(a) and 182-513-1363(1)(f)(iv). Upon application after the gift, a 20 month period of ineligibility will be established. The trust can then be used to pay for care for the 20 month period of ineligibility. Here again, the "net gift" would be the $180,000 cash initially gifted.

A single person already receiving Medicaid LTC services receives an inheritance of $180,000. If he gifts $100,000 there will be a resulting 11 month penalty period. The single person can use the retained $80,000 to pay for care during the 11 month penalty period and reapply for Medicaid after the 11 month penalty period and when his retained assets are below $2,000.

D. ARE THERE ANY OPTIONS TO PROTECT ASSETS

The following are some examples where there may be a benefit to transferring assets under the Medicaid gift rules:

1. Wait out Look-Back Period: A person can make a substantial gift and wait at least 60 months before applying for Medicaid benefits.

2. Gift All or Portion of Home. Mrs. Jones owns a home worth $200,000. She is "otherwise eligible for Medicaid" because her remaining assets are below $2,000 and the home is an exempt asset as long as she indicates that she intends to return home. She meets the level of care requirement for Medicaid. After Mrs. Jones is approved for Medicaid she makes a gift of a percentage of the house, valued at $100,000. The gift of $100,000 will create a 11 month ineligibility period for Medicaid starting with the month after the gift is made ($100,000 ÷ 9,038 = 11.06 months). Mrs. Jones will use her remaining equity in the home of $100,000 to pay for her care during the transfer penalty period.

3. Special Needs Trust and Gift. Tom is 60 and has $200,000 of assets. He gives away $50,000 of assets creating a 5.5 month penalty period ($50,000 ÷ 9,038 = 5.5 months). He takes the remaining $150,000 and puts it into a grantor special needs trust for his benefit. Because Tom is under the age of 65 he can transfer assets to a special needs trust without a transfer penalty. Tom's assets are now below $2,000 so he is "otherwise eligible for Medicaid" except for the 5.5 month transfer penalty. During the penalty period the assets in the special needs trust could be used to pay for his long term care.

E. WHEN THE TRANSFER PENALTY DOES NOT APPLY

In the following cases there would not be a penalty imposed for transferring assets:

1. There is no penalty for making a gift to a **spouse.** An outright gift to a spouse will not solve the problem of excess resources since resources of both spouses are considered together and a gift from either spouse to a third party will trigger a period of ineligibility.

2. There is no penalty for making a gift to a **child who is blind or permanently disabled**, as determined by the Social Security Administration. The gift can be outright or in a trust that mandates distributions during the child's actuarially life expectancy.

3. There is no penalty for transferring assets into a trust for the benefit of any person who is **disabled and under age 65**. The trust must mandate distributions during the beneficiary's actuarially life expectancy.

4. There is no penalty if a disabled person **under age 65** transfers assets into a trust for his or her own benefit as long as the trust is created by a parent, grandparent, legal guardian or the court and the trust document provides that any balance remaining at the death of the grantor go to the state to reimburse for Medicaid benefits paid.

5. There is no penalty if assets are converted into income in the form of an irrevocable annuity. The annuity must have no cash surrender value and be nontransferable. The annuity payments must not exceed the life expectancy of the Medicaid applicant or spouse. **The state must be the contingent beneficiary of the annuity for the spouse or minor or disabled children, and requires that the annuity be irrevocable, non-assignable and pay out in equal installments. The term of a nonqualified annuity must be at least five years or the spouse's actuarial life expectancy, whichever is shorter. There is no minimum term for a qualified annuity but it cannot exceed the spouse's actuarial life expectancy.**

6. There is no penalty if the transfer was for a purpose other than to

qualify for Medicaid.

7. There is no penalty if the **home** is transferred to a child under the age of 21; a disabled child; an adult child who has lived in the home, providing care to the parent for at least two years and the applicant would have been institutionalized but for the care; or a sibling who has an equity interest in the home and has lived in the home for at least one year.

8. There is no penalty if an excluded asset, other than the home or disregarded sales contract, is transferred (e.g. household furnishings, exempt vehicle, etc.).

9. There is no transfer penalty for gifts made **more** than **60** months from the date of application for Medicaid benefits.

10. There is no penalty if the transferred assets are returned to the applicant or spouse before a transfer penalty is imposed.

F. CARE CONTRACTS (WAC 182-513-1363(4))

Transferring assets to a family member as compensation for care will be treated as a gift unless the following criteria are met:

1. The applicant has a documented need for the care;

2. The care services are allowed under the Medicaid state plan or the COPES program;

3. The care services do not duplicate those that another party is being paid to provide and the amount charged for the services is comparable to the fair market value in the community;

4. The time for which compensation is claimed is reasonable for that service;

5. Payment must be on a month-by-month basis, not a lump sum.

G. CERTAIN PURCHASES TREATED AS TRANSFERS

Federal law treats purchases of certain interests as uncompensated transfers subject to the transfer penalty described above. The purchase of a life estate is deemed an uncompensated transfer unless the purchaser resides in the property for at least one year after the date of the purchase. The purchase of a debt instrument, e.g. a note or mortgage, will be treated as a gift unless the repayment term is equal to or less than the purchaser’s life expectancy, it requires equal periodic payments with no “balloon”

payments, and does not cancel upon the death of the purchaser. The purchase of an annuity will be treated as a gift unless it is irrevocable, non-assignable, pays out in equal periodic payments, and its term is equal to or less than the life expectancy of the annuitant. Annuity purchases will also be treated as a gift unless the state is named as the beneficiary after the death of the purchaser, the purchaser's spouse, or the purchaser's minor or disabled child. Except for the annuity regulations discussed above, which apply to annuities purchased on or after October 1, 2009, the state of Washington has not, as of the date of these materials, implemented regulations to deem these actions as uncompensated transfers which cause a period of ineligibility.

H. WAIVER OF THE TRANSFER PENALTY

The period of ineligibility for Medicaid can always be waived under state law if it would cause undue hardship on the nursing home resident. (WAC 182-513-1367) A hardship is defined as when the transfer penalty period would deprive the individual of medical care that would endanger health or life, or deprive the individual of food, clothing, shelter or other necessities of life.

I. PENALTIES FOR RECIPIENTS OF GIFTS

RCW 74.39A.160 imposes a civil fine for **recipients** of uncompensated transfers who refuse to return the gifts and, as a result, DSHS provides coverage during a period of ineligibility under the undue hardship exception. (DSHS will provide coverage despite a transfer penalty where the applicant would otherwise lose all access to care, e.g. be evicted from the nursing home.) The fine equals 150% of the amount expended by DSHS during the period of ineligibility. Transfers subject to this civil fine are also deemed a fraudulent conveyance and DSHS is given the right to petition a court to set aside the transfer and require the return of the assets given away.

V. MEDICAID TRUST RULES (WAC 182-561-0100)

A. EFFECT OF TRUSTS ON PUBLIC BENEFIT ELIGIBILITY

The existence and administration of a trust can affect whether the trust beneficiary is eligible for certain public benefit programs and the amount of benefits to which the beneficiary is entitled. The most significant programs that are affected by trusts are Supplemental Security Income (SSI), Medicaid, and Subsidized Housing.

Generally, whatever part of a trust estate the beneficiary can independently access and use will be treated as an available resource of the beneficiary. If a beneficiary has available resources in excess of $2,000 as of the first day of a month, the beneficiary will be ineligible for SSI and Medicaid for that month. Further, distributions from an irrevocable trust to the beneficiary are treated as income in the month of receipt and a resource if held in the following month. Income usually reduces the benefits available

from SSI and Medicaid on a dollar for dollar basis.

The term “Special Needs Trust” is not defined in law or regulation, but means a trust that is not treated as an available resource of the beneficiary. Distributions from Special Needs Trusts are usually made in a manner that will not be treated as income of the beneficiary.

The first question in determining whether a trust is a Special Needs Trust is whether the trust is a “first party” trust (often referred to as a “self-settled” trust) or a third party trust. Self-settled trusts are trusts that hold assets contributed by the beneficiary. Self-settled trusts will be treated as a Special Needs Trust only if they meet one of two criteria established by Congress in 1993. The first criteria is for a trust created by a parent, grandparent, guardian or court that requires a Medicaid payback on the death of the beneficiary, commonly called a “D4A” trust because it is authorized by 42 U.S.C. 1396p(d)(4)(A). The second criteria is for a “Pooled Asset Trust” established by a nonprofit organization that requires that Medicaid be paid back or the trust assets to be held for other trust beneficiaries upon the death of the primary beneficiary, commonly called a “D4C” trust. 42 U.S.C. 1396p(d)(4)(C).

Third party trusts are trusts that hold assets contributed by persons other than the beneficiary. Third party trusts will be treated as a Special Needs Trust if the beneficiary has no independent right to access and use the trust assets or income.

All Special Needs Trusts generally avoid distributing cash to the beneficiary because cash distributions will be treated as income to the beneficiary. Instead, Special Needs Trusts usually directly purchase goods and services which benefit the beneficiary because most “in-kind” distributions are not treated as income.

For many years, the State of Washington Medicaid program has included all of its regulatory provisions relating to all manner of trusts into one section of the Washington Administrative Code, codified at WAC 182-516-0100. In an effort to provide more comprehensible guidance on the treatment of trusts, the Washington Health Care Authority, which administers the Medicaid program in this state, proposed a new regulatory scheme for trusts on June 3, 2016. Under the newly proposed scheme, the regulation of trusts has now been broken down into nine separate sections.

Because of direction received from the federal government after the June 3, 2016 proposal relating to revocable trusts, it is anticipated that a new regulatory proposal will be submitted in late 2016.

B. ROADMAP OF NEW REGULATIONS

Here is the new structure of the proposed Washington Medicaid regulations relating to trusts:

1. Definitions: WAC 182-516-0001
2. General Rules Applicable to All Trusts: WAC 182-516-0105
3. Overview of Self-Settled Trusts: WAC 182-516-0110
4. Revocable Self-Settled Trusts: WAC 182-516-0115
5. Irrevocable, Exempt "D4A" Trusts: WAC 182-516-0120
6. Irrevocable, Exempt "D4C" Trusts: WAC 182-516-0125
7. Irrevocable, Nonexempt Self-Settled Trusts: WA 182-516-0130
8. Third Party Trusts: WAC 182-516-0140

C. TRUST PRINCIPAL AVAILABLE IF BENEFICIARY IS TRUSTEE OR IN CONTROL

Under the new regulations, if the beneficiary is the trustee of ANY trust (revocable or irrevocable, first party or third party), the assets in the trust will be deemed available to the beneficiary for all eligibility and benefit level determinations. WAC 182-516-0105(4)(a).

Similarly, all trust assets will be deemed available if the beneficiary has authority under the terms of the trust to direct the use of the trust principal or income for the beneficiary's support and maintenance. WAC 182-516-0105(4)(b).

If language in the trust makes a formerly available trust unavailable (a "trigger"), the beneficiary is treated as having made an uncompensated transfer at the moment the trust became unavailable. WAC 182-516-0105(5)(c). The uncompensated transfer will result in a period of Medicaid ineligibility under WAC 182-513-1363.

D. REVOCABLE SELF-SETTLED TRUSTS

If the beneficiary of a trust can change the terms of the trust (except for technical changes to comply with changes in trust law) or can acquire or reacquire any assets held by the trust, the trust will be treated as revocable by the beneficiary. WAC 182-516-0001.

A revocable trust is "self-settled" if:

1. The assets in the trust are from the beneficiary or beneficiary's spouse, and

2. The trust was not established by Will, and

3. The trust was established by the beneficiary, or the beneficiary's spouse, or a person (including a court) with legal authority to act in place or on behalf of the beneficiary, or a person (including a court) acting at the direction or upon the request of the beneficiary. WAC 182-516-0115(3).

Assets in a revocable, self-settled trust are treated as if directly owned by the beneficiary. WAC 182-516-0115(4). But, such assets will not adversely affect eligibility, if they are exempt under Chapter 182-512 WAC, with the notable exception of a home. Because of direction received from the federal government (the Center for Medicare and Medicaid Services), the Washington Health Care Authority is changing the proposed regulations attached to these materials to provide that a home held in a revocable trust will not be treated as an exempt resource for eligibility purposes.

All distributions from revocable, self-settled trusts for the benefit of the beneficiary are treated as unearned income to the beneficiary. WAC 182-516-0115(5). While this is inconsistent with the usual principles of income for SSI and Medicaid, it is arguably required by the federal Medicaid trust statute. 42 U.S.C. 1396p(d)(3)(A)(ii).

All distributions from revocable, self-settled trusts for the benefit of anyone other than the beneficiary are treated as uncompensated asset transfers, WAC 182-516-0115(6), and thus will cause the imposition of a period of ineligibility under WAC 182-513-1363.

E. DETERMINING SELF-SETTLED VS. THIRD PARTY TRUST STATUS

A trust is deemed to be self-settled if it contains assets originally owned by the beneficiary. WAC 182-516-0001.

A trust is also treated as self-settled if it contains assets that would have been owned by the beneficiary if they had not been diverted to the trust by the beneficiary, a court, a someone acting on the beneficiary's behalf. WAC 182-516-0001. This appear to overrule one statement by the appellate court in the case of *In Re Riddell* by Division 2 of the Washington Court of Appeals, 157 P.3d 888 (2007).

For trusts established after August 1, 2003, a trust is also treated as self-settled if it contains assets originally owned by the beneficiary's spouse or would have been owned by the beneficiary's spouse if they had not be diverted to the trust by the beneficiary's spouse, a court or someone acting on behalf of the beneficiary's spouse. WAC 182-516-0130(2)

F. SELF SETTLED IRREVOCABLE TRUSTS: COUNTABLE AND EXEMPT

1. Countable Self Settled, Irrevocable Trusts. Most irrevocable, self-settled trusts will either be deemed an available resource of the beneficiary or an uncompensated asset transfer by the beneficiary.

If an irrevocable, self-settled trust can provide any benefit to the beneficiary, any part of the trust from which that benefit may be provided is treated as a countable resource owned by the beneficiary. WAC 182-516-0130(6)(a). In addition, any actual distribution for the benefit of the beneficiary from such a trust will be treated as unearned income of the beneficiary. WAC 182-516-0130(6)(a)(i). And, finally, any actual distribution for the benefit of someone other than the beneficiary will be treated as an uncompensated asset transfer by the beneficiary. WAC 182-516-0130(6)(a)(ii).

If an irrevocable, self-settled trust can make no distribution for the benefit of the beneficiary, the funding of the trust constitutes an uncompensated asset transfer by the beneficiary. WAC 182-516-0130(6)(b).

2. Exempt Self Settled, Irrevocable Trusts. The exemption for "D4A" trusts is now set forth in a separate section: WAC 182-516-0120. The beneficiary of such a trust must be disabled under the Social Security Act definition and must be under 65 years old. The trust must be irrevocable and be established for the sole benefit of the disabled beneficiary. The trust must be established by a parent, grandparent, guardian or court. Finally, for such trusts established after August 1, 2003, Medicaid must be reimbursed for expenditures on behalf of the beneficiary when the beneficiary dies, the trust terminates or the beneficiary's disability ends.

There is no Medicaid transfer penalty under WAC 182-513-1363 for transfers to a D4A trust before the beneficiary attains age 65, and the trust remains exempt after the beneficiary attains age 65.

The exemption for "D4C" trusts is set forth at WAC 182-516-0125. The trust must be established and managed by a nonprofit organization. Each beneficiary must be disabled under the Social Security Act definition. The beneficiary's account must be established by the beneficiary, the beneficiary's parent, grandparent or legal guardian, or by a court. The beneficiary's account must be managed for the sole benefit of the beneficiary. When the beneficiary dies, the trust account terminates, or the beneficiary's disability ends, either Medicaid must be reimbursed or the remainder of the trust account must be held for the benefit of other disabled beneficiaries of the trust.

Although there is no age limit for persons establishing a D4C trust, a transfer into a D4C trust account after the trusts account beneficiary attains age 65 is subject to the Medicaid transfer penalty under WAC 182-513-1363. WAC 182-513-0125(5).

G. TREATMENT OF THIRD PARTY TRUSTS AND “MIXED” TRUSTS

For an irrevocable, third party trust, the trust is not an available resource if the beneficiary has no power to access or control trust assets or distributions. WAC 182-516-0140(6).

A testamentary trust created by a Will is treated as a third party trust. Such a trust must “be in the Will” and the estate must be the grantor. WAC 182-516-0140(3). So, assets in a testamentary special needs trust will not be deemed an available resource of the trust beneficiary.

Where a trust holds assets contributed by both the beneficiary and by a third party, the assets contributed by the beneficiary are treated under the self-settled trust rules and the assets contributed by the third party are treated under the third party rules.

H. BERTO V. DSHS

A recent decision interpreting WAC 182-516-0100 (the prior regulation governing trusts) by Division Three of the state court of appeals*, In the Matter of Estate of Margaret L. Berto, Appellant, v. State of Washington Department of Social & Health Services, Washington Health Care Authority,* Respondent, Cause No. 33591-7-III filed July 19, 2016, has caused some consternation. Here, a married couple fully funded a revocable trust before the husband died. The revocable trust, in turn, directed the deceased husband’s share to a testamentary trust created in the husband’s will for the benefit of the wife. The testamentary trust was a significantly flawed effort to create a Special Needs Trust. (The wife was named a co-trustee and the trust included a “HEMS” standard for distributions.) The purpose of directing the share to the testamentary trust was to defeat the deeming of the trust assets to the wife under WAC 192-516-0100(5) because the trust was “established by Will.” The court agreed that the testamentary trust did avoid deemed availability under WAC 192-516-0100(5) because it was established by Will. Nevertheless, the court concluded the testamentary trust was available to the wife based on WAC 192-516-0100(11) and Medicaid’s general rules relating to resource availability.

WAC 192-516-0100(11) says trust principal is not available if the beneficiary has no control over the trust and it is established with funds of someone other than the client or spouse. Here, the testamentary trust named the wife as a co-trustee, and the court found the funding of the testamentary trust by way of the revocable trust to constitute funding by the husband or wife.

The specific provisions relied upon by the court have been significantly modified by the new trust regulations. Specifically, the new regulations make clear that a testamentary trust where the estate is the grantor is a third-party trust, and a third party trust is not available if the beneficiary has no control over, or access to, the trust principal. WAC

182-516-0140(3).

But, in light of the *Berto* decision, trying to use a revocable trust structure to fund a testamentary special needs trust is at the very least problematical. The fact that the new regulations will treat any distribution from a revocable trust as either unearned income of the beneficiary, or an uncompensated transfer by the beneficiary, makes the use of a revocable trust exceptionally hazardous for persons who may need Medicaid.

VI. SUMMARY OF OPTIONS TO PROTECT EXCESS RESOURCES

A. OPTIONS FOR SINGLE PERSON

1. Lump Sum Gift and Wait out 60 Month Look-Back Period. For a person with a substantial amount of excess assets who is concerned about Medicaid nursing home coverage, it may be advantageous to transfer assets as quickly as possible to start the clock running on the 60 month look-back period. There is no limit on the amount that can be given away if the gift is not within the look-back period at the time of application -- though applying before the end of the look-back period can have disastrous consequences. For this approach to work, it is critical to hold back enough funds to fully cover care during the 60 month look-back period.

2. Gift and Pay Privately for LTC during Disqualification Period. In limited cases there may be some benefit to making a gift when LTC is currently required and there is not sufficient money to wait out the 60 month look-back period above. For each $9,038 there will be one month of ineligibility for Medicaid. Since the penalty period does not start to run until one is otherwise eligible for Medicaid long term care services (assets below $2,000 and in need of long term care) gifts will only be a benefit if the private pay cost of care during the penalty period, minus available income is less than $9,038 per month.

3. Purchasing Exempt Resources. The Medicaid applicant can purchase or invest in exempt resources. The mortgage to the family home can be paid off or down, the home can be repaired or remodeled, or the home can be sold and new, more expensive home or condominium purchased. Excess resources can also be used to purchase household furnishings or appliances or a new car if one of the exceptions to the $5,000 value limit applies. Note that these exempt resources will be subject to a Medicaid lien upon the death of the single recipient, reducing the value of this option in most cases.

4. Consuming Excess Resources. Medicaid applicants can always spend excess resources on themselves. Nothing will be accomplished if other countable resources are purchased, but the excess resources can be spent on long-term care as well as vacations, entertainment, additional help around the home, or other services.

5. Transfer of Home to Certain Children or Siblings. The home can be

transferred to a child who has lived in the home and cared for the applicant for the two year period immediately prior to institutionalization or a sibling who has lived in the home for one year and has an equity interest in the home. The home can also be transferred to a disabled child or child under the age of 21.

6. Trust for Disabled Persons under 65 or for Disabled Child. As discussed above, there is no penalty for transfers to trusts for the sole benefit of disabled any disabled person under 65. It does not have to be a child of the applicant. In addition, there is not transfer penalty to transfer assets, including but not limited to the house, to a disabled child who is receiving disability benefits from the Social Security Administration. Transfers to a disabled child can either be an outright transfer or a transfer to a special needs trust for the sole benefit of the child.

B. OPTIONS FOR A MARRIED COUPLE

All of the options described above for single persons also apply to a married couple. Married couples can also consider the following additional options:

1. Annuity for Community Spouse. A married couple can purchase an immediate fixed annuity for the community spouse with excess resources. The purchase of an annuity converts what Medicaid defines as a "resource" into what Medicaid defines as "income".

The annuity must be irrevocable, non-transferable, have no cash surrender value, and the payout term cannot exceed the life expectancy of the Medicaid applicant or spouse. (DSHS uses its own tables to determine life expectancy, which are set forth in Appendix 5 of the Long-term Care Chapter of the Eligibility A-Z Manual.)

2. Request Excess Resource Allowance. If the couple's combined income is less than $2,981, the couple may be entitled to keep excess resources to generate additional income. To obtain this increase in the resource level, a court or administrative law judge must make a determination that the excess resources are necessary to generate income for the maintenance of the community spouse.

3. Divorce or Legal Separation. After a divorce, the assets allocated in the dissolution decree to the non-applying ex-spouse are not countable resources for the Medicaid applicant and are not subject to any transfer penalty. An order allocating assets to a community spouse pursuant to a decree of legal separation appears to be as effective for this purpose as a divorce decree. See WAC 182-513-1350(7)(a). In many cases it will be necessary to appoint a guardian ad litem to represent the nursing home spouse. The allocation of assets and income between spouses will depend upon the circumstances of each case including the long term care needs of each spouse, whether property is separate or community property, and the length of the marriage.

4. Revise Wills for Husband and Wife. Older couples may want to consider revising their wills to leave their estate to their surviving spouse in a special needs trust. Assets in this type of trust are not considered available to the surviving spouse as long as the surviving spouse is not the trustee. It allows married couples to protect at least half of their joint assets when the first spouse died without having to transfer assets to a third party.

VII. MEDICAID LIENS AND ESTATE RECOVERY

A. BASIC RULE

DSHS has a statutory Medicaid lien in certain cases where Medicaid benefits have been paid. The Medicaid lien attaches to the estate of the Medicaid recipient at his or her death. 42 U.S.C. §1396p(a); RCW 43.20B.080; WAC 182-527-2710. The Office of Financial Recovery of DSHS pursues the enforcement of the Department's lien rights. DSHS is required to be notified as a creditor in virtually all probate and non-probate proceedings.

B. WHEN DOES ESTATE RECOVERY APPLY

1. Usually, a Medicaid lien only arises at the death of the Medicaid recipient. However under state legislation passed in 2005, the state can assert a lien against the property of a Medicaid recipient who is in a nursing home if DSHS determines the recipient cannot reasonably be expected to be discharged and return home (referred to as a TEFRA Lien). The determination that the recipient cannot reasonably be expected to return home may be contested in an administrative hearing. Even after the lien is filed, it must be removed if the recipient, in fact, returns home.

2. DSHS can cause to be recorded in the chain of title of any real property interest held by a Medicaid recipient, a request for notice of transfer or encumbrance of the real property interest. Title companies are required to list this notice in any title report and a Medicaid recipient attempting to transfer or encumber such property is required to notify DSHS. This recording does not establish a lien.

3. For Medicaid services provided after December 31, 2013, only long-term care related expenditures, e.g. nursing home and COPES services, Community First Choice funded services and certain prescription drug assistance, are subject to Medicaid recovery. For services provided between June 1, 2004 and December 31, 2013, expenditures for any Medicaid service are subject to recovery, except for certain payments to assist with Medicare cost-sharing requirements. For services provided between July 1, 1995 and May 31, 2004, the state only recovers for Medicaid benefits under the COPES or nursing home programs, and related hospital and prescription drug services for recipients of those programs. Effective July 1, l995,

the Medicaid estate recovery rules are applied to the state funded Chore, Adult Family Home and Congregate Care programs and the Medicaid Personal Care Program. Prior to July 1, l994, the Medicaid estate recovery rules applied to all Medicaid programs.

4. The state only recovers for benefits paid to recipients age 55 or older. There is no age restriction for the recovery rules applied to the state funded long term care programs (Chore, Adult Family Homes, Congregate Care).

5. The Medicaid lien applies to the property owned by the Medicaid recipient at death. This lien applies to life estates established on or after July 1, 2005 and joint tenancy with right of survivorship accounts. There is no lien asserted against the estate of a spouse.

6. The Medicaid lien is limited to recovery of the actual amount of Medicaid benefits paid.

7. The lien will not be enforced when there is a surviving community spouse. Enforcement of any lien is deferred if there is a disabled child or a child under the age of twenty-one. **The lien will not apply to the property in the name of the community spouse.** If a Medicaid recipient is on title to the home, dies before the community spouse, and the community spouse is the heir to the property, HCA will release a Medicaid lien when the probate matter is opened so that title in probate can be transferred to the community spouse or the property can be sold.

Practice Tip: *If the Medicaid recipient transferred all of his/her property to a spouse or a disabled child before death, there would be no estate at death for the lien to attach. (There is no transfer penalty for transferring property to a spouse or a disabled child.)* ***It is very important for couples to consider whether they want to avoid any potential Medicaid lien by transferring title to all property, including the family home, to the community spouse. The same would be true for single persons on Medicaid who own their home and have a disabled child.***

8. Medicaid recovery may be deferred where it will cause "undue hardship" as defined in WAC 182-527-2750.

VIII. DRAFTING CONSIDERATIONS WITH THIRD SPECIAL NEEDS TRUSTS

A. THIRD PART SPECIAL NEEDS TRUSTS

It is common for attorneys to include special needs trust provisions in Wills or revocable trusts to address concerns about preserving eligibility for government benefits for certain family members. Typical examples of a third party special needs trust are:

- Parents who want to set up a trust in their wills for their autistic minor child. When the child turns 18 she probably will be eligible for SSI and Medicaid benefits. At the parents' deaths their testamentary bequest to a special needs trust for their daughter will not disqualify her from receiving SSI and Medicaid if needed by the daughter.

- Parents have a son with schizophrenia who is periodically hospitalized at Eastern State Hospital. The assets they leave in a special needs trust for their son will not disqualify their son from receiving state funded psychiatric hospital care while he is under the age of 65 or receiving Medicaid assistance to pay for the psychiatric care after the age of 64.

- An elderly couple in poor health who each want to provide for the surviving spouse. It is likely the surviving spouse will need nursing home care. Each spouse leaves their estate to a special needs trust for the surviving spouse. When the surviving spouse's half of the estate has been spent down to $2,000 he or she would be eligible for Medicaid benefits to pay for the nursing home care. The testamentary special needs trust established by the deceased spouse will not be considered an available asset. The trust can be used to pay for additional care not covered by Medicaid.

- An elderly woman would like to leave a testamentary bequest of $20,000 to her brother who is in a nursing home where Medicaid pays for his care. By leaving the bequest to her brother in a special needs trust, the brother's benefits will continue uninterrupted. The trust can be used to pay for a private room at the nursing home and pay for a companion to come to the home to read to her brother.

An outright gift may be counterproductive if a family member or friend wants to provide for an elderly or disabled individual who is receiving needs based benefits with an asset cap. If a testamentary or inter vivos gift is made to a properly drafted special needs trust, the trust corpus will not be considered an available asset to the trust beneficiary.

While the trust corpus may not be considered an available asset, distributions from the trust may be considered income to the beneficiary in the month the distribution is made. This may temporarily reduce government benefits in the month of distribution only.

B. REQUIREMENTS FOR A THIRD PARTY SPECIAL NEEDS TRUST

The following are the essential requirements of a third party special needs trust to ensure eligibility for needs-based government benefits:

- Trust distributions must be discretionary with the trustee.

- The trust should not be a general health support and maintenance trust. A mandatory support trust would be an available asset in determining eligibility for

government benefits. A marital or credit shelter trust can be drafted as a special needs trust so that the trust corpus will not be considered as an available asset but any mandatory income distributions will be included with other income of the beneficiary as part of the beneficiary's income co-payment towards the cost of care.

- The beneficiary cannot have control over the administration of the trust. The beneficiary should not serve as trustee or co-trustee, have the power to remove or nominate the trustee, terminate the trust or control distributions of income or principal.

C. DRAFTING TIPS

To make it clear that the trust is not a general support trust, there should be language in the trust that the intent of the Trustor is to direct the trustee to supplement but not replace government benefits. It is not necessary, however, to prohibit the trustee from making any distribution that will reduce or eliminate government benefits. It is preferable to give the trustee discretion to determine if a distribution from the trust is appropriate even if it will reduce government benefits temporarily. It is also possible that it will be in the best interest of the beneficiary to forego governments at some times and have the trust replace the government benefits. Many third party special needs trusts are drafted with language that is unnecessarily restrictive and harsh in the amount of discretion given to the trustee in how trust assets should be used to benefit the beneficiary.

The following is a common but unnecessarily restrictive way to draft the supplement needs language:

The trustee shall not under any circumstances make any distributions to my daughter that will reduce or eliminate any government benefits she is receiving or may receive in the future. Under no circumstances shall the trustee pay for food, clothing or shelter from the trust estate.

The beneficiary of the above trust is Susan, a 30-year-old brain injured adult who receives SSI and Medicaid benefits. The trust was established for Susan in her father's Will. Susan has just been evicted and the trustee would like to help her with the expenses to move into a new apartment.

As drafted, the trustee would not be able to pay Susan's first and last month's rent to enable her to move into a new apartment. Under the SSI rules, such a payment would reduce her SSI benefit dollar for dollar in the one month the payment was made. If the payment was made directly to the landlord, the payment of shelter would result in a reduction of approximately 1/3 of Susan's SSI benefit amount.

If the trust had been drafted as follows, the trustee would have had the discretion to make the one time payment, even though it would result in loss of the SSI and Medicaid benefits in the one month the rent payment is made:

The primary purpose of the Trust is to provide for Susan's special needs resulting from her disabilities. If Susan is receiving government benefits based upon need or disability, from any local, state, or federal government program, the trustee shall have discretion to supplement those government benefits. No disbursement shall be made for Susan that would permanently jeopardize eligibility for, or inappropriately limit the type of assistance available to her, if she is receiving or intends to apply for local, state or federal benefit programs. If Susan is not receiving government benefits based upon need or disability, the Trustee shall have the absolute and sole discretion to determine what disbursements shall be made from the trust estate for Susan's benefit.

This language gives the trustee discretion to make distributions that would reduce or eliminate government benefits. This language also leaves open the option that the restriction on supplementing government benefits only applies if the beneficiary is actually receiving government benefits.

By not prohibiting payment for food clothing and shelter from trust assets, the trustee can exercise discretion to pay Susan's first and last month's rent. As explained below, payment of food or shelter from a special needs trust does not disqualify a person from SSI. At most it will reduce the SSI benefit amount by $264 per month. Payment from a trust for food and shelter will have no adverse impact on Medicaid benefits.

If Susan's trust has two million dollars in assets, the trustee would have the option of deciding that Susan would be better served by terminating her SSI benefit of $733 a month and her Medicaid coverage and using trust funds to pay her a higher monthly stipend from the trust and pay for private health insurance.

If the trustee in the future decided to stop the income payments to Susan, she would again be eligible to reapply for the SSI and Medicaid coverage. Unnecessarily restrictive language can result in forcing the beneficiary to stay on government benefits without taking into account whether it is in the best interests of the beneficiary to do so.

D. WILLS FOR ELDERLY COUPLES

If an elderly widow or widower needs nursing home care, his or her assets must be below $2,000 before he or she can qualify for Medicaid benefits to help pay for that very expensive level of care. If the surviving spouse received all of the deceased spouse's assets through a typical "I Love You" Will or community property agreement, the surviving spouse will need to spend down the entire estate to $2,000 before he or she would be eligible for Medicaid assistance. While there are options under the Medicaid

program to reduce assets by gifting, that is a gradual process and it may result in up to a five-year wait before the surviving spouse could be eligible for Medicaid benefits.

If the couple had wills that left their estate to the surviving spouse in a special needs trust, and if the surviving spouse was not the trustee of this testamentary trust, one half of the assets would be immediately protected if the surviving spouse needed nursing home care. It is not a complete solution to the surviving spouse's Medicaid eligibility but it is a very simple way to protect at least half of the couple's assets. Given the court's decision in the *Berto* case discussed above and new regulations that will be adopted by HCA in the near future, the estate plan should be in Wills, not a revocable living trust, and the surviving spouse should not be trustee or co-trustee.
The special needs trust should be established at the death of the first spouse without requiring the surviving spouse to disclaim assets to the special needs trust. Any prior community property agreement transferring assets outright to the surviving spouse should be revoked prior to the first spouse's death. Retirement accounts and other assets passing by beneficiary designation should be reviewed to see if changes are appropriate to avoid non-probate assets passing directly to the surviving spouse.

E. CONTINGENT OR SPRINGING SPECIAL NEEDS TRUST

In many cases the need for government benefits is not known at the time a Will is drafted. A will can include a provision that if any beneficiary is disabled at the death of the testator, that beneficiary's share shall be paid to a special needs trust. This allows for the contingency that a beneficiary may be in good health when the will was drafted but could become disabled by the time the testator dies. Similarly, a trust intended to terminate at a specified age can include a provision that the trust will be converted to a special needs trust if the beneficiary needs government benefits before the termination date of the trust.

The new proposed Medicaid trust regulations referenced above clarify that the holding in the *Riddell* case discussed above would not be permitted, allowing the court to reform a direct bequest to a disabled beneficiary to be treated as a third party special needs trust. Including this proposed contingent language would allow the Personal Representative or Trustee to divert assets to a special needs trust if appropriate to protect eligibility for government benefits for a now disabled beneficiary.

F. CREDIT SHELTER AND QTIP SPECIAL NEEDS TRUST FOR SURVIVING SPOUSE.

For married couples with potentially taxable estates, the federal estate tax exemption equivalent amount can be held in a special needs trust that serves the added function of a credit shelter trust.

The surviving spouse should not be the trustee. While the mandatory distribution of income from the QTIP trust will usually have to be paid toward the cost of long-term care, the principal can be preserved as long as distribution authority is limited by special needs trust standards.

G. INTER VIVOS THIRD PARTY SPECIAL NEEDS TRUSTS

There are reasons why an inter vivos special needs trust may be preferable to a trust incorporated in a Will. It sometimes is easier to get a financial institution to name a trust as the beneficiary of a deferred income retirement account if the trust is already in existence and has a tax ID number. Some parents like the idea of funding the trust on a regular basis as part of a savings plan (although not for annual exclusion gifts as discussed below). If other family members want to provide in their estate plans for a disabled individual it often is easier to just reference an existing inter vivos trust.

A third party inter vivos special needs trust can be revocable until the trustor's death if the trustor is not planning to fund the trust with annual exclusion gifts. If other family members are planning to make testamentary bequests to the trust it may be preferable to make the trust irrevocable.

The trustor must be careful if he or she wants to make annual exclusion gifts to an inter vivos special needs trust for the benefit of a disabled or elderly person who receives needs based benefits. The necessary Crummy withdrawal powers will arguably make the amount subject to a withdrawal an available asset, thus disqualifying the beneficiary from needs based government benefits. In the month the withdrawal power is given to the trust beneficiary, the amount deposited into the trust is treated as "income" for SSI and Medicaid purposes, disqualifying the beneficiary from receiving benefits in that month. While the IRS may permit a residual beneficiary to receive withdrawal powers, the very existence of withdrawal powers in the special needs trust may cause the Social Security Administration or the Department of Social and Health Services to treat the trust as a countable resource.

Because of the problems with funding a special needs trust with annual exclusion gifts, an ILIT that purchases life insurance with annual exclusion gifts is risky when the trust is intended to also serve as a special needs trust for a beneficiary. It would be better to name other non-disabled family members as beneficiaries of the ILIT and fund the special needs trust with probate assets or other assets not purchased with annual exclusion gifts.

MEDICAID AND SPECIAL NEEDS PLANNING:

Practice Tips when a Client Is Elderly or Disabled

Barbara A. Isenhour
Somers Tamblyn King / Isenhour Bleck

The elderly couple

- **Tom and Susan - 80 years old**

Assets:

• House	$500,000
• Savings	$200,000
• Tom's IRA	$400,000
Total estate	$1.1 mil

Susan has stroke

- House $500,000 - exempt
- Savings $221,220 - $100,000 fixed term annuity in Tom's name
- Tom's IRA $400,000 - roll over to fixed term IRA annuity

- Countable assets: < **$121,220**

Susan's power of attorney

- Can Tom transfer house into his name as his separate property?
- Does power of authorize agent to make gifts?
- Does power of attorney prohibit or limit agent's power to make gifts.
- If Tom & Susan have a revocable trust, does the trust authorize trustee to make gifts?

Gifting power to agent

- My agent shall have the power to make transfers of my property whether outright or in trust, including gifts to the attorney-in-fact, for the purpose of qualifying or maintaining eligibility for government benefits, including Medicaid, or to avoid estate recovery related to such benefits. Any transfers made pursuant to this paragraph shall be deemed not to be a breach of fiduciary duty by the attorney-in-fact.

Problematic assets or facts

- What if Susan had an IRA of $400,000?
- What if Susan and Tom have a vacation home on Whidbey in addition to their residence?
- What if Tom is terminally ill; does a Medicaid qualifying annuity with the State of Washington as the remainder beneficiary make sense?

Changes to Tom's estate plan

- Revise Tom's Will to leave his estate to a special needs trust for Susan.
- Revoke any community property agreement.
- Susan or her attorney-in-fact can transfer assets to a spouse with no transfer of asset penalty period.

New Medicaid rules on trusts

Proposed trust rules: WSR 16-14-008, June 23, 2016
http://lawfilesext.leg.wa.gov/law/wsr/2016/14/16-14PROP.pdf

- WAC 182-516-0140(3): A testamentary trust created by a Will, where the estate is the grantor, is a third party trust and is not an available resource of the trust beneficiary.
- WAC 182-516-0140(6): an irrevocable third party trust is not an available resource if the beneficiary has no power to access or control trust assets or distributions.
- *Berto v. DSHS*, Div. III July 19, 2016.

Medicaid and revocable trusts

- A residence in a revocable trust will not be an exempt asset.
- A special needs trust established at the death of the first spouse in a revocable trust rather than in a Will, will be a countable resource for the surviving spouse.
- Distributions from a revocable trust will be deemed to be income to the grantor

The single person

- Helen is 35 and was severely injured in a pedestrian accident.

Assets:

• House	$300,000	-	Exempt
• Wheelchair van	$25,000	-	Exempt
• Savings	$200,000	-	$2,000 exempt

Home equity < $552,000 is an exempt asset

Helen is not eligible for Medicaid long term care benefits because she has $198,000 in non-exempt assets

First party special needs trust

WAC 182-516-0125:

- Beneficiary must be under age 65
- Trust must be established by a parent, grandparent, the court or a guardian
- Beneficiary must be disabled
- The trust must be for the sole benefit of the disabled beneficiary
- The trust must provide that at the termination of the trust or death of the beneficiary, the Medicaid program must be reimbursed

How Helen qualifies for Medicaid

- Helen's parent establishes a 1st party special needs trust
- Excess assets ($198,000) are transferred into the trust
- There is no transfer of asset penalty period
- Assets in the trust are not counted in determining Helen's eligibility for Medicaid

The elderly single person

Hazel is 90 and requires long term care after a stroke. Her daughter has lived with Hazel for 2+ years to help her. Hazel also has a disabled son who is 65 and receives Medicaid benefits

Assets:

- House $300,000
- Savings $200,000

- Excess assets $198,000

How Hazel qualifies for Medicaid

- Home can be transferred to a caregiver child with no transfer of asset penalty period.
- Hazel's savings (and home) can be transferred outright to disabled child of any age with no transfer of asset penalty period.
- Assets can be transferred to a special needs trust for the sole benefit of a disabled child of any age or any disabled person under the age of 65, with no transfer of asset penalty period and with no Medicaid repayment requirements at the death of the beneficiary.

Pooled special needs trust

- Assets can be transferred to a first party pooled special needs trust for Hazel. There will be a transfer of asset penalty period because Hazel is over the age of 65 but assets in the pooled SNT are not counted in determining Hazel's eligibility for Medicaid.

WAC 182-513-0125(5)

- Does Helen's and Hazel's power of attorney allow transfers of assets to a first party SNT or to a caregiver child or to a disabled child?

- Does Hazel's power of attorney allow her attorney-in-fact to create a SNT for her disabled child or any other disabled person.

My attorney-in-fact shall have the power to establish and fund a trust for myself, a disabled child or disabled family member for the purpose of making a gift of my assets in order to qualify for government benefits.

Can a third party special needs trusts be created after death?

- Helen's father dies and leaves her an outright bequest in his Will of $50,000.
- TEDRA agreement to create a third party special needs trust? *In re Riddell, 157 P. 3d 888 (2007)*
- WAC 182-516-0001: A trust is treated as self-settled if it contains assets that would have been owned by the beneficiary if they had not been diverted to the trust by the beneficiary, a court, or someone acting on the beneficiary's behalf.

Medicaid liens and probate

- Susan did not transfer her interest in their home to her husband Tom when she was approved for Medicaid. House is an exempt asset because Tom is residing in the home but at Susan's death, DSHS files a Medicaid lien against Susan's interest in the home. The lien will not be enforced until Tom's death.
- Susan's Will leaves her estate to Tom. If Susan's Will is probated, DSHS will release its lien so that title can be transferred to a spouse free of any lien.

Drafting third party special needs trusts

- No need to prohibit distributions for food or shelter.
- Crummy withdrawal powers are a bad idea in an *inter vivos* SNT funded with annual exclusion gifts.
- Requiring the trustee to pursue public housing options usually unnecessary.
- Prohibiting the trustee from making any distributions that may reduce or eliminate a government benefit is too inflexible.

Setting the right tone

- The trustee shall provide Tim with the highest quality medical and residential care available.
- The trustee shall provide Tim with the same lifestyle my husband and I provided to him before our deaths.
- In exercising discretion, the trustee shall be guided by a Letter of Intent that my husband and I prepared before our deaths.

- If Tim is able to support himself as an adult with substantial gainful employment, the trustee shall be generous in providing him with as much financial independence as the trustee deems appropriate under the circumstances.

- The trustee may exercise discretion to preserve Tim's eligibility for needs-based programs so this trust is not intended to be a mandatory support trust. The trustee may elect, however, at the trustee's discretion to forego government benefits if the trustee determines it would be in Tim's best interest to do so.

ABLE Act accounts

§529 A of the Internal Revenue Code

- Must be disabled **before age 26**
- Maximum annual contributions from all sources **$14,000 per year**
- Maximum is the total allowed for 529 college savings plans (WA does not have a limit)
- SSI will disregard an ABLE account **if under $100,000**
- Medicaid can claim balance in account at death of the beneficiary

When can an ABLE account be helpful?

- Autonomy for a person who is capable of managing his or her own account.
- An alternative to a special needs trust for small inheritance or PI settlement.
- A way to pay for shelter expenses for a person on SSI without having a 1/3 reduction in the SSI benefit amount.
- Client who is chronically over the $2,000 asset limit.

CHAPTER TWO

MODERN FAMILY: WRONGFUL DEATH CONSIDERATIONS IN PROBATE

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I. INTRODUCTION

It goes without saying that probate actions and wrongful death litigation are often companions. However, estate attorneys do not usually handle wrongful death claims. Instead, separate litigators usually pursue claims based on the wrongful death and survival statutes. Given this bifurcation, it can seem as though probate actions and wrongful death litigation exist in their own separate legal bubbles.

The purpose of this paper and presentation is to highlight the fact that decisions made, and actions taken, in probate proceedings can directly impact wrongful death proceedings, and vice versa. Instead of providing an instruction manual, the authors seek to raise important and interesting issues that the estate or probate attorney may want to consider when a wrongful death action parallels their own

II. NECESSITY OF APPOINTMENT OF PERSONAL REPRESENTATIVE

A. Issues Regarding The Necessity of a Personal Representative To Bring An Action

In Washington, in order to bring a wrongful death or survival action, a personal representative must be appointed. For example, RCW 4.20.010 and 4.20.020 address wrongful death actions following the death of a decedent; RCW 4.20.046, "the general survival statute" addresses survival of actions which a decedent would have had if the decedent had lived against someone else on behalf of the decedent's statutory beneficiaries; and RCW 4.20.060, "the specific survival statute" provides that an action for personal injury which causes death survives the decedent's death. The common theme in all of the statutes is that the only one authorized to bring an action is the personal representative of the decedent's estate.[1] The statutory beneficiaries of a wrongful death and a specific survival action are the decedent's surviving spouse, registered domestic partner, and children including stepchildren. If there is no surviving spouse, registered domestic partner, or children, the decedent's parents, brothers or sisters who were dependent on the decedent for support and reside in the United States at the time of the decedent's death are statutory beneficiaries. Damages under RCW 4.20.046 can be recovered on behalf of the estate itself but certain types of damages are only recoverable on behalf of the statutory beneficiaries enumerated in RCW 4.20.020. Failure to have a personal representative of the estate appointed can lead to dismissal of an action. *See Huntington v. Samaritan Hospital,* 101 Wn.2d 466, 468, 680 P.2d 58 (1984).

The same is true with certain federal causes of action. For example, the Death on the High Seas Act (DOHSA), 46 U.S.C.A. 30301 *et. seq.* provides the exclusive basis of recovery for deaths on the high seas. *Dooley v. Korean Air Lines Co., Ltd.* 524 U.S. 116, 123 (1998); see also, *Helman v. Alcoa Global Fasteners, Inc.,* 637 F.3d 986,

[1] If the decedent is a minor child, the parents who have "regularly contributed to the support" of the child, have individual standing to bring an action for death of the child. RCW 4.24.010

989 (9th Cir. 2011).

DOHSA provides:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

46 U.S.C.A. § 30302 (emphasis added)

DOHSA applies to aircraft accidents, and has enhanced damages for deaths arising from commercial aviation accidents beyond 12 nautical miles from shore. *Helman v. Alcoa,* 637 F.3d at 989.

However, under DOHSA, only a personal representative can bring an action. *Alcabasa v. Korean Air Lines Co., Ltd.*, 62 F.3d 404, 407 (D.C. Cir. 1995) (Spouse of decedent who had not applied to be a personal representative was barred from brining suit). "A 'personal representative' is by definition a court-appointed executor or administrator of an estate, not merely an heir." *Id.,* (citing *Briggs v. Walker,* 171 U.S. 466, 471, 19 S.Ct. 1, 3, 43 L.Ed. 243 (1898). Without appointment as personal representative, an individual has no statutory standing to bring a claim. *Id. See also, Alcabasa* at 408. Even after application, oath, and court appointment of a personal representative, the processes for determining beneficiaries must be accomplished.

While Washington attorneys are generally used to appointing a personal representative as a matter of course, the need for extra caution arises when handling actions from other states – especially ones which do not require the appointment of a personal representative. For example, under California law a wrongful death action can be brought by classified family members without the appointment of a personal representative. An unwary litigator may find himself out of his depth when defendant's counsel moves for application of DOHSA, and dismissal of the claim, especially if the statute of limitations has expired.

Of course, the presenters' use of DOHSA is just an example of the caution needed when appointing a personal representative and hiring competent wrongful death counsel. As discussed below, the integration of wrongful death counsel early in litigation can make ensure that probate counsel is making informed decisions on the probate side.

B. Issues When The Personal Representative Or Beneficiaries Do Not Want To Bring Action, Or Only An Action That Benefits Some.

1. Fiduciary Duty

The personal representative of an estate is a mere agent or trustee for the statutory beneficiaries of a wrongful death action. *Gray v. Goodson,* 61 Wn.2d 319, 327, 378 P.2d 413 (1963). The estate itself may be a beneficiary of a survival action to some extent. The personal representative owes a general fiduciary duty to the beneficiaries and legitimate creditors of the estate under RCW 11.48.010. The personal representative also owes a duty to the statutory beneficiaries of wrongful death and survival actions. For instance, Division One of the Court of Appeals made it clear in an unreported decision, *Campbell v. Johnson,* 141 Wn. App. 1016 (2007), that the personal representative of an estate may have breached a duty to statutory beneficiaries of a wrongful death action. In that case, the personal representative was the decedent's surviving spouse and did not bring a claim on behalf of the decedent's adult children from a prior marriage. Instead, she only brought a claim on her own behalf and on behalf of the minor children of her and the decedent. The adult children were not able to bring a claim against the personal representative only because they failed to bring the claim within thirty days after the filing of a declaration of completion by the personal representative.

The personal representative may be reluctant to bring a claim against a particular defendant (for instance a potential individual defendant who is/was a friend of the personal representative or the decedent's family). The personal representative may also be reluctant to pursue particular claims because of concerns about the viability of a particular claim and the expense of pursuing it.

2. Petition for Instructions

One potential solution where the personal representative is reluctant to bring a wrongful death or survival action against a particular defendant or to pursue a particular claim is for the personal representative to petition the court for instructions regarding how to proceed. A court order will provide the personal representative with protection against claims for breach of fiduciary duty based on the personal representative pursuing or not pursuing a particular claim or defendant. The personal representative needs to be careful how the issue or issues are presented to the court given that the defendants in any wrongful death or survival action will be able to review the pleadings. The last thing the personal representative wants to do is lay out the weaknesses in a potential case or reasons why damages might be limited for a defendant.

3. Appointment of "Special Administrator"

Another possible solution is to have an administrator appointed for the estate solely for the purpose of pursuing wrongful death and other claims. This is not a special administrator appointed under RCW Ch. 11.32 but rather an administrator appointed

under the court's inherent power solely to act with respect to a wrongful death and survival action. The special administrator for the purpose of bringing the action would usually be someone who is not a statutory beneficiary of any of the potential causes of action and who does not have a personal interest in the outcome of the litigation or a relationship with potential defendants.

C. Issues Where A Potential Individual Defendant Is Deceased

1. Estate of Potential Defendant Opened

Where an individual potential defendant is deceased, the individual's estate is the proper defendant in a wrongful death action. RCW 4.20.046 If there is already a probate estate for the individual open, the potential plaintiff needs to follow the creditor's claim procedures discussed below to the extent the damages sought may exceed any liability insurance limits.

2. No Estate Opened

If no estate has been opened for the deceased potential defendant, the plaintiff needs to determine how to proceed. RCW 11.28.120 sets forth the order of persons who are entitled to serve as personal representative if a decedent died intestate or the persons named in the decedent's will are unable or unwilling to serve as personal representative. The first priority (after nominees in a will) is the decedent's surviving spouse or state registered domestic partner or such other person as he or she may request to have appointed. The second category is next of kin. The next of kin have priorities within that class depending on their relationship to the decedent. The sixth category in order is one or more of the principal creditors. If no one named in a will or named in the first six categories petitions for appointment within forty days of the decedent's death and certain other criteria are met, the court may appoint any suitable person to administer the estate.

If the potential defendant has a will, RCW 11.12.010 requires the person having custody of the will to file the will with court or deliver it to the personal representative nominated in the will within thirty days of learning of the decedent's death. The nominated personal representative who has custody of the will is required to file the will with the court within forty days of learning of the decedent's death. If the person having custody of the will or the nominated personal representative wilfully violates RCW 11.12.010, he or she has potential liability to an aggrieved party. Practically, it is hard to prove damages. The statute does give the plaintiff a way to compel the filing of the will if necessary and provides a timeline for figuring out whether a will exists.

While a principal creditor is entitled to petition to be appointed as personal representative if no one in the categories entitled to priority petitions to be appointed, a plaintiff should give considerable thought to whether he or she wants to serve in that role. Practically, the plaintiff will have an inherent conflict of interest and will be taking on a fiduciary duty to the beneficiaries of the estate and all of the duties of the personal

representative to settle the estate as quickly and rapidly as possible without sacrifice to the estate. RCW 11.48.010.

The more prudent course is often to contact the surviving spouse or domestic partner or other next of kin and request that he or she petition for appointment. If the persons with priority fail to petition for appointment within forty days of the decedent's death, the plaintiff can then use the provisions of RCW 11.28.120 to petition for the appointment of "any suitable person." The plaintiff may want to nominate a professional fiduciary to serve in that role. That may not be practically possible though if the decedent had no or limited liquid assets with which to pay the professional fiduciary.

3. Filing of Creditor's Claim

Once a personal representative has been appointed, the plaintiff needs to follow the creditor's claim procedures of RCW Ch. 11.40 before filing suit to the extent that the plaintiff is seeking to recover damages in excess of any liability or casualty insurance coverage. To the extent that the plaintiff does not intend to recover damages in excess of the liability limits (for instance if the deceased defendant had no assets), RCW 11.40.060 provides that there is no need to file a creditor's claim.

a. Time Limitations

RCW Ch. 11.40 contains time limitations for the filing of a creditor's claim against a decedent's estate. Different time limitations apply depending on whether the potential creditor is reasonably ascertainable or not and whether the decedent's estate has given the potential creditor actual notice under RCW 11.40.020. If the plaintiff is given actual notice, the plaintiff has until the later of thirty days from the date actual notice was served or mailed to the plaintiff or four months from the date of first publication of a notice to creditors to file and serve a creditor's claim as set forth in RCW 11.40.070. RCW 11.40.051(1)(a). If the decedent's estate published notice to creditors, plaintiff does not receive actual notice and is a reasonably ascertainable creditor (which is almost certainly the case with a wrongful death or survival action plaintiff), a creditor's claim must be presented within 24 months of the date of decedent's death. If decedent's estate does not publish notice to creditor's the creditor's claim must be presented within 24 months of the date of decedent's death. Note that in order to be properly presented the claim must both be served or mailed via first class mail to the personal representative or the personal representative's attorney and filed with the court where the probate is pending. RCW 11.40.070(3). The creditor's claim procedure does not extend any otherwise applicable statute of limitations. RCW 11.40.051(2) and RCW 11.40.060. If a plaintiff does not comply with the creditor's claim procedure, the plaintiff is "forever barred from making a claim or commencing an action against the decedent." The time bar of RCW 11.40.051 is a statue of repose and cannot be extended by equitable or other considerations. *See Cloud ex. rel. Cloud v. Summers,* 98 Wn. App. 724, 736-738, 991 P.2d 1169 (1999).

b. No Action Taken on Claim

If a claim exceeds $1,000 on its face, there is no automatic allowance of a claim due to lack of action by the personal representative. If the personal representative of the potential defendant's estate does not act on the claim, the plaintiff is in limbo until the claim is allowed or (most likely) rejected. RCW 11.40.080 provides a procedure for a claimant to have his or her claim allowed or rejected. Under RCW 11.40.080(2), if the claim has not been allowed or rejected within the later of four months from first publication of the notice to creditors or thirty days from the date of filing the claim, the claimant can give written notice to the personal representative that the claimant will petition the court for allowance of the claim if the claim is not accepted or rejected within twenty days. If no action is taken within the twenty day period, the claimant can file a petition for allowance of his or her claim and may be entitled to recover attorney's fees.

c. Claim Rejected

If the claim is rejected by the potential defendant's estate, the plaintiff must file suit within thirty days after notification of rejection of the claim. RCW 11.40.100. If notice of rejection is mailed by certified mail to the plaintiff, the thirty day period begins to run on the date of the postmark. If the plaintiff fails to do so, the claim is forever barred.

4. Applicability of RCW 11.96A.150

In *Sloans v. Berry,* 189 Wn. App. 368, 379-80, 358 P.3d 426 (2015), Division One of the Court of Appeals held that the attorney's fees provision of RCW 11.96A.150 applied to a suit on a rejected creditor's claim. While it may be unlikely that a court would find it to be equitable to award attorney's fees and costs in a wrongful death or survival action filed following the rejection of a creditor's claim, it is possible that a court might award fees under that provision under unique circumstances.

III. Potential Causes of Action

Available causes of action are controlled by the facts of the case, the applicable law, and the strategic choices of wrongful death counsel. Experienced wrongful death counsel will take all of these variables into account when determining potential cases of action; however, if there is a delay in retaining experienced wrongful death counsel, certain causes of action or avenues of recovery may be hindered, if not entirely foreclosed. Prompt retention of wrongful death counsel is essential.

Therefore, the first task of a Personal Representative in relation to potential wrongful death claims should be to find and retain experienced wrongful death counsel to investigate any potential claims. Any counsel considered should be ready to immediately investigate the case, and should have experts as needed available to assist.

A. Early Investigation Of The Facts, And Preservation Of Evidence

Wrongful death counsel should be able to launch an immediate investigation into the facts in order to collect and preserve evidence, and to evaluate and determine potential claims and at-fault parties. This often includes travel to the accident site (with investigating experts) and the collection and preservation of evidence pursuant to established preservation procedure. Interested parties may need to be invited to inspections, with inspection protocols agreed to beforehand.

Counsel's investigation is not limited to physical electronic evidence, but also evidence from outside the potentially at-fault entities' control. As needed, counsel should issue evidence preservation demand letters, Freedom of Information Act (FOIA) requests, and Public Records Act (PRA) requests from federal, state, and local governments. Counsel's evidence collection and preservation plan should also include a method to prevent spoliation, even though Washington does not recognize a tort claim for spoliation. *Henderson v. Tyrrell*, 80 Wn. App. 592, 607, 910 P.2d 522, 532 (1996), *as amended on denial of reconsideration* (Mar. 14, 1996). Instead, Washington courts grant a wide range of evidentiary relief based on (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party. *Id.* at 607. Counsel should be well versed in spoliation, both to preserve evidence for which the client is responsible, as well as to identify issues regarding evidence in relation to other parties.

B. Early Integration Of Experts

Wrongful death counsel should also begin integrating experts at the investigatory stage of the case. This will help in developing proper inspection and testing protocols, will help prevent spoliation of evidence, and most importantly will allow an opportunity for counsel to jump start their liability case for prosecution. Early integration also allows counsel and experts to work together so that all parties have a fair opportunity to inspect available evidence, and to properly preserve that evidence. This approach helps prevent a plethora of problems that may arise later on in litigation.

In addition, the early integration of expert witnesses is an aid in handling CR 12(b)(6) motions to dismiss or CR 56 summary judgement motions, which may be filed early in the case. It also helps define the scope of discovery for the case. For example, experts may be consulted in drafting FOIA requests, in narrowing the focus of investigation, and to determine the scope of product failure testing.

C. Comprehensive Analysis Of Law For Early Case Strategy

Identifying the proper defendants, theories of recovery, applicable law, and available jurisdictions should be at the forefront of any analysis. With recent jurisdictional decisions coming out of the United States Supreme Court, wrongful death counsel should be very careful with jurisdiction choices. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918, 131 S. Ct. 2846, 2850, 180 L. Ed. 2d 796

(U.S. 2011)(limiting general jurisdiction over foreign defendants); *Daimler AG v. Bauman*, 134 S. Ct. 746, 750, 187 L. Ed. 2d 624 (2014) (limiting general jurisdiction over corporate defendants).

Likewise, wrongful death counsel should be adept at pleading and arguing the application of foreign law, especially if such application is on an issue-by-issue basis, commonly called *depacage*. For example, Washington does not generally recognize claims for punitive damages. *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708, 711 (1981). However, since choice of law in Washington is available on an issue-by-issue basis, *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 581, 555 P.2d 997, 1000 (1976), Washington courts have recognized the availability of punitive damages when a plaintiff pleads and proves the applicability of foreign law to an out-of-state defendant whose punitive acts occurred in their home state which that allows punitive damages. *See, Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 148, 210 P.3d 337, 342 (2009) (Washington action applying California punitive damages law to a California defendant for an accident in Washington). Wrongful death counsel should be prepared to handle the numerous jurisdiction and choice of law issues that may arise – especially in cases involving multiple parties, products liability, and/or interstate commerce.

IV. Damages

A. The Effects of Intra-Family Litigation

Several special considerations can be noted with regard to the effect of intra-family litigation on wrongful death claims and litigation. Namely, counsel should consider the (perhaps unintended) effect of allegations regarding the decedent, and/or the family relationships with the decedent that can arise in probate proceedings.

As an example, the loss of "love, care, and companionship and guidance" are recoverable damages for the child or stepchild of a decedent in a wrongful death proceeding. *See,* RCW § 4.20.010, 020. Of course, the determination of these damages is necessarily a fact-driven inquiry. At the end of trial, jurors will be instructed to "consider what [the decedent] reasonably would have been expected to contribute to [his or her children] in the way of love, care, companionship, and guidance." WPI 31.03.01(2).

Evidence in probate proceedings may bear on the issues of love, care, companionship, and guidance – especially when there is family discord. For example, affidavits and materials presented in a will contest from *both sides* may adversely affect a jury verdict at trial. In fact, the potential adverse impact on the value of a beneficiary's wrongful death claim may exceed the amount at issue in the will contest.

A probate attorney should consider the impact that evidence filed in probate proceedings may have on one or more beneficiary in a wrongful death proceeding.

Likewise, wrongful death counsel should be cognizant of pending estate proceedings, and understand the impact evidence therein may have on probate issues.

B. Estate Tax Considerations

Probate counsel and wrongful death counsel should also plan early to deal with anticipated estate tax and income tax issues. Different portions of a recovery may be subject to different taxes, or no taxes at all. For example, damages under a survival statute for a defendant's pre death pain and suffering may be subject to different tax treatment than a wrongful death claim for loss of financial support. Strategies for handling these issues are different when a settlement is reached versus a verdict and final judgment, which if satisfied, affirms an allocation that may not have tax favorable treatment.

C. Apportionment of Recovery Between Different Beneficiaries

To some extent, taking a case to trial and through verdict alleviates much of the difficulties that come with apportioning damages between different beneficiaries. Common practice in wrongful death litigation is to present the jury with a special verdict form which outlines the categories of recoverable damages for each beneficiary, as well as for damages related to the survival action. A special verdict form for the question of damages may therefore look similar to the following:

SPECIAL VERDICT

Case No.

We, the jury, answer the following question submitted by the court as follows:

QUESTION 3: What do you find to be the amount of damages for the injury and death of Decedent?

a. Economic Damages (past and future) for Decedent's estate $_____

b. Economic Damages (past and future) for Decedent's spouse and children:

Spouse $_____

Child 1 $_____

Child 2 $_____

c. Noneconomic damages (past and future) for

Decedent's Spouse and children:

Spouse $_____

Child 1 $_____

Child 2 $_____

d. Emotional distress, fear, pain and suffering of Decedent before his/her death $_____

(Direction: Sign this verdict form and notify the bailiff.)

Date:_____ _____

Presiding Juror

Of course, the use of a special verdict form can create additional appealable issues if it does not comport with the law. Wrongful death counsel must carefully match the special verdict form with the categories of recoverable damages allowed under applicable law.

Nonetheless, even with the use of a special verdict form, the apportionment of certain categories of damages, such as economic loss to the estate, may be ultimately go through probate.

Alternatively, the interested parties may reach an agreement regarding allocation, typically when the case is headed to mediation or other settlement negotiation. Allocation can be based on percentages if allocated pre-settlement, or based on dollar figures if allocated after a lump settlement. Though pre-settlement allocation involves an unknown size of the dollar pie, beneficiaries may reach an agreement as to their respective percentages of the pie. If a minor beneficiary is involved, this must include participation of a Settlement Guardian ad Litem (SGAL). One advantage to pre-settlement allocation, is that some beneficiaries may be more likely to reach agreement on allocation based on percent than when real dollar figures are known. However, SGAL approval may be contingent upon a minimum dollar recovery regardless of percentage allocation. Special considerations including confidentiality must carefully observed when slicing the pie before its existence and size are known, because if settlement negotiations fail, and this information somehow gets to the jury, it could have an erroneous and chilling effect on the jury.

Likewise, the second time for allocation is after settlement, even settlement after trial and verdict. The advantage in this situation is that no one is left playing the guessing game as to how much they will each receive, as they already will know the size of the pie. In addition, if there is a post-verdict settlement, allocation is easier, even among competing family members, because the jury will have heard the evidence and

provided their own allocation. Last, SGAL approval is more certain with known dollar figures.

D. Special Considerations With Minor Statutory Beneficiaries

Minor settlements in Washington are controlled by SPR § 98.16W, which provides, in part, that, "In every settlement of a claim, whether or not filed in court, involving the beneficial interest of an unemancipated minor or a person determined to be disabled or incapacitated under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it." SPR § 98.16W(a).

Ordinarily, counsel may file a petition for the appointment of an SGAL if the wrongful death case is moving toward settlement, or has already settled, counsel will seek approval of the gross settlement and allocation to the minor. On counsel's petition, the court will appoint a Settlement Guardian ad Litem (SGAL). *Id.* at (c). The SGAL's job is not to represent the minor, but to review the overall allocation to the minor, and make recommendations to the court based upon fairness to the minor, and how to protect the minor's proceeds.

In a complex wrongful death lawsuit, early appointment of an experienced SGAL may prove advantageous, as it gives the SGAL time to become acquainted with the facts and legal theories surrounding the case, and to more meaningfully provide feedback to the parties during settlement discussions. Sometimes the role of the SGAL reporting to the court will be twofold if allocation is involved: reporting on the reasonableness of the overall lump sum settlement, and reporting on the allocation share to the minor once made.

Since the input and recommendation of the SGAL will likely impact the required court approval of a minor settlement, the role of the SGAL, and relationship with counsel and the parties, is very significant, to say the least.

V. CONCLUSION

From the appointment of a personal representative, to the selection of wrongful death counsel, the investigation of claims, litigation, and the eventual allocation and distribution of proceeds, a probate attorney may be more involved in wrongful death litigation than he or she originally anticipates. Interesting and sometimes novel issues arise at the overlap of these two spheres of litigation, where cooperation and coordination between competent counsel should net the most favorable client result.

modernfamily

Wrongful Death Considerations In Probate

by
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The Personal Representative

Necessity of Appointment of Personal Representative To Bring An Action- RCW 4.20.010, .020, .046, .060

The Personal Representative

Issues When The Personal Representative Or Beneficiaries Do Not Want To Bring Action, Or Only An Action That Benefits Some.

A. Fiduciary Duty

B. Petition for Instructions

C. Appointment of "Special Administrator"

Issues Where A Potential Individual Defendant Is Deceased

1. Estate of Potential Defendant Opened
   Follow RCW Ch. 11.40
2. No Estate Opened
   RCW 11.28.120 Priority of Appointment
   RCW 11.12.010 Custody of Will

Issues Where A Potential Individual Defendant Is Deceased

3. Filing of Creditor's Claim

A. Time Limitations

B. No Action Taken on Claim

C. Claim Rejected

Issues Where A Potential Individual Defendant Is Deceased

4. Applicability of RCW § 11.96A.150

Attorneys Fees and Costs

Wrongful Death Law

A. Wrongful Death Statutes

1. Statutory Beneficiaries

2. Standing to Bring Action

3. Recoverable Damages

Wrongful Death Law

B. Survival Statutes

C. Specific Provisions: Maritime Law

Choice of Law

Determining the law that should apply to one or more issues in the case.

Choice of Law

1. "choice of law is a veritable jungle"

   it "leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess'"

2. Choice of law in aviation cases is a "judicial nightmare".

Choice Of Law

A. Wrongful Death Law

Restatement of Conflicts § 175 – Lex Loci, unless other state has more significant relationship.

Choice Of Law

B. Examples of Issues

1. Beneficiary class
2. Recoverable Damages

Disclaimed Beneficiary

Choice Of Law

B. Examples of Issues

. . . . 3. International Accidental Death

Allocation of Proceeds

A. Role of Personal Representative and Wrongful Death Counsel

B. Timing

1. Pre-Settlement: Percentage Based
   Pros, Cons, Inclusion of SGAL
2. Post-Settlement
   Pros, Cons, Mediation, Binding Arbitration

What About Other Wrongful Death Law Regarding Standing?

Maritime Law

DOHSA provides:

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

46 U.S.C.A. § 30302 (emphasis added)

Damage Claim Issues

Effect of Intra-Family Litigation on Wrongful Death Proceedings

Loss of "love, care, and companionship and guidance."

RCW § 4.20.010, 020.

"consider what [the decedent] reasonably would have been expected to contribute to [his or her children] in the way of love, care, companionship, and guidance."

WPI 31.03.01(2).

Damage Claim Issues

Will Contest

Special Verdict Form

QUESTION 3: What do you find to be the amount of damages for the injury and death of Decedent?

Economic Damages (past and future) for Decedent's estate $_____

Economic Damages (past and future) for Decedent's spouse and children:

- Spouse $_____
- Child 1 $_____
- Child 2 $_____

Noneconomic damages (past and future) for Decedent's Spouse and children:

- Spouse $_____
- Child 1 $_____
- Child 2 $_____

Emotional distress, fear, pain and suffering of Decedent before his/her death $_____

(Direction: Sign this verdict form and notify the bailiff.)

Minor Statutory Beneficiaries

Minor Settlements

Controlled by RCW: SPR § 98.16 W

Many Local Court Rules/Practices to Consider

Minor Statutory Beneficiaries

Process:

1. Filing of Petition (Separate Cause No.)
2. Appointment of SGAL
3. Review and Report By SGAL
4. Petition for Approval (Gross or Final)
5. Distribution of Proceeds

Importance of Hiring Competent Counsel

1. Preservation of Evidence
2. Early Investigation/Expert Evaluation
3. Avoid Critical Mistakes

CHAPTER THREE

REAL PROPERTY PRACTICE TIPS FOR ESTATE PLANNING AND PROBATE ATTORNEYS

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REAL ESTATE PRACTICE TIPS
FOR ESTATE PLANNING AND PROBATE LAWYERS

By

Julie E. Dickens

1. Introduction. An estate planner's ultimate task is to transfer assets. Working with real estate poses unique challenges. Besides being an asset that often constitutes a large portion of a client's wealth, it usually holds a particular personal significance, both to your clients and their families. It is also governed by its own peculiar set of legal requirements and practical implications. My comments today aren't meant to be an exposition of new law or technical issues. Instead, they are meant to give you some pragmatic tools and insight into dealing with real property in your everyday practice.

2. Wills.

(a) Wills. Our first exposure to clients and their assets usually comes when we're asked to prepare their Wills. I've included some common considerations for dealing with real estate in Wills.

(b) Provision for Spouse to Temporarily Stay in Home if Passing to Children of a Prior Marriage. Do they intend for their home to pass to their children by a prior marriage, rather than their spouse? If so, provide for a specified period of time during which the spouse can live in the home and spell out the terms regarding rent, expenses, etc.

(c) Option to Purchase to Second Spouse; Valuation. Do they want the spouse to have an option to purchase the home? If so, set forth clear terms for determining the price and time frames for exercising the right. Valuation by appraisal can be an accurate method, but can be expensive and the source of disagreement. If you do opt for an appraisal approach, try and avoid the cost of multiple appraisals. Perhaps let key beneficiaries and the spouse choose the appraiser and be bound by the report. Or, if the spouse disagrees with the estate appraisal, the spouse can pay for a second appraisal. If that doesn't resolve matters, perhaps have the two appraisers pick a third appraiser who will analyze the first two and whose determination will be binding. On the other hand, in certain circumstances, say where it's a modest asset and the client wants the purchase to be at a bargain price with no questions asked, you could consider tying the price to the assessed value as of date of death. Or even a percentage of the assessed value if the testator wants to be particularly generous.

(d) Allocation of Property to One Child. Does your client intend for one child to have first crack at a certain piece of property? For example, has that child lived with the client as a caretaker or is it commercial property related to a business in which the child has been a key figure? Perhaps they'd like it to be allocated to that child's share of the residue of the estate. If so, consider the same type of clear valuation

method as described above and address the terms of buying out the other siblings if the value exceeds the value of the share of the child to whom it is to be allocated. For example, the Will could allow the child to sign a promissory note secured by a deed of trust, with favorable terms regarding interest and amortization.

(e) Multiple Ownership of Family Property. I tend to discourage multiple owners of family vacation homes. It may work for a while, but over time, it can be the source of contention. Especially when the next generation joins the mix. Consider options such as having one or two children "buy" it from the estate, taking into account the allocation and valuation considerations raised above.

(f) Trust for Vacation Home. In some cases, your client will feel strongly about placing a specific piece of real estate in trust. If so, be sure and add a bequest of cash to the trust for expenses, especially if it won't be income producing. Consider having an end game so that the trust is not perpetuated forever, e.g., process for distribution or sale.

(g) Out of State Real Estate. Does your client have real estate located out of state? If so, consider the use of a revocable living trust as discussed below.

(h) Real Estate out of U.S. Do they have real estate located in another country? If in this case, I would recommend that they retain an attorney in that jurisdiction to draft a Will to address the real estate. Again, due to the peculiar nature of real estate, the foreign Will will be more likely to address local requirements and ease the costs and delays associated with administration of this asset.

(i) Testamentary Lot Divisions. RCW 58.17.040(3) may be useful where the clients have a large parcel of property that they wish to be divided among multiple heirs. This statute exempts "divisions made by testamentary provisions, or the laws of descent." from the subdivision requirements under RCW 58.17. This could help the heirs skip the step of subdividing the property after the death of the testator. The heirs will still need to comply with local land use codes, such as minimum lot size. The exemption is referenced in King County Code Section 19.08.070B. Pierce County also has code provisions that address this exemption. See PCC 18F.10060 and 18A.05090. It's possible to take advantage of this clause by merely passing the property to multiple heirs through the residuary clause. *See Telfer v. Board of County Commissioners of San Juan County*, 71 Wash. App.833, 862 P2d 637 (1993). But the better practice would be to include express provisions addressing the division under the Will.

3. Revocable Living Trusts. If you are using a revocable living trust, you will be faced with most of the same issues discussed above for Wills. Some considerations unique to real estate in revocable living trusts are set forth below.

(a) Out of State Real Estate. As mentioned above, if a client has out of state real estate, this can tip the scale in favor of a revocable living trust to avoid an

ancillary probate. This is especially important in states like California and Hawaii, where probates are can be expensive and protracted.

(b) Single Revocable Living Trust for Estate Planning. Rather than draft a stand-alone revocable living trust for the out of state property, you might consider a revocable living trust for their overall estate plan since you're already going through the motions of drafting a trust and preparing a deed.

(c) Multiple Parcels of Property. If a client has several parcels of real estate, the need for several deeds can discourage them from using this tool. Some clients, however, find the task of conveying the parcels to the trust to be a good exercise in gathering the information concerning their holdings during their lifetime. This can be a benefit to their children down the road.

(d) Flushing out Title Issues. One benefit of performing this homework during the client's lifetime is that it can disclose title issues of which the client wasn't aware. I recently had a client who had formed a revocable living trust in California and I was asked to prepare a deed conveying his interest in Washington real estate into his trust. When we looked into the ownership, we saw that the property was still in the name of the client and his former spouse. While it's not unusual for parties to rely on the divorce decree alone, I prefer to see a deed vesting property in the name of the party to whom the property has been awarded. In this case, the client and his ex-wife were on friendly terms and she signed a quitclaim deed clearly releasing her interest.

(e) Pre-Divorce Line of Credit. If a client has been divorced, checking on title issues can also bring a pre-divorce line of credit to their attention. I recently had a client whose ex-husband borrowed against the line of credit, even though the client had been awarded the residence in the divorce. The property had not been deeded to her as part of the property division, although I'm not certain that this would have precluded the lender from relying on the security interest granted during the marriage without having received actual notice of the divorce.

(f) Create a Bucket for Separate Property. If a client has separate property real estate holdings, they might wish to consider their own separate revocable living trust to hold their separate property only. This can be especially important if they have children from a prior marriage. While this isn't a substitute for a premarital agreement, it can help keep the asset segregated. And if they name their adult child as the successor trustee, the child has ready access and control over the separate property asset at their death.

(g) Articulate Certain Trust Powers under Trust (as Well as Wills and Powers of Attorney). Under the trust powers section of the revocable living trust (as well as under the trust powers of a Will), it is a good idea to articulate the Trustee's power to borrow funds and grant a security interest in the trust property. While this is included in the trust powers under RCW 11.98.070, lenders prefer to see it expressly stated in the trust document. This should also be considered in Durable Powers of

Attorney. Again, even though the new Durable Power of Attorney Act grants broad powers to manage real estate if the real estate power is invoked under the document (see RCW 11.125.270), lenders are more comfortable seeing the power set forth in the document.

(h) Testamentary Lot Division Exemption Doesn't Reference Living Trusts. Note that if you're thinking of employing the testamentary Lot Division exemption referenced above, a revocable living trust would probably not work. RCW 58.17.040(3) refers to a "*testamentary*" provision. Interestingly, though, it appears to be available in an intestate estate due to its reference to divisions made by " the laws of descent."

(i) Protection of Vulnerable Adult. One benefit of holding real estate in a revocable living trust is that it can be a simple way of helping protect a vulnerable adult. For example, if your client is older and has lost his or her spouse, perhaps placing their home in a revocable living trust with one child as a co-trustee can help protect them from entering into an onerous loan or engaging in a gift of an interest to an acquaintance or caretaker.

(j) Shared Management of Property. A revocable trust might also help the client manage their real estate, even if they are fully competent. For example, I recently had a client who wished to gift her Hawaii condo to her son in time for a homeowner's meeting the following week. They were excluding any non-owners from an important meeting and she wished for her son to participate. Her condo was held in her revocable living trust. I suggested that we name him as a co-trustee on the trust. Her health is failing and he is a trusted heir and this would have been a logical next step regardless of the pending meeting. We were able to accomplish this quickly in time for the meeting. While she still might consider gifting the condo to him during her lifetime, adding him as co-trustee gave us the luxury of evaluating this decision without undue time constraints and she could still remove him as co-trustee if she changed her mind.

4. Conveyances into Revocable Living Trust. Once you've decided to use a revocable living trust, it is necessary to prepare a deed to convey the interest into the trust.

(a) Public Record Search. It's important to gather the information you need to prepare the deed. At the very least, you should request a copy of the deed by which your client acquired title. You can also gather information from the assessor's office:

http://blue.kingcounty.com/Assessor/eRealProperty/default.aspx

And from the recorder's office:

http://146.129.54.93:8193/legalacceptance.asp

(b) Property Profiles. Often, you can request a property profile from a title company that will provide the last deed and the tax assessor's information for no charge. See also considerations for purchasing a product from the title company in Section 14 below regarding transfers of property at death.

(c) Inquire with Client Regarding Post Acquisition Events. Even after you have done this homework, you should ask your client if they have done anything with the property since they purchased it. I've had clients who have purchased a side lot from their neighbor or who have undergone a boundary line adjustment which would need to be addressed in the deed to trust.

(d) Identifying the Grantee. The grantee of the deed should not be merely the name of the trust. It should be the name of the trustees in their capacities as trustee of the living trust, e.g., "John Doe and Jane Doe, Trustees of the Doe Family Living Trust dtd 1/10/2016."

(e) Local Counsel. If it is out of state property, it is good practice to engage local counsel to prepare the deed and comply with any transfer tax implications.

(f) Title Endorsement. We usually try and obtain a title endorsement to the owner's policy that the client received when they came into title to make sure the trustee doesn't lose the benefits of the policy. Older policies don't consider the trust as an insured and you can lose the benefits of the policy if a title problem arises in the future. You can get around this be requesting an endorsement from the issuing title company adding the trust, which is offered at a relatively nominal price. The 2006 ALTA Policy does include the trustee of a trust established by the owner for estate planning purposes under its definition of an insured. So you could forego the endorsement where this is the policy that was issued. But due to the relatively low cost, it can be good insurance to add the trust per an endorsement.

(g) Order Number; Older Policies. In order to request an endorsement, you need the policy number. First, ask your clients to try and track down their title policy. If they can't find it, the acquisition deed often has the name of the title company and the order number on its face. We have sometimes run into a dead end if the title company has been merged. Keep in mind that the benefit of the policy is limited to the purchase price, so an older policy will have lost some of its value. The duty to defend contained in the policy, can nevertheless be a valuable benefit.

(h) Deed Recording at Time of Issuance of Endorsement. If you are getting an endorsement, ideally you would arrange for the title company to record the deed and issue the endorsement at the same time. You don't want to record the deed and later request the endorsement.

(i) Form of Deed. With regard to the form of the deed itself, it is most common to use a quit claim deed. Some practitioners have suggested the use of a statutory warranty deed instead of a quitclaim deed, especially if you don't have an

endorsement on an old policy. The theory is that if there is a title defect, the trustee or successor trustee can sue the owner or owner's estate for a breach of warranty which can trigger the protection of the original policy. Title companies don't necessarily agree with this and recommend a quitclaim deed with an endorsement as the best practice.

(j) Excise Tax Affidavits; Exemption for Transfers into Revocable Trust. You'll need an excise tax affidavit when presenting the deed for recording. The exemption for a transfer to a revocable living trust is buried in WAC 458-61A-211(g), "Mere change in identity or form—Family corporations and partnerships." (Note, if you don't reference the particular subparagraph, in this case (g), they may bump the filing). For form excise tax affidavits, go to the Department of Revenue Site at:

http://dor.wa.gov/Content/GetAFormOrPublication/FormBySubject/forms_reet.aspx

(k) Notification to Property Insurer. Remind your client to notify their property insurance company of the transfer so they can include the trust as an insured under the property insurance policy as well.

(l) Due on Sale Clauses. Even if there is a deed of trust or mortgage against the property with a due on sale clause, this is not enforceable in the case of a transfer of a home into a revocable living trust under the Garn St. Germain Act, 12 U.S. Code § 1701j–3 - Preemption of due-on-sale prohibitions. This would not exempt transfer of non-residential property to a revocable living trust, so lender approval should be sought for such a transfer.

(m) Acquisition of New Property in Trust. I remind clients to be sure and acquire new property in the name of their revocable living trust. Some lenders, however, won't lend when a trust is the owner. In this case, if it's a residence, the client usually buys the property in their individual capacity and then conveys title to the trust after closing.

(n) Assignment of Secured Contract Rights. You may have clients who are receiving payments under a Note and Deed of Trust or Real Estate Contract for property they have previously sold. It is still necessary, however, to convey their interest into the trust by way of a proper recorded assignment. The assignment, however, does not require an excise tax affidavit for recording per WAC 458.61A.303(e).

(o) LPO Forms. LPO (Limited Practice Officer) forms include form Assignments of Deeds of Trust and Seller's Assignment of Contract, as well as other useful real estate forms. They can be found on the WSBA website:

http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Limited-Practice-Officers/LPO-Forms.

(p) Canadian Property. Last, but not least, do *not* convey Canadian real estate into a revocable living trust. This will be considered a taxable event triggering unwanted Canadian taxes.

5. Transfer on Death Deeds.

(a) TOD Statute. Washington now recognizes Transfer on Death ("TOD") Deeds as promulgated under RCW 64.80.

(b) Effect. A TOD Deed allows you to name a beneficiary of a designated parcel of real property. The beneficiary does not acquire an interest in the property until the death of the grantor. A TOD Deed is revocable. They shouldn't be relied on for comprehensive planning, but they do have their place in limited circumstances.

(c) Example. I have a client with two children who don't get along. My client wants her home to go to her daughter, but she wants her son to be the Personal Representative. She is making a specific bequest of the home to her daughter under her Will and asked about adding her to the title. We decided to instead record a TOD deed naming her daughter as beneficiary. This can help insure that that the title passes to the daughter without delay or reliance on her brother's administration of the estate.

(d) Acceptance by Title Companies. TOD Deeds are still relatively new in Washington. Title companies are somewhat leery about relying on them. They do feel more comfortable about insuring the transfer of title at death under the TOD Deed if there is a corresponding clause in the Will bequeathing the property to the same beneficiary. They will also request that the title company's form Lack of Probate Affidavit be completed and signed, which is more comprehensive than the Department of Revenue's new Lack of Probate Affidavit discussed in Section 7(g) below.

(e) No Excise Tax Affidavit. An excise tax affidavit is not required when recording a Transfer on Death Deed per WAC 458.61A.303(j).

(f) Exemption. RCW 82.45.010(3)(b) and WAC 458-61A-202(7) note that while transfer of title per a TOD Deed does not normally trigger an excise tax, it does if it is satisfying a contractual obligation.

(g) Documentation Following Death of Grantor. WAC 458-61A-202(8)(f) and RCW 82.45.197(1)(i) require that a certified copy of the death certificate be recorded to perfect title under the TOD Deed.

6. Joint Tenants with Right of Survivorship.

(a) Statutory Authority; Implications. RCW 64.28.010 describes the creation of joint tenancies with rights of survivorship. I would not ordinarily use this as a means of transferring title to avoid probate. By adding the other party to the title, you

have made a gift of the interest and exposed title to the claims of the creditors of the co-owner.

(b) Implications for Married Couples. Washington couples usually take title as "husband and wife." There are no rights of survivorship incident to this ownership. Joint tenancies are not commonly used in Washington by spouses. It's interesting to note that joint tenancies with right of survivorship held by a husband and wife are still presumed to be community property per RCW 64.28.040. If your client has out of state property, however, check to see if it is owned as joint tenants with right of survivorship so that its passage at death is not inconsistent with your plan.

(c) Only Recognized if Grantees Agree; Title Underwriting. In order to be recognized by title companies at the death of the first owner, the deed creating the interest must include a statement signed by both parties stating their intention to take as joint tenants with rights of survivorship. This is not a requirement under state law, but an important requirement from a practical standpoint. Title Companies will also evaluate these on a case by case basis as they do for TOD deeds. They prefer to see a consistent Will and will also require that their Lack of Probate Affidavit form be provided.

(d) Doesn't Avoid Probate At Second Death. If a client opts to use this technique—say for out of state property instead of a revocable living trust—it avoids probate at the first death, but of course does not resolve the disposition at the death of the survivor.

(e) Exemption; Documentation. Under WAC 458-61A-202(5), title passing under a joint tenancy with right of survivorship does not trigger an excise tax. WAC 458-61A-303 does not exempt the deed creating joint tenancy with right of survivorship from the obligation to file an excise tax affidavit. A recorded death certificate after the first death, however, is needed to perfect title per RCW 82.45.197(1)(d).

7. Community Property Agreements. RCW 26.16.120 allows spouses to enter into agreements to characterize their property as community or separate and to dispose of the assets at their death. The agreement must be acknowledged in the same manner as a deed. An amendment or termination of the agreement must be documented with the same formalities.

(a) Interference with Estate Plan. Community property agreements disposing of property at death can, as we all know, interfere with common estate planning techniques, such as a bequest in trust for the surviving spouse for tax purposes.

(b) Mutual Written Termination. Because of the requirement that both spouses agree to revoke—unlike a Will—agreements passing interests at death should be undertaken with caution.

(c) Usefulness in Limited Circumstances. If a couple has a long term marriage and a modest estate, a Community Property Agreement can be helpful. In such cases, it's often common for there to be no probate at the first death. At the second death, though, when title is passing to a third party, if a Community Property Agreement can be found, the transition from the first spouse to die to the second can be documented.

(d) Title Company Concerns. Title companies, however, are not completely comfortable with reliance on Community Property Agreements and will consider different factors in their underwriting. This is particularly true if there are children from a prior marriage. As with a TOD Deed, they are more comfortable relying on them if there is a consistent Will. They will also require the title company's Lack of Probate Affidavit.

(e) Clarification or Conversion of Status. A Community Property Agreement can often be used to clarify or convert the status of the property to community, without including a disposition at death clause. For example, if a long married couple moves to Washington from a non-community property state, they might benefit from a limited community property agreement that merely addresses status. This can be beneficial to obtain the step up in basis of the entire asset at the death of either spouse that is afforded community property.

(f) Activation at First Death. A Community Property Agreement can also state that the property converts to community at the moment of death and passes pursuant to the agreement, subject to revocation if the parties divorce. This conversion to community property at death where the asset was not otherwise community property, however, will likely not produce the benefit of a stepped up basis ordinarily afforded community property.

(g) Exemption; Documentation. An excise tax affidavit need not be provided to record the Community Property Agreement. See WAC 458-61A-303(3)(g). Per RCW 82.45.197(1)(f), however, in order to be recognized as an exempt transfer, the Community Property Agreement, a certified copy of the death certificate and a Lack of Probate Affidavit must be provided to the auditor And, as with the other documents required under RCW 82.45.197, this documentation must be recorded per RCW 82.45.197(2). Note that the Lack of Probate Affidavit is a new feature under RCW 82.45.197 since its revisions effective June of 2016. A Lack of Probate Affidavit can be found on the Department of Revenue Website page that includes the Excise Tax Affidavits as referenced above. Note that if there is property in multiple counties, you should record a certified copy of the Agreement, as well as a certified copy of the death certificate and the Lack of Probate Affidavit, in all counties in which the decedent's property is located.

8. Life Estates and Remainder Interests.

(a) Creation; Implications. A life estate is created where a grantor conveys property to a grantee, but reserves a life estate. I have also seen a

testamentary distribution to an estate beneficiary, with a life estate reserved for a different beneficiary. This creates a remainder interest in the grantee who comes into full title when the life tenant dies. I don't recommend the use of life estates. Too many questions can arise regarding allocation of duties and privileges regarding the property. A TOD Deed would be preferable under the first example above and a trust under the second.

(b) Exemption; Documentation. At the death of the life tenant, title passes to the holder of the remainder interest free of excise tax so long as no consideration passes. A certified copy of the death certificate must be recorded. See WAC 458-61A-202(6) and (8)(d). See also RCW 82.45.197(1)(d).

9. Transfers by Operation of Law or if Will Not Probated.

(a) Application. As referenced above, new provisions under RCW 82.45.197 were enacted into law effective June of 2016 to flesh out exemptions under RCW 82.45.010(3)(a) and documentation required thereunder. My materials above address the application of this statute to particular non probate transfers. RCW 82.45.197(g) specifically addresses the situation where the property is transferred to one or more heirs by operation of law (e.g., intestacy) or under a Will that has not been probated, but absent the vehicles described above, e.g., Community Property Agreements, TOD Deeds, etc. RCW 82.45.197(g) also addresses transfers where there is a Will, but it has not been probated.

(b) Documentation. In order to take advantage of this exemption, a certified copy of the death certificate and the DOR Lack of Probate Affidavit referenced above are to be recorded. Because WAC 458-61A-202 has not yet been updated, the excise tax affidavit will need to refer to the applicable section under RCW 82.45.197. If the exemption is claimed where two transfers have taken place and not documented, e.g., husband dies and leaves property to wife with no documentation or probate and then wife dies and leaves property to children with no documentation or probate, certified copies of death certificates of both spouses must be supplied, along with DOR's Lack of Probate Affidavit.

10. Tenancies by the Entirety. In some states, for example, Hawaii, Oregon and Florida, spouses may take title as tenants by the entirety. This ownership has a survivorship component that passes title to the surviving spouse similar to a joint tenancy. While they aren't used in Washington, it's important to be aware of them if your client has out of state property. The survivorship aspect can interfere with your planning or can be a surprise in your estate administration.

11. Lifetime Gifts of Real Estate.

(a) Gifts of Real Estate. Gifts of real estate are ordinarily exempt from excise tax. See RCW 82.45.010(3)(a) and WAC 458-61A-201. They will be taxable, however, if consideration is given in return for the interest granted. Grantee's assumption of a debt will constitute consideration and render the transfer taxable.

(b) Not to be Used for Probate Avoidance**.** Often I will hear from clients or friends that they or a family member gifted their home to their children to avoid probate. They are not happy to learn that this deprives them of the step up in basis were the parent to have bequeathed the property at death. The attorneys' fees they would have paid for the probate pale in comparison to the likely tax savings they wasted by doing so. In addition, it exposes the property to the claims of creditors or divorcing spouses of the new owner.

(c) Medicaid Planning. If the client might have a need for Medicaid planning down the road, think twice about gifting their home. They should first consult with an attorney specializing in Medicaid planning to see if there would be an advantage to retaining the residence.

(d) Gift of Real Estate into Trust**.** A parent may wish to make a gift of real estate to their child in trust. As with any gift of an asset, the grantee will take the grantor's basis and will lose any stepped up basis they would have enjoyed had they inherited the property. There can also be a loss of the step up in basis at the death of the beneficiary if the asset is not included in the estate of the beneficiary. If a residence is placed in trust, it's also important to remember that it will not qualify for the $250,000 exclusion from capital gains tax upon sale.

(e) Qualified Personal Residence Trust**.** Consider whether the residence should be gifted under a Qualified Personal Residence Trust ("QPRT") under 26 CFR 25.2702-5 for clients potentially facing federal estate tax.

(f) Documentation for Gift. If there is a gift of real estate, in addition to providing an excise tax affidavit, the parties must also submit a supplemental statement. See WAC 458-61A-201(5). The supplemental statement can be found on the Dept. of Revenue's website: http://dor.wa.gov/Content/GetAFormOrPublication/FormBySubject/forms_reet.aspx

(g) Documentation for Gift to Trust**.** WAC 458-61A-210 provides that a transfer of real estate into an irrevocable trust does not trigger an excise tax unless there is consideration. Per WAC 458-61A-210(5), a copy of the trust or a statement described in WAC 458-61A-210(5)(b) describing the trust must be provided.

(h) Insurance. As with other transfers of ownership, the property insurance for the property needs to be changed. You should also inquire with a title company regarding the option of obtaining an endorsement to add the trust as an insured.

12. Use of Limited Liability Companies.

(a) General. It is not unusual for clients to place their real estate in a limited liability company for creditor protection. This can also be a good vehicle for

gifting. My comments below set forth some particular planning considerations related to holding real estate in a limited liability company.

(b) Implications for Out of State Real Estate. From a tax perspective, it is best to avoid placing out of state real estate in a limited liability company. This will cause the client to own a membership interest in the LLC rather than an interest in real estate. The membership interest will be considered personal property and be subject to the Washington Estate Tax. If the owner's overall assets won't subject them to the Washington Estate Tax or if there are particular liability concerns, though, an LLC still might make sense.

(c) Exempt Transfer of Real Estate to LLC. The transfer of an interest in real estate to an LLC where the beneficial ownership does not change is exempt from excise tax per RCW 82.45.010(3)(p) and WAC 458-61A-211.

(d) Insurance. If property is transferred to an LLC, it is important for the client to coordinate this with their property insurance broker. This could trigger the need for a commercial policy at higher rates, although it's possible the broker would just add the LLC as an additional insured. As with a transfer to a revocable living trust, you should also obtain an endorsement to the original title policy, although under the 2006 ALTA's Owner's policy, the new LLC should be an insured if wholly owned by the original title owner(s).

(e) Due on Sale. If the property is subject to a deed of trust or mortgage, the transfer to an LLC will likely trigger a due on sale clause. The owner may decide to wait until the loan is paid off or is refinanced before transferring to the trust. Alternatively, the deed of trust may allow for the transfer subject to lender approval. The costs of lender review and approval, however, may discourage the owner from transferring the property to the LLC while the deed of trust is in place.

(f) Transfer of a Controlling Interest in an LLC. If a controlling interest in an LLC is transferred, it can trigger an excise tax if consideration passes. See RCW 82.45.010(2) and WAC 458-61A-101. The statute defines a "sale" to include the "transfer or acquisition within any twelve-month period of a controlling interest in any entity with an interest in real property located in this state for a valuable consideration."

(g) Documentation for Transfer of a Controlling Interest. If you are transferring a membership interest in an LLC, it's probably not on your radar to prepare an excise tax affidavit because you are not preparing a deed. Instead you would be using an assignment of the LLC interest, which of course is not recorded. But, if there is a transfer of a controlling interest as described above, you still need to file a special excise tax affidavit for transfers of controlling interests with the Department of Revenue:

http://dor.wa.gov/Content/GetAFormOrPublication/FormBySubject/forms_reet.aspx.

Any exemption to the tax, e.g., a gift (with reference to the applicable WAC provision), is noted on the affidavit. A supplemental statement would also be required for the gift.

13. Do you need to Probate the Estate?

(a) Real Estate as a Factor for a Married Couple**.** Whether the decedent owned real estate may be a determining factor in whether to probate an estate. If the decedent was married and the other assets pass to the surviving spouse per beneficiary designations, and assuming it's not a complex or taxable estate, you may opt not to probate the estate. Granted, without a probate, you cannot deed the decedent's interest to the surviving spouse. But if the spouse needs to sell or refinance the property, title companies have traditionally worked with the spouse. They would prefer to see a Will that would pass the property to the spouse and have the same underwriting concerns as discussed earlier for non-probate transfers. They will require the surviving spouse to sign their Lack of Probate Affidavit as well. See also Section 9 above for documentation required under newly revised RCW 82.45.197. It's still important to file the Will even if you don't submit it to probate. See RCW 11.20.010 regarding the duty to file the Will.

(b) Single Decedent with Real Property; Small Estate Affidavit Not an Option. If the decedent is unmarried and has real estate, unless he or she has a utilized one of the non-probate tools described above, a probate will normally be a practical necessity. Keep in mind, that even if the property is worth less than $100,000, the Small Estate Affidavit procedure prescribed under RCW 11.62.010 is not an option for real estate.

(c) Probate in County Other Than Where Property Located. RCW 11.96A.050(4) allows for a probate to be entered in any county chosen by the Petitioner. If the probate is entered in a county other than the one where the decedent's property is located, it's important to remind the Personal Representative to notify any title company involved in a sale to search for the probate in the applicable county.

(d) Ancillary probate. If there is out of state real estate, you will need to hire local counsel in the state where it is located to help you conduct an ancillary probate in that jurisdiction. The process for the ancillary probate can vary from state to state, some being simpler than others.

14. Post Death Sale of the Property.

(a) Sale by Fiduciary**.** Whether the property is held in a trust or an estate, a threshold question is whether the property will be distributed to an heir or sold to a third party. If the property is going to be sold, I think it makes sense to have the property sold from the estate or trust by the fiduciary. While you could distribute and have the heirs or beneficiaries sell, I think the administrative benefits of having a single fiduciary controlling the sale, as well as certain limitations on warranties of fiduciaries, weigh in favor of sale from the trust or the estate.

(b) Listing the Property**.** If the property is being sold, I strongly recommend that the property be listed with a brokerage. Besides the likelihood that this will generate the best return, even taking into account broker's commissions, it's important for the fiduciary to make sure that the property is sold at a competitive rate in an arm's length transaction. In the case of a probated estate, the Personal Representative will be approached by professionals who search the court records or neighbors who want to buy the property and help the estate avoid commissions. But clearly their intent is to buy the property at a below market price. While an individual could choose this option, a fiduciary is exposing him or herself to questions by heirs if they engage in a private sale. If there is truly a serious buyer in the wings, you can always negotiate a carve-out or reduced commission with the broker when you list.

(c) Coordinating with Listing and Purchase Agreements: Special Warranty Deed. It's a good idea to have the fiduciary run the listing agreement past counsel before signed. If nothing else, it needs to be clear that the Personal Representative is listing the property and signing the purchase agreements in their capacity as Personal Representative. It's also important for the broker to know ahead of time that they should insert "Special Warranty Deed" in the section in the purchase and sale agreement describing the deed that will be issued. See Section 14(b) below for further discussion of Special Warranty Deeds.

(d) Form 17 Disclosure Statements; Exemption for Estates. A Form 17 disclosure statement is not required in an Estate per RCW 64.06.010

(e) Considerations When Form 17 Used. It's important to note that there is no exemption from the Form 17 Disclosure for sales from revocable living trusts. And occasionally—say if it's a tight market—a Personal Representative may be pressured into providing one. If a Form 17 is being provided, it's a good idea to walk through it with your client. They often want to say no if asked about negative aspects of the property. They also tend to get the impression from brokers that it's safe to say "don't know." I try to explain that the exposure comes from a misrepresentation. So if they aren't sure the answer is "no" then don't say "no." If they do know the answer, then don't say "don't know." And they shouldn't be afraid to answer "yes" if they believe it to be the case, even if it doesn't reflect well on the property.

(f) Limitations on Form 17 Waivers. Keep in mind that while a buyer can waive the Form 17, if the answer to any of the environmental questions would be yes, then they can't waive the Form 17 as to the environmental questions. And make sure the waiver is expressly stated in the agreement. If required and not waived, the buyer can rescind the agreement and walk from the sale.

15. Distribution of the Property.

(a) Distribution; Timing and Valuation**.** If property is being distributed to an heir, rather than being sold, you might consider conveying it out sooner rather than later. That way the heir will bear the responsibility of the expenses of the property,

including a new insurance policy for the property. If it is being distributed, it is important to get a date of death valuation of the property for purposes of establishing the basis. You won't have a sale price to establish fair market value. An appraisal is preferred, but a market analysis can be an option.

(b) Deeds**.** As discussed above regarding deeds to revocable trusts, it's important to research the title of property, e.g., last deed, tax information etc. You might also want to consult with a title company. The deed should be in the form of a Special Warranty Deed. In Washington, a Special Warranty Deed uses the conveyance language of a Bargain and Sale Deed (See RCW 64.04.040), i.e., "bargain, sail and convey," with additional language limiting warranties that typically reads as follows:

> "The Grantor(s) for _____ and for _____ successors in interest do(es) by these presents expressly limit the covenants of the deed to those herein expressed, and exclude(s) all covenants arising or to arise by statutory or other implication and do(es) hereby covenant that against all persons whomsoever lawfully claiming or to claim by, through or under said Grantor(s) and not otherwise, Grantor(s) will forever warrant and defend the said described real estate."

We also add language to our deeds reciting the information regarding the appointment of the Personal Representative, e.g., the cause number of the probate proceedings and county. The deed from an estate is often referred to as a Personal Representative's Deed, but again, the operative language of conveyance will usually be as discussed above for a Special Warranty Deed.

(c) Deeds from Trusts. Similar considerations apply to deeds from a testamentary trust or a Revocable Trust at the death of the grantor or from an inter vivos irrevocable trust.

(d) Title Products. The Personal Representative or Trustee could consider purchasing an owner's policy to benefit the heir and in doing so, will have better protection for the heir, plus the benefit of a title search. If it is a residence, keep in mind that the ALTA Homeowner's Policy adopted in 1998 has much broader coverage than the older policies. And no matter the type of policy used, you can also increase the coverage amount. Alternatively, you can also order a Subdivision Guaranty for a modest fee. This doesn't give you a policy, but does give you the benefit of a title search. You can find copies of different title products at: http://alta.org/.

(e) Spousal Issues. If the decedent was married, a few considerations are raised as to the grantor under the deed. RCW 11.02.070 states that the whole of the community property is subject to the probate administration. That would lead you to believe that the Personal Representative has the authority could convey the whole of the property. Title companies, however, understandably would prefer that the surviving spouse join in the deed, whether to a third party or to an heir or testamentary trust. RCW 11.02.070 also says that the Personal Representative shall "confirm" the surviving spouse's interest in the property to the surviving spouse. If the property is being

conveyed to the surviving spouse, we include a paragraph where the Personal Representative articulates the confirmation.

(f) Exemption; Documentation. There is an exemption from excise tax where the property is being conveyed to an heir. WAC 458-61A-202. An excise tax affidavit must also be provided, along with a certified copy of the Letters Testamentary or Letters of Administration. For deeds distributing property from a trust, per RCW 82.45.197(1)(b), a certified copy of the death certificate must be provided, as well as a copy of that portion of the trust instrument showing the authority of the grantor.

(g) Nonprorata Distributions. A deed out of an estate can often include a nonprorata distribution. Say the husband dies and his Will gives all of his estate to his wife in trust. Assume his estate consists of his half interest in a million dollar parcel of real estate and his half interest in a million dollar bank account. Assume further that his surviving spouse wants all of the real estate to go in the trust and wants all of the cash to come to her outright. In such a case, the deed from the Personal Representative, signed by both the Personal Representative and the spouse, will recite that it is making a nonprorata distribution and will convey 100% of the title into the testamentary trust. Note that there is a specific exemption for nonprorata distributions under WAC 458-61A-202(2).

(h) Grantor; Grantee. The grantor under the deed should of course be the named Personal Representative in his or her capacity as Personal Representative of the pertinent estate or Trustee of the particular trust. If the conveyance is an individual, be sure and clarify the marital status and characterization of the grantee. For example, "Mary Doe, a married person, as her separate estate." If conveying to multiple heirs, articulate that they are taking as tenants in common and their respective percentage interests. The heirs may wish to have the property ultimately titled in their revocable living trust. Or multiple heirs may wish the property to be in an LLC. The role of the fiduciary, though, should be to convey to the heirs and then they can in turn convey to the new trust or entity.

16. Property Insurance. It's important that the property be sold or distributed as quickly as reasonably possible after a death. Insurers don't tend to renew policies where the original insured is deceased. You might have to scramble for a more expensive policy if the original one expires. There can also be exclusions from coverage if a loss occurs and the home is not occupied. It is also good practice to notify the homeowner's insurance if there is a death. If the property is distributed to an heir, it's important that they have insurance in place for the property upon receipt.

17. Final Considerations. There is a significant interplay between trusts and estates and real estate law. While some of you may have colleagues—whether real estate attorneys or paralegals--who can help you with this analysis and documentation, I believe it will make you a better estate planner to have working knowledge of the issues that real estate holdings and transfers pose in your practice.

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CHAPTER FOUR

TRUST AND ESTATE DISPUTES - TEDRA

December 2016

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SEAN A. RUSSEL is a shareholder with Stokes Lawrence, PS and is a member of the firm's Trust and Estate Litigation Group. He is a commercial litigator who represents clients in matters involving fiduciary duty claims arising from trust and estate administration, as well as privately-held business and shareholder disputes. He has previously presented on related topics about the duties of fiduciaries in Washington and litigating breach of fiduciary duty claims under Washington's Trust and Estate Dispute Resolution Act ("TEDRA"). He is admitted to practice in Washington and before the U.S. District court for the Eastern and Western Districts of Washington. Sean primarily practices out of the firm's Yakima office.

These materials were modified from a version prepared by Mr. Russel's law partner, Karolyn Hicks. Mr. Russel obtained the permission from Ms. Hicks to reproduce the modified version herein.

A. INTRODUCTION

The Trust and Estate Dispute Resolution Act (TEDRA) was enacted in 1999. As described by one of its drafters, TEDRA is a set of procedures that applies to judicial and nonjudicial resolution of disputes involving matters within the purview of Title 11. As a procedural statute, it does not create new or independent claims or causes of action, and instead, provides mechanisms by which such claims may be presented, heard and resolved. TEDRA serves as a model and a vehicle for effective resolution of disputes and as a means to address issues as they arise in the course of probate and trust administration.

B. DOES TEDRA APPLY?

If you are dealing with an issue in a trust or estate that could be or is in dispute, TEDRA more likely than not applies. RCW 11.96A.080 identifies specifically certain circumstances in which TEDRA does not apply (e.g., wrongful death actions, and disputes already covered by RCW Chapter 11.88 [guardianships] and RCW Chapter 11.92 [guardianships]).

RCW 11.96A.080(2) provides that TEDRA supplements, but does "not supersede . . . any otherwise applicable provisions and procedures contained in this title [RCW 11]."

Examples of circumstances in which TEDRA is appropriate:

- Will contests or contests to the validity of a revocable trust.
- Petitions to declare whether someone is or is not a beneficiary.
- Petitions to characterize the property of a decedent as "community" or "separate."
- Petitions to declare that a revocable trust has become irrevocable under a term providing for that result upon the incapacity of the trustor.

- Petitions for appointment or change of trustee (see, e.g., RCW 11.98.039(4)).
- Petitions for surcharge or damages against fiduciaries alleged to have breached their duties.
- Petitions to approve acts in furtherance of settlement agreements that were not executed by all interested parties.
- Petitions for reformation of a will or trust.
- Petitions to declare whether a community property agreement is valid or invalid.
- Petitions under RCW 11.68.070 to remove personal representatives.
- Petitions brought by fiduciaries for instruction or direction.
- Petitions to modify trust language and terms to meet changing needs and circumstances.
- Petitions to approve changing the identity of a charitable beneficiary.

C. THE PROCEDURE FOR INITIATING A TEDRA PETITION

1. Start a New Action

RCW 11.96A.090 now requires a TEDRA action be commenced as a new action. It "may" then be consolidated with an existing action "for good cause shown" by a party on a motion or by the court on its own. RCW 11.96A.090(2) and (3).

2. Name the Correct Parties

RCW 11.96A.030(5) provides that "parties" are persons who have "an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner." RCW 11.96A.030(5) identifies a list of possible "parties" who should be named and joined. Of particular interest are the following:

. . . .

(i) Any other person who has an interest in the subject of the particular proceeding;

(j) The attorney general, if required under RCW 11.110.120;

(k) Any duly appointed and acting legal representative of a party such as a guardian, special representative or attorney in fact;

(l) Where applicable, the virtual representative of any person described in this subsection the giving of notice to whom would meet notice requirements as provided in RCW 11.96A.120;

. . . .

RCW 11.110.120 provides that the Attorney General ". . . shall be notified of all judicial proceedings involving the charitable trust or its administration in which, at common law, he is a necessary or proper representative of the public beneficiaries."

RCW 11.96A.120 is the provision of TEDRA that clarifies the Trust Act's codification of the common law doctrine of "virtual representation," under which notice to an appropriate "virtual representative" can constitute notice to those parties he or she represents (and by which the virtual representative's signature on a nonjudicial dispute resolution agreement binds all parties he or she represents).

A guardian may also bind the estate he or she controls: agents having authority to act with a particular question or dispute may represent and bind the principal; a trustee may bind the beneficiaries of a trust; and a personal representative may bind persons interested in the estate. RCW 11.96A.120(4).

In circumstances where the standards of RCW 11.96A.120 are met, appointment of guardian ad litem under RCW 11.96A.160, or of a special representative under RCW 11.96A.250, is generally unnecessary. RCW 11.96A.120 is clear that a virtually represented person cannot have a conflict of interest involving the matter with the person representing him or her.

Great care should be taken in correctly identifying appropriate parties to a TEDRA petition (or to a nonjudicial dispute resolution agreement), particularly those who may "wear more than one hat" and thus, may require notice in multiple capacities or those who may initially not appear to require notice in their individual capacity, but who act in a representative capacity that does require notice.

3. Serve a Summons

A summons in substantially the form described in RCW 11.96A.100(3) is required. The summons and petition must be served on all those who have an interest in the subject matter of the hearing, not just the petitioner's adversary. RCW 11.96A.100(2).

NOTE: Because TEDRA is a "special proceeding," its procedures "trump" regular civil and court rules when the other rules are inconsistent. *See* RCW 11.96A.090. Hence, for example, because a TEDRA petition is commenced by filing, but not by service, *see* RCW 11.96A.100(1), whereas CR 3 provides for commencement by filing or service, serving a TEDRA petition without filing it may result in loss of a claim due to the running of a statute of limitations prior to filing.

RCW 11.24.020 [will contests] provides:

> Upon the filing of the petition referred to in RCW 11.24.010 *notice shall be given as provided in RCW 11.96A.100* to the executors who have taken upon themselves the execution of the will, or to the administrators with the will annexed, to all legatees named in the will, or to their guardians if any of them are minors, or their personal representatives if any of them are dead, *and to all persons interested in the matter as defined in RCW 11.96A.030(5)*.

In addition, RCW 11.96A.030 has been amended to add a new section (1) that provides:

> (1) "Citation" or "cite" and other similar terms, when required of a person interested in the estate or trust or a party to a petition, means to give notice as required under RCW 11.96A.100. "Citation" or "cite" and other similar terms, when required of the court, means to order, as authorized under RCW 11.96A.020 and 11.96A.060, and as authorized by law.

RCW 11.24.010 provides that tolling of the four month limitations will begin when a petition is filed with the court rather than when the petition is served on the personal representative; however, the petitioner must personally serve the personal representative within ninety (90) days from the date he or she files the petition with the court, otherwise the action will not be deemed to have commenced within the four month period. RCW 11.24.010 further provides that if no individual files or serves a petition within the aforementioned time period, then the probate or rejection of the will is determined to be binding and final.

4. An Answer Should be Filed

The form of summons required by TEDRA provides notice to its recipients that their answer (i.e., any defense or objection to the petition) is due no later than five (5) days before the date of the hearing on the petition. *See* RCW 11.96A.100(3).

The date for hearing on a TEDRA petition is to be at least twenty (20) days after personal service or mailing. RCW 11.96A.110(1). Notice in electronic form will be permitted if it complies with the notice requirements for written notice and the party receiving notice consents to receiving notice by electronic transmission. RCW 11.96A.110(1).

NOTE: Because TEDRA provides that "the date of service shall be determined under the rules of civil procedure," and because TEDRA provides for service of notice by mail or by electronic transmission, as a practical matter, when serving notice via mail counsel should set any hearing date at least twenty-three (23) days after mailing a TEDRA petition and notice/summons. *See* CR(6)(e) ("Whenever . . . the notice or paper is served upon him by mail, three days shall be added to the prescribed period.").

RCW 11.96A.100(5) provides that answers and counterclaims or cross-claims are due "at least five days before the date of the hearing" (i.e., *generally* at least fifteen

(15) days after service of a TEDRA petition) and that all replies are due at least two days before the date of the hearing.

Proof of service of the petition by personal service, mailing, or electronic delivery, must be made by affidavit or declaration filed at or before the hearing. RCW 11.96A.110(2). RCW 11.96A.140 makes clear that deficiencies in notice can be waived by a party, for example, by the party's appearance at the hearing without objecting to lack of proper notice or personal jurisdiction.

5. The Initial Hearing

Under TEDRA, the "first" hearing can be, and often is, the only hearing on the merits and can thereby result in a final order resolving the issue or dispute. Sections 7 through 10 of RCW 11.96A.100 provides:

> (7) Testimony of witnesses may be by affidavit;
>
> (8) Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law;
>
> (9) Any party may move the court for an order relating to a procedural matter, including discovery, and for summary judgment, in the original petition, answer, response, or reply, or in a separate motion, or at any other time; and
>
> (10) If the initial hearing is not a hearing on the merits or does not result in a resolution of all issues of fact and all issues of law, the court may enter any order it deems appropriate, which order may (a) resolve such issues as it deems proper, (b) determine the scope of discovery, and (c) set a schedule for further proceedings for the prompt resolution of the matter.

Legislative history reflects that these provisions were intended to "clarify that a court may resolve a matter promptly and efficiently at the initial hearing while also providing the court as much discretion and flexibility as possible to establish an appropriate procedure to be followed in any particular proceeding . . . ."

NOTE: As a practical matter, counsel for the various parties may, and often do, reach agreement on what they would like to have happen (or not happen) at the initial hearing and will jointly present that information to the commissioner or judge. Time limits on oral argument in the ex parte department often result in referral at the initial hearing to the presiding department for assignment to a trial judge for hearing at a date and time subsequent to that set by the petitioner in his or her notice. Assignment to a superior court judge for hearing of a TEDRA petition, based solely on the time constraints of the ex parte department, does not necessarily mean that live testimony is authorized or that discovery prior to a delayed hearing will be allowed.

D. TRIAL UNDER TEDRA

If the initial hearing on a TEDRA petition has not been "a hearing on the merits to resolve all issues of fact and all issues of law," RCW 11.96A.100(8), then the petition will likely be set for a subsequent hearing or trial.

1. Discovery Under TEDRA

In the past, TEDRA did not include a great deal about discovery procedure or adherence to the civil or local rules regarding discovery or pretrial scheduling. However, numerous provisions of TEDRA provided the trial court with ample jurisdiction and discretion to enter orders governing discovery in a particular TEDRA proceeding. *See*, *e.g.*, RCW 11.96A.020(2); RCW 11.96A.030(1); RCW 11.96A.040(3); RCW 11.96A.060; RCW 11.96A.100(9) and (10).

RCW 11.96A.115 was added in 2006 to address discovery and to limit discovery to two situations. First, discovery is available in judicial proceedings that have been commenced under RCW 11.96A.100. Second, discovery may be available where the court has ordered discovery with regard to a "matter" for "good cause." In either event, the RCW 11.96A.115 provides that " . . . discovery shall be conducted in accordance with the superior court civil rules and applicable local rules." When discovery has been ordered by the court in a "matter" that is *not* a "judicial proceeding" brought under RCW 11.96A.100, discovery may be "otherwise limited by the court."

As a practical matter, it is best to decide what you want, attempt to enter scheduling orders by agreement and ask the court for assistance when necessary either to compel or to obtain protection from discovery.

2. Pretrial Motions

As with discovery, TEDRA's provisions make clear that motion practice will be allowed when consistent with TEDRA's goal of prompt resolution of trust and probate disputes. *See*, *e.g.*, RCW 11.96A.100(9) and (10). Superior court judges are generally comfortable with applying the civil rules and their local rules to TEDRA proceedings; however, the timing of "prompt" hearings and trials under TEDRA often results in compression of standard pretrial deadlines for summary judgment motions or motions *in limine*. Again, attempting to schedule by agreement, acknowledging which cases warrant specialized briefing schedules, and seeking appropriate orders from the trial court is precisely the sort of flexibility TEDRA authorizes.

3. Trial

RCW 11.96A.170 preserves trial by jury in TEDRA actions where the party is otherwise entitled to a trial by jury and provides that, in nonjury cases, the court shall "try the issues, and sign and file the decision in writing, as provided for in civil cases." Because it is not inconsistent with TEDRA, ER 904 can be used to good effect to streamline admission of documents at trial, particularly in "document intensive" cases. Motions *in limine* (for example, to exclude testimony barred by the Deadman's Statute) are also helpful.

E. ARBITRATION UNDER TEDRA

1. Notice of Arbitration

RCW 11.96A.310 provides the method by which a TEDRA arbitration may be commenced. The circumstances triggering arbitration are more restricted than those for mediation. Arbitration is available only if:

- Mediation has "concluded";
- A court has decided mediation is not required and has not otherwise disposed of the matter;
- All of the parties or virtual representatives of the parties agree not to use mediation; or
- The court has ordered arbitration.

Timing for serving a notice of arbitration is set out in RCW 11.96A.310(2), which provides that a notice of arbitration should be served no later than twenty (20) days after the conclusion of an unsuccessful mediation or an order deciding that mediation is not required. Again, the statute provides an approved form of notice. RCW 11.96A.310(2)(b).

As with mediation, the recipient of a notice for arbitration can, within 20 days, file a petition objecting to the arbitration process. A hearing on the petition objecting to arbitration must be held between ten (10) and twenty (20) days after filing. RCW 11.96A.310(3).

As with mediation, arbitration will be compelled, unless the objector persuades the court that "good cause" exists not to arbitrate. As with mediation, an order compelling or denying arbitration is not subject to revision or appeal. RCW 11.96A.310(3).

TEDRA arbitrators must be either:

- An attorney with five years experience in trust or estate matters (note the "or" rather than the "and" which appears in the analogous mediation provision); or
- An attorney with five years experience in litigation or other formal dispute resolution involving trusts or estates; or
- Any individual with special skill or training with respect to the matter.

RCW 11.96A.310(4)(b).

The parties must exchange lists of acceptable arbitrators within thirty (30) days of receipt of the notice of arbitration. RCW 11.96A.310(4)(a). If the parties cannot agree on an arbitrator within ten (10) days of the exchange of lists, then any party may petition the court to appoint an arbitrator from the lists that have been exchanged. *Id.*

RCW 11.96A.310(4)(b) provides that the mediator used by the parties can also serve as the arbitrator.

There is no statutory timeframe for arbitration actually occurring, presumably because the statute presumes the arbitrator will handle scheduling and discovery matters. TEDRA arbitration is governed by RCW Chapter 7.06 (Mandatory Arbitration of Civil Actions) and the applicable superior court MAR Rules. If the local county has not created a mandatory arbitration program, then the King County mandatory arbitration rules are to be used. RCW 11.96A.310(5)(a).

Parties have ten (10) days to respond to the matter that is subject to the arbitration. RCW 11.96A.310(5)(b). Unless the parties agree otherwise, or the arbitrator rules otherwise, normal rules of evidence will govern the arbitration. RCW 11.96A.310(5)(g).

Costs of arbitration should be split equally, RCW 11.96A.310(e)(i), subject to the usual exception for reallocation by the arbitrator "as justice requires," which is codified at RCW 11.96A.310(6). Arbitrators are to issue their decisions in writing "within thirty (30) days of the conclusion of the final arbitration hearing," serve all parties "promptly," and file proof of service. RCW 11.96A.310(7). Any party may file the arbitrator's decision and give notice to the other parties of having done so. RCW 11.96A.310(8).

2. Appealing an Arbitrator's Decision

RCW 11.96A.310(9) provides that an arbitrator's decision can be appealed within thirty (30) days. If an appeal is filed, the court will try the matter *de novo* on all issues of fact and law, including by a jury, if demanded.

If an arbitrator's decision is appealed, the prevailing party "must" be awarded costs, including expert witness fees and attorney fees, in connection with the judicial resolution of the matter. RCW 11.96A.310(10). However, the court will allocate the payment against the nonprevailing parties "in such amount and in such matter as the court determines to be equitable." According to RCW 11.96A.310(10), its provisions "take precedence over the provisions of RCW 11.96A.150 or any other similar provision."

F. MEDIATION UNDER TEDRA

1. Notice of Mediation

RCW 11.96A.300 provides in detailed fashion the method by which a party can obtain mediation -- voluntarily or by court compulsion -- under TEDRA. Notice of mediation can be served at any time if the matter has not been set for hearing (i.e., if no petition under RCW 11.96A.100 has been noted for hearing). The form of written notice of mediation when a hearing has not yet been noted is set forth in RCW

11.96A.300(1)(a). The statutory form of notice recites all of the procedural information that is set forth throughout the balance of RCW 11.96A.300.

If the matter has been set for hearing, then the statutory form of notice set forth in RCW 11.96A.300(1)(b) should be used and notice must be filed and served at least three days before the hearing.

2. Objecting to Mediation

Of course, if all parties agree to mediation, then mediation will occur in the normal course. However, if the party served with a notice of mediation does not wish to participate, RCW 11.96A.300(2) provides a method to object. Again, the procedure for objecting varies depending on whether there is a pending hearing date for an already-filed TEDRA petition. If no hearing has been set, the objecting party must, within 20 days of being served with the notice of mediation, object by petition and note the petition for a court hearing no less than 10 days (RCW 11.96A.300(2)(d)) and no more than 20 days from filing the petition objecting to mediation (RCW 11.96A.300(2)(c)). In King County, the standard 14 day notice works well. KC LR 98.14.

If a hearing on the matter has already been noted, then the party objecting to mediation may either object via petition or may make his or her objection orally at the hearing. RCW 11.96A.300(3).

A petition objecting to mediation can also ask the court to decide the matters at issue or include additional matters. RCW 11.96A.300(2)(b).

Under the provisions for objecting, the burden is on the objector to show "good cause" why the mediation should not proceed. RCW 11.96A.300(2)(d); RCW 11.96A.300(3). The court's order either compelling mediation or relieving a party from the obligation to mediate is not subject to appeal or revision. *Id.*

Once mediation is agreed or ordered, the parties must each, within thirty (30) days of the receipt of the initial notice, or within twenty (20) days of court determination, whichever is later, furnish all other parties or virtual representative, with a list of acceptable mediators; if the parties cannot agree on a mediator within ten (10) days after the list of mediators is required to be furnished, a party may petition the court to pick from the list of acceptable mediators submitted to the court by each party. RCW 11.96A.300(4)(a).

TEDRA mediators must be either:

- An attorney with five years experience in estate and trust matters;
- Any individual with special skill or training in the administration of trusts and estates; or
- Any individual with special skill or training as a mediator, and must neither have an interest in the affected estate, trust, non-probate assets, nor be related to any party.

RCW 11.96A.300(4)(b).

The parties should be able to set a date for mediation by agreement. If that is not accomplished within ten (10) days of mediator selection, the court will set the date on petition from any party. RCW 11.096A.300(5). The parties must stay in the mediation for at least three hours, unless resolved earlier. RCW 11.96A.300(b).

RCW 11.96A.300(8) requires that the costs of mediation be borne equally by the parties. This can result in disputes over division of mediator fees in multiparty cases. Also, RCW 11.96A.300(8) provides an exception for allocating costs of compliance that may have been imposed by the court under RCW 11.96A.320 (which provides for a "Petition for Order Compelling Compliance," and authorizes a myriad of costs and fees to be imposed on the noncomplying party). Another exception to RCW 11.96A.300(8)'s

"equal sharing" rule may be applicable if the mediation is unsuccessful "and the court or arbitrator finally resolving the matter directs otherwise." This latter exception is consistent with RCW 11.96A.150, TEDRA's overarching attorneys fee provision.

Assuming mediation is successful, RCW 11.96A.300(7) requires the drafting and execution of nonjudicial dispute resolution agreement under RCW 11.96A.220. (*See* discussion at Section G, *infra*.) Best practice is to bring with you to mediation a template binding agreement that includes the names of the parties, jurisdiction, venue, subject matter, whether a special representative should be discharged, standard terms (mutual releases, dispute resolution, governing law, etc.), and a blank section to fill in the actual terms of the agreement if one is reached. Sharing the template, without the settlement terms, early in the mediation session can also reduce the amount of time that is needed at the conclusion of the mediation to draft and negotiate the nonjudicial dispute resolution agreement. The other parties can review the template during the "downtime" when the mediator is in another room.

G. SETTLEMENT UNDER TEDRA.

1. "Binding Agreements"

Because one of TEDRA's primary purposes is to keep trust and estate disputes from resulting in costly and unnecessary litigation whenever possible, *see* RCW 11.96A.010, RCW 11.96A.210 and RCW 11.96A.260, the procedures addressed in this section can be used either before litigation is ever filed or to resolve litigation which has been filed, but where the parties have been able to resolve matters short of the actual hearing or trial.

TEDRA's nonjudicial dispute resolution procedures, found at RCW 11.96A.210 – .250, can be invoked at any time by fiduciaries, beneficiaries and/or other interested

parties who are in agreement with regard to resolution of an issue that could be (but is not necessarily) contentious. TEDRA's nonjudicial dispute resolution provisions can be used, for example, to modify an obsolete trust provision, to terminate a trust early, to agree to a methodology for characterizing property in an estate as "separate" or "community," to create a mechanism for resolving future disputes, or to change or add fiduciaries. Almost anything that could be the subject of a petition under TEDRA can be the subject of a TEDRA nonjudicial dispute resolution agreement.

RCW 11.96A.220 requires a written agreement, signed by all parties, which (subject to RCW 11.96A.240's procedure for a special representative to seek court approval) "shall be binding and conclusive on all persons interested in the estate or trust." RCW 11.96A.220 contains suggested, but not mandatory, elements of a nonjudicial dispute resolution agreement (i.e., recitations regarding jurisdiction, governing law, waiver of notice of filing under RCW 11.96A.230 and discharge of any special representatives).

A virtual representative's signature on a nonjudicial dispute resolution agreement binds all parties he or she represents. In the absence of a conflict of interest, RCW 11.96A.120(4) confirm that a trustee may represent and bind the beneficiaries of a trust, a guardian may represent and bind the estate that the guardian controls, an agent may represent and bind his or her principal, and a personal representative of a decedent's estate may represent and bind persons interested in the estate.

TEDRA adds the innovation of a "special representative" (*see* RCW 11.96A.250 and .030(5)(k)) to represent the interests of an interested party who is a minor, incompetent or disabled, unborn or unascertained or whose identity or address is

unknown. Unlike a court appointed guardian ad litem, a special representative can be nominated by the parties, and the trial court should generally act on the nomination of the parties in the absence of evidence that the nominated person would not act with impartiality or prudence. RCW 11.96A.250(1)(b). *In King County, the Commissioners want the parties to propose more than one special representative for them to select; other counties will appoint one if only one is proposed.* Petitions to appoint a special representative may be heard without notice and the person so appointed is then authorized to enter into binding nonjudicial agreements on behalf of the individual beneficiary or beneficiaries on whose behalf he or she has been appointed.

A special representative will be discharged from responsibilities and have no further duties at the earlier of: six (6) months from the date of appointment, or the execution of a non-judicial agreement by all the parties or their virtual representatives. *See* RCW 11.96A.250(4); however, in the absence of an order approving the agreement, he or she remains subject to claims for the three years statutes of limitations period following discharge. *See* RCW 11.96A.070(3)(i). This statute of limitations is shortened to the date of court approval of the nonjudicial dispute resolution agreement if the special representative seeks and obtains judicial approval of agreement under RCW 11.96A.240.

Regardless of whether a special representative has been appointed or, if appointed, has petitioned for approval of a nonjudicial agreement, any party may file the agreement or a memorandum of it with the court (but may only do so within thirty (30) days of execution in circumstances when the special representative has given his or her written consent). In cases where there is no special representative, the

agreement or a memorandum of the agreement, may be filed sooner than thirty (30) days after execution pursuant to RCW 11.96A.230. "On filing . . . the agreement will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust." RCW 11.96A.230(2).

NOTE: Particularly where a nonjudicial dispute resolution agreement has been reached without the matter being resolved having been placed in the public record (through a petition or otherwise), the parties' interests in privacy can be protected by choosing not to file the agreement at all *or* by filing the "memorandum summarizing the written agreement" authorized by RCW 11.96A.230. The memorandum can be carefully drafted to omit details regarding specific dollar amounts or other information that is not necessary to place in the public record.

2. How do you bind parties who never participated?

As set forth above, TEDRA provides a mechanism for establishing jurisdiction over parties, through its notice procedures, in order to "corral" all interested parties so that they will be bound by the court's final decisions. Often, however, parties who have been given proper notice do not bother to appear or respond. Subsequently, parties who have appeared and responded may reach a settlement under Civil Rule 2A that is the result of negotiations between those individuals as the primarily interested parties. Those parties must then decide whether to rely on the failure of the others to appear and participate or on a previous entry of default against a nonappearing party. *See*, *e.g.*, *In re Estate of Stevens*, 94 Wn. App. 20, 971 P.2d 58 (1999) (beneficiary's motion to vacate default and objection to entry of judgment on interpleader rejected because she failed to respond to petition and summons or to seek diligently vacation of default order). The settling parties may also wish to take additional steps to achieve a resolution which is final and binding on all parties by seeking judicial approval of the acts they have committed to take in furtherance of the settlement agreement.

These issues should be carefully considered, as one or more parties to a settlement may wish to condition the obligations agreed to in the settlement agreement on court approval of the entire settlement. In such cases, it may be advisable to return to the initial "roster" of interested parties, file a new petition under TEDRA to approve the settlement and again give notice to all interested parties. Counsel should determine in each situation whether such an additional petition with notice is necessary or prudent on the facts of their particular case.

H. ATTORNEYS FEES UNDER TEDRA

TEDRA's attorney fee provision, found at RCW 11.96A.150, states:

> (1) Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may *but need not* include whether the litigation benefits the estate or trust involved. (emphasis added).
>
> (2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

The sentence "[i]n exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved" was not in the original version of RCW 11.96A.150 enacted in 1999, but was added in 2007.

Prior to this addition, case law dictated that "[t]he touchstone of an award of attorney fees from the estate is whether the litigation resulted in a substantial benefit to the estate. *In re Estate of Black*, 116 Wn. App. 476 (2003) (citing *Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324, 1333 (1991)). Indeed, the Washington Supreme Court in *Niehenke* (a case decided prior to the enactment of RCW 11.96A.150) went as far as to hold "[r]ecent Washington cases suggest that it is inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate; we agree." (emphasis added). Where there was no benefit to the estate as a whole and only particular beneficiaries benefited by successful litigation, fees were denied. *See e.g.*, *In re Ehlers*, 80 Wn. App. 751, 911 P.2d 1017 (1996) (court noted that even if beneficiaries had succeeded, which they did not, they would not have been entitled to fees because their action would have only benefited them).

To the extent one may be looking for trends -- if the Courts follow the legislature's lead, we should see a broadening of the application of TEDRA's attorney fee provision beyond cases where the litigation results in a "substantial benefit" to the estate. *See e.g.*, *In re Estate of Haviland*, 162 Wn. App. 548, 255 P.3d 854 (2011)("RCW 11.96A.150 and RCW 11.24.050 grant this court discretion to award fees in this case. *Because it is equitable to do so*, we grant their request.") (emphasis added).

RCW 11.96A.150 also differs from the prior RCW 11.96.140 in three minor ways: (1) the standard by which the court exercises its discretion was changed from "as justice may require" to as the "court determines to be equitable," which in practice may be an insignificant change; (2) RCW 11.96A.150 clarifies the sources from which the court may award fees, although it probably does not broaden the scope of the prior

RCW 11.96.140; and (3) RCW 11.96A.150 clarifies that the fees provision applies to guardianships (although arguably so did RCW 11.96.140).

I. OTHER NOTABLE ATTORNEY FEE PROVISIONS FOR TRUST AND ESTATE LITIGATION

1. RCW 11.24.050: The attorneys' fees provision applicable to will contests:

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

The term "costs" used in the statute is not limited to statutory costs under RCW 4.84.010, but includes reasonable attorneys' fees. *In re Estate of Zimmerli*, 162 Wash. 243, 250, 298 P. 326 (1931)(applying former codification of RCW 11.24.050); *see generally In re Estate of Starkel*, 134 Wn. App. 364, 134 P.3d 1197 (2006)(contestant did not act with probable cause when decedent's dispositional intent had been historically clear, thereby justifying award of attorneys fees and costs on appeal to the estate); *In re Estate of Kessler*, 95 Wn. App. 358, 977 P.2d 591 (1999)(no attorneys fees awarded where will contest unsuccessful because evidence did support *some* inference of fraudulent inducement).

2. RCW 11.48.210: Attorneys representing the personal representative of an estate are to be compensated out of the estate "as the court shall deem just and reasonable." The personal representative's attorneys' fees are considered expenses of administration and are given first preference for payment from the estate. RCW 11.76.110 ("After payment of costs of administration the debts of the estate shall be paid in the following order . . . "). RCW 11.48.210 does not apply to nonintervention estates. In re Estates of Aaberg, 25 Wn. App. 336, 344, 607 P.2d 1227 (1980).

Attorneys' fees paid in a nonintervention probate, however, may be reviewed. RCW 11.68.070, 11.68.110-.114; In re Estate of Coates, 55 Wn.2d 250, 256-60, 347 P.2d 875 (1959).

3. RCW 11.68.070: Attorneys' fees for successful removal or personal representatives. Any heir, devisee, legatee or unpaid creditor who has filed a claim may file a petition to remove a personal representative with nonintervention powers, alleging that he or she has failed to execute his or her trust faithfully or that he or she is subject to removal for any reason.

> In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words "Powers restricted" upon the original order of solvency together with the date of said endorsement, and in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the court determines.
>
> *Id.*

4. RCW 11.76.070: Attorneys' fees to contest an erroneous account or report. If any interested party retains legal counsel either to compel or to challenge an accounting or report and the court orders an accounting or denies approval of the account as rendered by the personal representative, the court may in its discretion, and in addition to statutory costs, award reasonable attorneys' fees in favor of the person instituting the proceedings and against the personal representative or the surety on any bond. RCW 11.76.070; In re Estate of Mathwig, 68 Wn. App. 472, 478-79, 843 P.2d 1112 (1993); In re Estate of Hamilton, 73 Wn.2d 865, 868-69, 441 P.2d 768 (1968).

5. RCW 11.96A.310(10): makes mandatory an award of attorneys' fees and costs to the prevailing party in any appeal from an arbitration decision. In re Estate of Kerr, 134 Wn.2d 328, 949 P.2d 810 (1998); In re Guardianship of Nicholson, 101 Wn.

App. 1057, 2000 WL 1022869 (July 25, 2000) (unpublished). This section takes "precedence over the provisions of RCW 11.96A.150."

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CHAPTER FIVE

POWERS OF ATTORNEY, DIGITAL ASSETS, AND PARTNERSHIP AUDIT

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"Advances in computer technology and the Internet have changed the way America works, learns, and communicates. The Internet has become an integral part of America's economic, political, and social life."[1]

INTRODUCTION

The rise of the internet has changed the way our clients conduct their lives; accordingly, it changes the way we must approach their estate planning. Digital assets that (1) have intrinsic financial value, (2) are the primary means of accessing other assets of financial value, or (3) hold unique sentimental value now comprise a significant component of our clients' property and should be addressed in the estate planning and administration process. Part I of this article will address how the rise of the internet has resulted in the creation of digital assets and why they need to be considered in a client's estate plan. Part II will discuss how digital assets should be addressed in the estate planning process. Part III will address how to access the digital assets of a deceased or disabled client.

PART I: The Rise of the Internet Has Changed the Way We Plan Our Clients' Estates

Years ago, the death of a client would prompt the estate planning attorney (or someone from his or her office) to sort through paper files at the decedent's home and office and to collect the mail as it was delivered in an effort to create a list of bills to pay, services to cancel, assets to custody and creditors to notify. However, in today's digital age, there may not be a paper trail[2] as the important information regarding bank and brokerage accounts, recurring expenses, insurance and debts are now stored digitally on the client's computer, smartphone or email account. If the client's digital files cannot be accessed promptly, important bills may go unpaid, valuable assets may be overlooked, and the estate administration process may be unavoidably delayed.

One example of how this could cause problems can be seen in creditor claim proceedings. For estates that are insolvent, state law determines the order in which creditors are to be paid and, consequently, which creditors should not be paid. If a decedent has arranged for automatic bill-paying from his or her bank account, the fiduciary may need to act immediately to stop those payments. Not only could automatic payments overdraw an account, they could violate the ordering rule for payment of creditors if the estate is insolvent, which presents a liability risk to the fiduciary.

While lack of access to a client's important data is a significant problem, it is not the only problem that digital assets present to the estate planner. Not only are digital files the key to important information concerning assets of value such as bank accounts and insurance, but in many instances, those digital files themselves have significant

[1] President Bill Clinton, *at* http://www.clinton4.nara.gov/WH/EOP/html/principals.htmll (last visited Sept. 24, 2012).
[2] *See* Simovska, "Are we Becoming a Paperless Society?" WLUC TV6 News, 12/16/ 2011.

financial or sentimental value. If steps are not taken during the estate planning process to preserve and protect digital assets in the event of death or disability, the estate may suffer significant financial loss and precious memories of the decedent's life may be permanently unrecoverable.

While providing a precise definition of a digital asset is nearly impossible given how fast technology changes, a current working definition would include electronic content, information and/or media and the right to use that content, information or media.[3] The most common digital assets include email accounts, smartphones, tablets, netbooks, computers, online sales accounts, online purchasing accounts, online storage accounts, webpages, domain names, blogs and social networking profiles. Often forgotten are the intellectual property rights in digital assets, which are crucial given that content and information, without the legal right to use it, is not an asset at all since it cannot be used freely without fear of legal consequence or liability.[4]

Financial Value of Digital Assets

While some digital assets have little or no financial value themselves, some have significant intrinsic financial value or can be the key to unlocking other assets with value. For example, a domain name, which is an identification string used to identify the location of a particular website, often has little or no value to third parties. However, a domain name can have significant value if it is tied to a popular internet search word or phrase, words or phrases used for selling goods or services, or a company brand name. Over the last few years, several domain names have sold for significant value. For example, Vacationrentals.com sold for $35,000,000 in 2007, Internet.com sold for $18,000,000 in 2009, Insurance.com sold for $9,999,950 in 2010, Privatejet.com sold for $30,180,000 in 2012, Sex.com sold for $13 million in 2010 (after selling for $14 million in 2006) and 360.com sold for $17,000,000 in 2015.

Most personal blogs also tend to have little or no financial value, but some blogs generate significant revenue through the sale of advertisements on the blog's web page or through subscription sales.[5] In November of 2011, America's top ten most valuable blogs had an estimated aggregate value of $785 million.[6] The most valuable blog in 2011 was Gawker.com, which was valued at $318 million, with $53.6 million in advertising revenue in 2010.[7] Drudge.com was valued at $93 million, with $13 million of revenue earned in 2010.[8] In February 2011, AOL agreed to purchase The Huffington

[3] See Austerberry, "Digital Asset Management," Second Edition, (Elsevier 2006).
[4] See *id.*
[5] See "The Twenty-Five Most Valuable Blogs in America – 2011," 247wallst.com, 10/31/ 2011, available at http://247wassst.com/2011/10/31/the-twenty-five-most-valuable-blogs-in-america-2011/.
[6] See "The 10 Most Valuable Blogs in 2011", The Atlantic, 11/1/ 2011, available at http://theatlantic.com/business/print/2011/11/the-10-most-valuable-blogs-in-2011/247706/.
[7] See *id.*
[8] See *id.*

Post—one of the most heavily visited news websites in the United States—for $300 million.[9] The Huffington Post earned $31 million in revenue in 2010.[10]

Non-Financial Value of Digital Assets

In addition to potentially significant financial value, some digital assets have unique sentimental value that may be very important to the family and friends of a decedent. Long gone are the days when special photographs, diaries and letters are kept in a shoebox or albums stored on a bookshelf. [11] Instead, for many people, these items are now stored in a computer and never printed. Photographs are stored in online photo accounts or on social media sites. Family trees are created and stored in online genealogical accounts such as Ancestry.com. A decedent's correspondence may comprise only emails or text messages instead of handwritten letters. Blogs have replaced diaries and Twitter feeds and Facebook posts share a person's thoughts and track his or her day-to-day activities. If heirs and loved ones lack knowledge of or the ability to access these digital assets, a decedent's life story could be lost.

Another non-financial reason for planning for digital assets is to prevent the disclosure of secrets or hurtful information or material. For example, digital assets may reveal the existence of an extra-marital affair or an illegitimate child. As this information may cause significant emotional distress to a decedent's family, he or she may prefer to suppress this information. By designating appropriate people to take care of (or delete) certain information and/or accounts, the decedent can avoid exposure of such private details.

Proper planning for digital assets can also help to prevent online identity theft.[12] In 2014, 17.6 million Americans (7% of all U.S. residents age 16 or over) were victims of identity theft at an estimated collective cost of $15.4 billion.[13] After death or upon disability, the risk of identity theft increases because the deceased or incapacitated person is unable to monitor his or her online accounts, thereby giving criminals more freedom to hack into online accounts to obtain personal information needed to assume an identity.[14]

[9] See Peters, "Betting on News: AOL to Buy The Huffington Post," The New York Times, 2/7/ 2011, available at http://www.nytimes.com/2011/02/07/business/media/07aol.html.
[10] See *id.*
[11] See Beyer and Griffin, "Estate Planning for Digital Assets," Estate Planning Developments for Texas Professionals, April 2011, available at http://ssrn.com/abstract=1781483.
[12] See Todorova, "Dead Ringers: Grave Robbers Turn to ID Theft," smartmoney.com, 8/4/2009, available at http://smartmoney.com/retirement/estate-planning/dead-ringers-grave-robbers-turning-to-identity-theft/.
[13]See "Victims of Identity Theft, 2014 – Bureau of Justice Statistics" available at www.bjs.gov/content/pub/pdf/vit14.pdf (last viewed on 1/3/2016).
[14] See "How to Prevent ID Theft After Death," CreditCards.com, 2/19/2012, available at http://www.foxbusiness.com/personal-finance/2012/03/12/how-to-prevent-id-theft-after-death/. See also Beyer and Cahn, "When you Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets," 26 Probate & Property 40 (January/February 2012).

PART II: Addressing Digital Assets in the Estate Planning Process

Estate planning for digital assets brings to mind the old adage that an ounce of prevention is worth a pound of cure. Planning ahead for the disposition and transfer of digital assets upon death or disability may be the only adequate method of preserving the value of the client's digital assets for his or her intended beneficiaries. In the absence of prior planning, it may be possible for the client's fiduciary, working with a data forensics expert, to recover some digital assets upon the client's death or disability, but the delay and cost involved in such an undertaking is substantial and may be easily avoided with appropriate planning.

The first step to preserving and protecting a client's digital assets is to create a comprehensive inventory of those assets. Few estate planning attorneys would forgo having a new client inventory and identify his important and valuable assets such as bank accounts, retirement assets and life insurance. Today, a comparable inventory of digital assets is just as necessary. Because clients may overlook the many types of digital assets that they own, the estate planning attorney should provide a comprehensive checklist of questions and/or prompts that will compel a client to identify his or her digital assets fully. The importance of cataloging digital assets cannot be overstated, given that it is difficult, if not impossible, for heirs, fiduciaries and family members to discover many digital assets without actual knowledge that the asset exists and where to look for them. Finding a digital asset without knowing where to look has been compared to finding a needle in a haystack,[15] since digital assets are often designed to be hidden from public awareness to protect against unauthorized access and to preserve the value of the intellectual property associated with them. An example of a comprehensive inventory for client use can be found at Figure A.

The next step is to devise a method for transferring the value associated with those digital assets to the client's desired beneficiaries. The appropriate planning method to preserve digital assets in the event of death or disability depends on the complexity of the client's digital assets, his technological fluency and his trust of online resources. As with all estate planning, one size does not fit all. For most clients, a two-step process should be sufficient to transfer and preserve most of the client's digital assets. This can be done by (i) transferring ownership of digital assets to an entity such as a trust or LLC, when possible, and (ii) maintaining an online storage account or, at a minimum, a secure list of digital assets and passwords to provide fiduciaries with access to the client's digital assets. Although this point will be further discussed in Part III of this article, it bears repeating here—the terms and conditions of certain websites and digital asset providers prevent anyone other than the individual user from accessing the user's account, regardless of whether the fiduciary has proper authority and regardless of whether the fiduciary has the user's password. Before the fiduciary attempts to access a deceased or disabled client's digital assets, it is crucial that these terms and conditions be reviewed and the consequences for breach of these terms and conditions be discussed with counsel.

[15] Krough, "The DAM Book: Digital Asset Management for Photographers," Second Edition (O'Reilly Media, 2009), page 8.

Transfer Ownership of Digital Asset to Entity

Transferring ownership of digital assets to an LLC, corporation, partnership or trust is probably the most effective way to preserve the value and accessibility of the client's digital assets upon his or her death or disability, although such a transfer is not always possible. Most have no such limitations, but some digital asset providers (e.g., iTunes[16]) limit ownership and use of accounts to individuals, and it is currently not possible to hold such assets through an entity or trust. Where such a transfer is permitted, it will invite fewer headaches if ownership and use of valuable digital assets are transferred to an LLC, corporation or partnership, rather than to a trustee. Although the terms of service of a particular digital asset provider may permit non-individuals to own or operate the digital asset and may not specifically distinguish between trusts and corporate entities,[17] ownership of digital assets by a trustee is far less common than ownership by a corporate entity. As a result, there may be a delay in processing trustee succession while the service provider's staff reviews legal documents that are unfamiliar to them and interprets (with very little, if any, reported case law or other legal guidance to go on) how stringent privacy laws should be applied in the context of a trust.

If the client personally owns any digital assets that he uses in connection with his business, ownership should be transferred immediately to the business entity. Otherwise, the death of the client may mean the loss of the digital asset and its use by the company. If the client's digital asset provider does not allow the asset to be owned by an entity, the client should change digital asset providers to one that recognizes the importance that digital assets play to a company. Digital assets are too important to the identity, growth and success of a business to risk their total loss to the business upon the death of the business owner.

In some instances, it will not be possible to transfer an existing digital asset to an entity, because the type of account available to entity owners differs from the type of account available to individual owners. In that case, the business entity may need to acquire a new, identical or similar digital asset that is properly titled in the name of the entity. For example, Facebook provides personal profiles/timelines to its individual users but provides a business account, page and/or group to a user that is an entity.[18] Personal profiles/timelines cannot be used for selling or for commercial gain[19] so it is imperative that a client's marketing initiatives are conducted via a business account. Facebook will convert a personal page to an entity page upon request.[20] While this situation is not ideal, it may be the only reasonable option and if the transition happens while the business is still young and growing, the loss of value resulting from the switch may not be significant.

[16] See http://www.ios4business.com/2012/02/03/the-itunes-accounts-phenomenon/.
[17] For example, GoDaddy.com, one of the largest domain name registrars, allows accounts to be held by an entity http://www.godaddy.com/legal-agreements.aspx.
[18] See http://www.facebook.com/help?page=213602951994043.
[19] Facebook terms of service are available at http://www.facebook.com/legal/terms.
[20] See http://www.facebook.com/help?page=213602951994043.

Online Storage Accounts

The next step is to provide a means by which fiduciaries will be able to identify and access the client's digital assets upon death or disability. Online storage accounts provide one means of cataloguing digital assets. These companies offer services to allow users to store digital assets and information about digital assets, as well as personal notes and emails to be delivered after the client's death, for a monthly or yearly fee.[21] Many allow designated persons to access the owner's digital assets in the event of death or disability, and most will store copies of important documents and frequently used data.[22] Upon the client's death or disability, a person designated by the client would be able to access the online storage account, allowing for convenient access to important documents and information.

Currently popular online storage accounts include legacylocker.com and securesafe.com. Legacylocker.com enables users to save online account information in a digital safety deposit box.[23] Users can store passwords for all of their online accounts in their safe deposit box and assign a beneficiary for each account.[24] Legacylocker.com also allows users to store important documents, which will be "accessible 24/7, from anywhere in the world, in a safe and secure repository."[25] Clients are offered a free trial account and unlimited storage and beneficiaries with a cost of $29.99 per year or $299.99 for a lifetime subscription.[26]

Securesafe.com enables users to store important documents, create a secure list of online accounts and passwords, and designate which accounts get passed to which beneficiaries.[27] A user can access his or her account and view saved documents at anytime using an iPad or iPhone.[28] A user is allowed to store up to 50 passwords and 10 MB of data for free; an unlimited package is available for $12.90 a month.[29]

One advantage of online storage accounts is that they tend to offer state-of-the-art security. For example, SecureSafe.com claims to offer "more privacy than in a bank."[30] It further claims that its applications are "designed following NIST security standards," its operating systems and third party applications are continually updated, two (2) datacenters handle data recovery management and its accounts are monitored by "top security experts."[31] These accounts also allow a designated person to access digital assets immediately, without knowing a single password. Upon the user's death or disability, the designated person will be provided with all the information necessary to

[21] See Beyer and Griffin, s*upra* note 13.
[22] *Id.*
[23] See http://legacylocker.com/features/locker.
[24] See *id.*
[25] *Id.*
[26] *Id.*
[27] See www.securesafe.com/en/.
[28] See *id.*
[29] *Id.*
[30] *See* www.securesafe.com/en/security.html.
[31] See *id.*

access the user's accounts and to deal with them in accordance with the account holder's wishes.

These accounts also have their disadvantages. Information stored in an online storage account will need to be updated whenever new digital assets are acquired or deleted or when passwords change. In order for an online storage account to function as intended, the information held in the account must be accurate and up-to-date. Cyber security best practices include frequent changing of passwords; following that rule necessitates updating the online storage account to reflect the new passwords. There is also no guarantee that the company hosting the online storage account will still be in business when the critical time comes.[32] Most of these companies are start-ups with little or no capital. If a company fails to make a profit, it can dissolve or declare bankruptcy.[33] While there should be some concern about what happens to information stored in an online storage account if the host goes out of business, it is unlikely that the information would be misappropriated. The more probable drawback is that a user may not be able to access his or her data.

If the client uses an online storage account to store digital assets and information, he or she needs to tell a fiduciary—preferably in writing—that the account exists. Although some online storage services will email a user's authorized designee directly and give him or her instructions on how to access digital assets in the event of the account owner's death or disability, this feature is not always offered or utilized. It is imperative that the fiduciary has another means of learning that the account exists and how to access it, or the online storage account will serve no purpose. If a user isn't comfortable disclosing the existence of the online storage account to the fiduciary during the user's lifetime, the user could make the disclosure in a writing left in the custody of his estate planning attorney.

Digital Asset Inventory

At a minimum, the estate planner should advise his or her client to create an inventory listing digital assets and passwords. In addition to detailing information regarding the client's online presence, accounts and passwords, the inventory should also detail the client's computer hardware, software and file structure systems.

To be secure, the inventory should be an electronic file, encrypted with a complex password. Normal password protections of a MS Word or other MS Office document are easily circumvented, so best practices are to use a software package designed to store confidential documents and passwords, such as KeePass, SecuBox or Web Confidential. The properly encrypted electronic inventory file can then be stored on a home computer, smartphone, or USB drive, or it can be uploaded to the cloud. The complex password to access the electronic list may be written on a piece of paper stored with original estate planning documents or in a safe-deposit box. Again, it is

[32] See Langley, "Advantages & Disadvantages of Internet Storage," eHow.com, 8/14/2012, http://www.ehow.com/list_5891071_advantages-disadvantages-internet-storage.html.
[33] See *id.*

imperative that this password be kept up-to-date. If a user changes the password and fails to replace the written, now outdated password, the person designated to access the list will be unable to do so.

Because the estate planning attorney will not have access to the electronic file containing the inventory, he or she may safely store the password as only a person having both the password and the file can access the inventory. Before agreeing to hold the password, however, the attorney should consider the risk that someone could claim that the attorney disclosed the password without authorization. In addition, an attorney should never have custody of both the electronic file and the password. As with all confidential information, the password should be stored securely by the attorney to avoid inadvertent or unauthorized disclosure.

Electronic lists are easy to use, inexpensive, portable and easily accessible. However, the electronic list must be kept updated as passwords and digital assets change. There is also a risk of data loss if the file is stored only on a device which may be lost or broken.

PART III: Accessing the Digital Assets of a Deceased or Disabled Client

Preliminary Concerns in Accessing Digital Assets

Even in the best case scenario—where the decedent had inventoried all his digital assets, usernames and passwords for his fiduciary—the administration of a deceased or disabled person's digital assets can be extremely complicated. Before attempting to access any digital assets of a deceased or incapacitated person, the fiduciary and his attorney should carefully review the terms and conditions of use of all digital assets. Federal and state laws criminalize certain types of unauthorized access to computers or data. If the fiduciary is not authorized to access digital assets *under the digital asset provider's terms of service*, then accessing the deceased or disabled person's digital assets may be a crime, even if the fiduciary is expressly authorized to access the digital asset by the relevant estate planning documents and even if the decedent gave the fiduciary his username and password. For example, Yahoo's terms of service provide that a deceased user's rights to his account terminate upon his death[34] and, accordingly, his fiduciaries are not authorized to use or view his Yahoo.com account. If the fiduciary accesses the decedent's Yahoo mail in violation of the terms of service, he does so without appropriate legal authorization. This kind of unauthorized access is a crime, thanks to broad anti-hacking and electronic data security laws.

All 50 states have criminal laws prohibiting unauthorized access to electronic data.[35] Federal law, specifically the Computer Fraud and Abuse Act[36] ("CFAA"), criminalizes intentional access of a computer without authorization or exceeding authorization and thereby obtaining financial data or information from a protected (e.g., private) computer. In fact, the U.S. Department of Justice ("DOJ") has stated that violating a term of service on Facebook or Match.com is a federal crime under the CFAA, however they have also stated it is not their intention to prosecute "minor" violations.[37] The DOJ did prosecute a mother under the CFAA who posed as a 17-year-old and cyber-bullied her daughter's classmate, which violates MySpace's terms of service prohibiting lying about identifying information, including age.[38] While there is no reported case of the DOJ or any state prosecuting a fiduciary for unauthorized access to a deceased or disabled person's digital assets, some threat of criminal penalty remains. Estate planning attorneys should warn fiduciaries of these risks.

In light of these issues, in January of 2012, the Uniform Law Commission approved a committee to study the question of a fiduciary's power and authority concerning digital assets of a disabled or deceased person.[39] The Uniform Law

[34] Available at http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html.
[35] See Jackson, Network Security Administration (Cisco Press, 2010).
[36] 18 USC section 1013.
[37] U.S. v. Nosal, No. 10-10038, D.C. No. 3:08-cr-00237 (CA-9, 4/10/ 2012); see also, testimony presented by DOJ on 11/15/2011 before Subcommittee of U.S. House Judiciary Committee.
[38] U.S. v. Drew, 259 F.R.D. 449 (DC Calif . 2009).
[39] See Minutes of Uniform Law Commission Midyear Meeting, 1/20/ 2012, available at http://www.uniformlaws.org/shared/docs/scope/ScopeMinutes_012012.pdf.

Commissioners identified that:

> there is considerable uncertainty concerning how a fiduciary can access such property when administering a decedent's estate or the affairs of an incapacitated person. When an individual dies or becomes incapacitated, fiduciaries need to find, access, value, protect, and transfer the individual's valuable or significant property. Fiduciaries need clear powers to act on behalf of the individual in the digital world.[40]

After working with leaders from the American Bar Association and American College of Trusts and Estate Counsel, the Uniform Law Commissioners approved the Uniform Fiduciary Access to Digital Assets Act on July 16, 2014. This Act will likely be an important influence for other states to adopt similar legislation.

As of the date of this article, twenty-one (11) states (Washington, Oregon, Idaho, California Arizona, Wyoming, Colorado, Nebraska, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Tennessee, New York, Connecticut, Maryland, North Carolina, South Carolina, Florida and Hawaii) have enacted statutes which give fiduciaries limited access to certain digital assets. While these state laws may be well-intentioned, they conflict with the federal CFAA, making their validity unclear.

Recovering Digital Assets that are Legally Accessible to the Fiduciary

Although the terms of use of some digital asset providers will prohibit any fiduciary access, that is the exception, rather than the rule. The valuable content of most digital assets (or access to the digital asset itself) is usually available to the fiduciary. The first step to begin recovering digital assets that can be accessed legally by the fiduciary is for the fiduciary to access the digital asset inventory that the deceased or disabled person created during the estate planning process. If such an inventory does not exist, the fiduciary should attempt to create one by making a list of all the decedent's known digital assets, including all personal and professional email and online accounts. If the fiduciary has access to the deceased or disabled person's home computer, the internet browser history may help to reveal evidence of digital assets.

After creating a comprehensive list of known digital assets, the fiduciary should begin to protect and preserve those digital assets. The method for doing so varies, depending on the type of digital asset in question.

Email Accounts

Prompt access to the client's email account can often be critical to paying bills on time, identifying bank accounts with liquidity and discovering valuable digital and non-digital assets. If prompt access is not obtained, emails could be lost as most free email services delete messages if account has not been accessed for 4 to 9 months and will

[40] *Id*.

delete a person's entire account if not accessed for 8 to 12 months. When, or if, the fiduciary is able to access the deceased or disabled person's email account, the fiduciary should immediately change the password, choosing a highly complex password to prevent unauthorized access.

If the fiduciary can access the email account legally and knows the username and password, the fiduciary should search messages to identify digital and non-digital assets and for information relevant to access and preserve those assets. If the fiduciary finds information regarding digital assets but not the passwords necessary to custody those assets, he may use the "forgot my password" feature available on most websites to have the password (or password reset instructions) emailed to the client's account.

If the fiduciary does not have the user's password and username but is confident that he has legal authority to access the account, the fiduciary may be able to access the email account from the user's home or work computer, tablet, netbook or smartphone. In some cases, the username and password data may be saved on the device or may automatically populate when one correct character is typed. If the email account is through an internet service provider (phone or cable company), the provider will usually reset the password at the fiduciary's request, upon presentation of supporting documentation such as letters of office and/or a death certificate.

Assuming the fiduciary is able to gain access to the email accounts, he should review new emails regularly (generally every week) during the period of estate administration to identify additional assets, creditors or other relevant information. When the period of audit on the estate tax return is closed (or, if no estate tax return is due, then after the probate estate has been closed), the email account should be deleted. If the fiduciary is not able to access the email account legally, the email account should be deleted promptly to prevent unauthorized access.

If the terms of use of the email account prohibit a fiduciary from directly accessing the account, the fiduciary cannot legally log on to the email account, but the account provider may nevertheless be willing to provide the fiduciary with a copy of the contents of the account upon request. For example, Gmail (Google mail) may release a copy of the messages/content in a deceased user's email account (but not the password) to a fiduciary upon presentation of supporting documentation such as a death certificate and/or letters of office.[41] Note that the Gmail terms of service indicate that:

> in rare cases we *may* be able to provide the Gmail account content to an authorized representative of the deceased user . . . we take our responsibility to protect the privacy of people who use Google services very seriously. Any decision to provide the contents of a deceased user's email will be made only after a careful review, and the

[41] Gmail terms of service for a deceased user are available at http://support.google.com/mail/bin/answer.py?hl=en&answer=14300.

application to obtain email content is a lengthy process.[42]

Accordingly, the fiduciary should not count on receiving a copy of the email account contents promptly (if at all).

Other email account providers are even less accommodating than Gmail and not only prohibit a fiduciary from accessing the account, but also will not provide a copy of the contents of the account unless ordered to do so by a court. As stated above, Yahoo's terms of use provide that the deceased's user's Yahoo email account terminates upon his or her death and does not provide any opportunity, short of a court order, for a fiduciary to obtain a copy of the account contents.[43] For example, in 2004, the family of deceased U.S. Marine Justin Ellsworth requested a copy of his Yahoo email messages (after first unsuccessfully requesting his password), to better understand his last words and thoughts before death.[44] Yahoo refused, citing user privacy concerns. The Ellsworth family then obtained a court order directing Yahoo to release the contents of the account. Yahoo complied, and Justin's father was sent a CD containing all messages Justin received, but not those that he had sent, which were deleted consistent with Justin's account settings.[45]

Computers and Smartphones

For some clients, important data regarding recurring expenses, digital and non-digital assets, taxes and insurance are stored not on the internet, but on the hard drive of a home computer. Clients who are always on the go may opt to store this information instead on a smartphone, netbook or tablet. Few information technology experts would say that this method of storage is secure; however, it is not uncommon. The fiduciary may be unable to access the device itself or important files stored on it without a password that the fiduciary does not know. The fiduciary could spend countless hours guessing the password, however, it is probably most efficient to engage the services of a data forensics expert. For anywhere from several hundred to a few thousand dollars, a data forensics expert can protect, preserve and access most secure data files stored on a computer, smartphone or similar device's hard drive.

Online Sales Accounts

If the deceased or disabled individual ran an online business (or simply sold occasional items online), current sales may be pending on online sales accounts such as eBay, Craigslist, Amazon or Etsy at the time of his or her death or incapacity. In addition, funds from online sales may be sitting in related payment entities such as Paypal or Western Union.

Timely access to sales accounts could be critical to preserve the value of the decedent's business and to avoid breach of contract actions. If it is unknown whether the decedent maintained an online sales account, the fiduciary should check the

[42] *Id.*
[43] Available at http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html.
[44] See Chambers, "Family gets GI's e-mail," Detroit News, 4/21 2005.
[45] *Id.*

decedent's email accounts and text messages for alerts about sales transactions and should review bank records for deposits from online transactions. A fiduciary should arrange for the completion of in-process sales, refund incomplete sales and, if desired or appropriate, prevent future sales from occurring.

Most online sales marketplaces will allow the fiduciary to access the decedent's account. However, the fiduciary generally may not transfer the account to another. For example, eBay, under its user agreement, does not allow the transfer of a personal sales account without eBay's special consent.[46]

For an online business, the fiduciary should contact the web-hosting agency to have access transferred to the fiduciary.

Websites and Blogs

Because personal webpages and blogs are intentionally made to be shared, a decedent's family and friends will likely know if a decedent was maintaining one. A fiduciary may also discover evidence of a blog by checking credit card statements and email accounts for payment of site hosting fees. The fiduciary may also discover webpages and blogs by simply Googling the decedent's name.

If the decedent paid for webpage and blog hosting, the fiduciary can usually have the password reset and can gain full access. Some (but not all) free webpages and blog hosting services will also allow a fiduciary to reset the password.

Most free webpage and blog hosting accounts are generally not transferable under their terms of service contracts and fiduciaries may not be able to access the accounts at all.[47] If a fiduciary is denied access to a free account, in many cases a copy of the content may be sufficient to satisfy the family's desire to preserve its sentimental value. After the content has been copied, the fiduciary should request that the account be closed.

Social Media Accounts

Rarely will a fiduciary need to continue the actual use of a social media account because the benefit of social media is primarily personal to the individual, allowing him to connect and engage with other people.[48] Most social media services, including Facebook, MySpace, Twitter and LinkedIn, do not allow an assignment or transfer of a user's account,[49] including a transfer of the account to an appropriate fiduciary upon death or disability. The fiduciary's choices for the user's account are to (1) request the

[46] See http://www.pages.ebay.com/help/policies/user-agreement.html.
[47] See, for example, the terms of service for Google's Blogger and BlogSpot blog hosting services, available at www.google.com/intl/en/policies/terms/; however, the terms of service of the popular blog hosting service, wordpress (available at http://en.wordpress.com/tos/) permit assignment of the user's blog to any party that consents to its terms of service.
[48] See Herman, "Social Networks and Government, Sponsored by GSA's Office of Citizen Services & Innovative Technologies," available at http://www.howto.gov/social-media/social-networks.
[49] See http://www.facebook.com/legal/terms; http://www.myspace.com/Help/Terms; http://twitter.com/tos; http://www.linkedin.com/static?key=user_agreement.

deactivation or deletion of the account or (2) leave the account as is.[50] Facebook will also allow the appropriate fiduciary or family member to turn the account into a memorial page, which prevents the addition of further "friends" and will allow current friends to post messages in remembrance.[51]

CONCLUSION

For most clients today, an estate plan that does not address digital assets is an inadequate estate plan. The potential administrative burden on the fiduciary, to identify and marshal elusive digital assets without a proper roadmap, is tremendous. Add to that the potential financial losses that may occur if digital assets with significant intrinsic value are never found (or are inaccessible), or if pending online orders from a client's business are not promptly filled, and the result could be devastating. At a minimum, estate planners should be aware of these issues and should discuss them with their clients, encouraging clients to assemble a comprehensive inventory of digital assets and passwords. It may be possible after the fact, with the help of a data forensics expert and a great deal of diligent legwork, to pull some of the digital pieces together but, as with most aspects of estate planning, by far the simpler and more effective approach is to be informed and plan ahead.

[50] See e.g. Twitter's policy on a deceased account holder, available at https://support.twitter.com/groups/33-report-abuse-or-policy-violations/topics/148-policy-information/articles/87894-how-to-contact-twitter-about-a-deceased-user.
[51] See http://www.facebook.com/help/359046244166395/.

Figure A

Digital Asset Inventory

If you have a home computer, smartphone or email account or if you engage in any activities on the internet, please complete the following:

1. **Computer and Phone Information.** List all of your personal and professional computers, tablets, netbooks and smartphones and identify the username and password to access each device.

   _____
   _____
   _____
   _____
   _____

2. **Email Information.** List all of your email addresses, describe what activities the email address is used for (e.g., personal, professional or to receive unwanted messages) and indicate the password.

   _____
   _____
   _____
   _____
   _____

3. **Social Networking Profiles.** List the usernames and passwords to each of your social networking profiles such as Linked In, Facebook and Twitter. In the event of your death or disability, should your profile be deleted? If not, who should be responsible for continuing your profile and what would you like for them to do with it?

   _____
   _____
   _____
   _____
   _____

4. **Blogs, Webpages and Domain Names.** List all of your blogs, domain names and webpages and indicate the registrar/host for each. In the event of your death or disability, should these sites be continued? If so, how and by whom?

   _____
   _____
   _____
   _____
   _____

5. **Online Financial Information.** List each bank and brokerage account for which you have online access and indicate your username and password for each account. If you have a paypal or other online purchasing account, list your username and password.

_____
_____
_____
_____
_____

6. **Digital Photos.** If you take photos digitally, describe where you store your photos, list any photo sharing websites that you use and indicate your username and password for each site.

_____
_____
_____
_____
_____

7. **Other Online Accounts/Information.** List any other online accounts or digital information that may be important or valuable. If relevant, describe what you would like to happen to that account or information if you die or become disabled.

_____
_____
_____
_____
_____

8. **Sensitive Information.** Is there any sensitive information in the online accounts listed above that should be kept secret from some of your family and friends? If so, how should that information be handled and by whom?

_____
_____
_____
_____
_____

GARVEY SCHUBERT BARER

The New Partnership Audit Regime Will Be Here Soon – Are You Ready?

By Larry J. Brant

On November 2, 2015, the Bipartisan Budget Act ("Act") was signed into law by President Barack Obama. One of the many provisions of the Act significantly impacts: (i) the manner in which entities taxed as partnerships[1] will be audited by the Internal Revenue Service ("IRS"); and (ii) who is required to pay the tax resulting from any corresponding audit adjustments. These new rules generally are effective for tax years beginning after December 31, 2017. As discussed below, because of the nature of these rules, **partnerships need to consider taking action now in anticipation of the new rules.**

The Current Landscape

Entities taxed as partnerships generally do not pay income tax. Rather, they compute and report their taxable income and losses on IRS Form 1065. The partnership provides each of its partners with a Schedule K-1, which allows the partners to report to the IRS their share of the partnership's income or loss on their own tax returns and pay the corresponding tax. Upon audit, pursuant to uniform audit procedures enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), examinations of partnerships are conducted generally under one of the following scenarios:

1. For partnerships with ten (10) or fewer eligible partners,[2] examinations are conducted by a separate audit of the partnership and then an audit of each of the partners;
2. For partnerships with greater than ten (10) partners and/or partnerships with ineligible partners, examinations are conducted under uniform TEFRA audit procedures, whereby the examination, conducted at the partnership level, is binding on the taxpayers who were partners of the partnership **during the year under examination**; and
3. For partnerships with 100 or more partners, at the election of the partnership, examinations may be conducted under uniform "Electing Large Partnership" audit procedures, whereby the examination, conducted at the partnership level, is binding on the partners of the partnership **existing at the conclusion of the audit**.

Lawmakers believed a change in TEFRA audit framework was necessary for the efficient administration of Subchapter K of the Code. If a C corporation is audited, the IRS can assess an additional tax owing against a single taxpayer—the very taxpayer under examination—the C corporation. In the partnership space, however, despite the possible application of the uniform audit procedures, the IRS is required to examine the partnership and then assess and collect tax from multiple taxpayers (i.e., the partners of the partnership). In fact, the Government Accountability Office (the "GAO") reported in 2014 that, for tax year 2012, less than one percent (1%) of partnerships with more than $100 million in assets were audited. Whereas, for the same tax year, more than twenty-seven percent (27%) of similarly-sized corporations were audited. The GAO concluded the vast disparity is directly related to the increased administrative burden placed on the IRS under the existing partnership examination rules.

New Law

Effective for tax years beginning on or after January 1, 2018, new centralized examination rules may apply to entities taxed as partnerships. Under the new rules, it is expected the number of partnerships that will be subjected to IRS examination each year will dramatically increase.

While Congress has already enacted this new statutory audit regime, Treasury has yet to publish regulations providing taxpayers with much needed guidance on the application of the rules. Most tax practitioners expect regulations will be published within the next twelve (12) months.

[1] For purposes of these materials, the term "partnership" will include limited liability companies ("LLCs") taxed as partnerships and the term "partner" will include the members of such LLCs.
[2] Eligible partners include individuals (other than non-resident aliens), C corporations, and estates of deceased partners.

As stated above, the new rules apply for tax years beginning on or after January 1, 2018. Partnerships may, however, elect to apply the new rules to any returns filed for tax years beginning after November 2, 2015 (the date President Obama signed the new rules into law).

An Overview of the New Rules

The following is a broad summary of the key aspects of the new partnership audit rules:

Application to All Partnerships. Except for eligible partnerships that affirmatively "elect out" of the new audit regime, these rules apply to all partnerships.[3]

Annual Election Out; Implications. A partnership is eligible to "elect out" of the new audit regime,[4] if:

- The partnership issues 100 or fewer Schedule K-1s for the tax year[5]; and
- Each of the partners of the partnership during the tax year is:

  ◊ An individual;

  ◊ A C corporation;

  ◊ A foreign entity that would be treated as a C corporation if it were domestic;

  ◊ An S corporation; or

  ◊ An estate of a deceased partner.

Thus, partnerships with partners that are entities taxed as partnerships or that are trusts are ineligible to "elect out" of the new audit regime. If a partnership "elects out" of the new audit regime, the pre-TEFRA audit rules apply under which any audits involving partnership items occur at the partner level.

Partnership Representative Requirement. Each partnership (other than partnerships which properly "elect out") is required to appoint a Partnership Representative ("PSR"). The PSR has sole authority to act on behalf of the partnership for purposes of the new audit rules. If the partnership does not appoint a PSR, the IRS may select a PSR for the partnership. The PSR is similar in concept to the "Tax Matters Partner" under the TEFRA audit regime.

Audit Adjustments; Imputed Underpayment. Generally, audit adjustments of income, gain, loss, deduction, or credit will be made by the IRS at the partnership level with respect to any tax year under audit (i.e., a "reviewed year"). Under the new audit regime, the IRS will assess and collect from the **partnership**, rather than the partners, any resulting underpayment of tax (the "imputed underpayment") calculated at the highest corporate or individual income tax rate in effect during the reviewed year.[6] The tax is assessed in the year in which the audit (or judicial review) is completed (i.e., the "adjustment year"). In addition, the partnership is directly liable for any related penalties and interest.

This is a huge change. Under this new framework, the economic burden of a tax assessment resulting from an audit falls on persons who are partners in the **adjustment year**, rather than persons who were partners during the reviewed year(s) to which the partnership adjustments are attributable. It is, however, expected to significantly reduce the administrative burden on the IRS (which has encountered substantial budget cuts in recent years, reducing its audit and collections staff).

[3] The election appears to be a year-by-year decision reflected on the partnership's IRS Form 1065.
[4] The exact method by which a partnership may "elect out" will likely be set forth in Treasury Regulations, but, as stated above, no regulations have been published by Treasury to date.
[5] For partnerships with S corporation partners, the number of Schedule K-1s issued by the S corporation partners counts toward the "100 or fewer" requirement.
[6] The new statutory regime directs the Treasury to establish procedures under which the imputed underpayment may be modified in certain circumstances.

Alternative Payment Election. The Act allows partnerships to elect to use an alternative payment system whereby the liability to pay any assessment is transferred to the reviewed-year partners. The election applies with respect to each imputed underpayment assessed against the partnership and must be made no later than 45 days after the date the partnership receives the notice of audit adjustments. Once made, the election is revocable only with the IRS's consent.

The partnership must notify each partner of the partnership during each the **reviewed** year(s) of their share of audit adjustments for such years in a manner and time provided by future IRS guidance. Each reviewed-year partner then must take into account the reviewed-year adjustments and pay any additional tax with its return for the **adjustment year**, along with related penalties and interest calculated from the reviewed year(s) at the federal underpayment rate plus two percent (2%). Each partner is only liable for its own share of the tax (i.e., there is no joint and several liability).

This election shifts the economic burden of any assessment back to each reviewed-year partner and prevents the burden from being shifted to different partners if there is a change in partners (in terms of percentage ownership or otherwise) between the review year(s) and the adjustment year; however, it effectively precludes any partner from challenging the assessment. The details and methodology surrounding this alternative payment election have not yet been created by Treasury.

Application

Without guidance in the form of Treasury Regulations, taxpayers are somewhat in the dark as to the application of the new partnership audit rules. Some guidelines or issues, however, should be considered by partnerships before the rules go into effect, including, without limitation, the following:

- Whether the new audit regime should be adopted early. Without guidance from Treasury, most taxpayers will likely avoid early adoption.
- Careful review of each partnership and its partners is required to see if the partnership is eligible to "elect out" of the new audit regime. If it can "elect out," most tax practitioners believe a partnership should do so. Again, it appears the "elect out" option must be exercised annually.
- Consider amending each partnership agreement to restrict ownership (and the transferability of partnership interests) to persons or entities who will not render the partnership ineligible to "elect out" of the new regime.
- Carefully consider each person or entity before they are admitted to the partnership to determine whether the new admittee will render it ineligible to "elect out" of the new regime.
- If a partnership cannot "elect out" of the new audit regime, consider:

  ◊ Amending the partnership agreement so that the partners direct (by the terms of the agreement) the PSR to elect the alternative payment system in all cases. Each partner should affirmatively approve this amendment and agree to be so bound; and

  ◊ Amending the partnership agreement so that the partners from each review year (in the ownership proportions they hold during each such review year) bear any economic burdens of an IRS examination, rather than the partners for the tax year in which the examination concludes (in the ownership proportions they hold at the conclusion of the audit). Accordingly, consideration should be given to adding: (i) a provision expressly allowing the partnership to withhold distributions from any partner in order to pay the resulting tax; (ii) a "clawback" provision requiring that the partners from the review year indemnify the partnership and other partners from their share of the resulting liability; (iii) a provision expressly allowing the partnership to set up a reserve in anticipation of a tax liability; and/or (iv) a provision expressly providing a method by which any tax liability that cannot be recovered from departed or reduced-interest review-year partners is allocated and assumed by the remaining partners.

- The "Tax Matters Partner" (under the old regime) needs to be replaced with a PSR. Adding a totally new PSR provision should be considered when drafting or amending any partnership agreements. Such a provision should include, but not be limited to, the following:

  ◊ An obligation of the PSR to notify partners, including both current and any former partners who could be impacted, of any IRS audits;

  ◊ An obligation of the PSR to keep the partners informed of the audit as it progresses;

◊ The granting of authority to the PSR to resolve audits and make decisions about tax matters;

◊ A release of the PSR of all liability relating to audits, provided the PSR acts in good faith;

◊ A requirement that the partners promptly provide the PSR with any needed information and/or documentation for purposes the audit;

◊ An agreement of each of the partners to file amended returns and/or comply with any audit results, including paying their share of any resulting tax liability; and

◊ Specifically directing or limiting the authority of the PSR with respect to "electing out" of the new audit regime and/or elect the alternative payment system.[7]

In addition to amending current or existing partnership agreements, partnerships should consider notifying each of their partners of these new rules and the date upon which these rules will be effective. Further, before admitting new partners, partnerships should advise the prospective partners of the audit rules applicable to the partnership, along with any transferability restrictions placed on the partners in the partnership agreement relating to the partnership's ability to "elect out" or use the alternative payment system.

While it is tempting to immediately amend partnership agreements to deal with the anticipated changes created by the new audit rules, taxpayers and partnerships may not want to implement any changes until Treasury issues regulations.

Preliminary Suggestions for Partnerships

For existing partnerships, the following should be considered:

- Appoint a PSR to act on behalf of the partnership in years in which the partnership may be subject to the new audit regime (i.e., if it is ineligible or if it fails to "elect out" of the new audit regime).
- Determine if the partnership is eligible to "elect out" of the new audit regime. To be eligible, the partnership:

  ◊ Must issue 100 or fewer Schedule K-1s (for this purpose, all Schedule K-1s issued by S corporation partners are counted); and

  ◊ Must not have any partners that are trusts or entities taxed as partnerships.[8]

- If a partnership is eligible to "elect out" of the new audit regime:

  ◊ Consider obtaining the written approval of the partners to "elect out"; and

  ◊ Consider amending the partnership agreement so that transferability of partnership interests is restricted to only eligible partners.

- If a partnership is **not** eligible to "elect out" of the new audit regime:

  ◊ Determine (once regulations are issued) whether the alternative payment system is available and consider whether the partnership should elect into it in all cases or at the discretion of the PSR;

  ◊ If the alternative payment system is <u>not</u> available, consider amending the partnership agreement to address responsibility for any tax liability resulting from review year audit adjustments, including addressing changes of partners

[7] By definition, the PSR has the authority to make these elections on behalf of the partnership. Thus, a partnership agreement may wish to include a provision specifically directing the PSR to always make these particular elections when available or to require the PSR to make these elections at the direction of the partners or governing board.

[8] The statute is unclear whether a disregarded entity that has an otherwise eligible owner is an eligible partner for this purpose. Likewise, it is not clear whether a revocable living trust which is disregarded for income tax purposes during the life of the trustor is an otherwise eligible partner. Until regulations are issued by Treasury, we do not know these answers.

and partnership interests between the review year and the year in which the audit concludes; and

◊ Add a provision to the partnership agreement to specifically address PSR issues (as discussed above).

For newly created partnerships, the following should be considered and addressed:

- Whether the partnership will be initially eligible to "elect out" of the new audit regime and, if so, whether to impose transfer restrictions on partnership interests to restrict transfers only to eligible partners;
- Appointment of a PSR to act on behalf of the partnership in years in which the partnership may be subject to the new audit regime (i.e., if it is ineligible or if it fails to "elect out" of the new audit regime);
- Specifically directing or limiting the authority of the PSR with respect to "electing out" of the new audit regime and/or elect the alternative payment system; and
- Making appropriate disclosures to prospective partners regarding the foregoing.

Take the Time Now to Plan Ahead

Even though the new audit regime does not officially come into play until 2018, partnerships and entities taxed as partnerships need to consider its impact and take appropriate action sooner than later. Waiting until 2018 may be disastrous.

For any questions, feel free to contact Larry Brant at lbrant@gsblaw.com or at 503.553.3114.

ESTATE PLANNING HOT TOPICS

Considerations Regarding Washington's New Durable Power of Attorney and Fiduciary Access to Digital Assets Acts and New IRS Partnership Auditing Rules

BY:
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Introduction

- 2016 Washington Uniform Power of Attorney Act (SB 5635) (effective January 1, 2017)
- Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA") (in effect since June 9, 2016)
- Bipartisan Budget Act of 2015 – impacts the manner in which entities taxed as partnerships will be audited by the IRS (effective tax years beginning after December 31, 2017)

Uniform Power of Attorney Act

- Washington Power of Attorney Act – RCW 11.94 (in effect since January 1, 1985)
- 2006 Uniform Power of Attorney Act ("UPAA") passed by Uniform Law Commission
- 2016 Washington Uniform Power of Attorney Act (SB 5635)
  - Signed by Governor Jay Inslee on April 1, 2016
  - Effective January 1, 2017

New Washington Uniform Power of Attorney Act – Drafting Considerations

Gifting

Current Law:	General gifting provisions are unlimited.
New Law:	General gifting provisions will be limited to the principal's annual exclusion amount (currently $14,000 per person/per year) unless the document specifically states otherwise.
Drafting tip:	Discuss gifting issues with your clients and then provide specific gifting authorization in the document.
Note:	Retroactive provision in Act will not effect previously executed powers with general gifting provisions.

New Washington Uniform Power of Attorney Act – Drafting Considerations

Durability

Current Law: A power of attorney is assumed to be non-durable unless there is language included in the document making it effective beyond disability.

Task Force: All powers signed after the effective date of the bill would be considered durable unless the document provides otherwise.

New Law: Legislature wanted to keep current law. Must declare durability.

Drafting tip: The declaration of durability or non-durability should be specifically mentioned in your documents – depending on client's preference.

New Washington Uniform Power of Attorney Act – Drafting Considerations

Execution Requirements

Current law: No execution requirements.

New law: Principal must sign and date the document before a notary or two disinterested witnesses.

Drafting tip: Revise forms to follow the new execution requirements.

New Washington Uniform Power of Attorney Act – Drafting Considerations

Termination

Current law: Appointment of a spouse or registered domestic partner as attorney-in-fact is terminated upon dissolution of the marriage or partnership.

New law: Such an appointment is revoked upon filing a petition to dissolve.

Drafting tip: Revise forms to make change.

New Washington Uniform Power of Attorney Act – Drafting Considerations

Co-Agents

Current law: No provisions regarding whether co-agents are required to exercise their authority jointly.

New law: A new provision clarifies the authority of co-agents and requires co-agents to exercise their authority jointly unless the document provides otherwise.

Drafting tip: If it is the principal's intent that co-agents may act separately on the principal's behalf, then draft the document to specifically so provide.

New Washington Uniform Power of Attorney Act – Drafting Considerations

Fiduciary Duty

Current law: Silent on as to the attorney-in-fact's fiduciary duty.

New law: All attorneys-in-fact must act in good faith and act consistent with the principal's wishes, if known and reasonable, otherwise in the principal's best interests. The new law also provides that no provision in a power of attorney can relieve an agent of liability for gross negligence.

Drafting tip: Revise forms accordingly.

New Washington Uniform Power of Attorney Act – Drafting Considerations

Resignation

Current law: No guidance as to how an attorney-in-fact can resign.

New law: Provision added to describe how an attorney-in-fact can resign.

- Attorney-in-fact may resign by giving notice to the principal, and, if the principal is incapacitated:
  - To the conservator or guardian of the principal, or if none,
  - To any person reasonably believed to have sufficient interest in the principal's welfare,
  - To a governmental agency having authority to protect the welfare of the principal, or
  - By filing notice with the county recorder's office in the county where the principal lives.

New Washington Uniform Power of Attorney Act – Drafting Considerations

Resignation

Drafting tip: Revise forms accordingly unless principal wants to provide alternate resignation provisions.

New Washington Uniform Power of Attorney Act – Drafting Considerations

Miscellaneous

- **Health Care Instructions:** The new act now requires that the power to make healthcare decisions must now be specifically authorized in the power of attorney. While this is consistent with current law, the power to make healthcare decisions are currently in a different section.
- **Aid in Dying:** The new act provides that a principal cannot grant the power to invoke the aid in dying statute. Again, this is consistent with current law set forth in a different section.
- **Fiduciary Access to Digital Assets:** While not addressed in the new act, SB 5029 Revised Uniform Fiduciary Access to Digital Assets Act ("UFADAA") was signed by Governor Inslee on March 31, 2016. UFADAA, effective as of June 9, 2016, will allow fiduciaries to access digital assets of deceased or incapacitated individuals.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

- In January of 2012, the Uniform Law Commission approved a committee to study the question of a fiduciary's power and authority concerning digital assets of a disabled or deceased person.
- After working with the leaders from the American Bar Association and ACTEC, the ULC approved the Uniform Fiduciary Access to Digital Assets Act (UFADAA) on July 16, 2014.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

25 states have adopted UFADAA or developed similar legislation.

- Arizona, California, Colorado Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Wisconsin, Wyoming and

WASHINGTON!

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

Washington UFADAA

- On March 31, 2016, Governor Jay Inslee signed Senate Bill 5029 to enact the Washington Uniform Fiduciary Access to Digital Assets Act (UFADAA) with an effective date of June 9, 2016.
- The Act addresses circumstances in which a digital asset custodian must disclose digital asset information to a fiduciary who is in need of access to the information to fulfill his or her duties.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

Washington UFADAA (cont'd)

- The Act applies to four types of fiduciaries:
  - Personal Representatives of a decedent's estate;
  - Court appointed guardians of incapacitated persons;
  - Trustees; and
  - Attorneys-in-fact under a power of attorney.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

Washington UFADAA (cont'd)

- Under the Act, users/owners of digital assets can now dictate what they want to happen to those assets upon their death or incapacity.

- Users can do this in two ways:

  1) by an online tool provided by the custodian, or

  2) by will, trust, power of attorney, or another similar written document.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

Washington UFADAA (cont'd)

- Online tool must be separate from the terms of service and requires the user to state his or her wishes affirmatively.
  - Facebook now has a function in its settings called a "legacy contact" which allows the user to name someone to manage the account after he or she dies.
- If a custodian does not provide an online tool or if the user does not use the online tool, the user may include provisions in their estate planning documents.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

Washington UFADAA (cont'd)

- The online tool trumps conflicting written authorization. However, both online tools and written authorizations trump contrary terms of service provisions.
- The Act requires that a fiduciary must provide sufficient information for the custodian to identify and retrieve the electronic information that is requested.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

- In Washington, we now have authority to drafts wills, trusts and powers of attorney to specifically grant authorization to a fiduciary to access digital assets.
- Clients may want to consider a special digital asset fiduciary.
- Clients should be instructed to investigate the online tools offered by the custodians of their digital assets.

Sample Power of Attorney Language

Digital Assets. My attorney-in-fact shall have (i) the power to access, use and control my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exits or may exist as technology develops or such comparable items as technology develops for the purpose of accessing, modifying, deleting, controlling or transferring my digital assets, and (ii) the power to access, modify, delete, control and transfer my digital assets, including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts and similar digital items which currently exist or may exist as technology develops or such comparable items as technology develops.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

How does UFADAA work?

- Distinction between "content of electronic communications" and "catalogue of electronic communications".
  - Content of electronic communications include the subject line and body of a user's email messages, text messages and other messages between private parties.
  - A catalogue of electronic communications is essentially a list of communications showing the addresses of the sender and recipient and the date and time the message was sent.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

Under UFADAA, a custodian must disclose content if:

- The user consented to disclosure or if a court directs disclosure; and
- The personal representative provides a written request, death certificate, a certified copy of the letter of appointment and a copy of the record of the user's consent, if not made in an online tool.

The custodian may also request from the fiduciary:

- Information linking the account to the user;
- A finding by the court that:
  - The user had a specific account with the custodian;
  - Disclosure would not violate ECPA;
  - Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or
  - Disclosure of the content is reasonably necessary for the administration of the estate.

Washington Uniform Fiduciary Access to Digital Assets Act ("UFADAA")

As long as a user didn't prohibit disclosure or a court has directed that disclosure not be made, a custodian must disclose non-content digital assets if:

- The personal representative provides:
  - A written request;
  - A death certificate; and
  - A letter of appointment.
- The custodian may also request:
  - Information linking the account to the user; and
  - Either an affidavit of the necessity of the disclosure or a court order finding that the account was the user's and that disclosure is reasonably necessary for the fiduciary to complete his or her duties.

New Partnership Audit Rules

Bipartisan Budget Act of 2015 ("BBA")

- Two year budget deal to extend national debt limit and spending caps through 2017.
- Repeals and replaced Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").
- Result: Substantially changes how IRS makes tax audit adjustments to partnerships and LLC that are treated like partnerships for tax purposes.

New Partnership Audit Rules

- Changes are intended to enhance the IRS's ability to audit partnership tax returns and enable the IRS to collect taxes, interest and penalties that flow from a partnership tax audit adjustment directly from the affected partnership.
- After 2017, the new rules provide that any tax adjustments will be determined at partnership level, even though partnerships are not subject to income taxes and the partners are the relevant taxpayers.

New Partnership Audit Rules

- Departure from existing partnership tax audit rules where the IRS audits the return of the partnership but then makes adjustments, collects tax, interest and penalties at the partner level.
- Under the new rules, unless a partnership elects to implement a Form K-1 adjustment, it will need to satisfy the cost of the tax adjustment from its own balance sheet or with contributions from its partners.

New Partnership Audit Rules

- Result: Cost is to be borne by the partners of the partnership when the IRS makes the adjustment – which may be different persons/ownership percentages than in the year the IRS is reviewing.
- Tax adjustments on the partnership will be based on the highest rate of tax for U.S. individuals or corporations that was in effect for the year that it was subject to audit.

New Partnership Audit Rules

Elective K-1 Procedure:

- Partnership will be permitted to send an amended Form K-1 to the partners of the partnership in the year being audited.
- Each (then) partner would be required to pay additional tax, interest and penalties.
- Exception: Partnerships with fewer that 100 partners may opt out of new rules.
- BUT smaller partnership exception does not apply to partnerships in which another partnership is a member.

New Partnership Audit Rules

What to Do?

- Before the rules go into effect in 2017, partnerships need to review their operating agreements to determine whether to implement amendments to enable or require the partnership to elect the Form K-1 adjustment process or to allocate the cost of tax adjustments in a different manner.
- In addition, buyers of partnership or LLC interests should consider the approach of the target entity to the new rules so that the buyers can assess whether they could be required to bear the cost of an entity-level adjustment.

Thank you!

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CHAPTER SIX

AN ETHICAL REVIEW OF REPRESENTING TRUSTS AND ESTATES: WHO IS THE CLIENT?

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Ms. Taylor would like to extend her gratitude to her partner, Donald K. Querna, who initially created portions of these materials and has authorized her to use them in this presentation.

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REPRESENTING THE TRUST OR ESTATE – *Who is the Client*?

1. INTRODUCTION. The Rules of Professional Conduct (the "RPCs" or "Rules"), which have been adopted by Washington, can generally be applied fairly easily and at the commencement of representation in the context of litigation, for adversarial positions and resultant conflicts of interest are generally apparent. An estate or trust administration engagement, however, can be more complex as it is often non-adversarial, or adversarial only in part, or technically but seemingly not practically adversarial, as a consequence of which conflicts are often more subtle and emerge later in the representation. Notwithstanding that difference, the RPCs apply in the context of those engagements as well. The purpose of this Outline is to explore the application of some of the ethical rules to issues confronting the lawyer assisting in the administration of a trust or an estate.

2. CONSEQUENCES OF BREACH OF THE RULES OF PROFESSIONAL CONDUCT. The breach of an ethical rule is not malpractice *per se,* though it is a short journey from one to the other and they are often conflated. However, the breach of a Rule of Professional Conduct does expose a lawyer to a Bar Complaint and risk of discipline, the cost of which may be both broader in scope and more costly than a malpractice claim [see, for example, Gregory A. Dahl, *Lawyer Discipline in Washington: What You Need To Know,* Washington State Bar News, July, 2011 at page 9].

   2.1 Consumer Protection Act. In *Short v. Demopolis,* 103 Wn.2d 52 (1984), the Court held that the Consumer Protection Act applies to the "entrepreneurial aspects" of the practice of law, including "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients." In *Eriks*, *supra.*, the Supreme Court found that a lawyer's conflicts of interest might present a violation of the Consumer Protection Act if they occurred within the context of such "entrepreneurial aspects." See also *Cotton v. Kronenberg,* 111 Wn. App. 258 (2002). Accordingly, one who breaches an ethical rule, at least as it relates to such "entrepreneurial aspects," might be found to have violated the Consumer Protection Act and thus might become liable for or subject to not only discipline, but also, if sued, disgorgement of fees, damages, and attorney fees as well.

   2.2 RPCs as a Consideration of Civil Liability. In *Behnke v. Ahrens,* 172 Wn. App. 281, 294 P.3d 729 (2012), the court determined that "A trial court may properly consider the RPCs in an action by a client to recover attorney fees for the attorney's alleged breach of fiduciary duty." In *Behnke*, the co-trustees of a trust had paid large fees to an attorney for advice and implementation of a tax shelter to shelter capital gains upon sale of trust assets. Co-trustees were later advised by other attorneys that the IRS considered this an abusive tax shelter and that they should pay the taxes and penalties. They settled with the IRS and then sued the first

lawyer for fraud, consumer protection violation, common law breach of fiduciary duty, and breach of fiduciary duty based on RPCs. The court held that the attorney had violated RPC 1.7(b) and thus his fiduciary duty. While representing the trust and setting up the tax shelter, the lawyer had also been representing the vendor of the tax shelter, and had a financial interest in referring clients to the vendor, and did not fully disclose that relationship to the co-trustees and obtain written consent.

3. WHO IS THE CLIENT? RPC 1.1 demands that "A lawyer shall provide competent representation to a client." That demands not only competent representation, which, pursuant to Rule 1.1, "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation," (see, for example, *Lewis v. State Bar of California,* 170 Cal Rptr 634 (1981), in which Attorney Lewis was disciplined for having undertaken a matter beyond his competence), but also identification of the "client." No duty is more fundamental, nor sometimes more complex, than identifying the client. The other Rules discussed in this Outline can be applied if, and only after, the attorney has identified and, in some instances confirmed, the identity of his or her "client."

3.1 Intake and Conflict Checking Procedures. If the identity of a potential "client" is clear, the first question with which the attorney must deal is whether representation of such client will conflict with the attorney's representation of an existing or former client. That demands that the attorney apply a conflict checking system, the complexity of which is probably proportional to the size of the attorney's firm. The conflict checking database should include all clients of the firm from the inception of the practice, because "once a client, always a client, unless such relationship is terminated." WSBA Informal Ethics Opinion 2097 (2005). That conflict check should occur before the attorney obtains any substantive information from the potential client, because if, after having obtained substantive information from the potential client, the attorney discovers a conflict, neither the attorney nor his or her firm (RPC 1.10) may be able to participate in the transaction/litigation about which they obtained information from the "potential client." (See RPC 1.18 Duties to Prospective Client)

3.2 Existence of Attorney-Client Relationship. The existence of an attorney-client relationship "turns largely on the client's subjective belief that it exists," regardless of whether or not a fee is paid. The client's subjective belief is controlling only if it "is reasonably formed based on the attending circumstances, including the attorney's words or actions." See for example, *Bohn v. Cody*, 119 Wn.2d 357 (1992), citing *In Re McGlothlen*, 99 Wn.2d 515 (1983), within which Attorney Cody carefully explained to Mrs. Bohn that he would not represent her as he represented the borrower who was adverse to her in the transaction, but then proceeded

to give Mrs. Bohn both legal and factual advice. While, because of the attorney's statements that he did not represent Mrs. Bohn, which Mrs. Bohn admitted, the attorney was held not to have an "attorney-client" relationship with Mrs. Bohn, he was found to have owed a duty to Mrs. Bohn which may have been breached. A summary judgment in favor of Attorney Cody was therefore reversed.

Jones v. Runft, Leroy, Coffin, & Matthews, Chtd., 125 Idaho 607, 873 P.2d 861 (1994) is a somewhat analogous case. The law firm represented the borrower in a secured loan transaction. The lender sent the law firm the loan proceeds, together with a letter saying "Your responsibility is to handle the transaction in the best interests of [the lender]." The law firm disbursed the loan proceeds without having obtained and recorded one of the lender's security instruments, and the lender was injured. While, as in *Bohn,* the Court found that the lender was not a client of the law firm, the Court did find that by not having repudiated the direction in the letter and by accepting the loan proceeds for disbursement, a question of fact arose as to whether the law firm assumed a contractual or other duty to the lender. The law firm could have avoided this result by proceeding as directed by RPC 4.3 (dealing with an unrepresented party), by advising the lender that the law firm represented only the borrower, and had and would assume no duty to the lender.

Malpractice awards have been based upon a "relationship" formed, (1) by a lawyer's substantive response to a non-lawyer's question at a Seminar, (2) by a casual (albeit apparently substantive, at least in the eyes of the "client") response to a question while shopping at a grocery store, and (3) by other seemingly inconsequential comments or conversations. Be forewarned, therefore, that any substantive comment or conversation, whether or not billed for, may be sufficient to satisfy (or at least implicate, thereby placing you in the crosshairs of a claim) the "reasonable expectations" test of *Bohn*, thereby giving rise to a duties of care, loyalty, zeal, confidence, etc.

4. <u>IF THE LAWYER REPRESENTS A FIDUCIARY OF AN ESTATE OR TRUST, OR A GUARDIAN OF A WARD, WHO IS THE "CLIENT?"</u> Comment 40 to Washington Rule 1.7 states "under Washington case law, in estate administration matters, the client is the personal representative of the estate." However, in the author's judgment, the authorities in the State of Washington, like those in other jurisdictions and those academicians who have advanced proposals, do not necessarily support that statement. For example, in *In re Estate of Larson*, 103 Wn.2d 517 (1985), the Court held that the fiduciary duty of the attorney ran not only to the personal representative but also to the heirs. In *In re Vetter*, 104 Wn.2d 779 (1985), on the other hand, the Court held that as attorney for the personal representative, Mr. Vetter represented not only the

personal representative but also the estate. In *In Re Fraser*, 83 Wn.2d 884 (1974), in the context of a disciplinary proceeding, the Court held that Mr. Fraser represented both the guardian and the ward. More recently, however, in *Trask v. Butler*, 123 Wn.2d 835 (1994), the Washington Court introduced a "modified multifactor balancing test,"[1] and held that under that test, the primary inquiry is the degree to which the representation was "intended to benefit the plaintiff." Based upon that test, the Court held that Mr. Butler, who represented the personal representative of an estate, owed no duty to the beneficiaries of that estate. In *Stanglund*[2], on the other hand, the Court discovered the duty owed third parties who, absent the discovery of such duty, would have been without a remedy. Similarly, in *Janssen v. Topliff,* 110 WnApp. 76 (2002) and *Estate of Treadwell v. Wright,* 115 WnApp 238 (2003), applying the "multifactor balancing test," the Court held that the attorney for the guardian owed duties to the ward. The decisions, in large part, appear to be driven by the beneficiaries' or ward's ability (or lack thereof) to bring an action against the fiduciary for a breach of fiduciary duties.

Idaho has drawn a clear distinction between representing the personal representative and representing the beneficiaries. In *Allen v. Stoker,* 138 Idaho 265, 61 P3rd 622 (2002), the Court stated that personal representatives and beneficiaries are often adverse to one another, and thus to suggest that an attorney for the personal representative owed duties to the non-client beneficiaries would create a patent conflict of interest. In that case, Ms. Allen was a beneficiary of an estate who was injured by the defalcations of Mr. Stoker's client, the personal representative of the estate (who was later removed in favor of Ms. Allen). Holding that Ms. Allen's remedy was against the personal representative, and that Ms. Allen was not a third-party beneficiary of the attorney-client relationship between Attorney Stoker and his client, the Court dismissed Ms. Allen's claim.

In an interesting twist on the above question, in *Fitzgerald v. Linnus,* 765 A.2d 251 (N.J. Super. Ct. App. Div. 2001), the Court held that Mr. Linnus, an attorney who had made clear to Ms. Fitzgerald that he was representing her solely in her fiduciary capacity, did not owe her a duty in her individual capacity. Ms. Fitzgerald asserted that Mr. Linnus, who represented Ms. Fitzgerald as the personal representative of her husband's estate, should have advised her to disclaim assets in favor of her children, thereby taking advantage of her late husband's transfer tax exemption. The Court stated that such advice to her as an individual would have been outside the scope of Mr. Linnus' express and intended representation of her solely as a fiduciary, and thus that Mr. Linnus did not owe her a duty as an individual.

[1] The elements of the test are as follows: (1) the extent to which the transaction was intended to benefit the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) the extent to which the profession would be unduly burdened by a finding of liability. 123 Wn.2d at 843.

[2] *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 1080 (1994).

The ACTEC Commentaries do little to resolve the conflict or confusion. Instead, the ACTEC Commentaries state:

> The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate, although he or she does not represent them.

Given the absence of clarity suggested by the ACTEC Commentaries, a lawyer would be well advised to identify in a letter to the fiduciary the scope of the lawyer's intended representation and to send copies of that letter to the beneficiaries advising them of any limitations upon the lawyer's representation. The ACTEC Commentaries continue:

> The lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while a fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests.

What should the lawyer do if, while representing the fiduciary, the lawyer becomes aware of any potential breaches of trust by the fiduciary? Clearly, the attorney should bring those breaches of trust to the fiduciary's attention and seek to cause the fiduciary to voluntarily remedy those breaches. But what should the lawyer do if the fiduciary is unwilling or unable to remedy the breach? If the lawyer truly represents only the fiduciary, RPC 1.6, which demands that the lawyer respect client confidences, would generally prevent the lawyer from disclosing the misconduct to the beneficiaries. Note, however, that Washington's formulation of RPC 1.6 provides at paragraph (e):

> [A lawyer] may reveal information relating to the representation of a client to inform *a tribunal* about any client’s breach of fiduciary responsibility when a client is serving as a court-appointed fiduciary such as a guardian,

> personal representative or receiver. [emphasis added]

Sadly, however, RPC 1.6(e) as adopted by Washington does not permit disclosure to beneficiaries, and a lawyer who fails to inform the beneficiaries of the fiduciary's misconduct may ultimately be liable for losses to the fiduciary estate if, notwithstanding cases like *Allen v. Stoker,* above, a Court, applying the modified multifactor balancing test, concludes that the lawyer owed a duty to the beneficiaries just as he or she owed a duty to the fiduciary. As a consequence, the ACTEC Commentaries conclude that the lawyer representing a "breaching, noncorrecting" fiduciary has right of disclosure to beneficiaries. However, a number of state ethical opinions, distinguished by ACTEC, and ABA Opinion 94-380, hold otherwise. In such event, if the fiduciary will not voluntarily disclose and/or correct his or her breaches of trust, the authors believe strongly that the lawyer should withdraw.

5. DOES THE LAWYER'S DUTY RUN TO PERSONS OTHER THAN THE "CLIENT(S)?" As noted above, traditionally, the lawyer's duty ran only to the client(s), as a consequence of which third parties injured by the lawyer's acts or omissions could not sue the lawyer for malpractice. However, at least in the context of estate planning, virtually all states which have considered the question have now relaxed that constraint. For example, in *Stanglund v. Brock*, 109 Wn.2d 675 (1987), the Washington Court held that "[a]n attorney who undertakes to draft a Will owes a duty to the intended beneficiaries of that Will." Though the attorney was successful in that case, the Court held that beneficiaries injured by a draftsman's incompetence may sue the draftsman for legal malpractice. More recently, in *Trask v. Butler*, 123 Wn.2d 835 (1994), the Court introduced, and in *Janssen v. Topliff,* 110 Wn. App. 76 (2002), in *Estate of Treadwell,* 61 P3rd 1214 (Wash, Ct. App. 2003), in the context of a guardianship, and in *Campbell v. Johnson,* 2007 Wash.App LEXIS 2930, 2007 WL 3133883 (2007), the Court affirmed a "modified multifactor balancing test," borrowed from *Biakanja v. Irving,* 49 Cal 2d 647 (1958), as supplemented by *Lucas v. Hamm,* 56 Cal2d 583 (1961), and held that under that test, the primary inquiry is the degree to which the representation was clearly and unambiguously "intended to benefit the plaintiff." Based upon that test, the Court held that Mr. Butler, who represented the personal representative of an estate, owed no duty to the beneficiaries of that estate. The decision, in large part, was driven by the beneficiaries' ability to bring an action against the personal representative for a breach of fiduciary duties. In *Stanglund*, supra, on the other hand, the Court discovered the duty owed third parties who, absent the discovery of such duty, would have been without a remedy.

The Idaho Supreme Court reached a similar conclusion in *Harrigfeld v. Hancock,* 140 Idaho 134, 90 P.3rd 884 (2004), in which the Court, seemingly somewhat reluctantly, held:

> "We hold that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. If, as a proximate result of the attorney's negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed."

However, the scope of that duty, as well, may be broadening. In *Sorkowitz, Trustee, et. Al. V. Lakritz, Wissbrun & Assoc., P.C.,* 683 NW2d 210, the Court held that the defendant law firm owed a duty to the beneficiaries not with respect to defects in the documentation itself or the manner of its execution, but instead in the firm's failure to include a "*Crummey* clause" and appropriate generation skipping provisions.

Thus, in the matter of representing a fiduciary, the ACTEC Commentaries provide that

> … The lawyer who represents a fiduciary generally [i.e., in the fiduciary's representative capacity] is not considered also to represent the beneficiaries. However, most courts have concluded that the lawyer owes some duty to them. Some courts subject the lawyer to the duties because the beneficiaries are characterized as the lawyer's "joint," "derivative" or "secondary" clients. Others do so because the lawyer stands in a fiduciary relationship with respect to the fiduciary who, in turn, owes fiduciary duties to the beneficiaries….
>
> The lawyer … is required to act in good faith and with fairness toward the beneficiaries [and] should advise the fiduciary to act impartially with respect to [them] and to provide [them] with information regarding matters affecting their interest in the fiduciary estate…. [T]he lawyer may not deliberately misinform or mislead the beneficiaries or withhold information from them….
>
> The existence of such affirmative duties [to the beneficiaries] is implicit in the nature of the representation, which involves the lawyer advising the fiduciary in a representative and not a personal capacity. Recognition of such duties is also supported by the fact that the fiduciary estate is almost

> invariably created by a testator or trustor for the exclusive benefit of the beneficiaries. In addition, the fiduciary and the lawyer are both compensated by the fiduciary estate. Finally, recognition of some affirmative duties is also appropriate because the lawyer for a fiduciary is typically in a superior position relative to the beneficiaries, who may repose trust and confidence in the lawyer….
>
> See also Restatement Third, The Law Governing Lawyers § 51 (Duty of Care to Certain Nonclients) (when the client is a trustee, guardian, executor or other fiduciary); and R. Held, "A Trust Counsel's Duty to Beneficiaries," 92 Ill. Bar J. 636 (2004). The court in Charleson v. Hardesty, 108 Nev. 878, 882-883, 839 P.2d 1303, 1306-1307 (1992), stated: "We agree with the California courts that when an attorney represents a trustee in his or her capacity as trustee, the attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law."

6. Clients Bearing Multiple Relationships To An Estate or Trust. Be extremely careful in the situation where a client might bear several relationships to held an estate or trust. For example, the personal representative will often be a beneficiary of the estate, and a conflict may arise between his or her duties as personal representative and desires as a beneficiary (But see *Baker Manock & Jensen v. Superior Court (Salwasser)* , 175 Cal.App. 4th 1414 (2009) which held the representing the personal representative, as a fiduciary and beneficiary was not a conflict of interest). A personal representative may be a joint account holder with the decedent, and the question may arise as to whether the funds in that account are estate assets or instead passed to the personal representative/joint account holder upon death. A guardian may be asked to be the trustee of a special needs trust for the ward (see, for example, Washington Advisory Opinion 2107 (2006) holding that such appointment would create an actual or potential conflict of interest). The personal representative may have claims against either the estate or others interested in the estate. Often a surviving spouse will be both the trustee and beneficiary of one or more trusts established upon the death of the first spouse to die. See, if a slightly different fact pattern, for example, *Taylor v. Maile,* 142 Idaho 253 (2005), affirmed 2009-ID-0202.167 (2009), where the Court held that as a matter of law, a trustee and beneficiary have a conflict of interest. It is critical that the lawyer identify and make clear not only the identity of the client, but also the capacity in which the lawyer will represent that client, and, however hard, that the lawyer refer the client to other counsel for representation in capacities other than the identified capacity.

The ACTEC Commentaries provide that

> [s]o long as there is no risk that the decisions being or to be made by the client as a fiduciary would be compromised by the client's personal interest, such "dual capacity representation" poses no ethical problem. The easiest case would be where the client is the sole beneficiary of the estate as to which the client is the fiduciary. But even there, since a fiduciary owes duties to creditors of the estate, it is possible for a conflict to emerge.

In the instance that there are additional beneficiaries, there is some argument that it may be necessary for the attorney to obtain waivers from beneficiaries or others who are interest in the estate, but who are not the lawyer's clients. The ACTEC Commentaries note that MRPC 1.7(a)(2) provides that if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to …a third person, then MRPC 1.7(b) must be complied with, including the duty to get informed consent. However, the counter to the argument for waivers is that MRPC 1.7 contemplates getting waivers from "affected *client*[s]" (emphasis added). Thus, to the extent that beneficiaries are not otherwise clients, such waiver is not required. Additionally, the ACTEC Commentaries state that as long as the lawyer has explained to the client his or her responsibilities to third persons, such as non-client beneficiaries or creditors, and obtained the requisite client waivers, this should allow the lawyer to honor those responsibilities consistent with representation of the client.

> In *Estate of Buoni*, 2006 Cal. App. Unbpub. LEXIS 9368, 2006 WL 2988737 (2006), a Court in California found that an attorney who represented a fiduciary who was both the personal representative and a creditor of the Estate was not engaging in a conflict. The rationale behind this reasoning was that the conflict was on the part of the fiduciary and that California law required a Personal Representative to seek court approval or rejection of the creditor claim. Washington has a similar requirement. RCW 11.40.140.

6.1 Representation of Co-Fiduciaries. On the assumption that co-fiduciaries will have a common purpose and intent, the author believes that a lawyer can represent co-fiduciaries, though such representation should be the subject of an engagement letter dealing with confidences and other matters (much like the representation of husband and wife). However, conflicts can arise between co-fiduciaries just as readily as in any other joint representation. Upon such conflicts, the lawyer should, I believe, transition the representation to separate counsel for each fiduciary. Before accepting the representation, the lawyer should explain to the co-fiduciaries the implications of the joint representation, including the extent to which the lawyer will maintain confidences as between the co-fiduciaries. An

example of the potential conflicts in joint representation of co-fiduciaries is *Estate of Rothko,* 372 N.E.2d 291 (N.Y. App. 1977), where two of three co-executors were found to have conflicts of interest with respect to contracts to sell paintings in the estate. ACTEC Comments to MRPC 1.2.

6.2 Representation of the Decedent and Personal Representative. Generally a lawyer can and does represent both the decedent and, following the decedent's death, personal representative. What if, however, the Will or other dispositive instrument is challenged, and the lawyer will be a witness? RPC 3.7 permits a lawyer to be a witness in a Will contest, if another lawyer, even if in the same firm, is acting as the advocate in the proceeding.

6.3 Dispute Resolution Agreements. The drafting and execution of Dispute Resolution Agreements involves persons having arguably competing interests agreeing on an outcome in the context of an estate or trust. Note however that a party to such an agreement who initially agrees may later have second thoughts, and may challenge the Agreement and those who participated in its development and adoption. Thus, in the context of Dispute Resolution Agreements, the lawyer should be particularly mindful of RPC 1.7 (conflicts of interest, both as to identity and capacity) and RPC 4.3 (dealing with unrepresented persons).

6.4 Lawyer As Both Personal Representative and Lawyer For the Personal Representative. Setting aside any question as to whether the lawyer's malpractice insurance will cover activities as personal representative, the lawyer for the personal representative owes a duty to the personal representative, as described above, and the personal representative owes a duty to the beneficiaries. Thus, serving in both capacities dramatically increases the number and complexity of the fiduciary obligations of the lawyer/personal representative. In this case excessive compensation was recovered from the scrivener of a will who was subsequently appointed co-trustee of a large testamentary trust. The court held that an exoneration clause did not protect the scrivener against liability: "As the attorney engaged to write the decedent's will, [defendant] is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect." *Fred Hutchinson Cancer Research Center v. Holman*, 732 P.2d 974, 980 (Wash. 1987).

7. A LAWYER'S DUTY OF CARE. As a matter of law, a lawyer owes his or her client that degree of care, skill, diligence, loyalty, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law. *Cook, Flanagan & Berst v. Clausing,* 73 Wn.2d 73, 438 P. 2d

865 (1968). If a lawyer holds himself or herself out as an expert, the lawyer may be held to a standard of care and performance of those who hold themselves out as experts. *Walker v. Bangs,* 92 Wn.2d 854, 601 P. 2d 1279 (1979). The standard of care is a statewide standard; it is not a localized standard. *Cook, supra.*

A lawyer can be liable to his or her client(s), and as noted below, perhaps others as well, for a breach of the foregoing duty of care and loyalty. However, a breach of an ethical duty may be evidence of, but is not the same as, a breach of the duty of loyalty and care. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P. 2d. 646 (1992); *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999). *See also,* the Preamble to the Washington Rules at Section 20. A breach of an ethical duty, standing alone, is thus not prima facie actionable. However, in *Eriks v. Denver*, 118 Wn.2d 451 (1992), the Court held that an attorney with an un-waived multiple client conflict thereby violated his duty of loyalty as well, thus establishing a direct link between a violation of the Rules of Professional Conduct and malpractice. See also *Traub v. Washington,* 591 SE2nd 382 (2003), in which the Court established a direct link between the Rules of Professional Conduct and the standard of care. Thus, business or estate planning lawyers probably ought not to draw too much comfort from the seeming teachings of *Hizey* and *Hetzel*, and should pay greater attention to *Eriks*. In fact, poor client selection, often coupled with allegedly confusing roles for the lawyer (such as an alleged conflict of interest), is a common fact pattern of the "big money" case against law firms.

7.1 Duty to Assure that Client Implements "Best" Strategies. Does an attorney have a duty to assure that the client implements the strategies which the attorney believes to be in the beneficiary's best interests? This was at issue in *In the Matter of the Janice Galloway Trust*, No. C5-04-200042 (Minnesota Dist. Ct., 2007), in which expert witnesses retained by Mrs. Galloway's children, as remainder beneficiaries of the Trust, urged that US Bank, as trustee, had a duty to place her Marital Deduction Trust estate in a family limited partnership, in order to depress the value of that Trust for estate tax purposes. The Court held that the Trustee had no duty to engage in estate tax saving strategies, but a number of commentators predicted that the claim itself foretold claims against attorneys for their failure to cause their clients to implement strategies best meeting the needs of beneficiaries. Those claims have not arisen, and, as described below, under the law as it currently exists, subject to limited exceptions, it may be that beneficiaries would lack standing to bring such a claim. Instead RPC 1.4(a)(1) and 1.4(b) suggest that so long as the client is adequately informed, the choice of options rests with the client. The attorney is thus permitted to implement the option chosen by the client, even though the attorney believes such option inferior to one or more other alternatives.

Note that the lack of a duty to assure that the client adopts the best strategy

is materially different from a lack of a duty to assure that the client is aware of the best strategy. Indeed, RPCs 1.1 (Competence), 1.3 (Diligence), 1.4(a)(1) and 1.4(b) each suggest that a lawyer has a duty to assure that the client is aware of all reasonably available alternative strategies by which to meet the client's goals.

8. A LAWYER'S DUTY OF ZEAL. At common law, an attorney owed his or her client the unbridled duty of zeal, upon the premise that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client." *Proceedings in the House of Lords, Trials of Queen Caroline 7 (*Duncan Stevenson & Co. ed. 1820) (quoting Lord Brougham). Does the same duty still exist, or have Rules 3.4 and 4.1 and case law changed the status and duties of lawyers by defining the lawyer as not only an advocate but also an officer of the Court? See, for example, *Washington State Physicians Exchange & Association v. Fisons Corp.,* 122 Wn.2d 299 (1993). For example, in negotiations with others, does an attorney have a duty to assure that the attorney's client is wholly truthful and transparent, and a duty to assure that the opposing party is not mislead?

8.1 Relevant Rules. RPC 4.1(b) requires an attorney to disclose material facts to a third person when disclosure "is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is *prohibited* by RPC 1.6." RPC 1.2(d) provides that "a lawyer shall not…assist a client in conduct the lawyer knows is…fraudulent." RPC 1.6, as adopted in both Washington and Idaho, generally prohibits disclosure, but permits (ie, does not *prohibit*) disclosure "to prevent the client from committing a crime,…" or "…to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result … from the client's commission of a crime in furtherance of which the client has used the lawyer's services." Thus despite the fact that RPC 1.6 generally appears to trump RPC 4.1(b), and is often cited as the cornerstone of the legal profession, numerous cases and recent legislative and regulatory trends in the wake of the Enron/WorldCom cases, which appear to signal a requirement of (or at least a greater opportunity for) greater disclosure and appear to suggest a diminished acceptance of the lawyer's role as a close-mouthed advocate for an errant client, lead one to the conclusion that a lawyer is at greater risk if the lawyer fails to disclose a fraud of a client than if he discloses it.

8.2 Analysis. The threshold issue is thus whether the client's conduct or proposed conduct constitutes a "crime" as contemplated by RPC 1.6(b)(1). The Rules are silent as to that which is deemed to be a "crime" for purposes of disclosure. Unless the attorney concluded that the failure to disclose would be a "crime," the attorney could not disclose the material fact under RPC 1.6(b)(1). Washington and Idaho differ in the formulation

of RPC 1.6(b)(3) dealing with disclosure "to prevent, mitigate, or rectify substantial injury to the financial interests…of another." Washington frames its Rule in terms of "fraud," which is defined in RPC 1.0(d) as "conduct that is fraudulent under the substantive or procedural law of the jurisdiction and has the purpose to deceive." Under Washington's formulation of the rule, disclosure may not be permissible, because the definition of "fraud" in the RPC's does not include "failure to apprise another of relevant facts". *See* Comment to Model Rule 4.1. However, *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960) supports a contrary result in the context of the sale of an apartment house.

If the lawyer knows or concludes that the client is knowingly failing to disclose germane information and is uncertain whether the client's failure to disclose constitutes fraud, the lawyer must face the ethical dilemma raised by RPC 4.1(b), RPC 1.2(d) and RPC 1.6. In that situation, the Rules of Professional Conduct are clear as to the lawyer's first response. Under RPC 1.2(d), the lawyer should discuss the legal consequences of the client's course of conduct, analyze the proposed conduct under applicable law, and offer options to the client that arguably would not involve fraudulent conduct.

If the client refuses to make the disclosure or otherwise prevent or mitigate the possible fraud, though disclosure is only permissive under Rule 1.6, the seeming thrust and direction of the law would suggest either that the lawyer should withdraw from the representation or, instead, should make the disclosure pursuant to the possible authority granted the lawyer in Rule 1.6. The lawyer does so, however, at his peril, if, in hindsight, the disclosure is not permitted by RPC 1.6.

In any case, the matter should be brought to the attention of the client and the lawyer should advise the client of the risks inherent in the client's decision to withhold the information. G.C. Hazard and W.W. Hodes, 2 The Law of Lawyering § 4.1:201 (1993) at 717. In the author's judgment, this would be a good first step. If the client failed to disclose thereafter, however, it would not be a reasonable last step.

9. Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary. Under RPC 1.8, entitled "Conflict of Interest: Current Clients; Specific Rules," a lawyer is prohibited from participating in certain "prohibited transactions," and discouraged from participating in transactions having an "appearance of impropriety." Under RPC 1.7, a lawyer should not undertake or continue representation where such representation may be materially limited by the lawyer's own interests.

Drafting oneself into a Will or trust as a personal representative or trustee, from which the attorney may enjoy substantial fees, gives rise to an appearance of

impropriety. The relationship, were it to arise, also creates a potential for conflicts of interest with other clients of the lawyer and with beneficiaries of the estate or trust. Naming oneself as a fiduciary thus creates substantial ethical risks.

9.1 Is Independent Counsel Required. RPC 1.8 demands that the client receive independent counsel before engaging in any business or financial transactions potentially adverse to the client. The ACTEC Commentaries opine that Rule 1.8 is not implicated in a situation in which the attorney drafts an instrument in which he or she is named as a fiduciary. Nonetheless, a good practice would suggest or demand that, if the client insists upon naming the attorney as a fiduciary, the attorney, in writing, encourage the client to seek independent counsel and, if the client elects not to engage independent counsel, to obtain a written waiver from the client. Further, the document naming the attorney as fiduciary should recite that the attorney has discussed the issue with the client and has encouraged independent representation.

Washington Informal Opinion 86-1 held that:

> A lawyer may draft a document for an unrelated client that appoints the lawyer as a fiduciary if the client is fully informed regarding the alternatives and costs and is advised that he or she is free to consult independent counsel.

Note that drafting an exculpation clause will not limit the liability for the drafting. In *Fred Hutchinson Cancer Research Center v. Holman*, 732 P.2d 974, 980 (Wash. 1987), the court held that an exculpation clause could not protect the scrivener against liability: "As the attorney engaged to write the decedent's will, [defendant] is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect."

9.2 Potential Additional Problems. Naming the lawyer as fiduciary may give rise to some secondary problems as well. For example, naming the lawyer as fiduciary may cause beneficiaries to challenge the Will who, but for such designation, might not have challenged the Will, as it may suggest an absence of independence of the testator. Similarly, the evenhandedness required of the fiduciary may create a conflict between the lawyer's role as an advocate for the fiduciary and the fiduciary's duty of evenhandedness. That same duty of evenhandedness will extend the duties owed by the attorney from duties owed solely to the fiduciary to duties owed the beneficiaries themselves. See, for example, *In re Disciplinary Proceeding Against John L.McKean,* 148 Wn.2d 849, 64 P.3d 1226 (2003) and *In re Talbot,* 107 Wn.2d 335, 728 P3d 595 (1986), each of which held that an attorney acting as personal representative owes a fiduciary duty to each and all beneficiaries. The attorney ought not draft himself or herself into an

instrument as a fiduciary unless he or she is willing to accept these broader risks. Finally, the lawyer's malpractice insurance might not provide coverage for claims incurred as a fiduciary, as opposed to those incurred as a lawyer.

10. CONFLICTS INVOLVING FORMER CLIENTS. RPC 1.9 bars a lawyer from representing a current client in a matter which is materially adverse to a former client and which involves the same or a substantially related matter as was the subject of the former representation, unless the former client consents after consultation and full disclosure. In addition, whether or not the former client consents, the lawyer may not use confidences gained in the prior representation to the disadvantage of the former client, unless RPC 1.6 would allow such use. Finally, even if the former client consents, the new client probably must also consent under Rule 1.7.

10.1 What is a Former Client? The line between a terminated attorney client relationship, giving rise to "former client" status, and a "dormant albeit on-going" attorney-client relationship is unclear. Sometimes it is not easy to tell whether X is a current or former client. (For example, what if you have represented X off and on for a number of years, but do not have anything currently going on?). Note that the issue may be interpreted from the client's perspective, with doubt resolved against the lawyer. The comments to Model Rule 1.9 states:

> If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing... .

If there is a reasonable basis by which the client could argue that they felt they were still represented by the lawyer or the firm, the situation should be tested under RPC 1.7 rather than RPC 1.9. In order to avoid the question, and to blunt such dispute, the attorney should, where possible, send a "disengagement" letter upon termination of a matter.

11. THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE. Generally, when representing a fiduciary, the attorney is assisting the fiduciary in making decisions regarding matters affecting the representation, such as the timing and composition of distributions and the making of available tax elections. In addition, the attorney may be reviewing and analyzing the fiduciary's decision making processes with respect to complex matters in the administration process – decisions that could create or mitigate liability to the fiduciary. As noted in the ACTEC Commentary, communication between the lawyer and client is one of the

most important ingredients of an effective lawyer-client relationship. ACTEC Commentary on MRPC 1.4. The ability to speak freely to counsel and to provide them with a full understanding of all of the facts is a protected right between clients and counsel. However, in the case of a fiduciary, there is a concern as to whether the privilege will apply to communications between a counsel and the fiduciary.

Over the years, there has been created a "fiduciary exception" to the attorney-client privilege which is based on the idea that a communication between an attorney and a client is not privileged as to those to whom the client owes a fiduciary duty. *47 A.L.R.6th 255*. This rule stems from the principle of English trust law that requires a trustee to comply with a beneficiary's request to produce all legal advice that the trustee has obtained on matters concerning administration of trust. *In re Kipnis Section 3.4 Trust*, 235 Ariz. 153, 329 P.3d 1055 (Ct.App.Div. 1 2014).

There is some discussion as to whether the applicability of the attorney-client privilege is dependent on whether the trustee obtained the advice for his or her protection and personally paid for the legal advice. See R2d Trusts §173 (Cmt. b), R3d Trusts §82 (Cmt. f). Commentators have stated that it is likely that a trustee would "need not disclose 'information acquired … at his own expense and for his own protection' and is thus "privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection." *Id.*, *see also,*, R. Reid, et al., "Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary," 30 Real Property, Probate & Trust J. 541 (1996).

In the leading case of *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713-714 (Del. Ch. 1976), the court stated:

> As a representative for the beneficiaries of the trust …, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply incidental beneficiaries who chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries…. The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is … ultimately more important than the protection of the trustee's confidence in the attorney for the trust.

In making its determination that the beneficiaries had a right to a memorandum that the trustee's attorney had drafted, the court looked to the purpose of the prepared memorandum. The court noted that the only litigation was a "Petition for Instructions" and as a result the court determined that the legal advice was for the benefit of the beneficiaries and not for the trustee. Finally, because the trustee used trust funds to pay for the legal expenses, the court found that the

trustee sought the advice for the benefit of the beneficiaries. See II Scott on Trusts 3d Ed. s. 173.

Florida courts have recognized that the attorney's ultimate client is the beneficiary unless the attorney's work concerns a dispute between the fiduciary and the beneficiary. *Jacob v. Barton*, 877 So.2d 935, 937 (Fla. App. 2004), *First Union National Bank v. Whitener*, 715 So.2d 979,982 (Fla.App. 1998).. Similarly, in Arkansas, *In re Matter of Torian*, 263 Ark. 304, 564 S.W.2d 521, 525-526 (1978), the Court determined that the attorney-client privilege could not be asserted in the instances that the fiduciary was acting for both itself and for the beneficiaries. See R. Chester, "The Lawyer as Charitable Fiduciary: Public Trust or Private Gain?," 25 Pacific L.J. 1353, 1382 (1994): "[I]t is hard to imagine an attorney-client relationship more explicitly dedicated solely to benefit third parties than that of a fiduciary and the fiduciary's counsel."

Several courts have also breached the topic of whether a successor trustee can assert or waive the attorney-client privilege as to confidential communications between an attorney and the former trustee. The Court in *Moeller v. Superior Court*, 16 Cal.4th 1124, 947 P.2d 279, 69 Cal.Rptr.2d 317 (1997), found that the successor trustee did have such authority.

With respect to the attorney-client privilege held by an attorney and a deceased client, in Washington, the privilege continues. However, the personal representative of the Estate can waive the privilege in a proceeding in which the estate is involved. *Martin v. Shaen*, 22 Wn.2d 505, 156 P.2d 681 (1945). There is some authority that provides that a beneficiary may also waive the privilege in the instance that there is a dispute over the estate.

CHAPTER SEVEN

RULES OF PROFESSIONAL CONDUCT

WASHINGTON'S RULES OF PROFESSIONAL CONDUCT (RPC)

(Amended effective October 1, 2002, September 1, 2006, September 1, 2010; September 1, 2011; December 13, 2011; September 1, 2012, September 1, 2013, January 1, 2014, April 14, 2015, September 1, 2016]