Real Property, Probate & Trust

Vol. 39, Number 4 *Published by the Real Property, Probate & Trust Section of the Washington State Bar Association* Fall 2012

The section lost one of its most valuable members when **Scott Johnson** passed away unexpectedly on October 20, 2012 at the age of 53. Scott was a tireless contributor to section activities, chairing the Probate and Trust Litigation CLE for many years and regularly speaking and writing for section seminars and publications. We are able to publish his last contribution, this article, because Scott had, as usual, submitted it early. Scott loved being a lawyer. He gave of his time freely, sharing his knowledge and experience with other lawyers and working for access to justice, because he valued the privilege of being in this profession. Scott had just won election to the King County Superior Court and was extremely excited to start his career on the bench in January, and it is a tragedy for the county to lose someone who would have surely been a great judge. Even though we will no longer benefit from Scott's expertise, we can all still learn from him by reminding ourselves of the reasons we became lawyers and that despite the negative aspects of practice, it is still a privilege to have this opportunity as lawyers to serve our communities. Our sympathies are with his wife and daughter and extended family.

The Importance of Filing Creditors' Claims for Real Estate Lenders and Home Owners' Associations in a Challenging Economy

by Scott A.W. Johnson, Mathew L. Harrington and Joan E. Hemphill – Stokes Lawrence, P.S.

In most circumstances, a lender does not need to file a creditor's claim in an estate when its loan to the decedent is secured by a deed of trust on real property. During normal times, it is understandable that lenders do not worry about filing creditors' claims because, so long as property values are not falling, the amount owed is never at risk of exceeding the value of the property secured by the deed of trust. But when real estate values decline, as happened in 2008 through 2011, the value of the property secured

continued on next page

Attention Please – Conversion to E-Newsletters

Following a growing WSBA trend, the RPP&T Newsletter has gone green! Starting with this issue, the Newsletter is being distributed in electronic format only. All future versions will be password-protected. You will be notified of each new edition of the Newsletter via an email from the WSBA providing a link to a PDF of the new Newsletter. This edition is available to you on the Newsletter Page at *www.wsbarppt.com/pub*. All future editions will be available on the RPPT's member only page at *http://www.wsbarppt.com/private/members.htm*. To access this web page you will need the members' password. To ensure that you continue to be able to access future editions of the Newsletter, please contact the RPPT Web Editors Doug Lawrence (*doug.lawrence@stokeslaw.com*) or Brett Sullivan (*bretts@sullivanstromberg.com*) to make sure you have the webpage password. Archive newsletters will remain on the section's website. Please contact Newsletter Editor Laura Zeman if you have any questions about the new newsletter format at *lzeman@zemanlaw.com*.

Table of Contents

continued from previous page

The Importance of Filing Creditors' Claims…

by a deed of trust can be less than the amount owing on the promissory note, resulting in an unsecured deficiency.

This unusual dynamic raises three questions that will be addressed in this article concerning creditors' claims for real estate lenders and homeowners' associations:

(1) Does a partially secured creditor need to file a creditor's claim in order to recover any deficiency from the estate? Remarkably there is no case law in Washington that directly addresses this issue, although the issue may soon be decided by the Washington Court of Appeals, Division One.

(2) In giving a creditor actual notice of the pendency of probate and the right to file a creditor's claim, does the estate have to comply with the creditor's unique contractual notice provision? The law suggests not and institutional creditors should not expect estates to follow the contractual notice provisions.

(3) Does a creditor to whom the estate has a continuing obligation have to file a creditor's claim for collection of amounts owed post-death? The recent decision in *Estate of Earls*[1] suggests that it does.

The Decedent's Condominium

To illustrate these issues, consider the following situation based loosely on a pending probate. At the time of his death in 2010, decedent owned a condominium. He purchased it in 2005 financed with an institutional lender. He executed both a promissory note and a deed of trust. Decedent also executed an amended condominium declaration that established the obligation to pay homeowners' dues to the condominium association.

Shortly after decedent's death, the personal representative initiated probate and published and filed a probate notice to creditors, although he did not provide that notice directly to the lender at that time. The personal representative continued to pay the monthly dues to the condominium association and the monthly payments to the lender of principal and interest due on the note. The personal representative put the condominium on the market.

As a result of the collapse of the real estate market in 2008, the value of the condominium was substantially less than the 2005 purchase price. The personal representative could not sell the property for more than the outstanding balance due on the promissory note. Even after lowering the asking price several times to well below the outstanding balance of the loan, no offers were made on the property.

The Lender's Creditor's Claim

Approximately one year after publishing notice to creditors, the personal representative mailed directly to the lender a notice of the commencement of probate, his appointment as personal representative and a probate notice to creditors. The notice was mailed first class postage prepaid to the address used for servicing the loan.

Because the condominium could not be sold for more than the balance of the loan, the personal representative proposed to the lender that it accept a deed in lieu of foreclosure. The lender rejected that proposal. Later, he asked the lender to accept a short sale in which the deficiency would be waived. The lender rejected that proposal as well. Although the lender had never filed a creditor's claim, it indicated that it expected the estate to pay any deficiency between the net proceeds from the estate's eventual sale of the property and the outstanding balance of the loan. The personal representative stopped paying on the note.

After the lender failed to file a creditor's claim within thirty days of the probate notice to creditors mailed directly to it, the personal representative filed a petition seeking a declaration that the estate would not be responsible for any deficiency – that the lender would be limited to the value of its secured interest in the property. The lender filed an opposition to that petition and simultaneously filed a creditor's claim. The lender argued that it did not actually receive the personal representative's notice of probate and thus its creditor's claim was not untimely because it was filed within two years of the publication of the probate notice to creditors.

The Court's Rulings on the Lender's Claim

On hearing the personal representative's petition, the probate commissioner ruled as a matter of law that the lender, by virtue of its status as a secured party, need not file a creditor's claim to preserve its claim against the estate for any amount of deficiency.

The personal representative filed a motion for revision of the commissioner's order. The superior court denied the motion for revision, but on different grounds. The superior court found that the personal representative failed to give proper notice to the lender. The trial court held that regardless of the manner of notice set forth in Washington's probate non-claim statute, the lender's contractual notice provision required that notice was valid only if actually received by the lender.

The personal representative sought discretionary review, but a commissioner of the court of appeals denied review because the personal representative had not yet accepted or rejected the lender's creditor's claim.

continued on next page

continued from previous page

The Importance of Filing Creditors' Claims...

The personal representative then rejected the creditor's claim and the lender filed suit. The personal representative brought a motion for summary judgment to dismiss the suit on the grounds that the lender failed to timely file a creditor's claim. The superior court agreed.

The lender has filed an appeal to the Washington Court of Appeals, Division One.[2]

The Association's Creditor's Claim

The personal representative did not mail any additional probate notice to creditors to the condominium association. After more than two years, during which the personal representative was unable to sell the condominium, the personal representative stopped paying the monthly homeowners' dues.

After the personal representative stopped paying the homeowners' dues, the association filed a creditor's claim and concurrently filed a petition suing on that creditor's claim without giving the personal representative the opportunity to either accept or reject the claim. The personal representative moved to dismiss the association's suit on the grounds that the creditor's claim was time barred and the association did not properly present the estate with the creditor's claim before filing suit.

The probate commissioner denied the estate's motion to dismiss. The personal representative filed a motion for revision of the commissioner's order. The superior court granted revision finding that the association was required to file a creditor's claim but failed to do so within two years of publication of the probate notice to creditors. The association did not appeal.

1. A Partially Secured Creditor Must Timely File a Creditor's Claim to Recover Any Deficiency

The probate non-claim statute, Chapter 11.40 RCW, provides that "a person having a claim against the decedent is forever barred from making a claim or commencing an action against the decedent … unless the creditor presents the claim in the manner provided in RCW 11.40.070 within" certain time limitations.[3] If the personal representative provided "actual notice" pursuant to RCW 11.40.020(1)(c), the creditor must present the claim for any unsecured debt the later of (a) thirty days from the personal representative's mailing of notice, or (b) four months after the date of first publication of the notice. The creditor must both file the claim in the probate proceedings and timely serve the claim on the personal representative or the personal representative's attorney.[4]

The policies of the probate non-claim statute are to limit claims against decedents' estates, expedite the settling of estates, and facilitate the distribution of decedents' property to the heirs and devisees.[5] The creditor's claim statute is, in essence, a statute of limitations.[6] Because its purpose is to obtain early and final settlement of estates so that those entitled may receive the property free from any encumbrances and charges that could lead to long litigation, the probate non-claim statute is more strictly enforced than general statutes of limitations, is mandatory, is not subject to enlargement by interpretation, and cannot be waived.[7]

There is an exception to this rule, however, when a loan is secured. But the exception in RCW 11.40.135 only applies up to the value of the security. "If a creditor's claim is secured by any property of the decedent, this chapter *does not affect the right of a creditor to realize on the creditor's security*, whether or not the creditor presented the claim in the manner provided in RCW 11.40.070."[8] By the

continued on next page

continued from previous page

The Importance of Filing Creditors' Claims...

plain language of the statute, a secured creditor need not file a creditor's claim to "realize on the creditor's security."[9] But, a secured creditor will need to file a creditor's claim if the claim exceeds the value of the security and the creditor wants to pursue the deficiency.

As noted in *In re Estate of Hoffman*,[10] mortgages are not subject to the probate non-claim statute's bar to claims against the estate which are not filed as a creditor's claim. There, the court noted that (secured) mortgage debts to which the estate has notice are exceptions to the non-claim statute: "The mortgages were established as debts against the estate without creditor claims *to the extent the mortgagees seek no deficiency judgment* as general creditors of the estate in foreclosure." [11]

Because the loan was secured by a deed of trust on the condominium, the lender did not need to file a creditor's claim for the value of the property, and was entitled to foreclose on the property. The lender, however, was not entitled to any deficiency above the value of that security. By definition, any deficiency – the amount of the outstanding balance of the loan that exceeds the value of the security – would be an unsecured claim to which the exception in RCW 11.40.135 would not apply.

Collection of a deficiency against an estate is more than just "realizing on the creditor's security." Collection of a deficiency, like any other unsecured creditor's claim, seeks to take other unsecured assets or funds from the estate. Thus, the lender was required to timely file a creditor's claim after receiving notice, which it did not do. The lender would be forever barred from collecting any deficiency against the estate.

Any ruling that a partially secured creditor need not file a creditor's claim in order to recover a deficiency against an estate would frustrate the purpose of the probate system to efficiently identify and resolve claims. It would allow partially secured creditors to hold onto their claims without asserting them within the deadline for asserting creditor's claims. It would frustrate the personal representative's ability to pay claims within the proper order, as laid out in RCW 11.76.110. A personal representative cannot assess the priority and order of claims until all claims are known. If the personal representative pays claims out of order, he can be personally liable.

Moreover, if a partially secured creditor does not have to file a creditor's claim then distributions from any estate featuring a potentially underwater property will be delayed because distributions cannot be made until all claims are paid. The personal representative could be prevented from paying any claims to any creditors and making any distributions to any beneficiaries. Furthermore, before closing the estate, a personal representative must sign a declaration of completion, in which he asserts that all claims have been satisfied or compromised. If partially secured creditors need not file creditors' claims to pursue their deficiency against estates, personal representatives would refrain from closing estates until all potential statutes of limitations have expired for fear that more creditors could surface, thus undermining entirely the time limitations in RCW 11.40.051.

This problem is a product of the times. This situation was unlikely to arise in the past because lenders used stricter lending standards and required a larger down-payment in order to insure that a drop in real estate values would not put a home loan underwater. Until the recent downturn in the real estate market, lenders were not faced with deficiencies and did not routinely file creditors' claims in estates. The lender in this case apparently was slow to react to the harsh new realities of the real estate recession, and instead sought to recover a deficiency that is unsecured *without* having to first timely file a creditor's claim.

It remains to be seen how the Court of Appeals will decide this issue. But, the best practice for any real estate lender or other creditor during difficult economic times, whether or not it has determined if its loan is fully or only partially secured, is to timely file a creditor's claim to preserve the ability to collect any potential deficiency from the estate.

2. Mailing Notice to Creditors is Sufficient; the Estate Need Not Comply with the Creditor's Own Contractual Notice Provisions

In the case above, the lender argued that the personal representative did not satisfy the enhanced notice provisions in its deed of trust which required that it actually receive any notices for those notices to be valid. The lender thus argued that the personal representative's notice was not effective to trigger the lender's duty to file a creditor's claim in the probate matter.

The probate non-claim statute provides a definition for what is meant by "actual notice."

If the personal representative provided notice under RCW 11.40.020 and the creditor was given actual notice as provided in RCW 11.40.020(1)(c), the creditor must present the claim within the later of: (i) Thirty days after the personal representative's service or mailing of notice to the creditor; and (ii) four months after the date of first publication of the notice.[13]

Thus, a creditor's claim must be presented within these time limits "[i]f the personal representative provided notice under RCW 11.40.020 and the creditor was given *actual notice as provided in RCW 11.40.020(1)(c).*"[14] In turn, RCW

continued on next page

continued from previous page

The Importance of Filing Creditors' Claims...

11.40.020(1)(c) provides that: "The personal representative may, at any time during the probate proceeding, give actual notice to creditors who become known to the personal representative by serving the notice on the creditor or mailing the notice to the creditor at the creditor's last known address, by regular first-class mail, postage prepaid…."[15] The statute does not require the creditor to actually receive the notice, only that notice be mailed regular first class mail postage prepaid.

Due process does not require actual receipt of notice by probate creditors. The United States Supreme Court has repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.[16] In *Mullane v. Central Hanover Lender & Trust Co.*,[17] the Supreme Court held that it is reasonable to dispense with actual notice to those with mere "conjectural" claims.[18] To hold otherwise would allow any creditor whose claim has been barred to resurrect that claim simply by asserting that the mail was never delivered.

Moreover, a creditor's contractual notice provision cannot alter or vary the notice requirements of the probate non-claim statute.[19] As a matter of practical necessity, the way that estates are administered in probate must be the same for all estates. The probate non-claim statute controls the manner of notice of the pendency of probate. Probate procedure law is exclusive.[20] If a creditor were allowed to require greater notice, every creditor of an estate would impose its own byzantine notice rules that would undermine the purposes of the probate statute.

Imposing other notice provisions would also be impractical because a personal representative has the duty to ascertain known creditors, but may not be aware of a given debt owed by the estate. A personal representative could not adhere to notice provisions of which he is not aware. Probate law requires, and imposes, the same notice provisions on all estates in probate, and no contractual provision may change those notice requirements.[21]

The personal representative satisfied the actual notice requirement under the statue by providing notice to the lender by first class mail postage pre-paid and notice by publication in the local newspaper. The probate non-claim statute requires no further notice from the personal representative to trigger the time for a creditor to file a creditor's claim with an estate.[22] Because the notice to the lender complied with the statute, it was valid notice and the lender's creditor's claim was untimely.

The best practice for institutional creditors would be to establish a system of monitoring probate filings and published probate notices, and timely respond to those and any notices received by mail. An institutional creditor should not ignore probate notices to creditors even if they do not comply with notice provisions in the creditor's contracts.

3. Creditors to Whom the Estate Has a Continuing Obligation at the Time of Death Must File a Creditor's Claim for Amounts that Become Due Post-Death

In *Estate of Earls*,[23] the court of appeals held that a creditor is required to timely file a creditor's claim for any obligation created during the decedent's lifetime even if the obligation does not arise until after the claims filing period has expired.[24] Expenses and obligations incurred by the personal representative after the decedent's death, including expenses to maintain estate property, are administrative expenses of the estate. But, obligations incurred by the decedent prior to his death, even if they become due after his death, and even if they are related to "maintenance" of property, are to be filed as creditors' claims.

The obligation to pay homeowners' dues was created by decedent during his lifetime when he purchased the condominium. It was not an obligation that the personal representative created after decedent's death. The obligation existed at the time that the probate notice to creditors was published. Nothing changed with respect to that contractual obligation between the time that notice was published shortly after decedent's death and the time that the association filed its creditor's claim more than two years later. Under the holding in *Earls*, the association was required to file a creditor's claim, even though the amount at issue was for homeowners' dues incurred after the expiration of the claims filing period.

The association did not file its creditor's claim within two years of the decedent's death . Because the association was a party seeking to collect on a debt from the estate, strict compliance with the probate non-claim statute was required in order for such debt to be recognized and paid out from estate proceeds.

Condominium associations, homeowners' associations, and other service providers who charge monthly dues or fees should adopt a best practice of filing creditors' claims in estates of deceased owners regardless of whether the decedent's homeowners' dues are current at the time of death.

Conclusion

The probate non-claim statute and probate administration regime impose strict procedures which favor settling of estates and threaten to cut off passive creditors. During difficult economic times, real estate lenders and owners' associations must be more vigilant in timely filing credi-

continued on next page

Shoreline Management Act – The Rules Are Changing

by Alexander W. ("Sandy") Mackie – Perkins Coie LLP

I. Introduction to Shoreline Management

The Shoreline Management Act (RCW 90.58; the "Act") is a state overlay regulation under which "shorelands of the state" are subject to very specific land use regulations. The Act was adopted by initiative in 1971 (Initiative 43B) following the Washington State Supreme Court decision in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969), which held that land fills in navigable waters violated the public's right of navigation and, in that case, required the fill to be removed.

When the decision was issued, it sent ripples through the state. Then-Governor Dan Evans issued a moratorium on further shoreline fills until a legislative solution could be found.[1]

The ensuing process gave rise to the Act, which created a regulatory program that was then and is still composed of three distinct elements that comprise the core framework of the regulatory program:

- Guidelines issued by the responsible agency, Washington State Department of Ecology ("WDOE") (now located at WAC 173-26 and WAC 173-27);
- Shoreline Master Programs adopted by local governments under the guidance of the WDOE regulations (WAC 173-26), planning guidelines and Washington's Growth Management Act (RCW 36.70A.480; the "GMA") where applicable; and
- Shorelines Hearings Board (administrative tribunal operating out of the Environmental and Land Use Hearings Office, *see www.eho.wa.gov*).

continued on next page

continued from previous page

The Importance of Filing Creditors' Claims…

tors' claims in estates. Where properties are under water and where it takes much longer to sell those properties, particularly in the still depressed condominium market, lenders and associations could be left holding substantial deficiencies and unpaid homeowners' dues if they fail to timely file creditors' claims.

1 164 Wn. App. 447, 262 P.3d 832 (2011).
2 *Washington Federal Savings v. Klein*, No. 68749-2-I.
3 RCW 11.40.051(1).
4 RCW 11.40.070(3).
5 *Bellevue Sch. Dist. v. Brazier Constr. Co.*, 103 Wn.2d 111, 120, 691 P.2d 178 (1984) (noting that allowing parties to bring *in rem* claims against estates long after claim period has expired would frustrate purpose of settling estates and distributing decedent's property to designated heirs); *Nelson v. Schnautz*, 141 Wn. App. 466, 475, 170 P.3d 69 (2007) (purpose of non-claim probate statute is to facilitate timely probate of decedent's assets).
6 *Bakke v. Buck*, 21 Wn. App. 762, 767, 587 P.2d 575 (1978).
7 *Judson v. Associated Meats & Seafoods*, 32 Wn. App. 794, 798, 651 P.2d 222 (1982); *see Turner v. Lo Shee Pang's Estate*, 29 Wn. App. 961, 963, 631 P.2d 1010 (1981) (noting that courts have held that non-claim statute applies to settlement of estates, supersedes all other statutes of limitation, and applies to every kind and character of claim against executor and administrator); *Messer v. Estate of Shannon*, 65 Wn.2d 414, 415, 397 P.2d 846 (1964) (RCW 11.40.010 is mandatory and strictly construed, and compliance with its requirements is essential to recovery); *Rigg v. Lawyer*, 67 Wn.2d 546, 553, 408 P.2d 252, 257 (1965) (noting that the failure to file a claim is an effective bar to any attempt to collect on a promissory note); *Estate of Wilson v. Livingston*, 8 Wn. App. 519, 525, 507 P.2d 902, *review denied*, 82 Wn.2d 1010 (1973) (non-claim statute is mandatory and equitable considerations may not mitigate strict requirements of statute when a timely claim is not filed); *Hanks v. Nelson*, 34 Wn. App. 852, 855-56, 664 P.2d 15 (1983) ("Compliance with the statutory nonclaim requirements is essential for recovery.").
8 RCW 11.40.135 (emphasis added).
9 *In re Estate of Hoffman*, 14 Wn. App. 498, 543 P.2d 254 (mortgage is established as claim against estate without necessity of filing creditor's claim to extent that mortgagee seeks no deficiency judgment), *modified in other respects*, 15 Wn. App. 307, 548 P.2d 1101 (1975), *and review denied*, 87 Wn.2d 1007 (1976).
10 14 Wn. App. 498, 543 P.2d 254, *modified in other respects*, 15 Wn. App. 307, 548 P.2d 1101 (1975), *and review denied*, 87 Wn.2d 1007 (1976).
11 *Id.* (emphasis added). *See also Locke v. Andrasko*, 178 Wash. 145, 154, 32 P.2d 444 (1934) (non-claim statute does not apply where no personal deficiency judgment is sought against estate); *Gilkes v. Beezer*, 4 Wn. App. 761, 763-64, 484 P.2d 493 (1971) (in action for mortgage foreclosure, claim is not subject to non-claim statute where no personal deficiency judgment against estate is claimed); *Reed v. Miller*, 1 Wash. 426, 428, 25 P. 334 (1890) (failure to present claim would not prevent foreclosure of mortgage where no recovery is sought beyond proceeds of mortgaged lands); *Scammon v. Ward*, 1 Wash. 179, 182, 23 P. 439 (1890) (plaintiff's rights to mortgaged lands not barred by failure to present claim; failure to present claim only operates to prevent him from seeking any deficiency that might remain after exhausting mortgaged property).
12 RCW 11.68.110(1)(d).
13 RCW 11.40.051.
14 *Id.* (emphasis added).
15 RCW 11.40.020.
16 *See, e.g., Mullane v. Central Hanover Lender & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983); *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982).
17 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).
18 339 U.S. at 317.
19 *See* RCW 11.40.010; *Bakke*, 21 Wn. App. at 767 (if creditor's claim not timely filed, claim against estate is barred); *Hanks v. Nelson*, 34 Wn. App. 852, 855-56, 664 P.2d 15 (1983) ("Compliance with the statutory nonclaim requirements is essential for recovery."); *Estate of Earls*, 164 Wn. App. 447, 262 P.3d 832 (2011) (strict compliance with the statutory requirements was "essential to recovery").
20 *In re the Trustee's Sale of Real Property of Whitmire*, 134 Wn. App. 440, 448, 140 P.3d 618 (2006) (in case where creditor already had a lien against specific estate assets, court nonetheless held: "Unless specific property has already been executed or levied upon, a person who obtains a judgment against the decedent is subject to probate procedures [i.e., the non-claim statute].").
21 *Judson v. Associated Meats & Seafoods*, 32 Wn. App. 794, 798, 651 P.2d 222 (1982) (the non-claim statute, RCW 11.40.010 *et seq.*, is more strictly enforced than general statutes of limitation, is mandatory, is not subject to enlargement by interpretation, and cannot be waived).
22 *See* RCW 11.40.051; RCW 11.40.020.
23 164 Wn. App. 447, 262 P.3d 832 (2011).
24 *Id.* at 451, ¶ 8.

continued from previous page

Shoreline Management Act – The Rules Are Changing

The jurisdictional reach of the Act is the ordinary high water line of all saltwater shorelines, lakes over 20 acres and streams below a point of 20 cubic feet per second mean average annual flow, together with associated wetlands and (optional) 100-year floodplains (RCW 90.58.030(2)(d,e,f)).

The Shoreline Master Programs operate as an overlay zone within the jurisdictional reach of the program, setting bulk, density, setback, and use limitations under a variety of circumstances. The original Master Programs were adopted in the mid- to late-1970s with many having only a few changes since. With the exception of small projects (now less than $5,000, adjusted for inflation) and statutory exclusions (single-family homes for personal use and a few others, RCW 90.58.030(3)(e); WAC 173-27-040), projects within the regulatory reach of the Shoreline Master Program are required to secure a shoreline substantial development permit for any development.

Much has changed since the Act was initially adopted in the 1970s. This includes the state's Growth Management Act, RCW 36.70A, the requirement to "designate and protect critical areas," including fish and wildlife habitat conservation areas (RCW 36.70A.060; 172, WAC 365-190-030(6)(a); WAC 365-190-130), and the listing of many endangered species. Yet, with all of these changes, many local governments had not amended the Master Programs regulating controls, which were often more than 30 years old and badly out of date.

For this reason, the Legislature mandated that local programs be updated based on a 2003 update of the Shoreline Master Program guidelines published by WDOE at WAC173-26.[2] (For a status report of adopted and pending actions on local updates, *see www.ecy.wa.gov/programs/sea/shorelines/smp/index.html*.)

The importance of the updates to waterfront property owners arises from the host of changes, many of which will significantly affect shoreline properties, with respect to both current use and future development potential. This article will touch on several of the more pertinent changes and provide guidance on key concepts to better enable you to advise your clients on the coming changes and the challenges such changes present to the waterfront property owner.

II. The Update Process

The update process to be carried out by local governments is detailed in WAC 173-26 and involves extensive inventory and fact gathering, a reexamination of the shoreline "designations" (or zones in the Euclidean zoning sense) and a host of required elements to be addressed. The process is to be open, and public comment and participation is both encouraged and required.

A common update program may proceed as follows:

1. Staff and consultants work on inventory and drafts. This work may also include local interest groups.
2. Draft materials are presented to the Planning Commission for public input and recommendations are made to city or county council or commissioners.
3. Public hearings are held at the city council / county council / commissioner level (typically more than one).
4. Final approval is given by the local government and referral is made to WDOE.
5. Comments and suggested or required corrections return from WDOE.
6. Negotiations between the community and WDOE are made on final language.
7. Final letter arrives from WDOE with approved or required changes.
8. Local government accepts the changes and WDOE publishes notice that the amendments have finally been adopted.
9. Citizen appeals to designated state agencies:

   For GMA counties, appeals are to the Growth Management Hearings Board (60 days from the WDOE notice, RCW 90.58.190(1)(a); RCW 36.70A.190(2)(c)).

   For non-GMA counties, appeals are to the Shorelines Hearings Board (30 days from the notice of adoption, RCW 90.58.190(3)(b)).

The effective date of the new master program is 14 days after the final notice, as provided in RCW 90.58.090(7).

III. Key Points of Interest

Among the key issues of concern arising in the development of new, updated Shoreline Master Programs are designation changes, critical areas, buffers and setbacks, and public access.

A. Designation

The designation alternatives for shorelands (the land abutting or under the regulated waters) under the original 1970s guidelines were Urban, Rural, Conservancy and Natural. (Some local governments had added some additional categories, but for most communities the four-part division was in place.) The designations served the same function as zoning boundaries, with each having differing density, use, and bulk requirements spelled out in the

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

Master Programs. The Urban and Rural distinctions were based on the density/intensity of existing and planned future development, while Conservancy and Natural reflected a heightened degree of environmental sensitivity, limiting development potential, with Natural being the most sensitive.

Under the new guidelines the new designation alternatives are:

- Natural – most sensitive, typically ecologically intact;
- Rural conservancy – low-intensity development outside urban growth areas and areas of more intense rural development and master planned resorts;
- Aquatic – the lands waterward of the shoreline (does not imply environmental sensitivity and may be adjacent to the full range of upland designations);
- High-intensity – typically the commercial and high-density residential areas;
- Urban conservancy – lands within an urban growth area that are relatively undeveloped and have a high environmental value; and
- Shoreline residential – The standard moderate density residential designation, limited to urban areas (typically four units per acre and above), master planned resorts, and limited areas of more intense development (areas outside urban growth areas that were developed as higher-than-rural densities prior to 1990 and identified as such in the local comprehensive plan).

WAC 173-26-211.

While the differences between the 1970s and 2003 designation alternatives may seem small, it is important to understand that the "limited intensity" designation for rural conservancy areas typically means an allowable density of one-unit-per-five-acres or less. Many rural shorelines were historically developed at densities greater than one-unit-per-five-acres. If these shorelines are outside of cities and their designated growth boundaries under GMA, and not in a "limited area of more intense rural development" under RCW 36.70A.070(5)(d) (which includes "shoreline development areas," RCW 36.70A.070(5)(d)(i)), such property will become a legal nonconforming use, which can pose significant limitations (*see* Nonconforming Uses and Structures, Section VI below).

The significance of the designation change is that the local choice may create a *de facto* downzone severely limiting the options available to waterfront owners. For example, the Rural Conservancy designation could affect many of the second-home waterfront areas in places such as the San Juan Islands, where waterfront homes are spread throughout the county shoreline. Most are not in urban- or rural-activity centers and are therefore likely to fall into a rural-conservancy environment and become nonconforming.

For those of you whose clients are still participating in the local Master Program update programs, it is important to understand the purposes and limits of each of the designation criteria and the designation or zone in which your client's property is proposed to be located. This designation will determine the extent to which it may be developed, redeveloped, or used in the future. In many cases an adverse designation will be extremely limiting on future uses, so a proper designation is the first step in protecting the interests of a waterfront-owning client.

B. Critical Areas

1. Fish and Wildlife Habitat Conservation Areas

The term "critical areas" in shorelines is borrowed from growth management planning, in which critical areas are to be designated and protected using best available science. RCW 36.70A.060, .170, .172.[3] The legislature also clarified the Act by specifically providing that not all shorelines are critical areas. RCW 36.70A.480(5).[4]

Criteria for designating critical areas is found in the Growth Management "Minimum Guidelines" for the designation of natural resource and critical areas; WAC 365-190. One of the principle focus areas along shorelines is the proper location of fish and wildlife habitat conservation areas. While the general guidelines are found at WAC 365-190-130, it is important to look carefully at the definitions to understand that not all shorelines are critical areas.

> (6)(a) "Fish and wildlife habitat conservation areas" are areas:
>
> 1. that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem; and
> 2. which, if altered, may reduce the likelihood that the species will persist over the long term.
>
> These areas *may include*, but are not limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness. …

WAC 365-190-030(6)(a) (formatted for emphasis and emphasis added).

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

The key to understanding the section is to understand that the listing which follows the definition may be considered for designation if a particular habitat meets the two part designation, but not otherwise.

The definition is important because the Legislature amended RCW 36.70A.480 in 2003 to specifically provide that a shoreline is not a critical area

> … except to the extent that specific areas located within shorelines of the state qualify for critical area designation *based on the definition of critical areas*….

RCW 36.70A.480(5) (emphasis added).

The courts have pointed to the "minimum guidelines" as the requirements for local governments to follow in the designation of resource lands. *See Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 959 P.2d, 1173 (1998) (forest lands of long-term commercial significance) and *Lewis County v. Western Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006) (agriculture lands of long-term commercial significance). The same rationale would apply to critical areas where the Legislature provided something more than the presence of fish and/or habitat as the basis for designation.

In some jurisdictions the local government has adopted a provision that all shorelines are critical areas merely due to the presence of fish and habitat (Whatcom County)[5] and a number of other jurisdictions are attempting the same approach. (*See, e.g.*, San Juan County critical area ordinance update).[6] Where such debates are occurring it is important to look at and correct local inventories to make sure the extent of existing use, development, and degradation are accurately characterized and directed to the tests in the definition.

Practice Tip – If your client owns waterfront property, pay particular attention to the critical area designations in the County Critical Area Ordinance and the Shoreline Master Program update. Your client will want to challenge any effort to make all shorelines critical areas unless the particular government entity can produce documentation that meets the essential two-part test and establishes:

1. that the shorelines serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and
2. which, if altered, may reduce the likelihood that the species will persist over the long term.

WAC 365-190-030(6)(a).

The reason to be concerned is that critical area regulations tend to provide more restrictions on shoreline use and development on the associated uplands than lands outside the critical area designation.

2. Timing – Critical Area Ordinances Have Limited Effect on Shorelines

Because shoreline regulations overlay local zoning and environmental codes, conflict arose by reason of the competing authorities. The question was whether a critical areas ordinance adopted under the Growth Management Act applied to lands also within the Shoreline jurisdiction when similar restrictions were not in the Shoreline Master Program. In *Evergreen Islands et al. v. Anacortes*, Case No. 05-2-0016 (2005), the Western Washington Growth Management Hearings Board ruled that adoption of the critical area ordinance without also amending the shoreline master program was not effective to supersede the Act's Master Program (which is a WDOE regulation; *see Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988) (Orion II) and *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011)). The Washington State Supreme Court, in a divided opinion, let the Growth Board decision stand. *See Futurewise v. WWGMHB*, 164 Wn.2d 242, 189 P.3d 161 (2008).

In response, the Legislature again amended RCW 36.70A.480 to provide:

- When the shoreline master program updates were complete the critical areas within the shoreline jurisdiction would be regulated solely by the Shoreline Master Program and not the GAO critical areas ordinance – a complete preemption.
- Until the Shoreline Master Program update is complete,

> Undeveloped shorelands will be governed by the GMA critical area ordinance
>
> Developed shorelands will be governed by the existing Master Program, without regard to the GMA critical area ordinance, subject to a no-net-loss test.

RCW 36.70A.480(3).[7]

While local governments are still just beginning to implement RCW 36.70A.480(3)(c)(i), one hearing examiner has issued a detailed opinion describing the proper approach.[8]

3. Buffers and Setbacks

Setbacks are measurements from the property line, which typically define the distance a structure can be located from a property line or other physical constraint.

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

But a setback per se does not typically encumber or limit the use of the intervening property.

A buffer, on the other hand, is typically an "environmental servitude" designed to "protect" the functions and values of the critical area to which it is associated by severely limiting the allowable activities within the area and in extreme cases set aside in separate open space tracts. As such, buffer regulations frequently impose significant and permanent limitations on the use and make up of the lands within the designated buffer area. As such, a buffer which materially restricts the use of the described property falls within the same environmental servitude limits as open space and subject to nexus, proportionality and reasonable necessity requirements discussed in detail below. *See*, *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002);

While the master programs of the 1970s commonly had setbacks from shorelines, the master programs being adopted in the update process often have significant buffers at the edge of shorelines. In Whatcom County, for example, where all shorelines are critical areas, the "buffers" on all marine shorelines are 150 feet. WCC 16.16.740. While buffers do not apply to developed areas, a property owner with an undeveloped parcel is required to set aside the first 150 feet as an environmental protection zone with severe limitations. In some jurisdictions this zone must be in a separate parcel, effectively creating a park.

Since buffers are designed to prohibit all but the most benign uses (trails) or essential uses (utilities when no other path is available), the effect of such a regulation is to make all houses or other structures within the designated buffer area nonconforming unless specific exemptions are granted.[9] *See* Nonconforming Uses and Structures, Section VI below.

The science of buffers provides that buffers work where there are naturally functioning conditions (the existence of native vegetation where the water quality, filtration, and nutrient uptake is present). But there is no science that says buffers are applicable or appropriate in developed areas, including roads, houses, yards, and other elements of the built environment. WDOE has recognized this fact in approving a shoreline master program provision (City of Vancouver) that provides that buffers are to be imposed to protect the shoreline except where it intersects with the built environment (such as bulkheads, homes, or yards). Whatcom County addressed the issue by providing that buffers "shall not include areas that are functionally and effectively disconnected from the habitat area by road or other substantial developed surface." WCC 16.16.740(A).

IV. Public Access and Excessive Requirements

Public access is a major point of contention in the current update process. Many communities seek to force waterfront property owners to dedicate lands to public access as a condition of a shoreline substantial development permit. Typical of the requirements is this provision presently in the Kirkland Shoreline Master Program update and approved by WDOE:

> **83.420 Public Access**
>
> 1. General – Promoting a waterfront pedestrian corridor is an important goal within the City. …
>
> The applicant *shall comply* with the following pedestrian access requirements with new development for *all uses and land divisions* …
>
> a. Pedestrian Access Along the Water's Edge – Provide public pedestrian walkways along or near the water's edge.
>
> b. Pedestrian Access from Water's Edge to Right-of-Way – Provide public pedestrian walkways designed to connect the shoreline public pedestrian walkway to the abutting right-of-way (emphasis added).

WDOE and consultants working on shoreline updates have been pushing local governments to include linear pathways and other forms of public access to the waterfront under the theory that the Shoreline Management Act requires public access as a condition of development except where physically impossible or dangerous, and that since such requirements serve a "substantial governmental purpose," such requirements will pass constitutional muster.

The problem with this approach is that it misreads both the Act and the cases concerning limitations on the public's ability to mandate public access as a condition of shoreline permit approval.[10]

A. Mandatory Public Access Is Not Only Not Required but Prohibited by the Act

The analysis concerning lawful public-access requirements begins with the only legislative directive concerning a public-access requirement in the Act. The provision is set forth in the legislative declaration of policy, which states a preference, not a mandate:

> … local government, … shall give *preference* to uses … which:
>
> (5) Increase public access to publicly owned areas of the shorelines;

RCW 90.58.020 (emphasis added).[11]

The Act also recognizes the inherent problem between the public's interest in access and the need to protect private interests.

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

> The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; … and, therefore, coordinated planning is necessary … *while, at the same time, recognizing and protecting private rights consistent with the public interest.* …

RCW 90.58.020 (emphasis added).

The guidelines for development of shoreline programs impose the responsibility on local governments for planning to protect private property as part of the planning process:

> **Governing Principles**
>
> The governing principles listed below are intended to articulate a set of foundational concepts that underpin the guidelines, guide the development of the planning policies and regulatory provisions of master programs, and provide direction to the department in reviewing and approving master programs. …
>
> (5) … Planning policies *should* be pursued through the regulation of development of private property *only to an extent that is consistent with all relevant constitutional and other legal limitations.*…

WAC 173-26-186 (emphasis added).[12]

The section goes on to provide that local governments are required to develop a process by which such protection is assured. Mandating public access without a process to assure requirements are within constitutional limits violates this fundamental principle.

B. Public Access Guidelines Limit the Ability to Mandate Public Access

The WDOE "Public Access" guidelines are found at WAC 173-26-221(4).

> (4) Public access.
>
> (a) Applicability. Public access includes the ability of the general public to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations. …
>
> (b)(i) Promote and enhance the public interest with regard to rights to access waters held in public trust by the state while protecting private property rights and public safety.
>
> (c) Planning process to address public access. Local governments should plan for an integrated shoreline area public access system that identifies specific public needs and opportunities to provide public access… plan elements, especially transportation and recreation. The planning process shall also comply with all relevant constitutional and other legal limitations that protect private property rights. …
>
> (iii) Provide standards for the dedication and improvement of public access in developments for water-enjoyment, water-related, and nonwater-dependent uses and for the subdivision of land into more than four parcels. In these cases, public access should be required except:
>
> (B) Where it is demonstrated to be infeasible due to reasons of incompatible uses, safety, security, or impact to the shoreline environment or due to *constitutional or other legal limitations that may be applicable*.

WAC 173-26-221(4) (emphasis added).

To reiterate the salient point of this paper, in developing planning policies and regulations dealing with public access, the burden is on the local government to pursue such regulation requirements in the development of their master programs "only" to the extent that such regulation is consistent with "all relevant constitutional and other legal limitations," *id.*, and provide a mechanism for dealing with the issue during the permit review process.

C. The Constitution and Legal Limitations to Public Access – Nexus, Proportionality, and Reasonable Necessity

The problem with simply mandating public access as part of a shoreline permit is that such a mandate, without specific project-related limitations, violates the Guidelines' mandate to regulate within the umbrella of protected property rights. Any mandatory public-access provision would be unenforceable except in the few cases where legal standards of "nexus," "proportionality" and "reasonable necessity" are met, as discussed below.

To begin with, the ability to exclude others is a "fundamental" protected right and one not easily abridged. As noted and reiterated on numerous occasions by the U.S Supreme Court:

> We start with the premise that the ability to exclude others is … so universally held to be a fundamental element of the property right, fn 11 falls within this category of interests that the Government cannot take without compensation.

Kaiser Aetna v. U.S., 444 U.S. 164, 179-80 (1979).[13]

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

Three principles are well established in connection with private rights on lands along shorelines and limitations on the public's ability to command access. While often discussed, it is useful to look at cases that are commonly referred to in the context of nexus, proportionality, and reasonable necessity, as each may bear on the analysis of a particular local requirement.

1. Nexus: *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

The first case is *Nollan,* which is referred to in shorthand for the doctrine of nexus or reasonable relationship between the condition imposed and the burdens created by the project under review. The case involved a condition that the property owners dedicate a public trail across the ocean frontage of their property as a prerequisite of securing permission to tear down a small cabin and build a 1,600 square-foot home. It is instructive in that case to review the specific rationale relied upon by the state and why such rationalizations were rejected by the Court, as the state approach may be found behind many "public access" demands in local master programs.

In *Nollan*, the Court visited the public authority on privately owned shorelines in which the Nollans would be required to accommodate a linear trail along the beach to facilitate public traffic. The state argued the trail was permissible in connection with legitimate public interests.

> The Commission argues that among these permissible purposes are *protecting the public's ability to see the beach*, assisting the public in *overcoming the "psychological barrier" to using the beach* created by a developed shorefront, and *preventing congestion on the public beaches*.

483 U.S at 835-36 (emphasis added).

But the Court rejected the state's argument pointing to the doctrine, which emphasize that "close scrutiny" is required when the public seeks to force public access as a condition of a private permit. The public bears the burden of showing a real connection between a problem created and the solution provided before the courts will tolerate a public access condition.. The mere fact of public need and private proximity to the water is insufficient, standing alone, to intrude on private rights.

The primary note of caution comes from the Court's view that the right of exclusion is a fundamental right to be protected from excessive regulatory control. Specifically, in the *Nollan* case the Court found that the requirement for a linear pathway in connection with the remodel of a beach cabin created no additional demand for public access and therefore constituted an impermissible condition. In the language of the Court:

> We have repeatedly held that, as to property reserved by its owner for private use, *"the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'* [citations omitted] . .. "our cases uniformly have found a taking to the extent of the occupation, *without regard* to whether the action achieves an important public benefit or has only minimal economic impact on the owner," [citations omitted]

483 U.S at 831-32 (emphasis added).

The Court noted that the ability to deny all building to achieve a legitimate public purpose could give rise to certain restrictions, including a view corridor. But without some direct connection to the legitimate purpose:

> … unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

483 U.S at 837.

In the context of the updates to the Act, where public access is being required in the context of the development or redevelopment of a shoreline property, the questions to be asked are:

- Is there a legitimate public access interest identified that is being adversely affected by the development in question, and
- Does the imposed public access requirement "substantially advance" the "legitimate" public interest adversely affected by the development?

Where, as in *Nollan*, there is no indicia of a public right to cross private lands to reach the water affected by the development, where the interests involved were at best the "view of the water" from the public right of way, and where the condition imposed goes beyond protecting the protected public interest, the condition lacks the necessary "nexus" with the protected public interest and is an unlawful exercise of regulatory authority without the exercise of eminent domain (taking) authority.

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

2. Proportionality: *Dolan v. City of Tigard*, 512 U.S. 374 (1974)

A second case was decided in which the Court took the next step and addressed the issue of limitations on municipal authority to mandate public access across private property where the necessary nexus between the public interests to be served, and the conditions imposed, is found to exist. In *Dolan*, the City required a public trail be dedicated across lands reserved for stormwater control in connection with a commercial development. But the city failed to provide any evidence that the commercial development (a hardware store) created an increased demand for a bicycle trail. The condition was based solely on a local ordinance mandating a linear trail on all creek side developments. On appeal to the U.S. Supreme Court, the Court examined the issue of the need for a reasonable relationship between the problem being affected and the condition imposed.

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

512 U.S. at 385.

The Court reiterated the heightened scrutiny required when examining an exaction ostensibly tied to a condition that proposed public use is a condition of private development, and concluded that in addition to "nexus," the reviewing agencies had to consider a second inquiry: the relationship between the impact created and the condition imposed and the need for some "reasonable relationship" between the two:

> The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions *bears the required relationship to the projected impact of petitioner's proposed development*. *Nollan, supra*, [citations omitted] ('[A] use restriction may constitute a "taking" if not *reasonably necessary* to the effectuation of a *substantial government purpose*' [citations omitted]).

512 U.S. at 388 (emphasis added).

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment.
>
> No precise mathematical calculation is required, *but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.*

512 U.S. at 391 (emphasis added).

After *Nollan* and *Dolan*, a community can no longer assert that a public access condition may simply be required by city code and have the courts uphold the validity of the condition based on the presumption of validity of the city codes. The significance of *Dolan* is the Court's direction that the government bears the burden of proving reasonable necessity for the condition based on both nexus and proportionality, in light of the facts of the individual case.[14]

3. Nexus and Proportionality – the Washington State Requirements

Nexus has been a well-recognized limit on the right of Washington municipalities to impose conditions otherwise designed to serve the public interest. The leading case under constitutional constraints is *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988), in which the county attempted to require a property owner to extend a county road, which was not used or necessitated by a small commercial development on another portion of the property, to a property that the owner was not developing. As noted by the appellate court:

> A property interest can be exacted without compensation only upon a proper exercise of government police power. Such power is properly exercised in zoning situations *where the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose.* Unless these requirements are met, the exaction is an unconstitutional taking.

50 Wn. App. at 727 (emphasis added).

More recently, the court in *Honesty in Environmental Analysis and Legislation (HEAL) v. Central*, 96 Wn. App. 522, 979 P.2d 864 (1999), reiterated the fundamental limits on permitting authority in language paralleling and citing *Nollan* and *Dolan*:

> Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate. Both requirements have also been incorporated into the GMA amendments to RCW 82.02 authorizing development conditions.

96 Wn. App at 533-34.

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

The Washington nexus and proportionality requirements have been incorporated into a statute, RCW 82.02.020, which was the statutory basis for *Benchmark Land Co. v. Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002) (roads not warranted by traffic) and *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) (extending the requirements to open space). A recent Washington State Supreme Court case holds RCW 82.02.020 does not apply to Shoreline Master Programs, *see Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011). That decision does not change the requirement that local governments prove nexus and proportionality in the "as applied" context, but instead merely shifts the appellate review to constitutional rather than statutory guidelines. In practice, the end result is the same.[15] Thus, Washington cities and counties are limited when seeking to impose a public-access condition on shoreline-development permits, even one dictated by an adopted master program:

- Nexus: The municipality has the burden to prove that the condition is "reasonably necessary" to mitigate an existing problem created by the project under the facts of the particular case and may not simply rely on a boilerplate code provision to impose a limitation on property, *see Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); and
- Proportionality: The municipality may not require the construction of a public facility to be developed far in excess of the burden imposed on a legitimate government interest, *see Benchmark Land Co. v. Battleground*, 146 Wn.2d 685, 49 P.3d 860 (2002).

As we look at the implementation of public-access guidelines in many draft master programs, the fact that the draft merely mirrors the WAC provisions for access, without providing a mechanism for limiting the requirements based on legal constraints, hits all target issues in creating a suspect requirement:

- They command the physical occupation of private property with a public amenity – a paved or surfaced trail to be maintained by the private property owner – without regard to nexus or proportionality.
- They deny the private land owner a fundamental attribute of ownership; that is, the right to exclude others, without adequate justification.

It is significant to note that a state Attorney General opinion concluded that failing to adequately consider or address property right issues is within the jurisdiction of reviewing agencies and grounds for appeal.

> … with regard to property rights, a government entity is *not* in compliance with the GMA if *it fails to consider property rights in developing its plans* and regulations, or if it considers property rights in an arbitrary and discriminatory manner. The Boards have jurisdiction to consider these issues.

AGO 1992 No. 23, p. 6 (emphasis added).

Where public access mandates in local shoreline updates fail to adequately address the nexus and proportionality limits, such a program may be appealed based on the AGO cited above. But the appeal window is short (30-60 days), as noted above. If the "as written" appeal period is missed, such provisions may still be challenged "as applied," but under a direct *Nollan/Dolan* constitutional challenge and not under RCW 82.02.020 by reason of *Citizens v. Whatcom County, supra*.

V. Vegetation Management

A controversial new requirement in many local program updates is the "vegetation" provisions of WAC 173-26-221.

> (5) Shoreline vegetation conservation.
>
> (a) Applicability. Vegetation conservation includes activities to protect and restore vegetation along or near marine and freshwater shorelines that contribute to the ecological functions of shoreline areas. Vegetation conservation provisions include the prevention or restriction of plant clearing and earth grading, vegetation restoration, and the control of invasive weeds and nonnative species.

The provision may be enforced through a variety of tree protection and vegetation management conditions attached to local programs. The more restrictive programs tie back to shoreline buffer requirements that existing developed areas – including lawns and gardens– need to be replanted in "native vegetation" to "restore" some real or imagined shoreline condition.

The vegetation management limitations may protect existing conditions (within limits concerning denial of all economic use of the property) and may require a project proponent to mitigate against impacts caused by a property. But the local authority, to require improvements, is limited to mitigation of existing impacts – "no net loss" as provided in RCW 36.70A.480(4) – and not "restoration" beyond the limits of nexus and proportionality discussed above. *See, e.g., Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 166 P.3d 1198 (2007).

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

VI. Nonconforming Uses and Structures

A lawful nonconforming use or structure is a use or structure that was lawfully commenced or erected, but is now not in compliance with the current legal development requirements due to a change in the law. Thus, where a community adopts a 150-foot buffer zone from marine or lake shorelines, a home within 50 feet of the water is no longer conforming to the current regulations (development of a new single-family home is not a permitted use in the buffer zone and becomes a nonconforming use).

The consequence of nonconformity is that the use or structure may not be expanded in a way to increase the extent of the nonconformity. *See, e.g., Keller v. Bellingham*, 92 Wn.2d 726, 730-31, 600 P.2d 1276 (1979). Historically, such a provision did not materially interfere with property use or development as the term "increase the extent of nonconformity" was limited to "going no closer to the water."

More recently, however, the term "increase the extent of the nonconformity" has been read to include *any* intrusion in the three-dimensional space surrounding the structure and, as such, there can be no expansion (horizontally or vertically), including an additional story or expansion in the back of the house away from the water, if that area was still within the measured buffer.

Even where local governments state that existing structures within buffers are not nonconforming, the only relief is against mandatory removal.[16] Expansion into the surrounding buffer area is still precluded as are new uses that would encroach.

While the government agencies try to make light of nonconformity, the presumption is that as an exception to allowed uses, the provisions are to be narrowly construed and strictly enforced. (To do otherwise is a denial of equal protection to those required to abide by the requirements.) Ultimately, both court cases and authoritative texts point out the bias is for nonconforming uses to be abated, though mechanics and timing are up to local governments. As noted by professor Richard L. Settle, "[z]oning ordinances may provide for termination of non-conforming uses by abandonment or reasonable amortization provisions." *See* Settle, Washington Land Use Sec. 2.7(d) (1983).[17]

An unreported case provides a good summary of the bias against nonconformity:

> The Supreme Court has repeatedly acknowledged the desirability of phasing out such uses as soon as possible, with due regard to interests of those concerned. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998).*

City of Lakewood v. Olson, 109 Wn. App. 1002, Not Reported in P.3d, 2001 WL 1346792 Wn. App. (2001).

Additionally, the common belief that local governments may not regulate existing nonconforming uses is incorrect. Whenever the local government concludes that issues of public health and safety are at stake, even existing uses may be regulated. *See, e.g., Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998).

Two of the more draconian limitations on nonconformity in the state's shorelines may be found in the administrative guidelines, which provide:

> (8) If a nonconforming development is damaged to an extent *not exceeding seventy-five percent* of the replacement cost of the original development, it may be reconstructed to those configurations existing immediately prior to the time the development was damaged, provided that application is made for the permits necessary to restore the development within six months of the date the damage occurred, all permits are obtained and the restoration is completed within two years of permit issuance.
>
> (9) If a nonconforming use is *discontinued for twelve consecutive months or for twelve months during any two-year period,* the nonconforming rights shall expire and any subsequent use shall be conforming. A use authorized pursuant to subsection (6) of this section shall be considered a conforming use for purposes of this section.

WAC 173-27-080 (emphasis added).

While many existing local programs provide for less onerous provisions, the inclusion of the referenced limitations (and other nonconforming uses found in WAC 197-27-080) suggests that the local tolerance options may be preempted by the new guidelines. Article XI, Section 11 of the Washington Constitution provides, "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." As the Legislature has granted WDOE the responsibility to manage the program through regulation, the 75 percent limitation and the 12-month abandonment provisions should be taken very seriously.

VII. Summary and Conclusion

This paper is a very brief summary of a very complex subject, with different context in each city and county undergoing the updates.[18]

continued on next page

continued from previous page

Shoreline Management Act – The Rules Are Changing

Your clients with waterfront property will be immediately and directly affected in their ability to use and develop their land by reason of the shoreline updates – those which have been approved and those which are still underway. By being more aware of the issues involved, you can better inform and advise your clients as to matters of concern and interest.

---

1 For a detailed discussion, *see* Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423 1973-1974.

2 The regulations were the product of a facilitated process after the original amendments had been declared unlawful. For more detailed discussion of the background, see www.ecy.wa.gov/programs/sea/shorelines/smp/index.html.

3 (5) "Critical areas" include the following areas and ecosystems: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas… RCW 36.70A.030(5).

4 (5) Shorelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060(2). RCW 36.70A.480(5).

5 The Whatcom County provision was challenged, but the appeal was dismissed on procedural grounds. RCW 82.02.020 does not apply to shoreline regulations that are state regulations and not local land use codes. The Court did not reach the merits of the propriety of designation without a record based on the definition. *See Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011).

6 Whenever a critical area ordinance says that the provisions apply to all "S" shorelines under the Department of Natural Resources definitions at WAC 222-16-030, they are designating all regulated shorelines under the Shoreline Management Act as critical areas because the definition of S shorelines encompasses all "shorelines of the state." WAC 222-16-030(1).

7 (b) Except as otherwise provided in (c) of this subsection, development regulations adopted under this chapter to protect critical areas within shorelines of the state apply within shorelines of the state until the department of ecology approves ...[the SMP update].
(c)(i) Until the department of ecology approves a master program or segment of a master program as provided in (b) of this subsection, *a use or structure legally located within shorelines of the state* that was established or vested on or before the effective date of the local government's development regulations to protect critical areas *may continue as a conforming use and may be redeveloped or modified if: (A) The redevelopment or modification is consistent with the local government's master program*; and (B) the local government determines that the proposed redevelopment or modification will result in no net loss of shoreline ecological functions… RCW 36.70A.480(3).

8 *See* Gordon Witcher Shoreline Exemption Appeal, Kitsap County Hearing Examiner Case No. 111013-018, Findings, Conclusions, and Decision, dated November 7, 2011.

9 In Whatcom County, for example, this provision made all homes on Birch Bay, most of which are within 50 feet of the shoreline and have developed yards on the water side of the house, nonconforming.

10 This topic is much more extensive than can be covered in this introductory piece. For more information, *see* the author's white paper on public access, available from Karen Rentz, krentz@ perkinscoie.com.

11 A second and parallel provision calls for an increase in the recreational opportunities for the public "in the shoreline," but with no reference to whether that increase is related to public or private lands.

12 While the regulation uses the term "should," the definitions in the guidelines, found at WAC 173-26-020(35), make it clear that in this context "should" is a mandate, excused only for good cause shown: "(35) 'Should' means that the particular action *is required* unless there is a demonstrated, compelling reason, based on policy of the Shoreline Management Act and this chapter, against taking the action."

13 [FN 11]. As stated by Mr. Justice Brandeis, "[a]n essential element of individual property is the legal right to exclude others from enjoying it." [citations omitted] Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond.

14 This requirement for the government to carry the burden of proof that an environmental exaction is reasonably necessary in a specific context has been specifically adopted by the Washington State Supreme Court. *See Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002).

15 In *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 230 P.3d 1074 (2010), the appellate court, Dwyer, C.J., held that SMPs were not subject to statutory prohibition in RCW 82.02.020 on municipalities from imposing direct or indirect taxes, fees, or charges on development. The case did not diminish the constitutional considerations, simply that RCW 82.02.020 was not the appropriate vehicle to challenge SMP provisions. Affirmed en banc *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn. 2d 384, 258 P.3d 36 (2011)

16 Must be relocated to a conforming site if it has destroyed more than 75 percent of assessed value.

17 *See, e.g., Bartz v. Board of Adjustment*, 80 Wn.2d. 209, 217, 492 P.2d 1374 (1972) ("phasing out a non-conforming use ... is the desirable policy of zoning legislation" and is "within the discretion of the legislative body of the city or county."). *See also State v. Thomasson*, 61 Wn.2d 425, 427, 378 P.2d 441 (1963) ("there are conditions under which a nonconforming use may be constitutionally terminated"). *See also State ex rel. Miller v. Cain*, 40 Wn.2d 216, 220, 242 P.2d 505 (1952) ("It was not and is not contemplated that pre-existing nonconforming uses are to be perpetual.")

18 A number of CLE and other papers are available for those seeking more detailed information. Washington Real Property Deskbook Vol. 5 Ch. 15 and Vol. 6 Ch. 12; A. W. Mackie papers on shorelines:
1/28/10 "The Interplay/Overlay of Shoreline Master Plans, Critical Areas Ordinances, Floodplain Management and Wetlands or Whatever Happened to 'All Appropriate Uses' "?
"The Shoreline Management Act and Public Access: A Critique of Common Practices" (white paper)
"Limitations on 'Furthering Substantial Governmental Purpose' When Considering Public Access Requirements for Washington State Shorelines Under the SMA"
11/3/11 "Restoration: Exploring Practical and Legal Limitations"
11/12/11 Town Hall Meeting II – Shoreline Update Checklist (San Juans)

A TEDRA Litigator's Advice on How Best to Defend Against a Challenge to Documents You Draft

by Karolyn Hicks – Stokes Lawrence. P.S.

There is no guaranteed way to avoid a contest challenging the validity of estate planning documents if a "disinherited" heir or beneficiary is determined enough. There are, however, steps that can be taken at the time the documents are prepared and executed that will minimize how effective a challenge will be. This article is intended to guide estate planners and drafters, who are likely to be the star witnesses in any will or trust contest, on how to anticipate a challenge and prepare documents that will withstand that challenge.

Generally a will or trust may be challenged on one of four grounds: lack of testamentary capacity, undue influence, fraud and insane delusion.

Lack of Testamentary Capacity

As most estate planners know "by heart," testamentary capacity has three elements. The testator must: (1) have sufficient mind and memory to intelligently understand the nature of the business in which the testator is engaged (i.e., creating/signing a will or trust); (2) be able to comprehend generally the nature and extent of the property that constitutes his estate and of which he intends to dispose (i.e., what does the testator own?); and (3) have the ability to recollect the natural objects of his bounty.[1] It is a lower standard than required for signing a contract.[2] This standard applies to both wills and trusts.[3]

For the purposes of preparation and certainly execution of the will or trust, a planner should meet the client in person so he or she can later testify that these three elements were satisfied by the client. Contemporaneous notes to the planner's file will certainly help the litigator who is later defending against the challenge to the will or trust. A planner may also want to consider having a form to use during the meeting which includes these three elements and space to write the client's verbal responses. This form can later be used to demonstrate that the planner discussed each of the three elements with the client, and the client's contemporaneous responses satisfied each of the elements of testamentary capacity. Also, at the time of execution the planner should use credible subscribing witnesses, and provide the witnesses with an opportunity to meaningfully interact with the client. The witnesses may also keep notes and/or prepare memos to the file about their interaction with the client.[4] These notes or memos can help bolster evidence of the client's capacity when defending against a challenge.

At times it is difficult to determine whether testamentary capacity exists. There are various cases in Washington that have reviewed some typical "end-of-life" scenarios and provide additional guidance on whether a client may have capacity issues:

Remaining Life Span/Advanced Age. Testamentary capacity is not affected by physical conditions nor one's approaching death if, in spite of that weakness, the testator had sufficient mental capacity to be able to know and understand the three elements described above.[5]

Poor Memory. The fact that a testator may have had poor memory is not enough to render a testator incompetent to execute a Will.[6] The mere fact that one is aged or occasionally forgetful does not render such person incapacitated.[7]

Dementia Onset. Even the onset of "senile dementia" is not enough to invalidate a will or trust.[8] Only when the dementia is sufficiently severe that the client can no longer satisfy the three elements described above can a will or trust be invalidated.[9]

Medications. Evidence that the testator was taking prescribed medications at the time the will was signed does not indicate lack of testamentary capacity.[10] Of course, if the client takes medications that severely affect memory or cognitive thinking, questions could be raised as to his capacity at the time of execution.

Significant Physical Limitations or Ailments. The fact that one was suffering from a terminal condition does not conclusively establish that a testator lacks testamentary capacity in the legal sense.[11]

The client does not need to be in perfect health to execute a will. A planner may want to gather more facts from the testator or testator's family, such as the state of the testator's health, what medical conditions could affect capacity, and what medications could affect capacity. The planner may also need to have more frequent meetings with the testator and/or take extra time in the execution of the will to make sure the testator is lucid and satisfies all three elements of testamentary capacity at the time of execution.

Undue Influence

Sometimes a client with testamentary capacity nevertheless may be susceptible to the undue influence of another. The planner must ensure that the client is exercising his or her own free will.

Undue influence occurs when someone has interfered with the testator's free will and has prevented the exercise of the testator's own judgment and choice.[12] Not every influence exerted over a person is undue influence: "[g]enerally, influence exerted by giving advice, arguments, persuasions, solicitations, suggestions or entreaties is not considered undue unless it be so importunate, persistent or coercive and operates to subdue and subordinate the will of the testator and take away his or her freedom of action."[13] It must be "influence tantamount to force or fear which destroys the testator's free agency and constrains him to do what is against his will."[14]

continued on next page

continued from previous page

A TEDRA Litigator's Advice …

Detecting the presence of undue influence may be harder for an estate planner than determining capacity or insane delusions. Often the influence takes place outside the view of the lawyer. Some circumstances to watch for include:

- A sudden, drastic or significant change in bequests from previous planning;
- The client's sudden change from his prior, long-term estate planner without explanation;
- Disinheritance of a family member in favor of a more distant relative, friend, charity or caregiver;
- Unequal treatment of children for no clear or articulable reason;
- The extent to which a gift or bequest has been made to someone an elderly or disabled testator depends on for care;
- Unusual or atypical behavior by the client during the meeting(s);
- Client's inability to answer questions without conferring with another person;
- Planner's inability to meet with the client alone; and
- Comments of the staff of the assisted living or other residence facility occupied by the client that the client is being harassed.

Other factors the planner might consider including in an office memorandum:

- Where did the meeting occur – planner's office, client's home, hospital, care facility?
- Who called the office to make the appointment?
- Who, if anyone, accompanied the client to the meeting?
- Did the person ask to come into the room with the client?
- Did anyone appear to be coaching the client, e.g., "Remember what we spoke about…?"
- Were there any statements that demonstrate a conflict in the family, e.g., "Nice to meet you, I'm the good daughter" or "His other children don't know we're here."
- Who did most of the talking?
- Does the new plan depart from prior plans and can the client (*not* anyone else) articulate why?
- How long did the planner meet with the client alone and what was discussed?[15]

The answers to these questions do not necessarily mean someone is exerting undue influence. In fact, it is not uncommon for a family member or close friend to accompany an elderly client to a meeting with his lawyer and try to be helpful. But further investigation is warranted when these circumstances are present. A planner should ask the client to articulate why, for example, he is making the change and/or favoring a more distant friend or relative over those who took under the previous plan or would take under the intestacy statutes. A planner should be sure he is satisfied with the response because he will likely be the star witness defending the will if it is challenged. Even if the case never gets to trial, the planner may be deposed and may be asked why the client did what he did. A planner may feel foolish if he has no idea and/or never asked why the client made some of the seemingly unusual decisions he or she made.

If the planner is satisfied with the client's response and there is an unusual or unexpected deviation from what one would normally expect, the planner should consider adding a precatory statement in the will about the intent behind the particular dispositions, and including a "No-Contest Clause."[16] Notes to the file addressing all of these issues will also be helpful if later a challenge is brought.

Fraud

An estate planning document can also be invalidated, either in whole or in part, on the ground of fraud, whether it be fraud in the execution or fraud in the inducement.[17] Courts will invalidate a will, trust or gift when the court finds that a beneficiary made willfully false statements of fact, intended to deceive a testator/donor and induce a particular result, which do deceive the testator/donor and induce the testator/donor to make a will, trust or gift, which the testator/donor would not otherwise have made.[18] This analysis is different than the analysis for undue influence, because in a fraud situation, the testator is not coerced, rather he is actually deceived. Though fraud and undue influence are distinct concepts, they are closely related. Facts that support a finding that one of these bases to invalidate a document or gift exists may provide additional support for a conclusion that the other basis is also present.[19] Fraud may be presumed in equity where the donor and donee share a confidential relationship.[20] In such a case there can be a "presumption of fraud."[21]

Fraud in the execution of wills is not common.[22] It is defined as "fraud that goes to the nature of the instrument

continued on next page

continued from previous page

A TEDRA Litigator's Advice ...

itself…. 'If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.'"[23]

As with undue influence claims, it can be difficult for an estate planner to recognize fraud in the inducement because, more likely than not, the fraud has already occurred by the time the client comes to the office. However, the same advice described above regarding the timing and duration of meetings and discussion, investigation of facts with the client and / or family members, and detailed notes to the file are all applicable in this situation as well.

Insane Delusions

Although these situations do not occur frequently, a will, trust or gift can also be overturned when it is the product of an insane delusion. Even when a testator meets the three-part test for testamentary capacity, "he may, nevertheless, be laboring under one or more insane delusions which may have the effect of making his will a nullity."[24] An insane delusion is a false conception of reality that a testator of a will adheres to against all reason and evidence to the contrary.[25]

A planner should be on alert if a client has said anything that does not sound entirely credible. For example, if a client claims his or her daughter has stolen the family house, but county records show the house is still in the client's name, further investigation may be warranted. Is the daughter squatting in the family home while the parent is in an assisted living facility or is this completely delusional thinking?

Conclusion

The good news for estate planners is that anyone seeking to invalidate a will has the burden of proving by clear, cogent, and convincing evidence that the testator lacked testamentary capacity, was unduly influenced, was the subject of fraud at the time that he or she executed the will, or was suffering from an insane delusion.[26] This is a difficult, although not impossible, burden to meet. The law presumes the will is valid if it is executed in legal form and is rational on its face.[27] The planner's testimony alone will make it very difficult for the contestant to prevail, especially if the planner is deliberate in his or her work with the client and follows the advice provided in this article. *Good luck!*

---

1 *In re Estate of Larsen*, 191 Wash. 257, 260, 71 P.2d 47 (1937).

2 *See Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 108-09, 120 P.2d 527 (1942) (quoting 17 C.J.S. *Contracts* § 133). To make a contract, one must "be of sufficient mental capacity to appreciate the effect of what he is doing and must also be able to exercise his will with reference thereto." *Id.* In contrast, testamentary capacity does not require such appreciation of the effects of the action, only that the testator can satisfy the three elements. *Estate of Larsen*, 191 Wash. at 260.

3 RCW 11.103.020, which became effective January 1, 2012, states that the standard of capacity for a Trustor to create, amend, revoke or add property to a revocable trust, or to direct the actions of a trustee of a revocable trust is the same standard as that required to make a will. This statute applies to trusts created before or after the effective date of the Act, confirming that, although revocable trusts can be viewed as contracts between trustor and trustee, the "contract standard" for capacity does not apply to them because revocable trusts generally contain a testamentary plan.

4 At the time of execution if the planner expects the will or trust may be challenged, it is incumbent upon the planner to have the witnesses to prepare contemporaneous memos of their interaction with the client.

5 *Estate of Larsen*, 191 Wash. at 261. Likewise, "'[g]reat age alone does not constitute testamentary disqualification,' and 'there is no presumption against a will because made by a man of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body.'" *Estate of Denison*, 23 Wn.2d at 714 (quoting *Horn v. Pullman*, 72 N.Y. 269 (1878)).

6 *In re Estate of Malloy*, 57 Wn.2d 565, 568, 359 P.2d 801 (1961). Failure of memory is not alone enough to create testamentary incapacity, unless it extends so far as to be inconsistent with the "sound and disposing mind and memory" requisite for all wills. *In re Estate of Kessler*, 95 Wn. App. 358, 371, 977 P.2d 591, 599 (1999) (quoting *In re Estate of Denison*, 23 Wn.2d 699, 714, 162 P.2d 245 (1945)).

7 *In re Estate of Hansen*, 66 Wn.2d 166, 171, 401 P.2d 866 (1965). Offers of proof showing that the testatrix was subject to occasional lapses of memory, which are common to persons of her age, "would not support a finding that she lacked testamentary capacity when she executed her will, either standing alone or when taken in conjunction with all of the other testimony." *In re Estate of Malloy*, 57 Wn.2d 565, 358 P.2d 801 (1961).

8 *In re Estate of Denison*, 23 Wn.2d 699, 713, 162 P.2d 245 (1945). Although mental power of the elderly may, generally speaking, be below the ordinary standard of the populous, "if the testamentary act is understood and appreciated in its different bearings [and] if the mental faculties retain enough strength to comprehend the transaction entered upon, the power to make a will remains. In other words, to constitute senile dementia, there must be such a failure of the mind as to deprive the testator of intelligent action. Such is the rule of our own cases, and the rule established by the great weight of authority." *Id.* at 714.

9 For a litmus test regarding dementia, planners are encouraged to ask the attending physician for the client's score on the Mini Mental Status Exam (MMSE), if any. The MMSE is frequently used by litigators as well as by investigators of Adult Protective Services of the Washington Department of Social and Health Services to determine the severity of a client's dementia.

10 *In re Estate of Bussler*, 160 Wn. App. 449, 463, 247 P.3d 821, 829 (2011). "'[W]hile sick, a person desires to make a will,' and evidence that the person has been prescribed 'a sedative or some medicine to ease pain or reduce nervousness ... is not, of itself, proof or even weighty evidence of testamentary incapacity.'" *Id.* at 463 (quoting *In re Estate of Kinssies*, 35 Wn.2d 723, 734, 214 P.2d 693 (1950)). The Washington Supreme Court has also affirmed the trial court's finding that "the narcotic ministered to the testator – a quarter grain of morphine sulphate, given approximately three and one-half to four hours before the execution of his will … did not impair his mind, memory or faculties." *In re Estate of Mikelson*, 41 Wn.2d 97, 99, 247 P.2d 540 (1952).

11 *In re Peters' Estate*, 43 Wn.2d 846, 862, 264 P.2d 1109 (1953).

12 *In re Estate of Marks*, 91 Wn. App. 325, 333-34, 957 P.2d 235 (1998).

13 *Id.*; *see also In re Estate of Bottger*, 14 Wn.2d 676, 701, 129 P.2d 518 (1942); *In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998))

14 *Estate of Lint*, 135 Wn.2d at 535 (quoting *Estate of Bottger*, 14 Wn.2d at 700); *see also In re Estate of Kessler*, 95 Wn. App. 358, 377, 977 P.2d 591 (1999).

15 It is recommended as a matter of standard practice that the planner enter a separate time slip for each office or home conference held with a client to further document how long each meeting lasted.

16 These clauses provide that if any beneficiary contest the will, then he or she inherits nothing (or $1.00) from the Estate. In Washington, no contest clauses are valid and enforceable. *Boettcher v. Busse*, 45 Wn.2d 579, 585,

continued on next page

Notes from the Chair

by Mike Barrett – Perkins Coie LLP

These are the first two objectives in the mission statement of the Real Property, Probate & Trust Section:

- to assist our members in achieving the highest standards of competence, professionalism and ethics in their practices
- to assist the Legislature in the enactment and improvement of the laws affecting real property, probate, trusts and estates and to assist the Judiciary in the just administration of those laws.

I'd like to use this Notes from the Chair to describe some of the ways the Section works on these goals and to let you know how, if you're interested, you can become involved.

The Newsletter

Because you're reading this piece, you are already aware of one of the principal ways the Section pursues the first of the objectives in its mission statement – we publish the Newsletter. It comes out four times each year and provides articles on subjects of interest to members and updates on case law and new legislation. Behind the scenes, an editorial board that is led by an Editor and Assistant Editor identifies potential topics for articles, finds authors and provides editorial assistance to bring the content of each Newsletter into its published form. There are sixteen regular Editorial Board members (not counting the Editor and Assistant Editor) -- eight on the probate and trust side and eight on the real property side. All serve two-year terms, staggered so that no more than half rotate off the board each year. In addition, the Editorial Board may include up to four volunteers who work on the TEDRA articles that appear in the Newsletter.

Regular Editorial Board members are nominated by the Editor and Assistant Editor and appointed by the Chair of the Section. TEDRA members are nominated by the chair of the Section's TEDRA subcommittee and appointed by the Chair. There is no limitation on the number of successive terms that an Editorial Board member may serve, but we try to maintain diversity and provide leadership opportunities to as many Section members as possible.

If you know of a topic that should be addressed in the Newsletter, if you're interested in writing an article or if you're interested in serving on the Editorial Board, let the Editor or Assistant Editor know – you'll find their contact information in the Newsletter and on the Section website (http://www.wsbarppt.com).

Continuing Legal Education

In a typical year, the Section sponsors five CLEs – the annual Fall Real Estate Conference and a probate and trust CLE in December, a Trust & Estate Litigation CLE and a real estate CLE in the spring, and the annual Midyear Conference in early June. Many of these presentations can now be attended both in person and online. Attendance has been steadily growing, which we hope means our members find

continued on next page

continued from previous page

A TEDRA Litigator's Advice …

277 P.2d 368 (1954) (citing *In re Estate of Chappell*, 127 Wash. 638, 221 P. 336 (1923)); *In re Estate of Mumby*, 97 Wn. App. 385, 393-394, 982 P.2d 1219, 1224-1225 (1999). But the no contest or forfeiture clause does not operate where the contest is brought in good faith and with probable cause. *See Chappell*, 127 Wash. at 646, 221 P. 336; see also In re Estate of Kubick, 9 Wn. App. 413, 419-20, 513 P.2d 76 (1973); *Estate of Mumby*, 97 Wn. App. at 393-394. If a contestant initiates an action on the advice of counsel, after fully and fairly disclosing all material facts, she will be deemed to have acted in good faith and for probable cause as a matter of law. *Estate of Mumby*, 97 Wn. App. at 393-394 (citing *Kubick*, 9 Wn. App. at 420, 513 P.2d 76).

17 *In re Estate of Bottger*, 14 Wn. 2d 676, 701, 129 P.2d 518, 528 (1942).

18 *Estate of Bottger*, 14 Wn.2d at 701-702.

19 *Estate of Lint*, 135 Wn.2d at 537. There seems to be a fine line between fraud and undue influence in some cases. *See e.g.*, *In re Kleinlein's Estate*, 59 Wn.2d 111, 366 P.2d 186 (1962); *In re Estate of Kessler*, 95 Wn. App. 358, 977 P.2d 591 (1999); *In re Jennings' Estate*, 6 Wn. App. 537, 494 P.2d 227 (1972).

20 *See e.g.*, *Dean v. Jordan*, 194 Wash. 661, 671-72, 79 P.2d 331 (1938).

21 *Pedersen*, 64 Wn. App. at 723.

22 In fact, this author could find no cases on point. However, there is an inter vivos transfer case alleging "fraud in the execution" that is instructive. *Pedersen v. Bibioff*, 64 Wn. App. at 710 (holding inter vivos transfer of property from father to son was result of undue influence, and fraudulent in the execution).

23 *Pedersen*, 64 Wn. App. at 721 (quoting Restatement (Second) of Contracts § 163 (1979)) (internal citations omitted).

24 *In re Estate of Gwinn*, 36 Wn.2d 583, 586, 219 P.2d 591 (1950).

25 The question to be decided is whether the testator, when he made his will, had an insane delusion or "false belief, which would be incredible in the same circumstance to the victim thereof were he of sound mind, and from which he cannot be dissuaded by any evidence or argument." *Id.* at 586 (concluding that because "the natural friendly relationship between father and son over the years had taken a sudden unnatural turn in the opposite direction" due to an insane delusion affecting the testator/father, the testator's will must be declared a nullity) (quoting *In re Estate of Klein*, 28 Wn.2d 456, 183 P.2d 526 (1947)).

26 RCW 11.24.030; *In re Estate of Black*, 153 Wn.2d 152, 161-63, 102 P.3d 796, 802 (2004); *In re Estate of Martinson*, 29 Wn.2d 912, 914, 190 P.2d 96 (1948); *In re Estate of De Lion*, 28 Wn.2d 649, 660, 183 P.2d 995 (1947); *In re Estate of Marks*, 91 Wn. App. 325, 333, 957 P.2d 235 (1998); *In re Estate of Gordon*, 52 Wn.2d 470, 476, 326 P.2d 470 (1958).

27 *In re Estate of Nelson*, 85 Wn.2d 602, 606, 537 P.2d 765 (1975) (superseded by statute on other grounds as stated in *Estate of Black*, 153 Wn.2d 152, 161, 102 P.3d 796 (2004)); *In re Estate of Meagher*, 60 Wn.2d 691, 692, 375 P.2d 148 (1962); *Pond's Estate v. Faust*, 95 Wash. 346, 347, 163 P. 753 (1917) ("courts will presume sanity until that presumption is overthrown by competent and reliable evidence to the contrary").

continued from previous page

Notes from the Chair

the content valuable and the cost appropriate. We continue to explore ways of making CLEs even more accessible.

If you have an idea for a topic for one of our CLEs or if you're interested in being a co-chair or speaker, let someone on the Executive Committee know. Contact information for all Executive Committee members is on the website and, for some of us, in the Newsletter.

Legislation

The Section is an active participant in each session of the Legislature. Our role is limited to taking positions that relate to the practice of law in the substantive areas of probate and trust and real estate or to the administration of justice, but within that relatively narrow scope we find a lot to do. We sometimes sponsor legislation, we sometime oppose or support legislation introduced by others and we sometimes simply help to shape legislation by providing legislators with the benefit or our expertise. To sponsor legislation on behalf of the Section requires approval of the Section's Executive Committee, approval by the WSBA Legislative Committee, and ultimately, the approval of the Board of Governors. To take a position on legislation sponsored by others requires a vote of 75% of the Executive Committee.

This year, the Section will be sponsoring one Probate & Trust bill – a bill proposing a number of technical amendments to Title 11. In 2014 the Section expects to sponsor major legislation that would adopt a Washington-version of the Uniform Common Interest Ownership Act.

The Section has two legislative committees comprised of volunteers who assist the Executive Committee, one on the probate and trust side and the other on the real property side. The Probate and Trust legislative committee meets periodically and tends to focus more on the development of legislation for sponsorship by the Section. The volunteers on the Real Property legislative committee do not hold meetings and, instead, are asked from time to time during a session to offer their views on proposed legislation to help the Executive Committee decide whether to take a position on a bill and what position to take.

The pace of a legislative session is extraordinary – we often have only a day or two in which to prepare comments. Once we've commented on a piece of legislation, we're committed to continue our position as requested by the legislature, which can mean testifying before legislative committees, assisting with drafting and participating in stakeholder groups. It is both exhausting and rewarding.

If you are interested in participating on either legislative committee, let the Director of that side of the section know of your interest (Heidi Orr for Probate & Trust and Joe McCarthy for Real Property – check the Newsletter and Section website for their contact information).

Section Leadership

Finally, all of the Section's activities mentioned above are overseen by the Section's Executive Committee. You can see how many of us there are and what roles we fill in the Newsletter and on the website. Regular executive committee members serve two year terms. The Directors of the Probate & Trust and Real Property Councils each serve two years before moving on to become, in alternating years, the chair-elect, chair and immediate past-chair of the Section. Potential Executive Committee members are nominated by a nominating committee comprised of the three immediate past chairs of the Section. Nominees are elected by the Section's membership at our annual midyear meeting. The 2013 midyear meeting will be in Richland, June 7, 8 and 9. A notice will be posted on the website at least 120 days prior to the midyear meeting, soliciting nominations and listing the requirements for nominating someone to serve on the executive committee. If you are interested in serving on the Executive Committee or want to nominate someone to serve, watch the website in late January / early February for the announcement.

I hope you will consider becoming more involved in Section activities. We're the largest section of the Bar – over 2,400 members – so we unfortunately don't have enough opportunities to accommodate immediately everyone who might be interested. But we're committed to expanding both the ways in which we achieve the goals in our mission statement and the opportunities for members to participate in those efforts.

Recent Developments

Real Property

by Brian L. Lewis – K&L Gates, LLP and Anna E. Revelle – Stoel Rives LLP

Equitable Subrogation

In *Columbia Community Bank v. Newman Park, LLC*, 166 Wn. App. 634, Division Two of the Court of Appeals examined the doctrine of equitable subrogation in Washington.

Newman Park LLC's business purpose was to own, develop and sell a residential subdivision in Thurston County. The Newman Park project had a mortgage loan with Hometown National Bank. In 2008, Columbia Community Bank agreed to loan Newman Park's affiliate, Trinity, $1,500,000 but required a first-lien deed of trust on the Newman Park project as security.

Newman Park's operating agreement prohibited any member from incurring liability greater than $25,000 or pledging company property to secure a debt of more than $50,000. Newman Park's principal altered the operating agreement then submitted it to Columbia Bank and obtained the Trinity loan. Some of the loan proceeds were used to pay off the Hometown loan, thereby insuring Columbia's first-lien position on the Newman Park project.

Trinity defaulted on the Columbia loan and Columbia began foreclosure. Columbia then learned that the operating agreement had been altered and filed suit seeking a declaratory judgment that its deed of trust was either valid or, alternatively, equitably subrogated to the Hometown mortgage lien. Newman Park countersued, seeking a declaration that the deed of trust was invalid and unenforceable because the Columbia loan transaction was not duly authorized. The trial court consolidated the suits and, on summary judgment, granted Columbia an equitable lien for $491,037.31 under principles of equitable subrogation and unjust enrichment.

On appeal, the appellate court adopted the *Restatement (Third) of Property Mortgages* § 7.6(a) (1997) under which one who fully performs the obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment, even though the performance would otherwise discharge the obligation and the mortgage. Columbia satisfied Newman Park's obligations to Hometown when it paid off the Hometown loan. As such, Columbia was equitably subrogated to Hometown's lien to the extent of such performance, regardless of whether its own deed of trust was valid. Newman Park would have been unjustly enriched if it was awarded the property free of any mortgage lien. The appellate court rejected Newman Park's argument that Columbia was merely a "volunteer" and held that the "volunteer rule" is no longer a defense in Washington, and will not defeat application of the equitable subrogation doctrine where a mortgagee pays off another mortgage holder.

Surplus Foreclosure Proceeds

In *Boeing Employees' Credit Union v. Burns*, 167 Wn. App. 265 (2012), the court considered the effect, if any, that judgment on a secured promissory note has on the accompanying security instrument.

Burns had a first mortgage with Wells Fargo and a second mortgage with Boeing Employees' Credit Union. After Burns defaulted on both loans, BECU sued and obtained an $81,986 judgment on its promissory note and Wells Fargo foreclosed its deed of trust non-judicially. Well Fargo's foreclosure sale generated about $100,000 in surplus proceeds.

BECU claimed a lien in the surplus proceeds pursuant to its deed of trust, which was eliminated by the Wells Fargo foreclosure. Burns argued that BECU's deed of trust "merged" with its judgment and that Burns was entitled to the surplus proceeds under the homestead exemption established by RCW 6.13.030. BECU argued that Burns was not entitled to the homestead exemption because its deed of trust had been executed and acknowledged by both spouses, and therefore no homestead exemption was available pursuant to RCW 6.13.080(2)(b). The trial court ruled in favor of Burns, holding that BECU's deed of trust and promissory note merged with its judgment, and awarded the surplus proceeds to Burns.

The appellate court reversed. Under RCW 61.24.080, surplus proceeds from a non-judicial foreclosure sale must be deposited with the court. Liens or claims of liens against the property which are eliminated by the sale attach to the surplus proceeds in the order of priority they had against the property. BECU's deed of trust therefore attached to the surplus proceeds. The fact that BECU previously obtained a judgment on its promissory note did not result in a merger of the note and deed of trust with the judgment.

In Washington, a deed of trust beneficiary may elect to either foreclose or sue on its promissory note. If a judgment on the note is obtained, the obligations of the note merge into the judgment, but the mortgage is a separate obligation that is not merged into the judgment. The homestead exemption was not available to Burns because the exemption is unavailable against a debt secured by a deed of trust acknowledged by both spouses. RCW 6.13.080(2)(b).

continued on next page

continued from previous page

Recent Developments: Real Property

Analysis of Option Agreement

In 224 *Westlake, LLC v. Engstrom Properties, LLC*[1], Division One of the Court of Appeals analyzed an option to purchase real property. Two issues presented were whether the buyer's assignment of the purchase option was valid and whether the seller's failure to extend the closing date to allow time for soil testing was a material breach of the agreement.

Engstrom, as seller, entered into a real estate purchase option agreement with Investco, as purchaser, for property in the South Lake Union neighborhood in downtown Seattle. The agreement provided for a two-year option period, during which Investco could conduct a feasibility analysis. The agreement obligated Engstrom to remove two decommissioned fuel tanks and clean up any hazardous materials in the surrounding soil and stated that "[t]he parties further agree that the Closing Date shall be extended as is reasonably necessary to complete such tank removal, clean up and permitted testing."

The agreement also provided that it was not generally assignable without the other party's prior consent "which shall not be unreasonably withheld" but that Investco could freely assign its interest to an entity in which it "owns and continues to own through the Closing Date at least 51% of the ownership interests." In June 2007, Investco assigned its interest in the agreement to an affiliate (Westlake) without Engstrom's consent.

During the feasibility period, Engstrom performed environmental clean up work but Westlake's consultants found that the work was insufficient. Both parties then engaged consultants to perform additional testing. Engstrom's consultants concluded that the contamination levels did not exceed required clean-up levels, but Westlake's consultants concluded additional work was required. Westlake requested an extension of the closing date in order to allow it to perform the additional work. Engstrom suggested an extension of four days, which was not acceptable to Westlake.

Engstrom signed its closing documents on March 6, 2009. Westlake did not perform on the scheduled closing date, and stated that it believed Engstrom had materially breached the agreement by refusing to agree to a reasonable extension of the closing. On March 19, Engstrom put the property back on the market. On March 26, Westlake sued Engstrom for breach of contract. Engstrom moved to dismiss on the ground that Westlake was not a valid party to the agreement because Investco's assignment to Westlake was not valid under the agreement's anti-assignment provision without Engstrom's prior consent. That motion was denied on the ground that Engstrom's refusal to grant consent to the assignment was unreasonable, and the matter proceeded to trial. After a bench trial, the court ruled in favor of Westlake on every issue and Engstrom appealed.

The appellate court found the assignment to be valid, holding that anti-assignment provisions are to be narrowly construed and whether the withholding of consent was reasonable should be determined at the time the seller learns his consent was required. Engstrom did not learn that Westlake failed to satisfy the 51% ownership requirement for free assignability until after litigation ensued. At that time, Engstrom had an obligation to be reasonable in determining whether to grant consent to the assignment. Because Westlake had enough cash in its bank account to fund the entire purchase price and had paid nearly $1,000,000 in option payments and project development costs, Engstrom's withholding of consent was unreasonable.

The court also determined that although the closing date was never extended, the purchaser's behavior was consistent with intent to purchase the building and Engstrom had a duty to agree to a reasonable extension of closing. By failing to reasonably extend the closing, Engstrom materially breached the agreement and this breach discharged Westlake's duty to close. The appellate court also held it was not necessary for Westlake to tender the purchase price into escrow in order to maintain a breach of contract action against Engstrom.

1 __ Wn.App. __, 281 P. 3d 693 (2012).

Recent Developments

Probate and Trust

by Kelly Bowra – Law Offices of Kelly C. Bowra, PLLC and Jeff Herbster – Winston and Cashatt

For Washington State estate tax purposes, the estate of a surviving spouse does not include the remaining value of a QTIP trust established on the first spouse's death if the first deceased spouse died when Washington still had a pickup tax and no Washington QTIP election was made because Washington did not have a stand-alone estate tax and no such election existed. *In re Estate of Bracken*, 101812 WASC 84114-4.

Jim Bracken died in 1984 and William Nelson died in 2004. Both estates included trusts for the decedents' surviving spouses that the estates sought to treat as qualified terminable interest property ("QTIP"). The estates made the elections required to qualify the trusts as QTIP trusts and receive the federal estate tax marital deduction under I.R.C. § 2056(b)(7). The estates did not make a separate Washington QTIP election because no such election existed at the time of Mr. Bracken's or Mr. Nelsons death. The surviving spouses of Mr. Bracken and Mr. Nelson both died in 2006 and the estates included the property remaining in the QTIP trusts in their federal estate returns. However, neither estate included such property in their Washington estate tax because a Washington QTIP election was not made at the time of the first spouse's death. The Washington State Department of Revenue issued deficiency notices to the estates. The trial court found the failure by the estates to include the assets in the QTIP trust was impermissible. The Bracken Estate paid the Washington estate tax owed and filed an appeal, seeking direct review by the Supreme Court. The Nelson Estate filed an appeal with the Court of Appeals. The Supreme Court granted direct review and consolidated the two cases.

Prior to 2005, Washington had no stand-alone estate tax structure in place, but instead relied upon a "pickup" tax structure which mirrored federal taxes. The State estate tax was calculated, and paid from the gross federal estate taxes, which gave estates a credit in the amount of the State estate tax. However, in 2001, the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA") gradually phased out the state death tax credit beginning on January 1, 2002 and being completely eliminated by January 1, 2005.

On May 17, 2005, Washington enacted a new stand-alone estate tax, the Estate and Transfer Act, RCW 83.100, which relies substantially on the federal estate tax code for concepts, definitions and structure. The 2005 Act provides for a separate Washington QTIP election. RCW 83.100.047(1); WAC 458-57-115(2)(c)(iii). Additional regulations were added in 2006 clarifying the calculation of a Washington taxable estate, the effect of which allows for a state QTIP election and requires the surviving spouse to include the remaining value of the QTIP in their gross estate for Washington estate tax purposes.

The Supreme Court found in favor the Estates, holding that the QTIP was properly excluded from the surviving spouses' estates for Washington estate tax purposes. The Court found that the Washington estate tax applies only to transfers either at the time they are made or where there has been a voluntary election to defer taxation (i.e. QTIP election), and only prospectively. Citing *Coolidge v. Long*, 282 U.S. 582, 605, 51 S.Ct. 306, 75 L. Ed. 562 (1931), the Supreme Court found that property is transferred from a trustor when a trust is created and not when an income interest in the trust expires. Therefore, there was no transfer at the time of death of Mrs. Bracken and Mrs. Nelson. Similarly, no election to defer the taxes was made since there was no applicable Washington QTIP election at the time of the first spouses' estates. Given this situation, the application of a tax would essentially be retroactively taxing the property in the trust.

The Washington State Supreme Court found that the children of a decedent's predeceased spouse did not lose their status as stepchildren under the wrongful death statute on the death of the stepchildren's natural parent. *Estate of Audrey P. Blessing*, 174 Wash.2d 228, 273 P.3d 975 (2012).

The case revolved around the Estate of Audrey P. Blessing, and the children of Audrey's second (of three) husbands. Audrey had three natural born children with her first husband who she divorced in 1964. She later married Carl Blaschka, who had four children from a previous marriage. Audrey and Carl, who raised all seven children together, remained married until Carl's death in 1994. The "Blaschka stepchildren" remained close to Audrey after the death of their father and after Audrey's remarriage in 2002. However, they were never adopted by Audrey.

Audrey's third husband died in 2005. Audrey died in 2007 as a result of a car accident, which in turn resulted in a wrongful death action against the other driver. The Blaschka stepchildren claimed an interest in the wrongful death action, which claim was challenged by the Estate but confirmed by the trial court. The Court of Appeals reversed, stating that the Blaschka stepchildren's status as Audrey's stepchildren ceased upon their father's death.

RCW 4.20.020, which defines those entitled to benefit from a wrongful death action, includes "stepchildren" of the decedent within the definition of beneficiaries. However, there is no statutory definition of stepchild, nor any

continued on next page

Real Property Practice Tip: Reviewing Real Estate Loan Documents for Washington Law Compliance

by Rhys Hefta – K&L Gates, LLP

Whether representing borrowers or lenders, lawyers are often asked to review boiler-plate mortgage and deed of trust documents prepared by out-of-state attorneys for compliance with Washington law. In many cases, this task is accompanied by a request for an opinion that the agreements are enforceable under Washington law. The following is a brief, if an incomplete list of common issues to be aware of when reviewing these documents for Washington law compliance.

- No Agricultural Use. This is probably the most critical requirement. The deed of trust must contain a statement that "the real property conveyed is not used principally for agricultural purposes."[1] The inclusion of this statement, and the veracity thereof as of the date made and the date of the trustee's sale, is a requisite to a trustee's sale of the property. In its absence, the property can only be foreclosed judicially.

- Trustee. RCW 61.24.00 lists requirements for the trustee. Often the title company insuring the transaction is named. The trustee must have a Washington address so use the local office (not the national office that may be coordinating). It is also important to check the name of the company to be sure it is the correct one for the Washington office, which may be an affiliate of the national company. The lender may not be the trustee.

- Granting Language. The granting clause of the deed of trust should provide the trustee with "power of sale" and a "right of entry and possession."[2] The grant of a power of sale is a requisite to a trustee's sale.[3]

- Notice of Oral Commitments to Lend. Under Washington's statute of frauds, to be enforceable, all "credit agreements" must be in writing signed by the creditor.[4] This statute was enacted to help protect lenders from lender liability claims. To take advantage of the statute, a "conspicuous" statutory notice must be provided to the borrower that oral commitments are not enforceable.[5] The failure to provide such notice could result in enforceable commitments being inferred from casual correspondence and negotiations. Also note that the definition of "credit agreement" is quite broad.[6] Therefore, it is good practice to liberally include statutory notices in the loan documents, and especially in notes, loan agreements, deed of trust, guaranties and any forbearance or pre-negotiation agreements.

- Assignment of Rents. RCW 7.28.230 provides that an assignment of rents, if intended as security, is perfected upon recording. To make this intention explicit, an assignment of rents, whether included in a deed of trust or a separate document, can state that it is the intent of the parties that the assignment be deemed "specific, perfected and choate" for purposes of RCW 7.28.230. This language

continued on next page

continued from previous page

Recent Developments: Probate and Trust

significant case law to define if the classification of stepchild terminates on the death of such stepchild's natural parent.

The Blaschka stepchildren argued that once the label of stepchild attaches, it does not terminate, even after the death of their parent and subsequent remarriage of a stepparent. The Estate argued that the status of stepchild only applies so long as the stepchild's parent is currently married to the party in interest.

The Estate also argued that the child support statutes, specifically RCW 74.20A.020(8) defined stepparent to be the *present* spouse of a person who is the parent of a dependent child. The Supreme Court found the clear definition in child support context to not be persuasive in regards to application of the wrongful death statues, stating that these child support statutes only demonstrate that the legislature has the ability to better define the stepchild / parent relationship, and did not do so for wrongful death actions.

The Supreme Court considered the measure of the "closeness" of the relationship, and concluded the validity of the marriage between Carl Blaschka and Audrey sufficient to establish a step parent relationship, without having to make any measure of the closeness of their relationship.

In a unanimous decision, the Supreme Court held that for purposes of a wrongful death action, the status of stepchild attaches once their parent marries, the status and does not terminate, even after the death of the stepchild's natural parent.

continued from previous page

Real Property Practice Tip: Reviewing Real Estate Loan Documents for Washington Law Compliance

should be in place of a statement that the assignment is not intended as security.

- Environmental Indemnities. If the loan documents include an environmental indemnity from the borrower or a guarantor, that indemnity *should not* be secured by the deed of trust. The anti-deficiency provisions of RCW 61.24.100 with respect to the obligations secured by the deed of trust eliminate the principal benefit of the environmental indemnity, namely its survival following a trustee's sale.

- Environmental Provisions in Deed of Trust or Other Loan Documents. Similarly, the deed of trust and other loan documents secured by the deed of trust *should not* contain indemnities related to environmental matters. Even if the environmental indemnity is not secured by the deed of trust, RCW 1.24.100 applies the anti-deficiency provisions to obligations that are the "substantial equivalent" of those secured by the deed of trust.[7]

- Recording Formatting. RCW 65.04.045 prescribes formatting requirements for all recorded documents, and the deed of trust, assignment of leases and any other document to be recorded must comply. Among these, a "Grantor" and a "Grantee" must be identified. The cover page of the deed of trust should identify the borrower as the Grantor and both the lender and trustee as Grantees. After initially describing the capacity of the parties as grantor and grantees in the introductory paragraph, other terms may be used in the body of the document. Other information is required in the cover sheet. Sometimes, the most difficult advice for out of state lawyers to grasp is the 1" margin requirements and persistence may be required to get footers and page numbers out of the margin.

- Foreclosure Terminology. Deed of trust forms from other states may include a non-judicial foreclosure provision with terminology that differs from RCW 61.24. These should be deleted or revised. Usual suspects include those providing for recording a Notice of Default and Election to Sell, "adjournment" of a trustee's sale (as opposed to "postponement"), permitting the trustee to bid at the sale, payment of a statutory fee to the trustee and providing for a private power of sale conducted by the lender. It is also a good idea to include a statement that, if not foreclosed non-judicially, a deed of trust may be foreclosed as a mortgage.

As a postscript, lawyers working in the real estate finance field in Washington must be familiar with the recent decision of the Supreme Court of Washington in the case of *Bain v. Metro Mortg. Grp. Inc. (CITE),* which likely put an end to the use in Washington of Mortgage Electronic Registration System Inc. (MERS). MERS was developed by major mortgage lenders to serve as the holder of record of mortgages and deeds of trust on behalf of undisclosed noteholders, thereby facilitating the liquid market for transfers of interests in mortgages and mortgage backed securities by eliminating the need to record assignments of the underlying record documents. The court, in response to certified questions from the Federal District Court of Western Washington, ruled that MERS was not a lawful beneficiary of the deeds of trust it held, since it was never the holder of the indebtedness secured thereby. While use of MERS was already in decline, the ruling can nonetheless be instructive in structuring and analyzing future transactions. One of the principal points on which the ruling turned was whether MERS, though not a lawful beneficiary, was nonetheless a lawful agent of the actual beneficiary, and therefore still empowered to act on the beneficiary's behalf. While the court generally supported the concept of agency in this context, and recognized the rights of agents to take certain actions on behalf of a beneficiary, the court held that MERS was not a lawful agent, because its principals are unidentified and therefore unaccountable for the actions of MERS. The *Bain* case provides an important lesson on the court's view of agency in the context of the enforcement of deeds of trust, which must be taken into account if any effort is made to resurrect MERS in a new form or otherwise pursue the original objective of inserting a strawman as holder of record for undisclosed beneficiaries.

1 RCW 61.24.030(2)
2 Common granting clause language reads: "Grantor hereby irrevocably grants, bargains, sells, conveys, transfers and assigns to Trustee, in trust, with power of sale and right of entry and possession, for the benefit of Beneficiary, the following property and rights, whether now owned or held or hereafter acquired (collectively, the "*Property*"), and Grantor further grants to Trustee and Beneficiary a security interest and assigns for security purposes all right, title and interest in and to the following Property."
3 RCW 61.24.030
4 RCW 19.36.110
5 RCW 19.36.130 requires that the notice be provided, and RCW 19.36.140 specifies the language to be used.
6 RCW 19.36.100
7 RCW 61.24.100(10)

Real Property Council Legislative Update

by Joe McCarthy – Stoel Rives LLP

The Real Property Council takes an active role in reviewing proposed real property legislation that affects the practice of law or the administration of justice. In the last legislative session, the Real Property Council reviewed twenty-six real property bills (which was more than any other section of WSBA) and commented on seven bills. The RPPT website contains a summary of the legislative action of the Real Property Council during the last legislative session, which describes each bill, our position on the bill, and the final status of the bill. Click on the "Legislation" link in the navigation pane to see the summary.

The Real Property Council's legislative commentary is governed by General Rule 12, which provides that WSBA sections may comment on legislation only to the extent it affects the practice of law or administration of justice. The Real Property Council does not comment on the soundness of legislative policy or on political issues (individual attorneys are, however, free to express their opinions to the legislature).

The real property-related legislative work is done by the members of the Real Property Council and by the members of the Real Property Council's Legislative Committee. Typically, WSBA's legislative staff will refer a real property related a bill to the Real Property Council. Then, an initial analysis is done by a member of the Council or a member of the Legislative Committee. After reviewing the initial analysis, the members of the Real Property Council will decide whether to comment or take a position. We sometimes provide informal comment through the legislative staff. We sometimes take a formal position through the RPPT Executive Committee, in which case, the Real Property Council and the chair of the Probate and Trust Council must agree on the commentary. In either event, members of the Real Property Council may submit written comments, may meet with legislators and may testify at legislative hearings or work sessions. The Real Property Council may refer complex or specialized bills to the entire Executive Committee or to the Legislative Committee.

The Legislative Committee is composed of attorneys who have served on the Real Property Council or who have experience with particular areas of real property law. If you are interested in serving on the Legislative Committee, please send me an email and let me know the areas of real property law with which you would like to help. We typically get only a few days to analyze, discuss, and comment on a bill. There may or may not be any bills affecting that area of the law in the next session, but if there are, you will have the opportunity to work with top-notch, dedicated practitioners on matters of importance to real property attorneys.

Looking forward to the next legislative session, members should know that the Department of Financial Institutions has floated a proposed bill to revise the attorney exemption to the Mortgage Broker Practices Act, RCW 19.46.020(c). DFI's stated goal is to harmonize their exemption with the attorney exemption to the Escrow Agent Registration Act, RCW 18.44.021(2). The Real Property Council and WSBA's Chief Disciplinary Counsel provided informal comments to DFI's proposed bill. DFI apparently has a draft bill that is awaiting executive approval before being introduced. If DFI introduces a bill, we will follow it closely and notify our members.

Upcoming Member Survey

A member survey will be sent to all members from the RPPT Executive Committee in the near future that will be open through early January. We encourage you to please be on the lookout for and participate in this survey so that the RPPT Executive Committee can determine how to best serve you. Thank you for your contributions.

First Responder Will Clinic – Volunteers Needed

The RPP&T Section has agreed to fund the Washington First Responder Will Clinic. This clinic provides estate planning services at no cost to Washington's First Responders. Volunteers are needed to provide estate planning documents to firefighters, police officers and other emergency personnel. For information on how to volunteer, please go to the following link: *http://www.wsba.org/willclinic.*

CONTACT US

Section Officers 2012-2013

Michael A. Barrett, Chair
Perkins Coie LLP
1201 Third Avenue
Seattle, WA 98101-3099
(206) 359-8615
(206) 359-9615 fax
mbarrett@perkinscoie.com

Karen L. Boxx, Chair Elect & Treasurer
Associate Professor of Law
University of Washington
P.O. Box 354600
Seattle, WA 98195-4600
(206) 616-3856
kboxx@u.washington.edu

N. Elizabeth McCaw, Past Chair
9627 Lake Washington Blvd NE
Bellevue, WA 98004
(206) 250-9390
beth.mccaw1@gmail.com

Heidi Orr, Probate & Trust Council Director
Lane Powell, PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101
(206) 223-7742
(206) 223-7107 fax
orrh@lanepowell.com

Joseph P. McCarthy, Real Property Council Director
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
(Legislative Committee)
(206) 624-0900
(206) 386-7500 fax
jpmccarthy@stoel.com

EX OFFICIO

Laura Zeman, Newsletter Editor
Zeman Law Group, PLLC
10655 NE Fourth Street, Suite 701
Bellevue, WA 98004-5039
(425) 947-5405
(425) 749-7698 fax
lzeman@zemanlaw.com

April Anderson, Assistant Editor
Workland & Witherspoon, PLLC
601 W Main Ave, Ste 714
Spokane, WA 99201
(509) 252-5659
(509) 455-9077 fax
aanderson@workwith.com

Doug Lawrence, Web Editor
Stokes, Lawrence P.S.
800 Fifth Avenue, Suite 4000
Seattle, WA 98104-3174
(206) 626-6000
(206) 464-1496 fax
doug.lawrence@stokeslaw.com

Brett T. Sullivan, Web Editor
Sullivan Stromberg PLLC
827 W. 1st Ave., Suite 425
Spokane, WA 99201-3914
(509) 413-1004
(509) 413-1078 fax
bretts@sullivanstromberg.com

Alfred M. Falk, Emeritus
Harlow & Falk LLP
One Tacoma Avenue North, Suite 300
Tacoma, WA 98403
(253) 284-4413
(253) 284-4429 fax
afalk@harlowefalk.com

www.wsbarppt.com

Information for Your Clients

Did you know that easy-to-understand pamphlets on a wide variety of legal topics are available from the WSBA? For a very low cost, you can provide your clients with helpful information. Pamphlets cover a wide range of topics:

Alternatives to Court
Consulting a Lawyer
Criminal Law
Dissolution of Marriage (Divorce)
Landlord/Tenant
Legal Fees
The Parenting Act
Real Estate
Signing Documents
Trusts
Wills

Each topic is sold separately. Pamphlets are $9 for 25, $15 for 50, $20 for 75, and $25 for 100. Pricing for larger quantities is available on request.

To place your order or for more information, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Sales tax is applicable to all in-state orders.