Maintaining A Balance:
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CHAPTER 1
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Nuts & Bolts of TEDRA

Karolyn Hicks,
Stokes Lawrence P.S.

NUTS & BOLTS OF TEDRA:
Litigation, Arbitration, Mediation, and Binding Agreements Under RCW 11.96A

KAROLYN HICKS is a Shareholder at Stokes Lawrence, P.S., where she has worked since 2000. She received her B.A. *cum laude* from Pennsylvania State University in 1997 and her J.D. *cum laude* from American University in 2000. In 2008, she was named the "Outstanding Young Lawyer of the Year" by the King County Bar Association. In 2011 and 2012, her peers voted her a "Rising Star" in Washington Super Lawyers; in 2013, 2014 and 2015 she was named a "Super Lawyer" with added distinctions in 2014 as one of the "Top 100 Lawyers," and in 2014 and 2015 one of the "Top 50 Women Lawyers" in the State of Washington. Also in 2015, she received the "Top Rated Lawyer in Trust & Estates, American Lawyer Media and Martindale-Hubbell (2015)" and "AV Preeminent® Peer Review Rated," Martindale-Hubbell's highest ranking. She has a litigation practice with strong emphases on trust and estate disputes, partnership disputes, and fiduciary duty litigation. She serves on the Trust and Estate Litigation Sub-Committee of the Real Property Probate and Trust ("RPPT") Section of the Washington State Bar Association ("WSBA"). She is an editor and contributing author of the RPPT Newsletter. She is a frequent speaker at CLEs. She is a past co-chair of the WSBA Annual Trust & Estate Litigation Seminar (2009-2012). Karolyn is also a co-author of the "Estate Disputes" Chapter of the WSBA Washington Probate Deskbook (2005).

Prepared by Karolyn Hicks, August 2015[1]

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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.2
- Petitions to declare whether a community property agreement is valid or invalid.
- Petitions under RCW 11.68.070 to remove personal representatives.3
- 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).

NOTE: King County Local Rule, KCLR 98.14 "Trust and Estate Dispute Resolution Act and Power of Attorney," provides:

> **(c) Performance Requirements.** All issues initiated under TEDRA that pertain to an estate must be resolved before the estate can be closed. If the TEDRA proceeding was filed as an incidental action under a separate cause number, when all issues are resolved and the case is ready to be closed, a document shall be filed in the matter indicating that a complete resolution has been achieved.

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

[2] RCW 11.96A.030(h) allows reformation by court petition to conform the terms of a will or trust to the intent of the testator or trustor, where the petitioner can show by clear, cogent, and convincing evidence that the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement. (Reformation can also be achieved by means of a binding nonjudicial agreement, utilizing the same standards.) *See* RCW 11.96A.125.

[3] Interestingly, both Division III's decision in *In re Estate of Jones*, 116 Wn. App. 353, 67 P.3d 1113 (2003), and the Supreme Court of Washington decision reversing that ruling, *In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004), mentioned TEDRA only once, when they addressed RCW 11.96A.150 as authority for allocating attorney fees.

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).
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> (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.
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> *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."