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“Green” Leasing: A Practitioner’s Overview

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I. Introduction.

The “green” building movement is advancing quickly despite the Great Recession’s negative impact on the construction of new (and the retrofitting of existing) homes and buildings. Just a few years ago, the notion of building green was, as observed by one legal expert, chanted more often around campfires (think “Kumbaya”) than it was welcomed in corporate board rooms. But the times, as Bob Dylan noted, they are a-changin.’

Green building (part of the larger movement known as “sustainable development”) has become much more than an aspirational, touchy-feely concept. It is now being driven by government regulation, market demand, shifting societal expectations and good business judgment. A lease of space in a newly constructed green building or an existing conventional building that is to be renovated as a green building (green leasing) is following suit.

The recent rollout of programs such as the “Certified Green Broker” by Washington’s Commercial Brokers Association (“CBA”), and the “Green Broker” conference jointly sponsored by the CBA and the Cascadia Region Green Building Council, indicates that the commercial broker community is rapidly becoming educated in this field. The International Council of Shopping Centers’ upcoming “Retail Green Conference and Trade Exposition on Sustainability, Energy & Environmental Design” further evidences the momentum behind this effort. Clearly, to stay relevant, lease practitioners will need to add green leasing to their bag of tricks.

II. What Is Driving Sustainable Development and Construction?

There are myriad examples of sustainable development and construction. For example, building in a more compact and dense fashion than in the past, developing mixed-use and transit-oriented projects, erecting green buildings and constructing in ways that minimize impact on the surrounding area all constitute forms of green development. To the extent this differs from past practice, and can oftentimes cost more and take longer than traditional construction, why is it being done?

Climate change gets part of the credit (or blame) for this effort as our collective concern over global health is reflected in state, regional, county and city initiatives. The market is also at play in a variety of ways. Obvious examples include changing tastes and societal demands driven by the adverse reaction to rising energy costs and the desire to reduce our carbon footprints.

Legislative responses to these engines of change have included the City of Seattle Environmental Management Program’s Sustainable Building Policy, Resolution 30121 (2000); the King County Green Building Initiative (2001); the Governor’s Executive Order 05-01, Establishing Sustainability and Efficiency Goals for State Operations (2005); Revised Code of Washington Chapter 39.35D, High-Performance Public Buildings (2006); and the King County Green Building and Sustainable Development Ordinance (2008).

To standardize the field of environmentally sustainable development and construction, several third-party rating systems

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have been created, the two best-known being LEED (U.S. Green Building Council’s “Leadership in Energy and Environmental Design”), developed in 1998 (with version 3.0 having been launched in late April 2009), and Green Globes (Green Building Initiative’s Green Globes for Continual Improvement of Existing Buildings), released in Canada in 2002. There are now more than 3,000 LEED-certified projects in the United States.

III. Property and Directional Goals – Four Key Questions.

To understand this area of leasing practice, we must be able to answer four key questions:

A. What Is a Green Building?

A green building is one that incorporates sustainable development principles to ensure that the ongoing operation and maintenance of the building minimizes environmental impacts. Goals include and relate to choosing a sustainable site (e.g., finding one with access to mass transit); water efficiency (e.g., using high-efficiency fixtures and rainfall); energy and atmospheric concerns (e.g., endeavoring to reduce energy use and considering sources of renewable energy such as solar); the use of green materials and resources (e.g., using recycled and locally sourced materials); consideration of indoor environmental quality (e.g., maximizing natural light and fresh air, and using nontoxic materials and finishes); and innovation and design process.

A green building may or may not be more energy efficient. Its green attributes may simply come from being built with green materials, the use of bike racks, an aggressive recycling program, etc. However, there may well be measurable benefits. For example, operating cost decreases are typically quoted as 8-9%, and there may also be building value increases, return on investment increases and occupancy ratio increases (these are reported to be in the range of 7.5%, 6.6% and 3.5%, respectively).

B. Why Would a Tenant Desire a Green Building?

The tenant’s desire may stem from a company directive designed to enhance its reputation by adopting a mission or philosophy to be green (e.g., “reduce carbon footprint”). Additionally, health and human resource experts have found higher worker productivity and employee attraction, satisfaction, and retention in a green building. Corporate profitability may increase in a variety of ways, an obvious example being the potential for long-term utility cost savings.

Companies that have either opened green stores or branches or are constructing one or more such facilities include Starbucks, PNC Bank, Wal-Mart, McDonald’s, Subway, Staples, Kohl’s and Best Buy. Patagonia and REI have opened green distribution centers (Patagonia in Reno, Nevada; REI in Bedford, Pennsylvania). Starbucks has a prototype store approved by the U.S. Green Building Council, and although now opening fewer new stores than it did a few years ago, it has set a goal that all new

company-owned stores worldwide will be LEED certified by December 2010.

While the above examples are owner-occupied properties, there will undoubtedly be companies that mandate green leases going forward. Such mandates will mean more tenants looking for green buildings in which to operate. Cities such as Seattle and Bellevue have so far not mandated the use of green leases even though one (Seattle) requires that all new civic buildings be certified LEED Silver.

A Building Owners and Managers Association (“BOMA”) Seattle survey recently showed that 61% of real estate leaders believe that green buildings enhance their corporate image, and 67% of the leaders believe that over the next five years, tenants will make (and are already making) the “greenness” of property a significant factor in choosing their space.

C. What Is a Green Lease?

Despite the generic definition above, it is important to note that there is no single answer to this question. The nature of the building and the desires of each party to the lease will drive the answer. A green lease could be as involved as the 2008 BOMA model commercial lease with its green lease language (discussed below), or as simple as a standard commercial lease with a green rider. Such a rider might mandate recycling and the use of energy-efficient light bulbs and light timers, and enable the use of day-time janitorial services to reduce the use of lights and the need to heat the building after hours. In this arena, green is not black or white; green is many shades of gray.

D. Why Use a Green Lease?

A green building can cost significantly more per square foot to build. Moreover, compliance with the chosen third-party certification system is an ongoing cost (e.g., reporting and commissioning), as is maintaining and managing the high-performance building. A green lease will help ensure that the building will meet or exceed its intended performance and help the owner recoup its initial investment as well as the ongoing costs attributable to its green character. Most importantly, the landlord and its tenant must agree on objectively measurable sustainability standards and devise a lease that meets those needs.

IV. Big-Picture Green Leaving Issues.

Whether you advise landlords, tenants, or both, there are certain “big picture” issues that arise in almost every deal. Because the green lease is still relatively new and different, these fundamental issues take on heightened importance.

From the outset, each side should seek the advice of one or more persons who are conversant with green building issues, if not actually accredited by one of the dominant third-party certification systems. Green consultants and architects are plentiful. There are now well over 100,000 LEED Accredited Professionals.

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As an integral member of the team, the consultant may advise as to site selection, building comparisons, cost-benefit analysis, etc. In other words, sustainability must be in mind as part of the planning process.

Once the tenant selects a building and the parties have negotiated their basic deal terms, the letter of intent ("LOI") becomes more critical than ever. The LOI must be thorough and clearly articulate both parties' business goals, including their green goals. For a leasing lawyer, nothing is worse than receiving a draft lease to review but no LOI to use as a road map. The stakes can be higher with a green lease, meaning that a good LOI is that much more important.

Most of us are familiar with standard form leases such as those created by the CBA. While customization of these standard forms is routine, the documents will require even more work until such time as some green forms are created and distributed. The extent of the customization will depend on the parties' goals and negotiations, but an obvious starting point (beginning with the LOI) is to define the building's operating program through a third-party certification system such as LEED or Green Globes. Once the operating program is defined, the lease must complement the chosen standard (e.g., reference the third-party certification system in lieu of using the term "first-class office building"). Terms such as "Carbon Tax," "Carbon Offset Credits," "Renewable Energy Credits" and "Greenhouse Gases" should be defined, as should expectations regarding energy consumption, if applicable. Green leases do nothing if not burden us with more defined terms.

Finally, the parties must consider mandatory versus voluntary measures. This means thinking through the ease of tenant compliance, the method of monitoring the same and the suitable remedies for failure to comply with the green measures in the lease. In short, the green elements of the relationship must be integrated into the lease so they make sense and can be enforced by both parties during the term. The parties want this environmentally conscious relationship to work, meaning that the spirit of "Kumbaya" is not completely dead.

V. Current Sources of Model Green Lease Language.

There are now three readily available, complete model green leases: (1) BOMA International's "Guide to Writing a Commercial Real Estate Lease, Including Green Lease Language," published in June 2008; (2) the Real Property Association of Canada's ("REALpac") "National Standard Green Office Lease for Single Building Projects - 1.02 - 2009," released in March 2009; and (3) the "Model Green Lease," released in July 2009 by the Corporate Realty, Design & Management Institute based in Portland, Oregon. The BOMA document and the "Model Green Lease" can be purchased online; the REALpac form can be downloaded from the Internet for free.

The BOMA document is likely to see widespread acceptance for a variety of reasons. First, it is flexible. It contains alternative wording depending on whether the parties are drafting a triple net or a modified gross lease, a retail lease or an office lease. Second, it is annotated, providing reasoning behind most of the green sections. Despite having a notable landlord bias, it helps tenants by including possible tenant responses to some of its green provisions. Third, while drafted to be rating-system "neutral," it borrows heavily from LEED, which is the dominant third-party certification system in this country. Finally, although there are many references to "Landlord's sustainability practices," the term is not defined or attached as an exhibit. This will allow the landlord to create and redefine a sustainability plan as necessary.

Other sources of model green lease language include the California Sustainability Alliance's sample green lease provisions, and the recently released Natural Resources Defense Council's "Energy Efficiency Lease Guidance" product. The former is helpful though perhaps a little soft (e.g., several sections begin with "Lessee and Lessor will

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work together to achieve” their goals). The latter, while still in draft form, focuses on increasing energy efficiency in buildings through the use of lease provisions that more effectively allocate and align the costs and benefits of energy usage by landlords and tenants.

Lastly, the U.S. Green Building Council is set to publish a guide titled “Green Office Guide: Integrating LEED Into Your Leasing Process” by the end of August 2009. Judging from the table of contents, this publication should be a superb resource. Section headings include “Why Green the Leasing Process?”; “Greening the Leasing Process”; and “Tools for Greening the Leasing Process.”

VI. The Impact of Sustainable Development Goals on a Lease.

Sustainable development goals impact a lease in three major ways: (1) design and construction; (2) economics; and (3) operations and maintenance. Each category is addressed below.

A. Design and Construction Issues.

Design and construction issues will obviously impact the building itself and the tenant improvements within it. With regard to the construction of a new green building, the process requires even greater cooperation among the landlord, the tenant, and their respective contractors than we have previously experienced. The traditional work letter may not suffice, as the green building requires more integration and coordination of the landlord’s and the tenant’s design and construction efforts.

When it comes to the design and construction of the building, the tenant may require the landlord to represent and warrant that the building will achieve a specified green (e.g., third-party) rating. The tenant may also insist on a description of the shell and core that incorporates green building elements (e.g., reuse of wastewater or rainwater, high-efficiency building energy systems or the use of onsite renewable energy). Finally, the tenant will need to consider its remedies if the landlord breaches its representations and warranties relating to the green character of the building. Termination of the lease may not be a viable option; liquidated damages or a specified rent reduction may be more reasonable.

With respect to the design and construction of tenant improvements, the landlord gets its turn. It may, for example, condition approval of the tenant’s plans, specifications and construction contracts on the tenant’s and its contractor’s intended (and promised) compliance with the designated third-party certification system. The landlord may require that the tenant’s design deliver natural light into interior spaces and use energy-efficient lighting throughout the premises. The landlord may demand the use of green materials such as recycled products, nonendangered species, and nontoxic carpet, sealants, adhesives, paint and floor finishes. Additionally, the landlord may expect the use of energy-efficient equipment and appliances (e.g., “Energy Star”

appliances) and green fixtures and electronics such as low-flow fixtures and toilets, submitters and light timers.

B. Economics.

1. Competing Factors.

Much has been written about the economics of a green lease, and in particular, what form of lease best serves the parties’ interests. The overarching goal should be to align control with responsibility, and costs with benefits. The landlord controls the building and the tenant controls its space. Tenants typically pay for what they cannot control (e.g., building-wide operating expenses), which can be viewed as reducing the landlord’s incentive to conserve resources. But if both the landlord and the tenant act responsibly in terms of the most efficient use of materials and resources, regardless of the cost of energy, both parties should benefit from lower operating costs.

The landlord will want to recover the initial, increased higher cost of constructing the green building. The higher the third-party rating being sought, the greater the cost. To recoup this money, the landlord will want to set the base rent high enough to recover its initial investment in green technologies over a reasonable amortization schedule. A tenant faced with this argument during negotiations should be aware that the tax benefits of green building technology may shorten the payback period for the landlord, so that the cost to the landlord may not be as great as a straight amortization schedule would suggest.

2. What Form of Lease Should Be Used in a Green Building?

Generally, there are three types of leases: (1) the gross lease (gross rent with no pass-through of operating expenses and taxes); (2) the modified gross lease (base rent plus pro-rata share of increases in operating expenses and taxes over a base year, or operating expenses in excess of an expense stop); and (3) the triple net lease (base rent plus the tenant’s pro-rata share of operating expenses and taxes). Practitioners debate what form of lease best serves a green building.

Some argue that a gross lease is best used for a green building because it creates an economic incentive for the landlord to reduce operating expenses and the landlord sits in the best position to do so. To quote one well-known author:

“To create the green lease we must return to the gross lease format. The gross lease, with the appropriate language, transfers the fiscal responsibility for controlling operating costs back to landlords, who are far more qualified to do so than the tenants. It creates a financial incentive for landlords to effectively design, build, and manage high-performance and sustainable buildings without sacrificing comfort or service while maximizing the landlord’s return on investment.”

From “Green Lease” by B. Alan Whitson, RPA (2006).

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A gross lease encourages the landlord to save on base building operating expenses, and to use more energy-efficient fixtures, appliances, and systems. However, a gross lease creates no incentive for the tenant to reduce its operating costs because its gross rent is fixed. This attitude is contrary to the spirit of being green.

A triple net lease creates a so-called “split incentive” insofar as the landlord pays for the capital improvements but the tenants, who pay the utility bills, benefit from the resulting energy savings. The market will push landlords using a triple net lease to keep operating costs as low as possible in order to keep the building competitive with others. Lower operating costs may justify the landlord charging a higher base rent. But if under the triple net structure the landlord cannot recoup the higher costs of its initial investment in the high-performance building, it may require a gross lease so that it can recover the benefits of reduced operating costs.

At the end of the day, most commentators feel that no one form is inherently better, and that any of the three types of leases can be made equally green. Gross leases are widely used by U.S. government agencies, and the 2008 BOMA model (as noted above) can be set up as a triple net or a modified gross lease. The “Model Green Lease” employs a modified gross format.

C. Operations and Maintenance.

Finally, we turn to the lease itself. Green language may be sprinkled throughout the document, and it is most often seen in the following dozen or so sections.

1. Right to Relocate.

The tenant (particularly if it is subject to a corporate mandate to lease in a certain caliber of green building) should try to limit the landlord’s relocation right to replacement premises that meet or exceed the green certification for its current premises.

2. Term.

Longer-term leases are considered more environmentally friendly because they conserve resources, reduce waste, and minimize the impact of a tenancy in terms of future tenant improvements. As noted in the BOMA model green lease, LEED for Commercial Interiors provides a credit for leases greater than ten years.

3. Additional Rent.

Beyond the usual costs, examples of annual operating charges that may be added to a green lease could include the landlord’s right to charge for insurance endorsements that would be needed to repair, replace, or recommission the building for third-party recertification. Additionally, the landlord may try to pass through the costs of certifying, maintaining, managing, reporting, commissioning, and recommissioning the building to conform to the third-party certification system, subject to amortization under GAAP. As always, it pays to be specific at the outset to avoid potential disputes regarding operating charges.

4. Use.

A green lease should prohibit the tenant from using the premises in any manner that conflicts with the landlord’s sustainability practices (including any third-party certification system). This may cause the tenant to consider whether the permitted use will conflict with its business needs. For example, will the tenant’s branding be impacted by restrictions as to light emissions from illuminated signage?

With respect to sustainable building operations, the lease may require that the tenant’s construction and maintenance methods and procedures, material purchases, and disposal of waste comply with minimum standards and specifications, in addition to all applicable laws. The tenant may be required to use proven energy- and carbon-reduction measures such as energy-efficient bulbs, lighting motion sensors and timers, Energy Star equipment, etc.

As to recycling and waste management, the tenant may be required to comply with all present and future governmental requirements regarding trash disposal, and with the landlord’s recycling policy and trash-sorting/separation system. The lease may grant the landlord the right to refuse to collect or accept waste that is not properly sorted and to require that the tenant arrange and pay for its own collection in the event it fails or refuses to comply with the program.

5. Assignment and Subletting.

The landlord may insist that its consent to a proposed assignment or sublease can reasonably be withheld in the event the proposed use by the proposed assignee or subtenant will or could cause part or all of the building to not perform in accordance with the green aspects of the lease, including the third-party certification system.

6. Maintenance and Repairs.

In maintaining and repairing the premises, the tenant may again be called upon to support the landlord’s sustainability practices. An example would be a requirement that the tenant’s light bulbs, fluorescent tubes, and lighting fixtures be environmentally friendly. To prove its compliance, the tenant may have to report its lighting purchases to the landlord.

7. Alterations, Tenant Improvements, and Surrender.

To ensure that the tenant’s alterations and improvements comply with the landlord’s sustainability practices, a qualified third-party professional may have to review all plans, materials procurement, demolition, and construction and waste management procedures. The landlord may require that the tenant seek and maintain a LEED for Commercial Interiors certification for any alterations and improvements. In exchange, the tenant may try to obligate the landlord to consent in advance to any alterations or improvements that promote green goals.

At surrender, the tenant may have to dispose of all equipment, furnishings, and materials that are no longer needed by the tenant in an “environmentally sustainable manner,” or recycle or reuse

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the same, per the landlord’s sustainability practices. The tenant may be required to report this activity to the landlord.

8. Signs.

Depending on their signage needs, the parties may have to address the amount of light pollution and energy consumption attributable to the tenant’s exterior signage (including external lighting for passive signage). If this is a concern, there exists even more reason than normal to have an exhibit to the lease that accurately depicts and describes the desired signage.

9. Tenant’s Equipment.

The landlord may reserve absolute discretion to limit the watts per square foot of nonstandard equipment that the tenant may install in its premises. The tenant may have to pay for extra consumption of electricity, or buy carbon offsets (credits) to try to counter the potential negative impact that its equipment could have on the landlord’s reduction targets and the third-party certification system.

10. Services and Utilities.

The landlord may reserve the right to purchase green or renewable energy, and may require a specific release from the tenant for business interruption or damage in case off-grid energy becomes interrupted or unavailable. The landlord may also require that the tenant submit electricity consumption data to the landlord (e.g., for use with the Energy Star Portfolio Manager tool to benchmark energy consumption patterns against a baseline). In exchange, the tenant may want to negotiate for the ability to review the building’s “Statements of Energy Performance” upon the tenant’s reasonable, periodic request.

The landlord may also want the flexibility to conduct routine cleaning during normal business hours in order to save on after-hours lighting and heating. The tenant may want to negotiate a reduced rate for such services in exchange for its willingness to allow janitorial work to be performed during the day. As to business hours, the parties may consider reducing weekday and weekend business hours, if possible, to save energy.

11. Damage or Destruction.

The parties may wish to consider whether any repair or rebuilding effort should exceed the building’s “prior condition” and instead use the then-current, post-damage green building standards. This may be hard to agree upon in advance, and the property insurer may object to the extent the building’s policy does not address such upgrades as part of the replacement coverage.

12. Other Green Ideas to Consider.

There are a number of other issues that may be raised by one party or the other to a green lease. For example, green building systems have detailed operating and maintenance requirements. The landlord may prepare an “Operations and Maintenance Manual” for the building and require that the tenant comply with it. The tenant may wish to require that the landlord monitor indoor air quality (carbon dioxide and ventilation) and report the results to the tenant. Both parties may agree to use “environmentally friendly” cleaning materials. The tenant may negotiate for bicycle storage

and showers. The landlord may create a program to encourage the tenant’s use of mass transit, and the landlord may establish preferred parking spaces for low-emission and fuel-efficient vehicles, and special spaces for plug-in hybrid cars.

VII. Violations and Enforcement.

As briefly noted at the end of Section IV, traditional events of default and the landlord’s remedies in the event of a default are, arguably, too harsh with respect to breaches of certain green provisions in a lease. For example, the 2008 BOMA model does not distinguish breaches of environmental responsibilities in the section governing the tenant’s failure “to perform any other term, condition, covenant or agreement to be performed or observed” under the lease. Tenants may find this broad language troubling.

The problem with some of the more generic green rules (e.g., “Tenant shall turn off all interior lights and equipment when not in the Premises” or “Tenant shall comply with Landlord’s recycling program”) is that they are well-intended but vague. Performance or compliance is difficult to monitor, and minor but routine violations would be easy to overlook. Such violations could lead to big trouble, however. What if, for example, the repeated conduct of either party interferes with the third-party certification for the building?

To avoid undoing the very benefits sought at the outset, the parties should consider when and under what circumstances such seemingly minor violations would ripen into a default, and how “failure to perform” is defined. The issues of materiality, frequency, and duration of the violation(s) will come into play, making precise drafting that much more critical. The parties might consider using alternative dispute resolution to settle squabbles related to certain categories of breach. Additionally, the landlord may want the ability to fine the tenant for certain kinds of violations (e.g., repeated failure to comply with the landlord’s recycling program). In order to create enforceable provisions of this kind, the landlord should agree to provide written notice and an opportunity to cure, indicate that the fine shall not be treated as a penalty and expressly preserve its full range of remedies despite the imposition of a fine.

VIII. Conclusion.

The green building movement is well-established, and the green lease is hot on its heels. Real estate practitioners should not be surprised if the next draft lease that crosses their desk contains some amount of green language, be it blended throughout the document or limited to a green rider stapled to the back. Knowing how to find and use existing resources to effectively negotiate the many potential green lease provisions will help ensure our continued relevance for years to come.

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Planning Considerations for Clients Who Own and Co-Own Valuable Copyrights¹

by Leslie C. Ruiter, RoseMary Reed, and Laura C. Cunningham – Stokes Lawrence, P.S.

I. Introduction.

Creative works, and particularly artistic works, are becoming ever more valuable assets. The modern painting “No. 15” by Mark Rothko recently sold at auction for \$50.44 million and Andy Warhol’s silkscreen “Double Marlon” sold for \$32.5 million; John Lennon’s creative output is still being licensed and protected 25 years later; and Michael Jackson’s royalty stream from his life of creativity will certainly be worth many millions. With increased value comes the increased desire for exploitation by non-authors such as spouses and heirs.¹ One example is the estate of Dr. Seuss (Theodore Geisel) where the words and images of Dr. Seuss have been used to create parodies and otherwise profit from his work.² There has also been significant turmoil surrounding the use and movie production of J.R.R. Tolkien’s *Lord of the Rings* series of books.³ Indeed, there are many little-known authors of a single song or book who have created long-term value in a royalty stream. Creative people of all walks of life are increasingly in need of an estate planning attorney willing to consider the complicated nature of passing on the value of copyrighted works.

Creative intangible assets, unlike most real property or tangible property, hold a unique place in the author’s estate – the author is typically concerned not only with the value and royalty stream, but also with the artistic integrity of the works. After death, will the heartfelt song be licensed for a ketchup commercial?⁴ Will my novel be sold to Disney for a distorted version screen play?⁵ Will my unfinished story be destroyed as I have instructed, or will it be published by opportunistic heirs?⁶

This article will provide an overview of copyright law as it relates to estate planning and address the special estate planning needs of clients who own valuable copyrights, either alone or in conjunction with co-authors. Given the diversity of works which may be protected by a copyright (fine art, literary or musical compositions, photography and film, choreography, architectural works, computer software or sound recordings) these assets are becoming a point of emphasis for more and more clients every day. While such artistic clients may enjoy living in the moment and pursuing their enthusiasm and passion for art, they may not be excited about sitting down with an attorney to discuss an estate plan. However, even the free-spirited artist can appreciate the value of employing an attorney when it is for the preservation of the future interests of his family, or the protection of the integrity of the works she has created.

II. Copyright Law Primer.

Creative clients who own valuable copyrights are fortunate; copyright protected works can provide an income stream during a client’s life, and they have the potential to generate income for the client’s family long after the client dies. However, without careful lifetime planning, the worth of these copyrights can be greatly diminished, and their potential for future benefit nearly

eliminated. Even artists known as “one-hit-wonders” can leave their heirs and offspring mired in litigation for years by ambiguous planning efforts.⁷ A critical first step toward ensuring that your client’s copyright assets and creative integrity are protected is understanding the nature of the copyright asset.

A. Ownership Vests in the Author(s) at Creation.

Copyright is a form of protection provided by the laws of the United States to all authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works. U.S. Code, Title 17. Copyright protection subsists from the time the work is created in fixed form, and unless the work was created as a work-for-hire or by an employee for her employer, the copyright in the work of authorship immediately becomes the property of the author or authors who created the work. 17 U.S.C. § 201(a).

The way in which copyright protection is secured is frequently misunderstood; no publication or registration or other action in the Copyright Office is required to secure copyright, although there are clear advantages to registration. For estate planners, this means that the unregistered copyright assets may be difficult to identify. These might include an author’s personal papers or letters, drafts of speeches, music manuscripts, or sketches. Some assets may be even more remote: was Martin Luther King Jr.’s speech fixed in a tangible medium?⁸ Was Jackson Pollock’s studio floor covered in paint a creative expression?⁹ Registered works may be easier to identify; the client may have certificates of registration and on-line resources are available.¹⁰

Estate planners should also be cognizant of the fact that mere ownership of a book, manuscript, painting, sound recording, or any other material embodiment of a protected work does not give the possessor any rights in the copyright to that work. If Aunt MaryAnne leaves a niece one of her paintings, this does not give the niece a copyright interest with a right to sell prints of the works.

B. The Copyright Bundle of Rights.

Like many of the testator’s assets copyrights are actually a “bundle” of rights. Copyrights consist of the separable rights to reproduce, to prepare derivative works, to distribute copies, to perform the work, or to display the work. 17 U.S.C. §106. Further, copyrights can be jointly owned, held in trust, or be transferred by gift or at death. Depending on the nature of the ownership, rights can be exclusive or non-exclusive. The first step for owners of copyrights and their estate planners is to determine which works are protected by copyright, what specific copyrights the client owns, how those rights are held, and the value of those rights.

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Planning Considerations for Clients Who Own and Co-Own Valuable Copyrights

C. Duration of a Copyright; Renewal Terms.

Copyrights do not last forever. Works first created or published in 1978 or later have a unitary term that generally extends for the life of the author plus 70 years. Works created before 1978 have somewhat different term rules (28 + 67 years).¹¹

D. Co-ownership of Copyrights.

Identifying all copyrights of your solo author client is difficult enough, but consider the common situation of co-authorship. The authors of a joint work become co-owners of a copyright in the work, unless there is an agreement to the contrary. 17 U.S.C. § 201(a). In a joint work, each author of an inseparable work, regardless of their proportionate contribution to the work, obtains an undivided tenancy-in-common in the whole work. *See, e.g.*, 1 M. B. Nimmer & D. Nimmer, *Nimmer on Copyright*, Sec. 6.06[A] (2008). Each owner has an indivisible right to use the work or license it to another, subject only to a duty to account to the co-owner(s) on an equal basis. 17 U.S.C. § 201(d).

E. Exclusive and non-exclusive copyright licenses.

Most lawyers are familiar with the significance of an exclusive license vs. non-exclusive license, but there are some unique features of copyright licenses where co-owners are involved. Where there is more than one owner, all co-owners must agree to grant an exclusive license. Thus, any license from less than all owners is non-exclusive, regardless of its purported terms. Most important transactions involving copyrights, and all foreign country licenses, require a grant of exclusive rights. For a group of co-owners then, any one co-owner can unilaterally end all possibility of exclusive licensing and thereby greatly diminish the value of the asset. Where a co-owner is a spouse or heir of one of the authors, this can create difficult control and valuation situations after the death of an author.

F. Difficulties of Fractional Ownership.

Co-ownership in a copyright can cause unexpected difficulties for the co-authors. Any partial owner can grant non-exclusive licenses to any third-party without consent from the other co-owners. A partial owner does not have control over how his work is used, where it is used, and who is permitted to use it, and can easily lose control of the artistic integrity of the work as well. Similarly, owners of a partial interest in a work are limited, acting alone, in their ability to protect the copyright from infringers. *Sybersound Records, In. v. UAV Corporation*, 517 F.3d 1137 (9th Cir. 2008). The number of co-owners can multiply with the addition of new artistic collaborators, but also with the addition of spouses, domestic partners, heirs and guardians, such that over time, copyright ownership becomes fractured in the same way title to real property passing intestate can become hopelessly entangled over time.

As the prudent estate planner will begin to see, rights occurring by succession, by community property rights, by a divorce decree,

or by a falling out between co-owners can all cause continual fragmentation of the ownership rights in the copyright, and each of these partial owners, by their ability to grant non-exclusive licenses without consent, can wreak havoc on the exploitation, enforcement and value of the copyrighted work. An author-client can contractually preserve her copyright ownership interests in some situations, but copyright rights in the current spouses or other marital-like relationships and heirs remain. Any heir who takes a partial ownership in copyright, by will or by operation of law, will have the leverage to undermine exclusive licensing and at the same time be hampered in protecting the work from infringers. And all of these problems multiply exponentially at the death of one of the co-authors.

G. Transfers of Copyright Interest.

Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred; assignments and exclusive licenses must be in writing. 17 U.S.C. § 204(a). A copyright may also be conveyed by operation of law (for example, community property law or bankruptcy law) and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession. Copyright is a personal property right, and where federal law does not pre-empt, it is subject to the various state laws that govern the ownership, inheritance, or transfer of personal property.

The estate planning and probate attorney should also note that the Copyright Act provides for the recordation of transfers of ownership in the Copyright Office. Although recordation is not required to make a valid transfer between the parties, it does provide certain legal advantages and may be required to validate the transfer as against third parties.¹²

H. Benefits of Ownership Consolidation Before Death.

When a client co-owns copyrights the estate planner may be in the best position to evaluate and recommend a consolidation of copyright ownership interests into a single entity before the death of one author. Such an entity would be able to grant licenses and engage in other wealth-building transactions for which exclusive rights are required. When all copyrights are gathered into a single entity by assignment and where future works are created as works-for-hire of the entity, a group of authors can reduce the future splintering of copyrights resulting from marriage, divorce, community property law, succession and termination rights (see discussion of termination rights, *infra*). An entity could better retain consolidated management and control over use of the works by: (a) placing all the existing copyrights under control of a single owner; (b) creating a structure for automatic vesting of future copyrights in the entity; and (c) surviving the departure or death of any co-author.¹³

An alternative to consolidated ownership may be an agreement regarding royalty sharing or combined artistic efforts. While

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common, these agreements do not consolidate ownership of the copyright but focus instead on how works will be exploited, who has the power to make those decisions, and how profits will be divided. These agreements have two major drawbacks. First, any spouse (through community property) may have sufficient ownership rights in the works to claim partial control without the consent of the co-authors. Second, any such agreement would dissolve at the death of the first co-author, frustrating the intent of the co-authors by again fragmenting control of the works.

III. Termination Rights in Estate Planning.

Co-ownership of copyrights makes the planning of an estate more complicated, but when one adds termination rights into the mix the need for proactive and thorough planning becomes even more evident.

A. Termination of Transfers for Works Created After January 1, 1978.

One of the legal rights in the copyright owner's bundle is the ability to transfer or license one's copyright to a third party. But once a license or grant is created, the authors of the creative works may also terminate grants under certain conditions. 17 U.S.C. § 203. In essence, grants of copyright interests (assignments, licenses, gifts) may be terminated by the author between 35-40 years from the date of the grant. 17 U.S.C. § 203(a)(3).¹⁴ Thus, authors and their heirs can "recapture" rights previously given away. The importance of these "recapture" rights is illustrated by Chuck Berry's experience in the 1950s rock-n-roll industry. Mr. Berry, an African American, originally granted the rights to his hit song "Maybellene" to Chess Records, but when the song started to climb the charts, the record label added two co-composers (both white men), without Berry's consent, causing a dilution of Mr. Berry's rights and royalty income.¹⁵ After three decades Mr. Berry was able to recapture sole rights to Maybellene, thereby preserving future royalty income for himself and his heirs.¹⁶

These "springing" re-capture rights cannot be eliminated or contracted away. Assigning both the initial copyrights and the termination rights in one transfer does not eliminate the termination provisions which are "effective notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." 17 U.S.C. § 203(a)(5). Likewise, any requirement that a spouse transfer in advance their future rights in their spouse's termination rights will have no effect.

Not only do authors have inalienable termination rights, but such rights pass at the death of the author under the Copyright Act's statutory scheme. An author cannot transfer the right to terminate by will; the right to terminate is vested in those persons specified in the copyright law, regardless of the author's estate plan. 17 U.S.C. § 203(a). The estate planner for a grantee-client will be faced with the question of whether and to what extent grants of the copyrights can be re-captured by the author's (or

co-author's) surviving spouses and heirs. The estate planner for a grantor-client will be faced with the question of to whom the statute will transfer the termination rights, despite the well-crafted will.

Termination rights both create co-ownership problems after death, and exacerbate co-ownership problems before death. Notably, the heirs of an author who receive termination rights upon the author's death can accumulate enough control to outvote a living co-author. Even where pre-nuptial agreements attempt to keep ownership of the copyright interests solely in the author-spouse, the non-author spouse will still gain the right to terminate the author's own copyright grants at some point and would, again, partially control the use of the works. By lack of planning, it is not unusual for three co-authors to become six co-owners after marriage, and for this lot to become 24 co-owners after children, divorce, or death.

It is important to note that only copyrights that are the subject of a grant executed by the author are subject to termination;¹⁷ executed grants of copyright interests by spouses or former spouses, such as copyright grants in prenuptial agreements or divorce settlement agreements, would not be subject to termination. Further, only grants based upon the Copyright Act (not grants based on other federal laws such as bankruptcy, or state law, or foreign law) are subject to termination.

Further complicating matters, spouses can execute a permanent grant of their own interests in the copyrights (whether acquired by community property laws or otherwise), which grant is not subject to termination, but an author's surviving spouse and children cannot alienate their termination rights in the author-spouse's copyrights, which may not vest for many years. 17 U.S.C. § 203(a)(2). R. Nimmer Sec. 11.02[A][4][a]. To illustrate, if the spouse of an author owns 1/2 of the rights in copyrighted works created during the marriage, she can assign those rights at any time, and cannot later terminate that assignment. However, she cannot alienate by a current agreement the other 1/2 interest (or 1/4th interest if there are children) that would pass to her under the Copyright Act if her author-husband died before the termination rights vested.

B. Vesting of Termination Rights.

The rules around vesting of termination rights are complicated. The right to terminate a grant of a copyright interest vests upon service of a termination notice on the transferee. This notice may be served as much as ten years, or a little as two years, before the "effective date" for the termination falling in the window 35-40 years after the grant of the copyright interest. If the author serves a timely termination notice and survives until termination occurs, he re-captures the copyright interest through reversion. 17 U.S.C. § 203(a)(1). However, if the author serves notice but dies before termination occurs (a scenario which is quite pos-

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sible given how far in advance of termination the notice may be served), the author's estate takes the reversion.

However, if the author survives to the date at which she could serve a termination notice, but dies without serving a notice, the statutory successors, not the estate, gain the right to serve such notice and to enjoy the interests that subsequently revert by reason of such notice. 17 U.S.C. § 203(1). Likewise, if an author dies before commencement of the period in which a termination notice could be served, then the heirs of such author can step into the shoes of the author and terminate the transfer when the period commences. In that case, her copyrights automatically pass to her surviving spouse, children or grandchildren, per *stirpes* (that is, the termination interest is owned 1/2 by the surviving spouse and 1/2 divided equally between surviving children). 17 U.S.C. § 203(a) (2). In these two cases, nothing passes by will and the testator cannot control the passing of a potentially valuable asset.¹⁸

C. Termination Rights for Co-Authors.

When termination rights are exercised, ownership and control of the work changes. Where there are co-authors in the work, the estate planning problems are multi-faceted. For example, a grant by two or more joint authors may be terminated by a majority of the joint authors who executed it. If two joint authors joined in a grant, both must agree to terminate that grant. R. Nimmer, Sec. 11.03[A] (1). If one joint author does not survive until the vesting of termination rights, then the termination interest of any such deceased author may be exercised as a unit by the persons who own and are entitled to exercise a total of more than one-half of that author's interest. 17 U.S.C. § 203(a) (1). For co-authors then, this creates the post-death scenario of a stalemate between an author on the one hand, and the family of a co-author on the other, over whether to exercise termination rights. It could also create a conflict between one author's spouse and another author's children over whether to exercise termination rights.

D. Results of Termination.

When a right to terminate is exercised, all copyrights covered by the terminated grant revert to the author(s) or other statutory possessors of the non-transferable termination interest, even those who voted against termination. 17 U.S.C. § 203 (b).

IV. Planning Suggestions.

The goal when creating an estate plan for an author-client will be to arrange the ownership of the copyrights so that in the short-term and the long-term the author-client is able to control the licensing and use of the copyrighted works, while spouses and heirs continue to be paid their share of royalties. Other goals will typically be reducing state and federal tax obligations, promoting harmony among co-authors and co-owners of copyright assets, and minimizing post-death litigation related to fractured copyright ownerships among large groups of heirs.

As highlighted, consolidation of copyrights (particularly those co-owned) into a single entity during the author's life can greatly simplify the administration of these assets during life and at death. One potential downside of consolidation is the impact on the value of the copyrights. The value of copyright assets for estate tax purposes may be higher where rights are consolidated. Fragmented copyrights, because of the inability to obtain foreign licensors and the difficulty of U.S. licensing and enforcement, might have a lower value for estate tax purposes, due to the decreased anticipated royalty stream. Consider also how a client's majority or minority interest in an entity, or the right to manage or control the entity, might affect the value for estate tax purposes, particularly when compared to the value of a minority or majority ownership interest in the various copyrights themselves.

Another planning tool to consider is the nomination of an intellectual property personal representative or trustee. By isolating the administration of these artistic assets away from the other assets, it allows for the nomination of an individual with specialized skills or training. Such management may greatly enhance the value of the estate, such as where paintings increase in value upon the artist's death, and even more so when sold not in bulk, but in a well-planned divestment strategy. It also may help ensure that the assets are managed in a way consistent with the author's desires, so that artistic integrity is maintained and value is maximized for the author's heirs.

The estate planner should also be certain the client understands the value of termination rights and how these rights will pass at death. Careful planning must take into consideration both the termination rights and reversionary interests that may be controlled by the client's estate plan and those that will pass automatically to the client's statutory heirs regardless of the terms of the will.

Finally the prudent estate planner should be aware of possible conflicts of interest between the author-client and his or her spouse. The potential for conflicts between spouses exists in all joint estate planning representations, but when copyrights are involved, there is an additional dynamic to consider. Even where all property is shared in life and death as between spouses, the creative spouse often sees the work as his own, not recognizing the spouse's community property interest, or not willing to allow the spouse to control the creative work, even after his death. The potential for conflicts in advising both spouses where one is the owner of valuable creative works may be somewhat heightened from the usual spousal conflict-of-interest questions.

As this article has demonstrated, the intersection between copyright law and estate planning is complicated and somewhat unwieldy. However, the complexity also creates opportunities to work with the author-client to find creative solutions that will preserve the artistic integrity of the works, maximize the value of

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Recent Developments

Probate and Trust

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PR failed to meet RPC 1.9 standards for disqualification of a law firm and creditors failed to follow the statutory procedure for removal of PR. *In re Estate of Jensen*, 148 Wn. App. 1032, Not Reported in P.3d (2009).

Stanley Jensen died in November 2001, and his wife, Laura Leeds Jensen (Leeds), was appointed personal representative of his estate with nonintervention powers. Ms. Leeds was the sole beneficiary under Mr. Jensen's will. Lukins & Annis (Lukins) filed creditor claims on behalf of itself for legal work done on Mr. Jensen's (unresolved) dissolution matter and on

behalf of Washington Trust Bank (WTB) for various secured and unsecured notes. Subsequent estate activity was sporadic for the next four years. In December 2003, Ms. Leeds filed for personal bankruptcy and some estate assets were turned over to the bankruptcy trustee.

In June 2005, WTB filed a motion to remove Ms. Leeds as personal representative pursuant to RCW 11.28.250, alleging that she was unfit to act as personal representative because she failed to timely complete the probate and she filed for personal
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the works for future generations, and avoid protracted and costly legal battles over the works after the author has passed away.

- 1 We refer to "author" in this article in the generic sense to mean the creator of the artistic or scholarly or other creative work; "author" therefore encompasses writer, painter, sculptor, programmer, designer, architect, musician, etc.
- 2 See Dan Brekke, *Tangled Up in Seuss*, posted on www.Salon.com April 13, 2007, and retrieved August 10, 2009 (in which Kevin Ryan, a Houston music producer and author, created a musical work using a combination of the music and stylings of Bob Dylan, and the words of Dr. Seuss classics such as "The Cat in the Hat" and "Green Eggs and Ham." After the music became viral online, Ryan was ordered to cease and desist by Dr. Seuss Enterprises); see also *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997) (in which an author attempted to parody "The Cat in the Hat" as a book entitled "The Cat NOT in the Hat" – an account of the O.J. Simpson double murder trial).
- 3 See Andrew O'Hehir, *Beyond the Multiplex: Will Tolkien's Heirs Kill off The Hobbit?* www.salon.com (in which Tolkien's heirs claim they are owed \$220 million from New Line Cinemas, while New Line claims it owes them nothing. If the heirs are successful, they will likely be able to halt or cancel production of "The Hobbit").
- 4 Anticipation, performed by Carly Simon, released November, 1971.
- 5 See Devin Leonard, *The Curse of Pooh*, Fortune Magazine, January 20, 2003 (the Slesinger family's unsuccessful attempt to void a contract with Disney).
- 6 According to Microsoft Encarta 2009, Hemingway's unfinished novel *The Garden of Eden* was published in 1986. In 1999 another posthumous book edited by Hemingway's son, Patrick, was published from a draft manuscript (*True at First Light*). The posthumous publication of some of Ernest Hemingway's unfinished novels was met with controversy, as it is not clear that Hemingway ever wanted these books published.
- 7 *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762 (6th Cir. 2005) Song "King of the Road"; *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) Song "Moonlight and Roses."
- 8 *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999) (in which the Court of Appeals held that King's oral delivery of the speech to a large audience, along with the fact that sponsors of the event at which the speech was delivered obtained a live broadcast on radio and television and extensive contemporary coverage of the event in the news media, was not enough to amount to general publication of the speech for copyright purposes).
- 9 Jackson Pollock created the works for which he is best known in his studio located in East Hampton, New York. Visitors can tour the studio, and its paint-laden floor, wearing special slippers. See [http://naples.cc.sunysb.edu/CAS/pkhouse.nsf/pages/](http://naples.cc.sunysb.edu/CAS/pkhouse.nsf/pages/house)house.
- 10 For a starting point, the U.S. Copyright Office (www.copyright.gov) provides a data base searchable by author or by title, and also provides Circular 22: How to Investigate the Copyright Status of a Work.

- 11 For works prior to 1978, the renewal rights can vest only in (1) the writer, (2) if the writer is dead, the writer's surviving spouse and children, as a class, (3) if there are no surviving spouse or children, the writer's executor under the writer's will, and (4) if the writer left no will, the writer's next of kin under state law. The result of the pre-1978 renewal term scheme was that when an artist died, the artist or any party to which the artist transferred rights during the first copyright term *could not control* who would obtain the renewal copyright in a pre-1978 work. Instead, the transfer would be mandated entirely by the Copyright Act. Thus, if an artist had wanted the renewal copyright in, for example, a song composition, to go to a parent, sibling, or charity, these desires would be trumped by the Copyright Act, which requires that the renewal right go to the eligible statutory heirs.
- 12 For information on recordation of transfers related to copyright, see Circular 12, *Recordation of Transfers and Other Documents*. www.copyright.gov.
- 13 In addition to the estate planning benefits, having all the copyrights gathered in one entity has economic benefits. A single, consolidated owner can: (a) streamline the licensing process; (b) increase licensing opportunities; (c) decrease copyright management costs while increasing the potential income stream for co-authors; (d) help with valuation of assets for estate tax planning purposes; (e) decrease litigation over unilateral decisions regarding jointly owned songs; and (f) decrease the chance of co-owners creating non-exclusive licenses and devaluing songs or eliminating opportunities to create non-exclusive licenses ... create a uniform licensing strategy and decision-making process, appoint a manager of the use of the songs, and assign an intellectual property rights manager if the group dissolves, if a member dies, or if a member chooses to leave the group.
- 14 The requirements for serving notice of termination are complicated, and include a writing, served on the transferee, between 35-40 years from the date of the grant, and notice of termination rights must be given not fewer than two years nor more than ten years before the date of termination. 17 U.S.C. § 203 (a)(4)(A). For works already under statutory copyright protection before 1978, the current law provides a similar right of termination covering the newly added years that extended the former maximum term of the copyright from 56 to 95 years. For further information, see Copyright Office Circulars 15a and 15t.
- 15 See Glenn C. Altschuler, *All Shook Up*, Oxford University Press 2004 (highlighting that musicians like Chuck Berry were routinely pressured to sign one-sided contracts giving them little control over the use of their works and as little as 1% of the total sales).
- 16 See Bernad Weinruab, *Sweet Tunes, Fast Beats and a Hard Edge*, New York Times, February 23, 2003.
- 17 17 U.S.C. § 203.
- 18 Further complexity comes from the fact that much of the commentary and case-law discuss "contingent renewal rights," which are in many ways parallel rules to the current "termination rights" but apply only to copyright transfers prior to 1978. Sometimes the terms appear to be used interchangeably, although copyright registrations no longer have renewal filings. The estate planner should be aware that the application of the old rules (Copyright Act, Sec. 304) differs from the application of the new rules (Copyright Act, Sec. 203) in subtle but significant ways.

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bankruptcy. WTB did not file a petition nor a supporting affidavit with facts related to the alleged deficiencies. The personal representative asserted that the removal motion did not establish facts warranting removal and filed a motion to disqualify Lukins as attorney for WTB. At the hearing on the motions, the court only heard oral arguments and made an oral ruling; no testimony was taken. The trial court held that theoretical conflicts were not sufficient for disqualification of Lukins and that the personal representative should be replaced without making specific oral findings as to the evidence on which it was basing its ruling. The personal representative appealed.

Respecting the disqualification motion, the Court of Appeals held that the trial court did not abuse its discretion in denying the motion. The personal representative waited over three years from the filing of the creditor claim to request the disqualification, Mr. Jensen was represented by Lukins in the dissolution action without apparent concern for any conflicts by Ms. Leeds at the time, and Ms. Leeds did not articulate an actual conflict warranting disqualification.

Respecting the motion to remove the personal representative, the Court of Appeals held that the removal order is reversed and remanded for further proceedings because the statutory procedure for removal was not properly invoked and the trial court lacked a factual basis for making its findings. The process for removing a personal representative is clearly set forth in RCW 11.68.070, and it expressly requires a petition and a supporting affidavit which makes a *prima facie* case showing cause for removal. In addition, after a preliminary finding of *prima facie* showing of cause, the trial court must cite the personal representative to appear before it. In this case, WTB filed a motion with a supporting memorandum, not a petition and supporting affidavit, and the trial court did not make a *prima facie* showing of cause and did not cite the personal representative to appear before it. The Court held that this failure to follow statutory procedure meant the trial court never regained jurisdiction over the matter and therefore the trial court lacked authority to remove the personal representative.

In addition, the Court ruled that without the statutory filings there was no evidence before the trial court to consider. The petition and affidavit give notice to the personal representative of the allegation to which she must respond and give the court an evidentiary basis for taking action. "Allegations in a pleading, unsupported by an affidavit, do not constitute a basis for factual findings." *State v. Ford*, 137 Wn.2d 472, 483, 973 P.2d 452 (1999). Therefore the trial court lacked a factual basis for its findings.

Creditor substantially complied with claim statute by filing suit on the same day notice of rejection was filed but not served.

Johnston v. Von Houck, ___ Wn. App ___, 209 P.3d 548 (2009).

Grace and George Mattson sold their motel pursuant to a promissory note in 1986 and divorced in 1991. The decree of

dissolution provided that the Mattsons would divide the buyer's monthly payments. The Mattsons later entered into a management agreement which Mr. Mattson erroneously believed made the Mattsons interest in the note joint tenants with right of survivorship.

In January 2005, Grace died, and George refused to make payments to her estate believing that as a joint tenant with rights of survivorship, he was entitled to the entire payment. George withheld eleven monthly payments until his death in December 2005. Sherry Johnston, personal representative for Grace's estate, delivered a notice of creditor claim to the law office representing George's estate, and then served notice of the claim on George's personal representative, Rod Von Houck, the next day. The next day, Von Houck filed a notice of rejection with the court and on the same day Johnston filed a summons and complaint against the estate. Johnston timely served Von Houck with the summons and complaint, and several days later, Von Houck sent the notice of rejection to Johnston. Johnston did not file a new action after receiving formal notice of the rejection.

Von Houck moved for summary judgment against Johnston's creditor claim because she had not complied with RCW 11.40.100 by filing suit after receiving notice of rejection but before the 30-day limitation period. The trial court denied Von Houck's motion, and the Court of Appeals affirmed. The Court determined that the legislature's statutory goals did not require strict compliance, and a claimant substantially complied with the statute by filing suit against the personal representative on the same day the rejection notice was filed but before receiving notice of the rejection.

The Court reasoned that RCW 11.40.100(1) "does not establish a mandatory waiting period that must expire before a claimant may sue an estate." The Court viewed the statute as setting forth a sequence of events and a time period within which the claimant must sue, which are intended to further the timely resolution of claims against an estate. The Court rejected the personal representative's argument that Johnston's failure to follow the statutory sequence undermined the timely resolution of the claim by requiring the estate to become involved in litigation before having any opportunity to accept or reject the claim. The Court cited Van Houck's filing of his rejection claim the day after he received notice of the claim and on the same day that Johnston filed suit, thereby demonstrating that in this case the estate was not deprived of any opportunity to consider the claim before being involved in litigation. Under these circumstances, the premature filing did not harm the estate's rights or the statutory goal of facilitating the resolution of claims against an estate. The Court held that Johnston substantially complied with RCW 11.40.100(1) where she filed suit before receiving notification that her claim had been rejected but on the same day that the notice of rejection was filed with the court and before the 30-day period expired.

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Court retains power to approve real estate sale in guardianship turned probate matter. *Estate of Harder v. Elliott*, No. 26401-7-III, 2009 WL 997416 (Wn. App. Apr. 14, 2009) (Not Reported in P.3d).

Dr. James Harder, a resident of California and a domiciliary of Oklahoma, purchased a ranch in Okanogan County in 2003. In 2005, a California court appointed his son, Thomas Harder, as Dr. Harder's guardian, and an ancillary guardianship was thereafter established in Washington. Thomas listed the ranch for sale at \$900,000, and Alicia Elliot offered to purchase the property for \$880,000. They entered into a purchase and sale agreement (REPSA) for \$880,000. An addendum to the REPSA imposed two conditions precedent for the sale prior to the closing date: 1) the seller had to obtain any and all required court approvals; and 2) the seller had to resolve a quiet title action. Thomas later received an inquiry from JHM-2 Investments, LLC (JMH2) regarding the property, and Thomas told them about the pending sale but indicated that he would take another offer if it resulted in gain for the family.

Dr. Harder died three days after the quiet title action was settled, and the guardianship proceeding was transferred to a probate proceeding, wherein Thomas was appointed personal representative with nonintervention powers except for the sale of the ranch. A complicated procedural history ensued, which involved an agreement among the heirs which recognized both the purchase agreement with Ms. Elliot subject to court approval and the indicated higher offer by JHM-2, and a formal upset bid by JMH2 that Ms. Elliot did not try to beat. Recognizing its independent role in guardianship and probate matters, the trial court ruled in favor of the highest bidder and confirmed the sale to JMH2 despite the REPSA with Ms. Elliot.

The primary issue on appeal was the denial of the sale to Ms. Elliot. Although Ms. Elliot did not allege that there was any failure of the parties or the court to follow the applicable statutes, the opinion details the proper statutory procedure for the sale of realty under RCW 11.56, including one involving an upset bid.

Ms. Elliot did argue that the change from guardianship to probate removed the court's authority to approve the sale once the heirs ratified the agreement. The Court found that the heirs' agreement in fact did not change the original agreement that the sale was subject to court approval. In addition, the Court determined that the statutory scheme provides the same result. Recognizing that RCW 11.04.250 vests title to real estate immediately upon the death of the owner, the Court held that the fact that the heirs can encumber or dispose of realty does not strip the court of its role in the sale once the heirs have acted. "As a matter of law, the parties could not have avoided court approval if they had wanted to." Since the trial court correctly followed the statutory scheme involved in this case and the court had ultimate authority to determine which bid was best for the estate, the Court concluded that the sale to JMH2 was proper.

Another issue of note raised by Ms. Elliot involved her notice of the higher bid. The Court determined that Ms. Elliot had actual knowledge of the amount of the higher bid, even though her formal notice originally failed to include the amount. Since there was substantial compliance with the notice statute, the Court upheld the trial court's determination of the deadline for Ms. Elliot's increased bid.

Heir's widow has no standing to set aside her husband's disclaimer of interest in his mother's estate. *In re Estate of Barnhart*, 149 Wn. App. 1050, Not Reported in P.3d (2009).

Reva Barnhart died intestate in March 1995, survived by her two children, Janet and Morris, the sole heirs of her estate. Janet served as personal representative and Morris signed a "waiver of claim of inheritance" in 1998 which was filed with the court. He died in March 2001. His wife, Kathleen, survived him and his Will was never probated.

Kathleen petitioned to set aside Morris' waiver in July 2006. Janet had not closed the probate, so the court determined it had jurisdiction over the matter and that laches did not bar the petition. It concluded that Morris' claim was not validly waived. The appellate court, in its review, determined that standing is a necessary precondition to jurisdiction. It found that Kathleen had no present or future interest in her mother-in-law's estate and therefore no standing to assert a claim. Kathleen could claim in Reva's estate only through Morris, but because Morris' estate was never probated, the extent of Kathleen's interest in his estate was never determined. Further, any property Morris' estate received from Reva would have been separate property, not community property. Only Morris' personal representative could bring an action in Reva's estate and Kathleen had not been appointed his personal representative. While she had standing under RCW 11.96A under that statute's definition of "party," she was not a party of Reva's estate. The trial court was reversed and attorney fees were reversed.

Burden of proof shifts to recipient of lifetime gift to prove that gift of property was intended as a gift and that she did not exert undue influence. *In re Estate of Maletta*, No. 61564-5-I, 2009 WL 1110897 (Wn. App. Apr. 27, 2009) (Not Reported in P.3d).

Tony Maletta had two stepchildren, Melanie and Daniel, from his 40-year marriage to Marietta Maletta. Allegedly, three years prior to his death, Tony conveyed his house to Melanie. Under his Will, the children were to receive equal shares of his estate, which primarily consisted of the residence. At a bench trial, the court concluded there had been no undue influence on the part of Melanie. The appellate court determined that the trial court had applied the incorrect burden of proof and remanded the case.

Prior to her mother's death, and at her request, Melanie moved in with her mother and stepfather to help take care of Marietta.

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After Marietta died in 2000, Melanie stayed on to take care of Tony. Tony's niece occasionally visited him and took note that Melanie helped with grocery shopping, housework and cooking, and that she gave good care to Tony.

In 2001, Melanie contacted an attorney on behalf of her stepfather, who created a new durable power of attorney for Tony, naming both children, but bequeathing his household goods and personal property to Melanie. The division of the estate was not changed but remained in equal shares to both. Thereafter, Tony suffered some health issues and met several more times with his attorney, who noted Tony's condition, and his ability to understand the effect of a lifetime gift of the house to Melanie. The documented visits to the attorney were part of the court review. He eventually signed the quitclaim, and the parties and witnesses agreed Tony had capacity to make such a gift.

Whether there is undue influence is a factual question. Generally a party seeking to unwind an *inter vivos* gift has the burden of showing that the gift is invalid. But where the donor and the donee have a confidential or fiduciary relationship, the burden shifts to the recipient of the gift to overcome an argument of undue influence. The question is not simply one of testamentary capacity to make a gift. The recipient must provide clear, cogent, and convincing evidence that the conveyance was a gift.

While the court found that there was "substantial evidence" in the record to support the lower court's findings, it reversed and remanded the case back to the trial court to apply the burden of proof to the proper party.

The Slayer Statute still applies to a defendant found "not guilty by reason of insanity" and prevents inheritance. *In re Estate of Kissinger*, 166 Wn.2d 120, 206 P.3d 665 (2009).

In January 2000, Joshua Hoge was found not guilty by reason of insanity for the murder of his mother, Pamela Kissinger, and stepbrother, James Kissinger. After a settlement in a wrongful death action, the personal representative brought a motion for a determination of statutory beneficiaries, arguing that Hoge was a "slayer" and barred from receiving under the statute.

In June 1999, Hoge entered his mother's house and stabbed her and his stepbrother to death. He attempted to kill his mother's boyfriend with an ax. When he was arrested, he was delusional, claiming he had killed his mother and stepbrother because they had killed his daughter (he did not have a daughter). Hoge had been diagnosed with schizophrenia around age nine and had previously threatened to kill his mother and stepbrother believing them to be imposters. He was taken to Valley Medical Center and then booked in jail. He was charged with two counts of aggravated murder in the first degree and one count of attempted murder. He pleaded not guilty due to insanity and entered a plea agreement where he stipulated that he had committed the acts charged. He was acquitted by reason of insanity and entered treatment at a state mental hospital.

Pamela's estate filed a wrongful death suit against the state mental health agency for not timely providing antipsychotic medications to Joshua, as necessary to control his illness. The lawsuit was settled and the personal representative argued Hoge was prohibited from sharing in the proceeds. Hoge appealed, arguing that he could not have acted unlawfully or willfully because he had been found not guilty. The Court of Appeals determined Hoge had acted unlawfully but found that the trial court had applied the wrong definition of willful under the Slayer statute. An act is willful for purposes under the statute only if done "intentionally and designedly." The appellate court remanded the definition of willful as it relates to "intentionally and designedly" standard back to the trial court, but not before an interesting discussion of the insanity defense. Ultimately the court concluded "RCW 11.84 is a civil statute and a determination of whether a person is a slayer as defined by the act must be made independently of any criminal proceedings. A finding of not guilty by reason of insanity does not make an otherwise unlawful homicide lawful. Willful under the slayer statute means intentionally and designedly. Upon the record before us, Hoge's actions were willful and unlawful when he killed his mother and he is barred from recovery under the chapter."

Testamentary language was unambiguous and supported a classification of decedent's granddaughter as an intended beneficiary. *In re Estate of Kuest*, No. 27161-7-III, 2009 WL 1317484 (Wn. App. May 12, 2009) (Not Reported in P.3d).

Dorothy Kuest died leaving her husband, Gary, as sole beneficiary of her Will. Shortly thereafter, Gary died and named Kelli Anderson as personal representative of his estate. Kelli was not a beneficiary and she filed a TEDRA petition to clarify the intended beneficiaries. The Kuests both had children from former marriages. Gary had left everything first to his wife, and then to his children and stepchildren, and then to grandchildren of any predeceased child or stepchild, except one – Desire. However, his Will attempted to provide for Desire's child, Jennica, however inelegantly. The provision read in part as follows: "...my stepdaughter, Desire, will not receive any benefit. In ordinary course, this would mean that my stepdaughter Desire's child, Jennica Conry, would not receive any benefit or inheritance, since no benefit would accrue to Desire. Trusting that all my other grandchildren will understand and honor my decision, I make the following provisions..." The Will then entertained various "what-if" provisions of him or Desire dying first, but ultimately leaving Jennica in the class of children and stepchildren, rather than grandchildren.

The family divided between those who argued that the decedent's intent was clearly to leave something for Jennica in the class of children, and those who did not agree and pointed to the less-than-artful language of the Will. The Court returned to the familiar discussion that the duty of the court is to determine the

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Litigating the Department of Revenue's Estate Tax Regulations on Pre-Enactment Federal QTIP Property

by Scott A.W. Johnson – Stokes Lawrence, P.S.

Jim Bracken died in 1984 and his executor made a federal Qualified Terminable Interest Property ("QTIP) election¹ for a marital trust established under his Will for the benefit of his wife, Sharon. No Washington QTIP election was made because it was not possible to make one – Washington law did not allow or provide for QTIP elections. Before Sharon died, in 2006, the Washington legislature enacted a new stand-alone estate tax. This tax is to be imposed on "every transfer of property located in Washington."² The new state estate tax act created the ability to make a state-only QTIP election.³ It also directed the Washington State Department of Revenue ("DoR") to adopt implementing regulations.⁴ In the initial regulations, the calculation of the Washington taxable estate disregarded any federal QTIP property and included only Washington state QTIP property.⁵ Like many estates, relying on the those regulations and the statutory provisions, and using DoR's own tax form, the executor of Sharon's estate excluded the federal QTIP property in calculating the Washington State taxable estate.

In November 2008, DoR filed findings in the Sharon Bracken estate proceedings claiming that additional state estate tax was due. Contrary to its own regulations, DoR sought to include in Sharon's Washington taxable estate the property in Jim's marital trust for which no Washington state QTIP election had been made. DoR's position is that property held in federal QTIP trusts that were established before enactment of the new state estate tax are includable in the Washington taxable estate. In February 2009, DoR changed its regulations in an attempt to make them more consistent with the position advanced in its Bracken estate findings. Under the amended regulations federal QTIP property is now excluded from the Washington taxable estate *only* if the spouse who created the marital trust died on or after May 17, 2005, the effective date of the new state estate tax act. In contrast, if the first spouse died before that date, the QTIP property is to be included in the Washington taxable estate (referred to herein as pre-enactment federal QTIP property). Sharon's estate objected

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intent of the maker and that in doing so, the Will clearly meant to include Jennica as a beneficiary.

A party who presents a Will as valid cannot challenge the decedent's capacity to grant a power of attorney the same day as the Will was signed. *Bedlington v. De Bruin*, Nos. 62536-5-I, 62586-1-I, 2009 WL 2152625 (Wn. App. July 20, 2009) (Not Reported in P.3d).

Henrietta DeBruin died in 2006, leaving three of her four adult children in this action: John, Harvey, and Mary. Prior to her death, Henrietta had executed agricultural leases with Dale and Judy Bedlington since 1994. The leases contained a provision allowing the Bedlingtons to purchase the property on certain terms on or before February 28, 1999. Three subsequent leases were renewed and modified extending the option; two signed by Henrietta, and one by John as power of attorney for his mother. The third lease extended the option to February 2008.

Henrietta's power of attorney clearly gave the attorney-in-fact powers to renew and modify the lease. Henrietta's Will left property to all three of her children, except Marcella, who had already received substantial property from her.

Dale and Judy gave notice to John, Harvey, and Mary that they intended to exercise their option to purchase the land. Appellants refused to sell them the property, claiming at the

summary judgment hearing that the power of attorney was invalid because Henrietta had been wholly incompetent when she signed it. The obvious problem with this argument was that in the probate proceedings, they submitted their mother's Will signed the same day as the power of attorney, and declared under the petition that the decedent had been of sound mind when she executed her Will.

After a second summary judgment hearing, the trial court directed an entry of final judgment on the incapacity defense raised by John, Harvey, and Mary. The appellate court stated that since the children had benefited from claiming their mother had capacity to execute her Will – barring their sister from inheriting from Henrietta – they could not now claim her incapacity to the detriment of Dale and Judy. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking advantage by taking a clearly inconsistent position." The Court also stated that Dale and Judy need not have been parties to the first (probate) action in order for estoppel to apply.

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to DoR's findings and, along with two other similarly situated estates, is now challenging in court DoR's efforts to impose state estate tax on pre-enactment federal QTIP property.

Washington's Estate Tax. In 1981, Washington voters passed an initiative repealing the state inheritance tax and limiting the state estate tax to an amount equal to the federal credit.⁶ After the initiative, the state estate tax was received not as a separate tax, but through a tax credit established by federal law.⁷ The credit reduced the estate's total federal estate tax due and transferred the amount of the credit to the state. This is commonly called a "pickup tax."⁸ In 2001, Congress enacted legislation to end the federal estate tax and repeal federal estate tax credits, essentially ending the estate tax revenue-sharing between the federal government and the states.⁹ Washington state sought to avoid the phasing out of the credits by tying the Washington estate tax to the federal law in effect on January 1, 2001. In *Estate of Hemphill v. Department of Revenue*, the Supreme Court found this approach to be improper and held that, under the then-existing state law, the state estate tax was limited to the amount of the federal estate tax credit that was actually available.¹⁰ When the federal state death tax credit was phased out, the State's pick-up tax was likewise phased out and ultimately eliminated.¹¹

In response to the prospect of no estate tax revenue, Washington's legislature hurriedly adopted a new stand-alone estate tax that was separate and distinct from the federal estate tax. This tax became effective, and is applicable to, estates of decedents dying on or after May 17, 2005.¹² Washington's new estate tax act authorizes state-only QTIP elections for marital trusts, much like the federal QTIP election.¹³ The Washington and federal QTIP elections, however, are separate and independent. For example, an estate's executor can make QTIP elections of differing amounts for Washington state purposes and federal purposes.¹⁴

DoR's Implementing Regulations. The legislature directed DoR to adopt rules to carry out the effect of the new estate tax act.¹⁵ These rules became effective on April 9, 2006, and by the terms of RCW 83.100.200 have the force and effect of law.¹⁶ Under the regulations, the amount of Washington estate tax is based on the size of the "Washington taxable estate." The "Washington taxable estate" begins with the "federal taxable estate."¹⁷

The regulations originally adopted by DoR required certain adjustments be made to the "federal taxable estate" to determine the "Washington taxable estate." One of the adjustments was to include in the "Washington taxable estate" the value of a trust, or a portion of a trust, of which the decedent was the income beneficiary *and for which a Washington QTIP election was previously made* pursuant to RCW 83.100.047 (emphasis added).¹⁸ Another adjustment required by the original regulations was the exclusion from the "Washington taxable estate" of the value of property included in the federal taxable as the result of a prior federal QTIP election.¹⁹ Thus, pursuant to the Washington statute and the regulations, the only QTIP property that was includable in the Washington taxable estate was property for which the execu-

tor of the first spouse to die had previously made a Washington state QTIP election.

Effective February 22, 2009, DoR amended the regulations regarding the calculations for determining the "Washington taxable estate."²⁰ The only change made by the amendment is the inclusion of the underlined text in WAC 458-57-105(3)(q)(vi) and 458-57-115(2)(d)(vi):

"Washington taxable estate" means the "federal taxable estate" . . . (vi) less any amount included in the federal taxable estate pursuant to IRC §2044 (inclusion of amounts for which a federal QTIP election was previously made) from a predeceased spouse that died on or after May 17, 2005."

Under the amended regulations, DoR would now include in the "Washington taxable estate" any pre-enactment federal QTIP trust property. In essence, DoR is seeking to retroactively apply the amended regulation to *all* estates of decedents who died after May 17, 2005.

Impact of the Amended Regulations. The application of these amended regulations will lead to bizarre results. Consider the following three scenarios as examples:

Scenario 1: The first death occurred before May 17, 2005 (the effective date of the new Washington estate tax). All of the decedent's property was located in the state of Washington, and a federal QTIP election was made to qualify a testamentary trust for the marital deduction.

Scenario 2: The first death occurred when the couple was living outside the state of Washington holding no Washington property. Because there was no Washington property, no Washington estate tax return was filed and no Washington state QTIP election was made. The surviving spouse moves to Washington, and dies after May 17, 2005. Before the second spouse died, all property owned by him or her (as well as the marital trust, including the marital trust property subject to the federal QTIP election) became Washington property.

Scenario 3: The decedent's spouse previously made an *inter vivos* gift to a federal QTIP trust. A federal QTIP election was made on the federal gift tax return. Because there is no Washington gift tax, no Washington state QTIP election was made.

The amended regulations really only address Scenario 1. The amended language leaves the pre-enactment federal QTIP property in as part of the "Washington taxable estate." DoR therefore contends that the property is subject to the Washington estate tax.

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The affect of the amendment under Scenario 2 is quite strange. The amended regulation includes the federal QTIP property in the Washington taxable estate if the first spouse died before May 17, 2005, but removes that property from the Washington taxable estate if the first spouse died after that date. In the latter case, the first spouse, as a non-resident, would not have filed a Washington estate tax return, or made a Washington QTIP election. Accordingly there would be no Washington state QTIP to cause inclusion of the property in the Washington taxable estate, regardless of when the surviving spouse died.

The effect of the amendment under Scenario 3 is even more bizarre. If the QTIP trust is created by gift, its value would be included in the federal taxable estate of the donee spouse under IRC § 2044, but under the original regulations to the Washington estate tax it would not be included in the Washington taxable estate. This is because no Washington state QTIP election was made, Washington having no gift tax. Read literally, the amended regulations would require inclusion of property in an *inter vivos* QTIP trust in the Washington taxable estate of the donee spouse only if (1) the donor spouse predeceased the donee spouse, and (2) the donor spouse died before May 17, 2005. Note that it would be the date of the donor spouse's *death* (if he or she had, in fact, died), not the date of the gift, which would control.

Grounds to Challenge the Regulations. Applying Washington's new estate tax legislation and regulations to pre-enactment QTIP trusts should be invalid for several reasons. Some of these are:

By seeking to apply the Washington estate tax to pre-enactment federal QTIP property for which no Washington state QTIP election was made, DoR seeks to impose an unconstitutional retroactive tax on estates. The legislation itself states that "this act applies prospectively only and not retroactively," undoubtedly because a retroactive tax is unconstitutional.²¹ Imposing the Washington estate tax on property held in QTIP trusts established before the tax's enactment violates the impairment clauses of both the U.S. and Washington State Constitutions.²² It also violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution and Article I, Section 3 of the Washington State Constitution.²³

The estate tax is to be imposed upon "every transfer of property located in Washington." RCW 83.100.040(1). The U.S. Supreme Court has held that the rights of the beneficiaries of a trust come into existence at the time the trust is established. Accordingly, the only "transfer" that occurs with regard to a QTIP trust occurs when the QTIP trust is created.²⁴ Since there is no transfer at the death of the surviving spouse, it is not subject to tax under the Washington statute.

The 2005 Washington state estate tax act may itself be unconstitutional under Article II, Section 19 of the Washington State Constitution. That section requires that the subject of the bill be expressed in the title.²⁵ The purpose of the subject-in-title rule is to give legislators and the public adequate notice of rights and liabilities contained in proposed laws. The title of Chapter 514, Laws of 2005, is "generating revenue to fund education." The title indicates nothing of the actual substance and scope of the bill — to impose a new stand alone state estate tax. No person reading the bill's title would reasonably conclude that the state intended to impose such a new tax. As such, Chapter 514 violates the subject-in-title rule because its title fails to give any notice of the bill's contents.

Procedures for Challenging the Regulations. There are two approaches to challenging DoR's estate tax regulations: deficiency proceedings and refund proceedings.

Where DoR has determined that there is a deficiency because not enough estate tax has been paid, the new state estate tax act sets out procedures for resolving the deficiency. DoR must first file "findings" with the probate court after which the clerk of the court gives notice of the findings to all interested parties.²⁶ Interested parties have 60 days to object and have the matter addressed at a hearing or trial.²⁷ The proceedings are governed by TEDRA, RCW 11.96A.180-200. DoR's findings are presumed correct, and the taxpayer bears the burden of showing otherwise.²⁸

For a refund case, where the estate has paid the estate tax and seeks to have it refunded, the statute is less clear. RCW 83.100.130(5) refers to an "application" for a refund to be filed by the estate on a "form prescribed by the Department." No such form exists. DoR has suggested that the estate tax return is the application for refund. The statute provides that "no refund should be made for taxes...paid more than four years prior to the beginning of the calendar year in which the refund application is made."²⁹ In at least one case, DoR has argued that once a request for refund is denied, the Washington Administrative Procedures Act ("APA") provides that any action for judicial relief must be filed within 30 days thereafter.³⁰ It is not clear what event DoR will argue triggers the 30-day period. Nor is it clear how DoR will argue that it is entitled to rely on the APA's 30-day statute of limitations when it has complied with none of the other adjudicative provisions of the APA in its enforcement of the Washington state estate tax. Suffice it to say, an estate seeking a refund and wishing to avoid arguments about the APA will want to file its lawsuit against DoR immediately after receiving any indication that DoR intends to deny the estate's refund request.

Pending Litigation. Three deficiency cases challenging DoR's application of the amended regulations to pre-enactment federal QTIP property are now pending in King County Superior

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PRACTICE TIP: Planned Action

by Jami Kuzaro-Balint – Yarrow Bay Group

What is a planned action? A “Planned Action” is a process through which governments can expedite the permitting process and SEPA review for a statutorily limited number of actions, including Master Planned Developments and Sub-Area Plans (See RCW 43.21C.031 for authority). The Planned Action process allows environmental review to be performed prospectively for a specific geographic area or development proposal. A city first completes an EIS that addresses the likely significant adverse environmental impacts of the proposed project and/or development area. After completing the EIS the city adopts a planned action ordinance designating what types of projects and/or land uses fit within the scope of the earlier performed EIS and thus qualify as “Planned Action” projects. The Planned Action process reduces permit processing time because projects that fit within the scope of the Planned Action do not require a new threshold determination and, therefore, public notice requirements and opportunities for administrative appeals at the project level do not apply.

What level of review is required? The planned action ordinance must be based on an EIS that adequately identifies and analyzes the likely significant adverse environmental impacts of the proposed planned action project(s). The EIS must include recommended mitigation measures for the significant adverse environmental impacts identified in the EIS. The EIS may also consider off-site improvements which would also qualify as planned actions. Because the planned action EIS provides a detailed analysis of the impacts generated by the planned action project during the early stages of development planning, developers and the public are given more predictability and certainty than individual project EISs.

When do you adopt the planned action ordinance? A planned action ordinance can be adopted anytime after a final environmental impact statement has been issued. The planned action ordinance can be adopted before a development application is submitted (typical for sub-area plans) or after (project specific EIS for MPD).

What are the parameters of the planned action? The parameters of a Planned Action should be based on either a geographical area or certain types of development (See RCW 43.21C.031, WAC 197-11-164 and 168 for requirements and restrictions). Additionally, the EIS for which the Planned Action is based sets parameters as only projects whose impacts were fully analyzed in the EIS qualify for planned action treatment. If a project has likely significant adverse environmental impacts that were not adequately addressed in the original EIS a new threshold determination is necessary, however environmental review for the project may rely on the environmental analysis in the original EIS with additional analysis to be performed only for the new impacts.

How does the planned action affect future project review?

The projects identified in a planned action ordinance do not require a new threshold determination; the city need only review the project to verify that it is consistent with the planned action projects designated in the ordinance and that the impacts of the project are adequately addressed in the planned action EIS (See WAC 197-11-172 for further details). If the proposed project has impacts that were not fully analyzed in the planned action EIS a new threshold determination and further environmental review are necessary.

Are other municipalities using the planned action process?

Several municipalities have adopted planned action ordinances, including:

- Kent (Kent Station)
- Renton (The Landing)
- Monroe (North Kelsey Sub-Area Plan)
- Cle Elum (Mountain Star Resort a/ka/ Suncadia)
- Shoreline (North City Project)
- University Place (Town Center Property)
- Tukwila (Duwamish Corridor Master Plan)
- Vancouver (Esther Short Sub-Area)

Thank You 2008-2009 WSBA RPPT Newsletter Editorial Board

Thank you 2008-2009 WSBA RPPT Newsletter Editorial Board for all your work and dedication this past year.

Your efforts are greatly appreciated.

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Notes from the Chair

by Timothy C. Burkart – Kutscher Hereford Bertram Burkart PLLC

This is my first letter as Chair of the RPPT Section. I had the good fortune to serve with four excellent chairs of the RPPT Section, Tim Osborn, Al Falk, Steve Crossland, and Lora Brown, and I learned a lot from them. My misfortune is that I am following four excellent chairs and have four tough acts to follow.

Our section, like its members, is not immune from the economic downturn. The section has reduced its budget by 14% for the coming year, but we have not reduced our commitment to public service or our commitment to providing high-quality programs for our members. The attendance at our recent Mid-Year Meeting in Spokane was comparable to prior years, which we hope is a positive indication of your opinion of the quality of our CLE programs.

This is your section and the members of the executive committee of the RPPT are here to serve you and to work to improve the practice of law in Washington. We welcome and encourage your input. If you have comments on existing legislation or want to propose new legislation, please contact either the Director of the Probate & Trust Council, Beth McCaw, or the Real Property Council Director, Mike Barrett. If there are CLE topics you would like to see covered, please contact Heidi Orr or Elizabeth

Stephan on the Probate & Trust Council, or Rich Moore or Mike Larson on the Real Property Council. If you have other ideas for improving our section, please feel free to contact me.

Finally, I urge you to get involved in the section. I have found my involvement in section committees and on the executive committee to be personally and professionally rewarding. I cannot recall a meeting where I did not walk away with some bit of knowledge that was useful to me in my practice. However, our section is run by volunteers who devote many hours a year to section business. Those executive committee members involved in monitoring legislation often make several trips a year to Olympia to testify before the legislature. Those involved in CLE likewise devote countless hours looking for new CLE ideas, working on topics, and lining up speakers. Few of us are able to make such a time commitment indefinitely so we need good people to replace us. If you are interested in getting involved in the section, a great first step is joining one of the many open committees. Also, please feel free to contact me or any member of the executive committee of the section.

Thank you, and let's all hope that the coming year will be happy and prosperous for us all.

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Court. Those three estates, including the Bracken Estate, have been consolidated for purposes of challenging DoR's findings and are scheduled to go to trial in October of this year. There likely are other cases pending in which these issues are being litigated with DoR.

- 1 IRC § 2056 allows a decedent's federal taxable estate to be reduced by an amount equal to the value of property passing to a decedent's surviving spouse in a qualified manner. 26 U.S.C. § 2056(a). To qualify certain kinds of trusts for the marital deduction an election has to be made by the decedent's executor on the decedent's federal estate tax return (a "QTIP election"). 26 U.S.C. § 2056(b)(7). If a federal QTIP election is made, the property subject to that election is treated as passing to the surviving spouse and can be deducted from the decedent's federal taxable estate. Property for which a federal QTIP election is made then becomes a part of the surviving spouse's federal taxable estate. 26 U.S.C. § 2044.
- 2 RCW 83.100.040(1).
- 3 Washington law allows a decedent's Washington taxable estate to be reduced by an amount equal to the value of property passing to the decedent's surviving spouse. RCW 83.100.047. An irrevocable Washington QTIP election is made by the decedent's executor with respect to property that transfers at the decedent's death and in which the decedent's surviving spouse has a qualifying interest for the remainder of his or her life. RCW 83.100.047; WAC 458-57-115(2)(c)(iii)(B). If a Washington QTIP election is made, the property subject to the election is treated as passing to the surviving spouse and can be deducted from the decedent's Washington taxable estate. RCW 83.100.047; WAC 458-57-115(2)(c)(iii). Property for which a Washington QTIP election is made becomes part of the surviving spouse's Washington taxable estate. WAC 458-57-115(2)(c)(iii)(B).
- 4 RCW 83.100.200.
- 5 WAC 458-57-105.
- 6 Initiative Measure 402, Laws of 1981, 2d Ex. Sess., ch. 7 (codified in part at RCW 83.100.030(1), repealed by Laws 2005, ch. 516 § 17).
- 7 *Estate of Hemphill v. Dept of Revenue*, 153 Wn.2d 544, 547, 105 P.3d 391 (2005).

- 8 *Id.*
- 9 Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).
- 10 *Estate of Hemphill v. Department of Revenue*, 153 Wn.2d 544, 551-52 (2005).
- 11 *Id.*
- 12 Laws of 2005, ch. 516, §20; RCW 83.100.040(3).
- 13 RCW 83.100.047.
- 14 WAC 458-57-115(2)(c)(iii)(B).
- 15 RCW 83.100.200.
- 16 The rules relating to Washington's estate tax are legislative rules, having been enacted at the express direction of the state legislature. As such, and as the agency that created these rules, they are binding on DoR. *Ass'n of Wash. Bus. v. Dept of Revenue*, 155 Wn.2d 430, 446, 120 P.3d 46 (2005); *Ritter v. Bd. of Comm'rs*, 96 Wn.2d 503, 637 P.2d 940 (1981).
- 17 WAC 458-57-105(3)(q).
- 18 WAC 458-57-105(3)(q)(v).
- 19 WAC 458-57-105(3)(q)(vi).
- 20 WAC 458-57-105(3)(q) and 458-57-115(2)(d).
- 21 Laws of 2005, Ch. 516, § 20.
- 22 United States Constitution (Art. I, § 10); Washington State Constitution (Art I, § 23.); *Coolidge v. Long*, 282 U.S. 582, 51 S. Ct. 306, 75 L. Ed. 562 (1931); *In re McGrath's Estate*, 191 Wash. 496, 507-10, 71 P.2d 395 (1937).
- 23 *Coolidge v. Long*, *supra* at 595-6.
- 24 *Id.* at 597-8.
- 25 Wash. Const. Art. II, Sec. 19; *Amalgamated Transit Union Local 587 v. State of Washington*, 142 Wn.2d 183, 206, 11 P.3d 762 (2000).
- 26 RCW 83.100.150 & 160.
- 27 RCW 83.100.180.
- 28 RCW 83.100.190.
- 29 RCW 83.100.130(3).
- 30 RCW 34.05.542.

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Article Ideas?

Please contact Brian T. McGinn if you are interested in writing an article for the newsletter or if you have ideas for article topics. Brian's phone number is 509-838-6131 and his email is btm@winstoncashatt.com.

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