

PROBATE BOOT CAMP

PROBATE LITIGATION: UNDERSTANDING TEDRA

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In Washington, disputes involving trust and estate issues are subject to the Trust and Estate Dispute Resolution Act, RCW Chapter 11.96A. (“TEDRA”). TEDRA consolidates the applicable provisions governing the resolution of disputes and other matters involving trusts and estates in a single chapter. RCW 11.96A.010, *et seq.*; *In re Estate of Morin*, 2004 WL 2650984 (Wn. App. Div. 3, 2004) (unpublished decision). TEDRA mandates using nonjudicial dispute resolution in trust and estate cases, such as mediation, arbitration, and agreement, but permits judicial resolution of disputes if other methods are unsuccessful. *In re Guardianship of Wells*, 491, 208 P.3d 1126 (2009); *In re Estate of Ginsberg*, 2003 WL 23020217 (Wn. App. Div. 1, 2003) (unpublished decision).

I. OVERVIEW OF TEDRA PROCEDURES

A. Court’s Broad Authority Under TEDRA

The court’s authority under TEDRA is extremely broad. The court has “full and ample power and authority under this title to administer and settle” estate and trust matters. RCW 11.96A.020(1). The court may make, issue, and cause to be filed or served, any orders, judgments, citations, notices, summons, and other writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by TEDRA. RCW 11.96A.060. If there is any doubt about the applicability of TEDRA to a matter, the court nevertheless has full power and authority to proceed with the administration and settlement of the matter in any manner and way that the court deems right and proper, so that the matter may be expeditiously administered and settled by the court. RCW 11.96A.020(2). A court is free to construe the probate statutes in any manner that in its judgment will best accord their purpose and spirit. *In re Estate of Toth*, 91 Wn. App. 204, 955 P.2d 856 (1998).

Under these provisions, a court has authority to approve and enforce agreements even when one of the parties objects. In *In re Estate of Synder*, No. 28000-4-III (Wa. Ct. App. Div. 3, 2010) (unpublished decision), the court of appeals affirmed the trial court’s approval of a plan for partition and distribution of property. All of the beneficiaries except one had agreed to the plan. The appellate court found that under RCW 11.96A.020(2) and RCW 11.76.050 the trial court had the authority to approve the plan everyone else had agreed to even without conducting a more comprehensive hearing on the issues.

Still there are limits to the court’s authority under TEDRA. RCW 11.96A.020 is based on and nearly identical to a prior statute RCW 11.96.020. Under the prior statutory provision, the court of appeals held that, while the statute gives the court the power to act in a probate proceeding in situations where the provisions of the probate code are inapplicable, insufficient, or doubtful, it does not give the court the power to ignore the express language of another statute. *Henley v. Henley*, 95 Wn. App. 91, 974 P.2d 362 (1999).

B. Applicable Procedural Rules

CR 1 states that generally the civil rules “govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated

in rule 81.” CR 81 provides that the civil rules are not applicable “where inconsistent with rules or statutes applicable to special proceedings.”

A judicial proceeding under TEDRA is a special proceeding under the civil rules. RCW 11.96A.090(1). In a TEDRA action, the provisions of chapter 11.96A RCW control over any inconsistent provision of the civil rules. RCW 11.96A.090(1). The Superior Court Civil Rules and other procedural rules of court apply to judicial proceedings under TEDRA only to the extent that they are consistent with chapter 11.96A RCW, unless otherwise provided by statute, ordered by the court, or other applicable rules of court. RCW 11.96A.090(1); RCW 11.96A.090(4). Moreover, the provisions in chapter 11.96A RCW do not supersede but rather supplement the other applicable provisions and procedures contained in Title 11 RCW.

TEDRA procedures expressly do not apply to actions for wrongful death under chapter 4.20 RCW. RCW 11.96A.080(2).

In addition to the TEDRA procedures and the regular civil rules, each county may have local civil rules or local special rules that apply to the matter. For example, King County Local Special Rule 98.04 applies estates and probate; Special Rule 98.14 applies to TEDRA actions and power of attorney; Special Rule 98.16 applies to settlement of claims of minors and incapacitated persons; and Special Rule 98.20 guardianships and trusts.

C. Commencing an Action

Filing a petition with the court under TEDRA commences a judicial proceeding. RCW 11.96A.100(1). Note that unlike other civil actions, TEDRA does not permit tolling a statute of limitations simply by serving the petition without also filing the petition.

A judicial proceeding under TEDRA may be commenced as a new action or as an action incidental to an existing judicial proceeding relating to the same trust, estate or nonprobate asset. RCW 11.96A.090(2). The court in *In re Estate of Black*, 116 Wn. App. 492, 66 P.3d 678 (2003), *aff'd*, 153 Wn.2d 152, 102 P.3d 796 (2004), stated that by its plain language, subsection (2) leaves it to the contesting party to elect whether to commence a new action or to file the petition incidental to the ongoing proceedings. But, proceedings before the probate court determining the status of a will are not “separate proceedings.” *Id.* They are related to the same subject matter, *i.e.*, the estate of the deceased. *Id.* Even where probate proceedings are separately docketed, they are still considered as one because they have a single objective — the settlement of the estate of the deceased. *Id.* at 496.

In a nonintervention estate, once an order of solvency is entered, the court loses jurisdiction, but can regain jurisdiction if a petition seeking relief from the court is filed by a person with standing. *In re Estate of Jones*, 152 Wn.2d 1, 9, 93 P.3d 147 (2004).

But, the court of appeals in *In re Estate of Dubois*, 2008 WL 4175027 (Wn. App. Div. III, 2008) (unpublished decision) held that a notice of mediation suffices as a petition for an accounting and to invoke the court’s jurisdiction to commence mediation of issues raised. No particular form or content of a petition is required. The filing of notice of mediation in that case was found to be incident to the probate and no underlying petition was needed. No summons

was required either as all the parties were already parties to the probate pursuant to RCW 11.96A.100(2).

Once commenced, a TEDRA action may be consolidated with an existing civil proceeding or, “upon good cause shown,” converted to a separate action upon the motion of a party or by the court on its own motion. RCW 11.96A.090(3); *Estate of Black*, 116 Wn. App. at 499. What is “good cause” to either consolidate or convert to a separate action is not defined in TEDRA or by any case law. In the context of whether mediation should proceed, the drafters comments state the following about “good cause shown:”

TEDRA § 505 (RCW 11.96A.300) - Mediation Procedure. This provision allows any interested person to use the mediation and arbitration process and directs the court to order the use of mediation unless the court finds ‘for good cause shown’ that mediation will not serve the best interests of the affected parties. If the court finds that mediation is not appropriate, the court may decide the matter at the hearing, may require arbitration, or may direct other judicial proceedings. It is not intended that one party’s unwillingness to participate alone will constitute ‘good cause shown.’

See <http://www.wsbarppt.com/comments/tedra99.pdf>

D. Standing

Any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030; for the resolution of any other case or controversy that arises under the Revised Code of Washington and references judicial proceedings under Title 11; or for the determination of the persons entitled to notice under RCW 11.96A.110 or 11.96A.120. RCW 11.96A.080(1).

The definition of “party” or “parties” under TEDRA is extremely broad and includes essentially any person who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner. RCW 11.96A.030(5). Under TEDRA, “persons interested in the estate or trust” means the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust. RCW 11.96A.030(6).

But not everyone has standing under TEDRA for all matters. Other provisions of Title 11 limit who are “persons interested” in the matter. For example, only any heir, legatee, devisee, unpaid creditor who has filed a claim, or beneficiary of a nonprobate asset from whom contribution is sought, is entitled to a copy of the inventory and appraisal. RCW 11.44.015(2). Also, under RCW 11.68.070, only heirs, devisees, legatees or creditors of an estate have the right to petition to remove or restrict a personal representative’s nonintervention powers. *In re Estate of Hitchcock*, 140 Wn. App. 526, 532, 167 P.3d 1180 (2007).

In *In re Irrevocable Trusts of Michael A. McKean*, 144 Wn. App. 333, 183 P.3d 317 (2008), the trial court in an earlier marital dissolution action appointed Commencement Bay as trustee of trusts established for the parties' children. On appeal of the dissolution matter, that order was declared void because the trial court in that action lacked jurisdiction. After the court of appeals ruled in the dissolution action, Commencement Bay brought an action under TEDRA for an order appointing it the trustee of the children's trusts which the trial court granted. The issue on this subsequent appeal was whether Commencement Bay had standing to bring the petition. The court of appeals found that during the period from when the trial court in the marital dissolution action appointed Commencement Bay and when Commencement Bay filed the TEDRA action, it was the "de facto trustee" of the trust. It had assumed the office and had acted as trustee. As the de facto trustee, it was a person who had an interest in the subject matter of the proceedings and was therefore a party with standing to commence a judicial proceeding. The court of appeals further relied on the trial court's plenary powers under RCW 11.96A.020(2) to support its decision.

E. Subject Matter Jurisdiction

Subject matter jurisdiction is "the authority of the court to hear and determine the class of actions to which the case belongs." *Somers v. Snohomish County*, 105 Wn. App. 937, 941, 21 P.3d 1165 (2005). Generally, the superior court has "universal" original subject matter jurisdiction, including jurisdiction in all cases in equity, in all cases at law which involve the title or possession of real property, in all probate matters, in all other cases in which the demand or the value of the property in controversy exceeds three hundred dollars, and "for such special cases and proceedings as are not otherwise provided for." RCW 2.08.010.

The subject matter of an action that may be brought as a TEDRA action is also extremely broad. Under TEDRA, any party may commence a judicial proceeding for the declaration of rights or legal relations with respect to any "matter." RCW 11.96A.080(1). The term "matter" is meant to apply broadly and is intended to encompass matters traditionally within the exclusive province of the courts." Official Comment for TEDRA § 104(1) (RCW 11.96A.030) available at <http://www.wsbarppt.com/comments/tedra99.pdf>.

Among the issues, questions, or disputes that may be brought under TEDRA are: (1) "all matters concerning the estate and assets of incapacitated, missing and deceased persons," (RCW 11.96A.020(1)(a)); (2) matters concerning nonprobate assets, powers of attorney (RCW 11.96A.020(1)(a)); (3) all trusts and trust matters (RCW 11.96A.020(1)(b)); (4) determining a class of persons interested in the estate or trust or with respect to any asset or property interest passing at death ((RCW 11.96A.030(2)(a)); (5) directing a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity, (RCW 11.96A.030(2)(b)); (6) determining any question arising in the administration of an estate or trust or any property interest passing at death, including document construction questions, a change of personal representative or trustee (RCW 11.96A.030(2)(c)); (7) determining the construction of wills, trusts, community property agreements and other writings (RCW 11.96A.030(2)(c)(i)); (8) situs questions (RCW 11.96A.030(2)(c)(iii)); (9) an accounting from a personal representative or trustee (RCW 11.96A.030(2)(c)(iv)); (10) the determination of fees for a personal representative or trustee, (RCW 11.96A.030(1)(c)(v)); (11) resolving disputes arising in connection with estates of incapacitated persons, (RCW 11.98.080(2)); and (12) amending or reforming a will or trust to

comply with or take advantage of tax provisions (RCW 11.96A.030(2)(f)). Moreover, an accounting involving whether one estate is liable for breach of fiduciary duty to another estate is a subject matter of TEDRA. *In re the Trust and Durable Power of Attorney of Hedges*, 2008 WL 44483428 (Wn. App. Div. III, 2008) (unpublished decision).

TEDRA includes several specific jurisdictional provisions:

1. The superior court has original subject matter jurisdiction over the probate of wills and the administration of estates of incapacitated, missing, and deceased individuals, including: (a) when a resident of the state dies; (b) when a nonresident of the state dies in the state; or (c) when a nonresident of the state dies outside the state. RCW 11.96A.040(1).

2. The superior court has original subject matter jurisdiction over trusts and all matters relating to trusts. RCW 11.96A.040(2).

3. The superior court may: (a) probate or refuse to probate wills; (b) appoint personal representatives; (c) administer and settle the affairs and the estates of incapacitated, missing, or deceased individuals, including but not limited to decedents' nonprobate assets; (d) administer and settle matters that relate to nonprobate assets; (e) administer and settle all matters relating to trusts; (f) administer and settle matters that relate to powers of attorney; and (g) do all other things proper or incident to the exercise of jurisdiction under this section. RCW 11.96A.040(3).

Certain matters fall outside the reach of TEDRA, for example wrongful death actions. RCW 11.96A.080(2).

Suits on rejected creditors claims also may be outside the scope of TEDRA. Included within the scope of TEDRA is any issue question or dispute involving (a) the determination of any class of creditors . . . and (c) the determination of any question arising in the administration of an estate or trust. RCW 11.96A.030(1). By this definition, TEDRA seems broad enough to cover such lawsuits. Still many practitioners believe lawsuits on rejected creditor's claims which before TEDRA were always brought as separate civil actions and which typically involve questions having nothing to do with the administration of the estate (contract disputes, personal injury suits) are not intended to be TEDRA proceedings.

In *In re the 1934 Deed to Camp Kilworth*, 149 Wn. App. 82, 201 P.3d 416 (2009), the Kilworths gifted certain property to the Boy Scouts. The Boy Scouts brought an action to reform a deed to remove the reversion clause that was triggered if the Scouts sold or stopping using the property as a scout camp. The trial court determined that this was a matter of trust administration and used its equitable powers to grant the petition. One of the Scouts' alternate arguments to affirm was that under TEDRA the trial court had the plenary authority to reform the deed. But the court of appeals rejected that argument stating that it is not a matter of administration of an estate or trust but rather the interpretation of a written deed conveyed during the grantor's lifetime. Implicitly, the court was saying that TEDRA did not apply.

In *In re Jean F. Gardner Amended Blind Trust*, 117 Wn. App. 235, 70 P.3d 168 (2003), the beneficiary of the trust sued the trustee and a securities broker for breach of fiduciary duty and negligence. The trustee filed a cross claim against the broker. The trial court dismissed the

case and compelled arbitration pursuant to the trustee's agreement with the broker. The trustee argued that if forced to arbitrate he would be prevented from pursuing alternative dispute resolutions under TEDRA. The court of appeals ruled, however, that the trustee waived jurisdiction in the superior court by agreeing to arbitrate under the broker's agreement.

F. Venue

TEDRA includes a number of specialized venue provisions that may or may not be inconsistent with the general venue provision:

1. For a testamentary trust established under a will probated in Washington, venue for any proceedings pertaining to the trust lies in the superior court of the county where the letters testamentary were issued, or, in the alternative, the superior court of the county of the situs of the trust. RCW 11.96A.050(1)(a). The "situs" of a trust is the place where the principal place of administration of the trust is located, unless otherwise provided in the instrument creating the trust. RCW 11.96A.030(9). "Principal place of administration of the trust" is the trustee's usual place of business where the day-to-day records pertaining to the trust are kept, or the trustee's residence if the trustee has no such place of business. RCW 11.96A.030(7).

2. For all other trusts (other than testamentary trusts established under a will probated in Washington), venue for any proceedings pertaining to the trust lie in the superior court of the county in which the situs of the trust is located, or, if the situs is not located in Washington, in any county. RCW 11.96A.050(1)(b).

3. Venue for proceedings pertaining to the probate of wills, the administration and disposition of a decedent's property, including nonprobate assets, and any other matter not involving trusts or guardianships, lie in any county in Washington. RCW 11.96A.050(3). Once letters testamentary or of administration have been granted, all orders, settlements, trials, and other proceedings shall be had or made in the county in which the letters were granted, unless venue is moved. RCW 11.96A.050(4).

4. Venue for proceedings pertaining to powers of attorney lie in the superior court of the county of the principal's residence, except for "good cause shown." RCW 11.96A.050(5).

5. Under the TEDRA procedures for mediation or arbitration venue lies: (a) before the commencement of any legal proceedings, in the appropriate superior court with respect to the matter as provided in RCW 11.96A.040; and (b) if legal proceedings have been commenced with respect to the matter, the superior court in which the proceedings are pending. RCW 11.96A.290.

Subject matter jurisdiction of the superior court applies without regard to venue. A proceeding or action by or before a superior court is not defective or invalid because of the selected venue if the court has jurisdiction of the subject matter of the action. RCW 11.96A.040(4).

Generally, in proceedings under TEDRA, to which a party is not required to file a responsive pleading, the party must file a motion to change venue within four months of

commencement of the action. RCW 11.96A.050(7). Any request to change venue that is made more than four months after the commencement of the action may be granted in the discretion of the court. RCW 11.96A.050(7).

In a probate proceeding, a party may request that venue be changed within four months of the mailing of the notice of appointment and pendency of probate. Except for “good cause shown”, the court must move the venue: (a) if the decedent was a resident of Washington at the time of death, to the county of the decedent’s residence; or (b) if the decedent was not a resident of Washington at the time of death, to any county in which any part of the probate estate might be or if there are no probate assets, any county where any nonprobate asset might be; or the county in which the decedent died. RCW 11.96A.050(3).

A change in venue does not invalidate any action taken before venue is changed. RCW 11.96A.050(6).

G. Service of Summons — *In Personam* or *In Rem* Jurisdiction

An *in personam* proceeding is one that implicates the personal property rights of an individual. The Fourteenth Amendment to the United States Constitution guarantees due process where personal or *in personam* rights are affected. *In re Estate of Codling*, 23 Wn.2d 261, 265 (1945). Due process considerations prevent a court from asserting personal jurisdiction over a defendant unless that defendant is given notice and the opportunity to be heard, and the defendant has minimum contacts with the state. The fundamental requirement of due process is notice that a suit is being commenced and the opportunity to be heard. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991). A key component of due process is the guarantee of serve of process upon an individual to give notice of an action that affects his or her personal property rights. *In re Estate of Codling*, 23 Wn.2d 261, 265 (1945).

For a regular civil action, to obtain jurisdiction over the person, the civil rules specify the form of summons and the manner of service. CR 4. Summons is to be served together with a copy of the complaint. CR 4(d)(1). Generally, summons must be personally served. In some instances summons may be served by publication or by mail if approved by the court. CR 4(d). Summons may be served anywhere the defendant may be found in the state and, in certain circumstances, anywhere he or she may be found out of state. CR 4(e); RCW 4.28.180-.185.

Probate proceedings are considered *in rem* because the function is the division and distribution of the property of the deceased to his or her heirs. An *in rem* proceeding is one that is against the thing. Probate proceedings do not implicate the personal rights of any individual. Generally, proceedings to probate or to set aside the probate of wills are proceedings *in rem* and not *in personam*. The proceedings are exclusively to determine the status of the *res* and not the rights of the parties. *In re Estate of Black*, 116 Wn. App. 492, 499, 66 P.3d 678 (2003). Its very object and purpose is to judicially determine who takes the property left by the deceased. *Krohn v. Hirsch*, 81 Wn. 222, 226 (1914). In an *in rem* proceeding it is not necessary to obtain personal jurisdiction over an individual who may have an interest in the proceeding. *Id.* at 266-67. A court sitting in probate is able to make a ruling as to the property under its jurisdiction and control that is conclusive and binding upon the whole world not just the persons over which it has personal jurisdiction. *Krohn v. Hirsch*, 81 Wash. 222, 226 (1914).

TEDRA provides that a summons must be served in accordance with chapter 11.96A RCW and, where not inconsistent, the procedural rules of court. RCW 11.96A.100(2). The summons must be served on all “parties,” not just the individuals against whom relief is sought. RCW 11.96A.100(1). “Party” or “parties” means essentially any person who has an interest in the subject of the particular proceeding and whose names and addresses are known to, or are reasonably ascertainable by, the petitioner, including without limitation, the trustee; the personal representative; any heir or beneficiary; a guardian ad litem; a creditor; in some instances the attorney general; any duly appointed and acting legal representative of a party such as a guardian, special representative, or attorney in fact; and the virtual representative of any party. RCW 11.96A.030(5).

There is some confusion whether a summons in a TEDRA action may be served by mail. Some argue that a summons must be personally served. In any other civil lawsuit, due process requires that the summons and a copy of the complaint be served personally (with some limited exceptions such as when publication notice is specifically authorized). CR 4(d). Under TEDRA in all judicial proceedings that require notice, “notice” must be personally served on or mailed to all parties. RCW 11.96A.110(1). But “notice” in section .110 may be different from “original process” such as a “summons” as used in section .100. It is not clear if this distinction was intended in TEDRA.

Others argue that a summons under section .100 may be “notice” under section .110, and thus need only be served by mail. Support for this is found in RCW 11.96A.140 which provides that a party that appears at a hearing without objection waives “lack of proper notice and personal jurisdiction” which is the purpose of a summons. Thus section .140 suggests that a summons is a notice under TEDRA. There, however, may be constitutional due process concerns with this interpretation.

Whether personal service of the summons is required may depend on what relief is sought in the TEDRA petition. If the relief is sought against an individual and not just with respect to the *res*, TEDRA may require that the summons be personally served. In *In re Estate of Morin*, 2004 WL 2650984 (Wn. App. Div. 3, 2004) (unpublished decision), the trial court removed the personal representative of a nonintervention estate. In ruling on an award of attorneys’ fees, the trial ordered the attorney for the personal representative to disgorge the fees paid in excess of the amount awarded. The court of appeals held that the trial court had subject matter jurisdiction but did not have personal jurisdiction over the personal representative’s lawyers to order disgorgement of attorneys’ fees paid by the estate. The lawyers were not named as parties, the petition did not include a claim of disgorgement, and the lawyer had not been served with summons. The court of appeals ruled that the trial court did not have jurisdiction to enter an order of disgorgement or judgment against the personal representative’s lawyer.

There has been a proposal before the state legislature to amend RCW 11.96A.110 to allow any notice under TEDRA to be served personally, by mail or by any other commercial delivery service and to provide that upon a showing that a party’s address cannot be ascertained with reasonable effort, that a party is refusing to sign an acknowledgment of receipt of a mailing or delivery, or that a party is evading personal service, the court may order service by publication pursuant to RCW 4.28.100 and 4.28.110 or alternative service pursuant to CR 4(d)(4). That proposal has not yet been adopted.

If the TEDRA proceedings are commenced as an action incidental to an existing judicial proceeding relating to the same trust, estate or nonprobate asset, summons need only be served on those parties who are not already parties to the existing judicial proceedings. RCW 11.96A.100(2). In *In re Estate of Dubois*, 2008 WL 4175027 (Wn. App. Div. III, 2008) (unpublished decision) where two beneficiaries of the estate filed notice of mediation seeking an accounting of the estate, the court found that the notice was incidental to the existing probate and no summons was necessary because all parties were already parties to the probate.

In *In re Estate of Kordon*, 157 Wn.2d 206, 210, 137 P.3d 16 (2006) the trial court dismissed a will contest because the challenger failed to timely serve a citation on the personal representative under RCW 11.24.020. The challenger had mailed a copy of the petition to the personal representative's counsel. The challenger argued that under TEDRA no citation was required because the will contest was commenced incidental to the existing probate. The Supreme Court stated that a citation is equivalent to a civil summons conferring personal jurisdiction over the party to a will contest and a will contest is a matter under TEDRA. The Supreme Court ruled, however, that because TEDRA does not supersede but merely supplements other applicable provisions and procedures in Title 11 RCW, TEDRA does not alter the notice procedures in a will contest. The Court stated that TEDRA cannot eliminate the requirement of a citation without superseding RCW 11.24.020. Because the challenger did not timely serve a citation, the will contest was time barred.

Subsequently, the Legislature amended TEDRA to define "citation" to mean giving notice as required under RCW 11.96A.100. It also amended RCW 11.24.020 to require that upon filing a petition for a will contest, notice is to be given as provided in RCW 11.96A.100 to the executor, administrator, or personal representative and to all persons interested in the matter.

H. Answer to Petition and Counterclaims

The answer to a TEDRA petition and any counterclaims or cross-claims must be served on the parties and filed with the court at least five days before the date of the hearing. RCW 11.96A.100(5). All replies to the counterclaims and cross-claims must be served on the parties and filed with the court at least two days before the date of the hearing. RCW 11.96A.100(5). Since notice of hearing on a TEDRA petition requires only 20 days, an answer may be due within 15 days, and replies to any counterclaims would be due only three days later.

The TEDRA procedures are not inconsistent with CR 12. If CR 12(b) defenses to a TEDRA petition are not made in the answer to the petition or by motion prior to hearing on the petition, they are waived. Even in answer to a TEDRA petition, affirmative defenses are waived unless they are affirmatively plead, asserted in a motion under CR 12(b), or tried by the parties' express or implied consent. *In re Estates of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008). The failure to assert lack of subject matter jurisdiction in a TEDRA matter is waived if not asserted in a responsible pleading or timely motion. *In re Guardianship of Wells*, 491, 208 P.3d 1126 (2009). A party waives any objection to personal jurisdiction when it appears in the proceedings and presents testimony and arguments. *In re the Trust and Durable Power of Attorney of Hedges*, 2008 WL 44483428 (Wn. App. Div. III, 2008) (unpublished decision).

I. Notice of Hearings

Under the Superior Court Civil Rules, notice of a motion or hearing in a regular civil matter (other than a motion for summary judgment) requires six days' notice. CR 7. Notice of hearing on a motion for summary judgment requires 28 days' notice. CR 56. Each county may also have local rules that establish the timing and manner for noting hearings that should be consulted.

In TEDRA proceedings that require notice, notice must be personally served on or mailed to all parties at least 20 days' before the hearing on the petition, unless a different period is provided by statute or ordered by the court. RCW 11.96A.110(1). The date of service is determined under the Superior Court Civil Rules. RCW 11.96A.110(1).

The question becomes whether the 20 day notice under section .110 applies to all motions, for example cutting short the notice requirement for summary judgments or requiring more than six days' notice on simple motions. There has been a proposal before the state legislature to clarify that the notice for all motions subsequent to the original petition would be governed by superior court civil rules and applicable local rules. That proposal has not yet been adopted.

One approach is the one taken by King County. King County Special Rule 98.14 provides "Hearings shall be noted at least 14 days in advance and at least 20 days after serve and filing of the TEDRA petition. LCR 98.14(b).

One exception to the notice provision in TEDRA provides that a court may appoint a guardian ad litem at an *ex parte* hearing, or the court may order a hearing with notice. RCW 11.96A.160(3).

Proof of the service or mailing is required by affidavit or declaration filed at or before the hearing. RCW 11.96A.110(2). There has been a proposal before the state legislature to amend the notice provision RCW 11.96A.110 to provide that no affirmative relief, including an award of attorneys' fees, may be had against a party without proof of actual notice having been served. That proposal has not yet been adopted

A person may waive in writing notice of the hearing. RCW 11.96A.140. A person also may waive notice by appearing at the hearing without objecting to the lack of proper notice or personal jurisdiction. RCW 11.96A.140. The waiver may apply either to a specific hearing or to all hearings and proceedings, in which event the waiver is of continuing effect unless subsequently revoked. RCW 11.96A.140. Revocation is made by filing a written notice of revocation of the waiver and mailing a copy to the other parties. RCW 11.96A.140.

Any person interested in an estate or guardianship matter may request special notice of proceedings under RCW 11.28.240 or RCW 11.92.150. Nothing in TEDRA eliminates the requirement to give notice to a person who has requested such special notice. RCW 11.96A.130.

J. Initial Hearing

Under TEDRA, unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law. RCW 11.96A.100(8). If the initial hearing is not a hearing on the merits or does not result in a resolution of all issues of fact and law, the court may enter any order it deems appropriate that may: (a) resolve such issues, (b) determine the scope of discovery, or (c) set a schedule for further proceedings for the prompt resolution of the matter. RCW 11.96A.100(10). The Superior Court Civil Rules do not have the concept of an “initial hearing;” It is unique to TEDRA proceedings.

If no other party to the proceedings has requested some other procedure, such as filing a notice of mediation, a notice of arbitration or a request for assignment to an individual judge, the court must resolve all the factual and legal issues at the initial hearing. But, the fact that such a request is made does not mean that the court cannot decide the merits even if the party seeks other procedural relief. The language of the mediation provisions of TEDRA, for example, make clear that if the court determines that the matter should not be subject to mediation, the Court shall dispose of the matter by: “(a) deciding the matter at the hearing, (b) requiring arbitration, or (c) directing other judicial proceedings.” RCW 11.96A.300(3). The arbitration provisions of TEDRA are similar. RCW 11.96A.310(3).

At the initial hearing, the court may take testimony by way of affidavit or declaration. RCW 11.96A.100(7).

K. Discovery

Prior to 2006, TEDRA did not include any specific discovery provision. A section was added in 2006 that expressly permits discovery in TEDRA actions, but only when: (1) a judicial proceeding that places one or more specific issues in controversy that has been commenced under TEDRA, or (2) the court orders that discovery be permitted for good cause. RCW 11.96A.115 (Laws of 2006, ch. 360, § 11). Discovery is to be conducted in accordance with the superior court civil rules and applicable local rules, unless under section (2) the court order otherwise limits discovery. RCW 11.96A.115

Several other provisions in TEDRA relate to discovery:

1. In a TEDRA proceeding, any party may move the court for an order relating to a procedural matter, including discovery, in the original petition, answer, response, or reply, or in a separate motion, or at any other time. RCW 11.96A.100(9).
2. The court also may award processes and cause to come before them all persons whom the court deems necessary to examine and to order and cause to be issued all such writs and any other orders as are proper or necessary. RCW 11.96A.040(3).
3. TEDRA provides that the court may make, issue, and cause to be filed or served, any and all manner of orders, citations, notices, summons, and other writs and process that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by TEDRA. RCW 11.96A.060.

In addition, under Title 11 RCW, the court also has authority to bring before it any person suspected of having in his possession or having concealed, embezzled, conveyed or disposed of any property of the estate of a decedent or incompetent subject to administration under Title 11 RCW, or who has in his or her possession or within his or her knowledge any conveyances, bonds, contracts, or other writings which contain evidence of or may tend to establish the right, title, interest or claim of the deceased in and to any property. RCW 11.48.070; *see also* RCW 11.92.185. If such person is not in the county in which the letters testamentary were granted, he may be cited and examined either before the court of the county where he is found or before the court issuing the citation. RCW 11.48.070. Such party may be brought before the court by means of a citation, and if he refuses to answer such interrogatories as the court may put to him regarding such matters, the court may commit him to the county jail until he is willing to answer. RCW 11.48.070.

II. ALTERNATIVE DISPUTE RESOLUTION PROCESS UNDER TEDRA

A. Mediation

1. Notice of Mediation

Under TEDRA, a party may cause a matter to be subject to mediation by service of written notice of mediation on all parties. RCW 11.96A.300(1).

The court of appeals held in *In re Estate of Dubois*, 2008 WL 4175027 (Wn. App. Div. III, 2008) (unpublished decision) that a notice of mediation suffices as a petition for a formal accounting and to invoke the court's jurisdiction to commence mediation of issues raised. No particular form or content of a petition is required. The filing of notice of mediation was found to be incident to the probate and no underlying petition was needed. No summons was required either as all the parties were already parties to the probate pursuant to RCW 11.96A.100(2).

In *In re Estate of Ginsberg*, 2003 WL 23020217 (Wn. Div. App. Div. 1, 2003) (unpublished decision), the personal representative of an estate had brought claims for unjust enrichment against others involved with decedent in an investment scheme. The other investors moved to dismiss. The personal representative had filed a notice of mediation but the trial court dismissed the case any way. On appeal the personal representative argued that TEDRA required the trial court to order mediation before dismissing the case. While the court of appeals reversed the trial court's dismissal of the unjust enrichment claim, it stated in dicta that TEDRA does not require the court to order mediation. The trial court could determine the motion before ordering mediation. To require mediation of an ostensibly inadequate case is both counterintuitive and contrary to TEDRA's purposes of expeditious complete and final resolution of estate and trust disputes.

2. Prior to Any Hearing Being Set

If no hearing on the matter has been set, the party may serve notice before any petition setting a hearing on the matter is filed with the court. RCW 11.96A.300(1)(a). In that event, the written notice may be served at any time without leave of the court. RCW 11.96A.300(2)(a). Any party may object to such notice by filing a petition with the superior court and serving the petition on all parties no later than twenty days after receipt of the written notice of mediation.

RCW 11.96A.300(2)(b). The petition may include a request that the court determine if the matters are subject to judicial resolution under TEDRA and may also request that the matters be decided at the hearing. RCW 11.96A.300(2)(b). The party objecting to mediation must give at least ten days' notice of hearing on the petition to all other parties. RCW 11.96A.300(2)(d). The hearing on the petition objecting to mediation must be heard no later than twenty days after filing the petition. RCW 11.96A.300(2)(c).

3. After A Hearing Has Been Set

If a hearing on the matter has been set, the party must file and serve notice at least three days prior to the hearing. RCW 11.96A.300(1)(b). When a hearing has been set in the matter, if the written notice of mediation is timely filed and served, a party may object to mediation by filing a petition or orally at the hearing. RCW 11.96A.300(3).

4. Hearing on Objections to Mediation

Upon a hearing on the objections to mediation, the court shall order that mediation proceed except for "good cause shown." RCW 11.96A.300(2) & (3). Such order is not subject to appeal or revision. RCW 11.96A.300(2) & (3). If the court determines that the matter should not be subject to mediation, the court shall dispose of the matter by: (a) deciding the matter at that hearing, (b) requiring arbitration, or (c) directing other judicial proceedings. RCW 11.96A.300(2) & (3).

5. Selection of a Mediator

Within thirty days of receipt of the written notice or within twenty days after the court determines that mediation shall proceed, each party shall furnish to all other parties a list of qualified and acceptable mediators. RCW 11.96A.300(4)(a). If the parties cannot agree on a mediator within ten days after the list is required to be furnished, a party may petition the court to appoint a mediator. RCW 11.96A.300(4)(a). All parties may submit a list of qualified and acceptable mediators to the court no later than the date on which the hearing on the petition is to be held. RCW 11.96A.300(4)(a). At the hearing the court shall select a qualified mediator from lists of acceptable mediators provided by the parties. RCW 11.96A.300(4)(a).

A qualified mediator must be: (a) an attorney licensed to practice before the courts of this state having at least five years of experience in estate and trust matters; (b) an individual, who may be an attorney, with special skill or training in the administration of trusts and estates; or (c) an individual, who may be an attorney, with special skill or training as a mediator. RCW 11.96A.300(4)(b). The mediator may not have an interest in an affected estate, trust, or nonprobate asset, and may not be related to a party. RCW 11.96A.300(4)(b).

6. At the Mediation

Upon designation of a mediator by the parties or court appointment of a mediator, the mediator and the parties shall establish a date for the mediation. RCW 11.96A.300(5). If a date cannot be agreed upon within ten days of the designation or appointment of the mediator, a party may petition the court to set a date for the mediation session. RCW 11.96A.300(5). The mediation must last at least three hours unless the matter is earlier resolve. RCW 11.96A.300(6).

A resolution of the matter that is the subject of the mediation must be evidenced by a nonjudicial dispute resolution agreement or a nonjudicial binding agreement (“NBA”). RCW 11.96A.300(7). NBAs are discussed in Section C below.

7. Costs of Mediation

Costs of the mediation, itself, including reasonable compensation for the mediator’s services, shall be borne equally by the parties. RCW 11.96A.300(8). Those costs and the compensation of the mediator must be set forth in a mediation agreement. RCW 11.96A.300(8).

Each party shall bear its own costs and expenses, including legal fees and witness expenses, in connection with the mediation proceeding: (a) except with respect to an order compelling mediation under RCW 11.96A.320, or (b) unless the matter is not resolved by mediation and the arbitrator or court finally resolving the matter directs otherwise.

8. Petition to Compel Compliance

If a party does not comply with any TEDRA mediation or arbitration procedures, the other parties may petition the court for an order compelling compliance. RCW 11.96A.320. A party obtaining an order compelling compliance is entitled to reimbursement of costs and attorneys’ fees in connection with the petition and any actions taken after the order compelling compliance, unless the court at the hearing on the petition determines otherwise for “good cause shown”. RCW 11.96A.320. Reimbursement must be from the party or parties whose failure to comply was the basis for the petition. RCW 11.96A.320.

B. Arbitration

1. Availability of Arbitration

Arbitration under TEDRA is available only if: (a) a party has first petitioned for mediation and mediation has not settled the matter; (b) the court has determined that mediation is not required and has not ordered that the matter be disposed of in some other manner; (c) all of the parties have agreed not to mediate; or (d) the court has ordered that the matter be submitted to arbitration. RCW 11.96A.310(1).

The trustee in signing a broker’s agreement can contract out of TEDRA’s ADR procedures. In *In re Jean F. Gardner Amended Blind Trust*, 117 Wn. App. 235, 70 P.3d 168 (2003), the beneficiary of the trust sued the trustee and a securities broker for breach of fiduciary duty and negligence. The trustee filed a cross claim against the broker. The trial court dismissed the case and compelled arbitration pursuant to the trustee’s agreement with the broker. The court of appeals held that even though the beneficiary was not a party to the broker’s agreement, she was bound by the arbitration provision. The trustee argued that if forced to arbitrate he would be prevented from pursuing alternative dispute resolutions under TEDRA. The court of appeals ruled, however, that the trustee waived jurisdiction in the superior court by agreeing to arbitrate under the broker’s agreement.

2. Commencing Arbitration

A party may commence arbitration by serving written notice on all parties no later than twenty days after conclusion of mediation or the court's order that mediation is not required. RCW 11.96A.310(2)(a). If the court orders arbitration, arbitration must proceed in accordance with the order. RCW 11.96A.310(2)(a). If the parties agree that mediation does not apply and have not agreed to another procedure for resolving the matter, a party may commence arbitration without leave of the court by serving written notice on all parties at any time before or at the initial judicial hearing on the matter. RCW 11.96A.310(2)(b). After the initial judicial hearing on the matter, such written notice may be served only with leave of court. RCW 11.96A.310(2)(b).

3. Objection to Arbitration

A party may object to arbitration by filing and serving a petition on all parties at any time but no later than twenty days after receipt of a written notice of arbitration. RCW 11.96A.310(3). The party objecting to arbitration must give notice to all parties at least ten days before the hearing. RCW 11.96A.310(3). The hearing on the objection to arbitration must be heard no later than twenty days after filing the petition. RCW 11.96A.310(3). At the hearing, the court shall order that arbitration proceed except for good cause shown. RCW 11.96A.310(3). Such order is not subject to appeal or revision. RCW 11.96A.310(3). If the court determines that the matter should not be subject to arbitration, the court shall dispose of the matter by: (a) deciding the matter at that hearing, but only if the petition objecting to arbitration contains a request for such relief; or (b) directing other judicial proceedings.

4. Selection of Arbitrator

If no petition objecting to arbitration is filed or if a court determines that arbitration must apply, within thirty days of receipt of the initial notice or within twenty days after the court determination, each party furnish all other parties a list of acceptable arbitrators. RCW 11.96A.310(4)(a). If the parties cannot agree on an arbitrator within ten days, a party may petition the court to appoint an arbitrator. RCW 11.96A.310(4)(a). All parties may submit a list of qualified and acceptable arbitrators to the court by the date of the hearing. RCW 11.96A.310(4)(a). At the hearing the court shall select a qualified arbitrator from lists of acceptable arbitrators provided by the parties. RCW 11.96A.310(4)(a). A qualified arbitrator must be (a) an attorney licensed to practice before the courts of this state having at least five years of experience in trust or estate matters, in litigation or dispute resolution involving trusts or estates, or (b) an individual, who may be an attorney, with special skill or training with respect to the matter. RCW 11.96A.310(4)(b). The arbitrator may be the same person used as the mediator. RCW 11.96A.310(4)(b). The arbitrator and the parties shall execute a written agreement setting forth the terms of the arbitration and the arbitrator's compensation. RCW 11.96A.310(5)(d) & (f). The arbitrator must be compensated at the arbitrator's stated rate of compensation for acting as an arbitrator of disputes in trusts, estates, and nonprobate matters unless the parties agree otherwise. RCW 11.96A.310(5)(d).

5. Applicable Rules

The superior court mandatory arbitration rules under chapter 7.06 RCW, except for the dollar limits and restrictions on monetary damages, and any superior court local rules for mandatory arbitration, apply to TEDRA arbitrations. RCW 11.96A.310(5)(a) & (c). The rules of evidence and the civil rules for discovery apply, unless the parties have agreed or the arbitrator rules otherwise. RCW 11.96A.310(5)(g).

6. Costs of Arbitration

Unless directed otherwise by the arbitrator or the court finally resolving the matter, costs of the arbitration, including compensation for the arbitrator's services, each parties' own attorneys fees, costs and expenses, and any witness fees, must be borne equally by the parties. RCW 11.96A.310(5)(e). The arbitrator, however, may order costs, including reasonable attorneys' fees and expert witness fees, to be paid by any party to the proceedings as justice may require. RCW 11.96A.310(6).

7. Arbitrator's Decision

The arbitrator shall issue and promptly serve on each party a final decision in writing within thirty days of the conclusion of the final arbitration hearing. RCW 11.96A.310(7). The arbitrator or any party to the arbitration may file the arbitrator's decision with the court at any time and notice of such filing shall be promptly given to each party. RCW 11.96A.310(8). If the arbitrator's decision is filed with the court, a judgment shall be entered and may be presented to the court by any party on ten days' prior notice and it shall have the same force and effect as judgments in civil actions. RCW 11.96A.310(9)(b).

8. Appeal to the Superior Court

Any party may appeal the final decision of the arbitrator by filing a notice of appeal with the court requesting a trial de novo on all issues of law and fact. RCW 11.96A.310(9)(a). The notice of appeal must be filed within 30 days after the date on which the decision was served. RCW 11.96A.310(9)(a). If an appeal is not filed within 30 days, the arbitration decision is conclusive and binding on all parties. RCW 11.96A.310(9)(b). The prevailing party in any such de novo trial in superior court shall be awarded costs, including expert witness fees and attorneys' fees, in connection with the judicial resolution of the matter. RCW 11.96A.310(10). Such costs shall be charged against the non-prevailing parties in such amount and in such manner as the court determines to be equitable. RCW 11.96A.310(10).

9. Petition to Compel Compliance

If a party does not comply with any TEDRA mediation or arbitration procedures, the other parties may petition the court for an order compelling compliance. RCW 11.96A.320. A party obtaining an order compelling compliance is entitled to reimbursement of costs and attorneys' fees in connection with the petition and any actions taken after the order compelling compliance, unless the court at the hearing on the petition determines otherwise for good cause shown. RCW 11.96A.320. Reimbursement must be from the party or parties whose failure to comply was the basis for the petition. RCW 11.96A.320.

C. Non-Judicial Binding Agreements (“NBAs”)

1. Application

NBAs may be used to resolve any matter to which TEDRA applies. RCW 11.96A.220. “Matter” is broadly defined under TEDRA to include any issue, question or dispute involving wills, estates, trusts and nonprobate assets. RCW 11.96A.030(1).

There are three specific exceptions to the broad coverage of the NBA provisions in TEDRA. Those provisions do not apply to matters involving: (a) the appointment, qualification and removal of guardians (chapter 11.88 RCW); (b) the powers and duties of guardians or limited guardians (chapter 11.92 RCW); and (c) any trust for a minor created at its inception by a judgment or decree unless the judgment or decree specifically provides that Sections .210-.250 apply. Guardians and guardians ad litem are court appointed fiduciaries subject to judicial oversight. TEDRA expressly excludes the use of NBAs with respect to guardianships or the actions of court-appointed guardians. RCW 11.96A.220.

2. Parties

A NBA must be signed by all parties. A “party” is any person who has “an interest in the subject of the particular proceeding and whose name and address are known to or are reasonably ascertainable by, the petitioner.” RCW 11.96A.030(4).

A special representative may enter into a NBA on behalf of persons he or she represents. RCW 11.96A.250(1)(b). A court can appoint a special representative to represent the interests of one or more persons who are minors, incompetents or as yet unborn or unascertained, or whose identity or address is unknown. RCW 11.96A.250(1). The special representative must be a lawyer or individual with special skill or training in the administration of estates or trusts, may not have an interest in the estate or trust at issue, and may not be related to anyone who does. RCW 11.96A.250(2). The purpose is to ensure that a competent and qualified individual with knowledge of trusts and estates is appointed to represent the parties. A party may nominate a qualified person to be appointed as a special representative. RCW 11.96A.250(1).

TEDRA also codifies the common law doctrine of virtual representation. RCW 11.96A.120. If a person who virtually represents another signs an NBA, that party’s signature constitutes the signature of all persons whom he or she virtually represents and all persons virtually represented are bound by the agreement. RCW 11.96A.220. Where it is applicable, the doctrine of virtual representation is an alternative to the appointment of a special representative. A person may not virtually represent anyone with whom he or she has a conflict. RCW 11.96A.120(3). A conflict exists where a “significantly different economic interest exists” between the representative and the party being virtually represented. *See* Comment to TEDRA § 305.

3. Form

TEDRA does not require any specific form for the agreement, although it does require certain provisions and suggests others. Mandatory NBA provisions include subject matter of the dispute and the parties. RCW 11.96A.220. Suggested NBA provisions include jurisdiction and

venue, governing law, waiver of notice of filing, and discharge of any special representative. RCW 11.96A.220.

4. When Binding

A NBA is binding and conclusive as to all parties upon execution. RCW 11.96A.220. The one exception arises when a special representative is a participant in the agreement. The special representative may note a hearing for presentation of the NBA within thirty days of its execution. RCW 11.96A.240. The special representative must give notice of the hearing to each party, unless waived, and must file proof of notice with the court. RCW 11.96A.240. The court's consideration of such a petition is limited to whether the special representative has adequately represented and protected the interests of the represented parties. RCW 11.96A.240. Arguably, the court may not consider any other issue. If the court determines that the interests were not adequately represented, the agreement is declared of no effect. RCW 11.96A.240.

The purpose of this exception is for the protection of the special representative from possible future claims by the parties he or she represented. Actions against a special representative must be brought the earlier of (a) three years of discharge, or (a) the entry of an order approving the NBA. RCW 11.96A.070(3)(i). TEDRA specifically excepted the application of any tolling provisions. RCW 11.96A.070(4). Thus, it does not matter that the represented parties to the agreement are minors or even unborn heirs. Once the NBA is approved, any claims against the special representative are barred.

5. Filing

The NBA need not be filed with the court to be binding or effective. It may be filed with the court at any time after its execution by any party or the legal representative of a party unless a special representative has participated in the agreement. RCW 11.96A.230(1). In that case, the agreement may not be filed for thirty days after execution without the written consent of the special representative. RCW 11.96A.230(1). The fee for merely filing the NBA with the court is \$2. If later any judicial action is taken with respect to the agreement, a new filing fee of \$200 is required. As an alternative to filing the entire agreement with the court, the parties may choose to file a memorandum summarizing the terms of the written agreement with the court. RCW 11.96A.230(1).

Upon filing of the agreement or the memorandum of the agreement with the court, the NBA will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate or trust. RCW 11.96A.230(2).