Real Property, Probate & Trust

Vol. 47, Number 3 *Published by the Real Property, Probate & Trust Section of the Washington State Bar Association* Summer 2020

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings:

How Practitioners Can Proactively Manage a Changing Landscape

Nicole DeNamur – Sustainable Strategies PLLC & Erik Jennings – Pacifica Law Group LLP

It is becoming less and less of a debate: the global community needs to take immediate steps to drastically reduce its greenhouse gas (GHG) emissions to avoid the most catastrophic effects of climate change.

While it has taken decades, the warning about the threat of climate change is finally taking hold and achieving broad acceptance. The current global pandemic and related global lockdowns have offered a small glimpse of the level of action that will be required. During the peak lockdown period, daily global carbon dioxide emissions decreased approximately 17 percent when compared with mean 2019 levels.[1] These reduced emissions levels were similar to those in 2006.[2] While at first glance this may seem like a drastic reduction, the reality is that the reduction is temporary and, when compared to the Intergovernmental Panel on Climate Change (IPCC) target of a 45 percent reduction from 2010 levels within the next decade, the pandemic-fueled reduction is a drop in the bucket.[3]

The sobering message is that during a period when the rates of surface and air travel (two widely discussed areas of focus to achieve reductions) plummeted to a small fraction of their prior levels, global emissions reductions were relatively minimal. The sources of the majority of emissions continued on a steady trajectory despite the lockdowns, further cementing the argument that drastic structural changes are necessary to hold off the worst effects of climate change. A significant source of emissions that has not traditionally received much attention from the general public, but has been subject to recent state and local regulatory action, is existing buildings. Over the past several years, a steadily increasing number of jurisdictions have come to understand the central role existing buildings play as GHG emitters and have increasingly flexed their regulatory muscles in an effort to rein in emissions.

As this practice intensifies and becomes a standard governmental tool, landlords and tenants alike will feel the impact. In this article we describe the relevant background with respect to climate change and the role of existing buildings. We then analyze two examples of regulatory tools that cities and states are increasingly leveraging to achieve climate goals. We examine key considerations for landlords and tenants, and discuss the impact these regulatory tools may have on existing and future leases. Finally, we provide strategies practitioners can leverage to promote energy efficiency and support their clients within this shifting regulatory landscape.

Continued on next page…

Table of Contents

Continued from page 1…

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings

Background on Climate Change

To understand why energy efficiency mandates, particularly for existing buildings, are increasingly used as a regulatory tool, and why this trend is expected to continue, it is important to have some background on buildings, energy use, and climate change.

In the United States, most human-caused GHG emissions originate from the burning of fossil fuels to create energy.[4] The energy needed to construct and operate buildings is a significant contributor to these emissions. Generally speaking, "buildings generate nearly 40 percent of annual global GHG emissions."[5] This breaks down into approximately 28 percent operational carbon dioxide emissions (energy to operate the building) and approximately 11 percent embodied carbon (carbon associated with extraction, manufacture, and transport of building materials, among other aspects).[6] A key difference between operational and embodied carbon is that operational carbon emissions can be reduced over time by instituting building efficiency strategies and requirements and by utilizing renewable (as opposed to fossil fuel–based) energy sources.[7] Conversely, once materials are incorporated into a building, embodied carbon is permanent and cannot be "improved."[8] Building codes generally regulate emissions through energy performance requirements, but typically do not—at least yet—regulate embodied carbon.[9]

> "…buildings generate nearly 40 percent of annual global GHG emissions."

The energy efficiency (or inefficiency) of existing buildings is an important part of this conversation because even in rapidly growing cities, highly efficient new construction and major renovation projects account for a fraction of the overall building stock.[10] Instead, existing buildings comprise the great majority.[11] Compounding these issues is the fact that, historically, building efficiency was only regulated during major renovations that required a permit.[12] This means that while embodied carbon and high-performing new construction projects are important, to meet emissions reduction targets, significant improvements must be made to the energy efficiency of *existing buildings*.[13] This requires the implementation of new tools that regulate outside the context of the permit process and regular code cycles.[14]

Despite the federal government's withdrawal from the Paris Agreement, many cities and states have continued or ramped up climate commitments or goals to meet or exceed standards set by the IPCC.[15] Many of these commitments involve reducing emissions by a certain percentage by a particular deadline or becoming carbon neutral within a certain timeline.[16] Below we discuss two regulatory tools that the city of Seattle and Washington state have implemented to reduce emissions and improve the performance of existing buildings.

City of Seattle and Innovative Energy Efficiency Tools

The city of Seattle has long been recognized as a "national leader in energy conservation, green energy production, and sustainable building."[17] In addition to an aggressive energy code, the city has piloted numerous energy efficiency initiatives.[18] The city's leadership role was recognized nationally when the American Council for an Energy Efficient Economy ranked Seattle third in the nation for "policies and programs that advance energy efficiency."[19]

In 2013, the city adopted a comprehensive Climate Action Plan (CAP).[20] Among other aspects, the CAP includes a goal of achieving "zero net GHG emissions by 2050."[21] The CAP also contains a section specifically dedicated to reducing emissions from building energy use,[22] which states that "improving energy efficiency requires an interconnected strategy that provides policies and tools that increase information, offers incentives and other assistance, and requires minimum building energy performance."[23]

In 2018, Mayor Jenny Durkan released an updated Seattle climate strategy "to reduce carbon pollution from our transportation and building sectors and make Seattle a national leader in fighting climate change."[24] The Seattle climate strategy "is a set of short- and long-term actions that provide a roadmap for our City to act in the absence of federal leadership, particularly on leading contributors of greenhouse gases: transportation and buildings."[25] For all the reasons described above, the CAP and climate strategy outline various tools focused on, among other aspects, improving the efficiency of the building sector. One such tool is the Building Tune-Ups Ordinance (Tune-Ups Ordinance).

The Tune-Ups Ordinance[26] supports the city of Seattle's overall goals for reducing GHG emissions because "[a]cross the entire commercial building sector, the tune-up mandate is expected to reduce energy use by five to eight percent and GHG emissions by six to nine percent."[27] The city analogizes the Tune-Ups Ordinance to owning a car: Cars require regular checks to ensure they are running safely and efficiently, and the same is true of buildings.[28]

Continued…

Continued from page 2…

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings

The stated goal of the Tune-Ups Ordinance is to "optimize energy and water performance by identifying low- or no-cost actions related to building operations and maintenance, that generate 10-15% in energy savings, on average."[29] According to the city, these low- or no-cost fixes "improve building performance and on average reduce building energy use by 10-15%."[30] Examples of these fixes include "changes to thermostat set points, or adjusting lighting or irrigation schedules. Tune-ups also review HVAC, lighting, and water systems to identify needed maintenance, cleaning, or repairs."[31] Building assessments must be completed by a Qualified Tune-Up Specialist.[32] Building tune-ups will be required every five years for buildings with 50,000 square feet or more of nonresidential space, excluding parking.[33]

The requirements of the Tune-Ups Ordinance phase in by building size.[34] These requirements started with the largest buildings (200,000 square feet or more) in March 2019, and extended to buildings comprising 100,000–199,000 square feet in October 2019. The deadlines for buildings with 70,000–99,000 and 50,000–69,000 square feet are, as of the date of this article, April 1, 2021 and Oct. 1, 2021, respectively.[35] Additional information, updates, and reported data relating to the Tune-Ups Ordinance is available on the city's website.[36]

Building Performance Standards

Building Performance Standards (BPS) are another example of a relatively new regulatory tool that attempts to increase the performance of various building aspects.[37] While this article primarily focuses on energy performance, BPS can also be used to improve the efficiency of gas and water use, among other examples.[38] To drive continuous improvement, these efficiency standards are generally designed to become more rigorous over time.[39] They are also generally tailored by building type and size, and they require either a percentage reduction in emissions or achievement of a standard of energy use per square foot.[40] As noted above, BPS work in tandem with building codes because they apply to all building types covered by the policy, regardless of whether the building is going through a major renovation that requires permits.[41]

An attractive feature of BPS—and one that is critical with respect to lease requirements—is that they are usually structured so that owners can implement whatever changes they deem most efficient and cost-effective to achieve the required standard.[42] That is, means and methods are not prescriptive.[43] However, owners have to prove that their means and methods were effective based on actual performance, not just predictive modeling.[44]

Like the city of Seattle, Washington state has taken a leadership role with respect to energy efficiency and GHG reductions. In 2008, the Washington Legislature set GHG emission targets that require overall state emissions to "match 1990 levels by 2020 then fall to 25% below 1990 levels by 2035, and to 50% below 1990 levels by 2050."[45] These percentages were updated in 2020 to 45 percent below 1990 levels by 2030, 70 percent below 1990 levels by 2040, and 95 percent below 1990 levels by 2050 and achieve net zero emissions.[46]

Despite the Legislature's goals, Washington state's GHG emissions demonstrate why a state-wide *building performance* standard is critical. "While statewide emissions have grown 10 percent overall since 1990, building emissions have jumped by 50 percent, more than any other source in [Washington] state."[47] In fact, "building-related emissions are the state's fastest growing source of greenhouse gases and account for 27 percent of the carbon pollution in Washington."[48] Large commercial buildings are particularly problematic. Buildings over 50,000 square feet represent only 6 percent of the number of commercial buildings, but produce more than 20 percent of the commercial building sector's emissions.[49]

In 2019, the Legislature enacted what is commonly called the "Clean Buildings Act" (Act).[50] Among other things, the Act contains a broad mandate to the Department of Commerce (Commerce) to develop a state energy performance standard for certain commercial buildings 50,000 square feet and larger (to align with the worst emitters).[51] Specifically, "[b]y November 1, 2020, the department must establish by rule a state energy performance standard for covered commercial buildings."[52] The standard will include energy use intensity (EUI) targets:[53]

> All buildings will need to develop energy management plans, including creating energy benchmarking reports. The mandatory standard will require building owners to demonstrate that their buildings consume less energy than a specified energy use intensity (EUI) target or be in the process of reducing the building's energy use intensity.[54]

Commerce will establish the standards through a rulemaking process, which will include adjustments by building type and geography (to account for, among other things, colder weather in Eastern Washington).[55] The Act works in conjunction with separate legislation, the new appliance energy efficiency law (House Bill 1444), which sets "energy efficiency standards for a range of commercial

Continued…

Continued from page 3…

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings

and residential equipment and appliances" in 17 product categories, including lighting, computers, and plumbing equipment.[56]

From 2021 until 2026, the standard will be part of a voluntary incentive program.[57] The largest buildings must comply by 2026, and most buildings will need to comply by 2028.[58] This phased-in approach allows owners to take advantage of tenant improvements and turnover, and, as with the Tune-Ups Ordinance, provides owners with the opportunity to make upgrades when it is most cost-effective to do so.[59] Beginning in 2031, Commerce must update the standard on a five-year cycle.[60]

A defining feature of the Act is that owners only have to demonstrate that they meet the EUI targets—there are no means and methods requirements.[61] This incentivizes owners to take advantage of the additional time provided by the voluntary program and highlights the importance of creating alignment with lease language as early as possible. Another key feature is that, generally speaking, owners will not be required to make improvements unless they pay for themselves over the lifetime of the project.[62]

Considering that the Act and the Tune-Ups Ordinance impose relatively novel requirements on existing buildings, and that the city of Seattle (and other Washington cities) and Washington state will likely continue to find innovative ways to meet climate goals, it is vital that both landlords and tenants think through the immediate and long-term impacts of these requirements.

Questions and Implications for Landlords and Tenants

One question landlords may want to consider is whether they want to meet minimum requirements of regulations imposed under laws like the Tune-Ups Ordinance and the Act, or get ahead of the regulatory curve by taking additional steps to improve the efficiency and sustainable attributes of their buildings. In locations like Seattle, landlords have a decent roadmap showing what they will be required to do over the next several years, while in jurisdictions that have not been as proactive, the future may look a little murkier. In addition to any philosophical considerations, a landlord's decision about how aggressive to be with respect to energy efficiency will likely require balancing several factors, including (1) the landlord's ability (or general appetite) for incurring potentially significant upfront costs, (2) the hope of achieving more savings over the long term, (3) whether the landlord has the ability to pass costs onto tenants, (4) how to address split incentive issues, (5) the type of tenants the landlord wants to attract, and (6) its relationship with current tenants.

Outside of rare exceptions, landlords are in the real estate business primarily as an investment for themselves as well as a collection of partners and investors. It should come as no surprise, then, that costs of operation and ownership are at the forefront of their minds. In the short term, money going into building improvements means less money coming in the form of returns on investment (i.e., profit). An overly cost-conscious landlord may consider doing only what is necessary (and when it is necessary) to remain in compliance with rolling efficiency mandates, especially if the landlord will not see a direct cost savings benefit, as discussed below. However, a variety of other cost-related factors should be considered prior to taking this position. First, absent

Continued…

Continued from page 4…

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings

chaotic shocks to the market, the cost of constructing or installing an improvement today will likely be less expensive than performing this work a few years from now. Moreover, while landlords are implementing energy efficiency strategies, there are potential cost savings associated with coordinating that work with implementing related sustainability initiatives, such as waste reduction, water efficiency, or healthier building materials. Second, given that the targeted improvements are aimed at increasing efficiency, the earlier improvements are adopted the sooner a building will be able to reap the rewards of lower utility consumption. Third, buildings that have obtained some form of environmental certification have generally enjoyed slightly higher rental rates.[63] Done properly, a landlord's initiative to get ahead of efficiency mandates (and to go above and beyond the minimums) could ultimately result in a higher rate of return over the life of the investment. Additionally, proactive landlords can mitigate the risk of taking on a project today that may encounter future compliance issues by attempting to get ahead of the regulatory curve, as opposed to waiting and "reacting" to future regulations.

In an ideal world, building owners who wanted to get ahead of upcoming regulations could make that decision now and get tenant buy-in to share in the costs. From a tenant's perspective, depending on how the lease is structured, investments designed to make a space more efficient may not yield enough direct benefit during the term of the tenancy to justify the associated costs. However, as with landlords, this is only one consideration. A tenant should consider looking at a bigger picture when determining the overall sustainability characteristics of its business in order to appeal to current and future employees, as well as its customer base.

For both landlords and tenants considering improvements, the structure of their lease can make a significant difference in determining how these issues are addressed. Commercial spaces are governed by a variety of lease structures, with two of the major formats being gross leases and triple net leases. In unmodified gross leases, tenants pay an agreed-upon rent, with the landlord retaining responsibility for all building operating costs. In contrast, a typical triple net lease provides that the landlord can, with some exceptions, pass through the costs of operating the building to tenants. Under a triple net structure, a tenant will generally pay its share of the building's costs (measured by the percentage of the building it leases) for utility usage, insurance, general maintenance and repair, janitorial services, and certain amenities.

Done properly, a landlord's initiative to get ahead of efficiency mandates (and to go above and beyond the minimums) could ultimately result in a higher rate of return over the life of the investment.

Traditionally, both the gross lease and triple net models have posed barriers to efficiency improvements. Under the unmodified gross lease model, tenants are not incentivized to make or pay for efficiency improvements, since the benefit of cost savings will go directly to the landlord and not be reflected in any reduction in rent payments. Under a triple net structure, a landlord may have less incentive to pursue energy efficiency upgrades, as any utility savings would pass through to tenants even though the landlord paid for some or all of the improvements. This has resulted in what is commonly referred to as a "split incentive" under both models.[64] In addition, under a triple net lease a tenant may not see much value in investing to increase efficiency in their own space, since they will still be paying a percentage of the building's overall utility costs, and any cost savings realized from lower consumption particular to their premises would be allocated among all tenants. The reality for most existing buildings is that the opportunity to make significant changes to lease relationships comes along only when a new tenant is coming into the building, or perhaps when negotiating a renewal or extension. This is why the increased timeline with respect to energy efficiency mandates should not be wasted.

In addition to the leasing model (gross or triple net), the classification of improvements is also important for landlords and tenants to consider. Capital expenditures or improvements are significant investments into a building, and most sophisticated tenants can require some guardrails on a landlord's ability to pass through such costs. From the tenant's perspective, capital expenditure costs will likely benefit the building for a longer period than the lease. Accordingly, the costs should be spaced out (i.e., amortized) over the life of the improvement to ensure an equitable payment allocation instead of being passed through entirely in the year they were incurred (or in the case of long-lasting improvements, having such cost passed through in its entirety throughout the lease term). A tenant with significant negotiating power may require that capital expenditure costs be excluded from being passed through at all, while other tenants

Continued…

Continued from page 5…

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings

may succeed at getting the cost pass through spaced out over time or otherwise limited in some fashion. One approach to limit pass through costs that is common in many commercial leases permits a landlord to pass through the cost of capital expenditures only so long as they are (a) required by law or regulation, or (b) otherwise required for the safety and protection of the building.[65]

As it pertains to the regulatory schemes discussed above, initial improvements required under the Tune-Ups Ordinance and the Act may not be significant enough to be considered capital in nature, which may allow a landlord in a triple net lease to pass them through without amortization. But although the Tune-Ups Ordinance and the Act in their current forms do not require that landlords make improvements that will not ultimately pay for themselves, landlords should consider how a lease may "redirect" the cost and eventual benefits of improvements for energy efficiency and emissions reductions overall. For example, given that the call for greater measures to combat climate change will likely increase over time, it is not unreasonable to expect that climate-focused regulations may eventually be less concerned with improvements paying for themselves and more focused on addressing emissions reductions, which may in turn require more significant investments that qualify as capital expenditures. Such increased costs may be ineligible to be passed through completely in the year they are incurred, and instead, depending on the terms of the lease, will have to be amortized over the life of the improvement or tenancy—a reason landlords might want to plan for greater capital investment sooner rather than later. That said, if a landlord wants to exceed the standards of the applicable regulation, it may find the ability to pass through these costs (amortized or not) is limited since any "extra" improvements are not for the purpose of complying with existing law.

How landlords and tenants want to approach these issues will vary with the type of building (e.g., size, number of tenants, primary use), current lease provisions, and the relative negotiating positions of each party. The key point to keep in mind is that a carefully structured pass through provision can provide certainty and ensure that all parties receive some benefit from going above and beyond the minimum required. That said, pass through clauses in leases are only one among several provisions worthy of review and analysis when considering upcoming efficiency mandates and other efforts to reduce building emissions. We discuss other provisions in more detail in the next section.

A final consideration to note here for landlords, as they determine the level of efficiency and sustainability upgrades to deploy, is the type of tenant population they desire for the building. Studies have shown that green building practices can be associated with less tenant turnover, and generally speaking, more efficient or "green" buildings are more marketable and can attract a larger pool of desirable potential long-term tenants.[66] High-quality tenants usually translate into more creditworthy tenants, which can reduce the risk of a landlord having to deal with defaults during the term and can also add a certain cachet to a building, further attracting quality tenants and opportunities. Lower turnover provides continued stability and generally lower leasing transaction costs. For existing tenants, landlords will want to evaluate whether current tenant relationships are such that overcoming potential hurdles to achieving efficiency upgrades can be approached with a collaborative, problem-solving attitude, or if it will be a pain point that could result in a tenant demanding concessions in order to accommodate the necessary upgrades and associated costs.

Impacts to Leases

A lease, like any contract, allocates certain obligations, benefits, and risks among the parties. A lease's cost pass through structure, although one of the primary areas of focus, is not the only lease provision worth reviewing in the context of existing and forthcoming efficiency regulations. Each lease will have its own characteristics reflecting the needs and relative negotiating power between the parties; however, in the commercial leasing world there are certain customs and standards that arguably can be considered "market." One important consideration for landlords and tenants alike is whether current customs and standards will work in a market that is faced with an increase in emissions-related regulations—regulations that are likely to have higher standards in the future.

As more efficiency regulations come into effect, leases will need to have clear provisions governing which party is responsible for regulatory compliance. The presumption (and reality in most cases) will be that, as the building's owner, the landlord is responsible for ensuring the building complies with all applicable regulations. While this may make sense in a multi-tenant lease where the landlord maintains some control over building operations, it may not necessarily work as well in a single-tenant building where the landlord has taken a more hands-off approach. Ultimately the city or state is going to impose any penalties for noncompliance on the landlord, so an important point of clarity in the

Continued…

Continued from page 6…

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings

lease will be who is responsible for improvements that are necessary to meet regulatory standards.[67] If it is the tenant, a landlord will want to evaluate available enforcement mechanisms that would allow the landlord to minimize any costs or headaches they may suffer from governmental enforcement.

In a related context, the parties should consider what happens if a building falls out of compliance. When making the necessary improvements a landlord should think about the likelihood of a bad actor somehow bringing the building out of compliance, whether through excessive energy usage or some other means, and whether the lease is clear enough to make enforcement possible. Similarly, the landlord should evaluate its access rights and think through whether efficiency improvements will require access to tenant spaces for installation and maintenance and whether having the ability to inspect a space to ensure compliance is warranted.

Utility metering and reporting will also likely take on a more important role. As noted above, annual benchmarking is a key component of laws like the Tune-Ups Ordinance and the Act. For a multi-tenant building, it may be difficult for a landlord to accurately pinpoint usage to individual tenants. While a report for the whole building may be achievable, the landlord may have less ability to determine which tenants may be heavy consumers and if there are certain problem areas of the building or certain building systems that should be isolated and addressed. One solution would be the use of submeters and usage reporting. In most multi-tenant buildings, individual metering tends to be the exception rather than the rule, and detailed reporting of individual tenant usage is even less common. Potential barriers to changing this norm boil down to the question of costs and, to some extent, concerns about confidentiality. The cost of installing a given submeter is a drop in the bucket of a buildout or general building operations costs. However, the landlord of a high-rise building may pause at the cost to submeter every tenant space, so likely will want to look at an arrangement to share installation costs with at least some of the tenants. When it comes to reporting, some tenants may have concerns about sharing information on energy use, and accordingly additional confidentiality provisions may be necessary (although information provided to the applicable governmental agency may ultimately be shared publicly).[68]

Finally, the parties should evaluate the lease's default and remedies section to ensure it is either broad or specific enough to allow for timely action on either party's side to address threats of noncompliance. While government-imposed penalties for noncompliance may currently be minimal, in all likelihood cities and states will feel the need to put more pressure on bad actors and increase enforcement mechanisms as these regulations become more common and robust.

Conclusion

As compared to attention given to other climate-related matters, the existing building stock's significant contributions to GHG emissions have only just begun to receive the attention of climate-minded regulators. While the commercial real estate industry has flirted with "green" leases and various environmental certifications for years, only recently have state and local governments started laying the foundation to impose more stringent emissions-reduction requirements. We expect that the Tune-Ups Ordinance and the Act are among only the first of these types of measures.

As the effects of climate change become more and more evident, it would be unwise not to expect implementation of more stringent (and expensive) requirements. Accordingly, it is important for building owners to consider whether they want to take a proactive leadership role, while also evaluating the goals for their assets and whether their current leasing practices will accommodate meeting or exceeding current and expected future emissions-reduction requirements. In looking at existing leases, existing efficiency regulations, and possible future regulations, landlords and their advisors should seek to identify pain points including cost sharing, risk management, access and information sharing, and enforcement, all while keeping in mind the importance of creating incentives for tenants to lease space in the building. Similarly, climate-minded tenants will want to begin considering if the relationship with their current landlord and the characteristics of the building provide any leverage to push efficiency changes, and if their current lease will allow them to realize direct benefits from higher emissions reduction standards.

Climate change and the implementation of regulatory measures to lessen its impacts are inevitable. The questions landlords and tenants should be asking themselves are whether they are adequately positioned to meet forthcoming standards and how they can foster relationships where exceeding the minimum is mutually beneficial. Careful review of lease provisions and consultation with legal and sustainability consultants will help provide a roadmap to successful and, ideally, mutually beneficial compliance with climate-inspired regulations.

Continued…

Continued from page 7…

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings

1 C. Le Quéré et al., "Temporary Reduction in Daily Global CO_2 Emissions During the COVID-19 Forced Confinement," 10 *Nature Climate Change* 647 (2020), *available at* https://doi.org/10.1038/s41558-020-0797-x.

2 *Id.*

3 *See* Intergovernmental Panel on Climate Change, Summary for Policymakers, in Special Report: Global Warming of 1.5□ (2018), *available at* https://www.ipcc.ch/sr15/chapter/spm/.

4 U.S. Energy Information Admin., Energy and the Environment Explained: Where Greenhouse Gases Come From, https://www.eia.gov/energyexplained/energy-and-the-environment/where-greenhouse-gases-come-from.php (last visited Aug. 23, 2020); U.S. Envtl. Protection Agency, Climate Change Indicators: Greenhouse Gases, www.epa.gov/climate-indicators/greenhouse-gases (last visited July 12, 2020).

5 Architecture 2030, Why The Building Sector?, https://architecture2030.org/buildings_problem_why/ (last visited Aug. 20, 2020).

6 *Id.*; *see also* World Green Bldg. Council, Bringing Embodied Carbon Upfront (2019), *available at* www.worldgbc.org/news-media/bringing-embodied-carbon-upfront.

7 Carbon Leadership Forum, The Carbon Challenge, http://carbonleadershipforum.org/the-carbon-challenge/ (last visited July 12, 2020).

8 *Id.*

9 *Id.* It is common to see a focus on GHG emissions instead of embodied carbon. *See, e.g.*, Architecture 2030, Existing Buildings: Operational Emissions, https://architecture2030.org/existing-buildings-operation/ (last visited July 12, 2020) (discussing the need for renovations of existing buildings to control energy emissions); Paula Melton, "Cities Crack Down on Buildings via Performance Standards," BuildingGreen, Dec. 2, 2019, www.buildinggreen.com/news-analysis/cities-crack-down-buildings-performance-standards (discussing regulation of GHG emissions by existing buildings).

10 Architecture 2030.

11 *Id.*

12 Melton.

13 Architecture 2030.

14 *See* Cliff Majersik, "The ABCs of BPS. What You Should Know about Building Performance Standards," Inst. for Market Transformation, Oct. 30, 2019, www.imt.org/the-abcs-of-bps-what-you-should-know-about-building-performance-standards/.

15 Melton.

16 *Id.*

17 Office of Sustainability & Env't, Buildings & Energy, www.seattle.gov/environment/climate-change/buildings-and-energy (last visited July 12, 2020).

18 *See id.*

19 *Id.*; *see also* Press Release, American Council for an Energy Efficient Economy, US Cities Boost Clean Energy Efforts but Few on Track to Meet Climate Goals (July 24, 2019), *available at* www.aceee.org/press/2019/07/us-cities-boost-clean-energy-efforts-0.

20 Office of Sustainability & Env't, Climate Action Plan (2013), *available at* www.seattle.gov/Documents/Departments/Environment/ClimateChange/2013_CAP_20130612.pdf [hereinafter CAP]; *see also* Office of Sustainability & Env't, Why Benchmarking is Required, www.seattle.gov/environment/climate-change/buildings-and-energy/energy-benchmarking/why-benchmarking-is-required#aboutthelaw (last visited July 12, 2020).

21 CAP at 3.

22 *Id.* at 36-43.

23 *Id.* at 37.

24 Office of Sustainability & Env't, Climate Action Plan, www.seattle.gov/environment/climate-change/climate-planning/climate-action-plan (last visited July 12, 2020).

25 *Id.*; see also City of Seattle, Seattle Climate Action (2018), http://greenspace.seattle.gov/wp-content/uploads/2018/04/SeaClimateAction_April2018.pdf [hereinafter Climate Action], at 4 (concisely summarizing the city's actions with respect to climate change).

26 SMC 22.930.

27 Climate Action at 10.

28 Office of Sustainability & Env't, Building Tune-Ups, www.seattle.gov/environment/climate-change/buildings-and-energy/building-tune-ups [hereinafter Building Tune-Ups] (last visited July 12, 2020).

29 Office of Sustainability & Env't, About Building Tune-Ups, www.seattle.gov/environment/climate-change/buildings-and-energy/building-tune-ups/about-building-tune-ups [hereinafter About Tune-Ups] (last visited July 12, 2020); see also Building Tune-Ups.

30 Office of Sustainability & Env't, Energy Benchmarking FAQ, www.seattle.gov/Documents/Departments/OSE/Benchmark/EB_FAQ_2019.pdf, at 4.

31 Climate Action at 10.

32 *Id.*

33 About Tune-Ups.

34 *Id.*

35 *Id.* N*ote* that deadlines have been extended due to the COVID-19 pandemic. *See* Building Tune-Ups.

36 *See* Building Tune-Ups.

37 Cliff Majersik, "The ABCs of BPS. What You Should Know about Building Performance Standards," Inst. for Market Transformation, Oct. 30, 2019, www.imt.org/the-abcs-of-bps-what-you-should-know-about-building-performance-standards/.

38 *Id.*

39 *See id.* ("These targets become stricter over time….").

40 *See generally* Paula Melton, "Cities Crack Down on Buildings via Performance Standards," BuildingGreen, Dec. 2, 2019, www.buildinggreen.com/news-analysis/cities-crack-down-buildings-performance-standards.

41 Majersik.

42 *Id.*

43 *See generally* Melton.

44 *Id.*

45 Press Release, Dep't. of Ecology, State of Wash., "New Data Shows Washington Carbon Emissions Cooling (Nov. 19, 2019)," *available at* https://ecology.wa.gov/About-us/Get-to-know-us/News/2019/New-greenhouse-gas-emissions-data; *see also* RCW 70.235.020.

46 ESSB 2311, Laws of 2020, ch. 79, §2 (to be codified at RCW ch. 70.235.020 (2020)); *see also* Dep't. of Ecology, State of Wash., Greenhouse Gases, https://ecology.wa.gov/Air-Climate/Climate-change/Greenhouse-gases (last visited July 12, 2020).

47 Policy Brief, Office of the Governor, State of Wash., Washington Takes Bold Steps to Reduce Greenhouse Gas Emissions from Buildings (2019) [hereinafter Policy Brief], at 1, *available at* www.governor.wa.gov/sites/default/files/documents/clean-buildings-policy-brief-bill-signing.pdf.

48 *Id.* at 2.

49 NW Energy Coalition, "Intro to New Washington Buildings Performance Standards," Aug. 20, 2019, https://nwenergy.org/featured/intro-to-new-washington-buildings-performance-standards/.

50 *See* Dep't of Commerce, State of Wash., Clean Buildings (E3SHB 1257), www.commerce.wa.gov/energy-blog/clean-buildings-e3shb-1257/ (describing passage of Engrossed Third Substitute House Bill 1257, Chapter 285, Laws of 2019).

51 *See* Dep't of Commerce, State of Wash., Clean Buildings, www.commerce.wa.gov/growing-the-economy/energy/buildings/ (last visited Aug. 24, 2020) (providing an overview of the standard and related information); *see also* Final Bill Rep, No. E3SHB 1257 (2019).

52 RCW 19.27A.210(1)(a).

53 NW Energy Coalition; *see also* Energy Star, "What is energy use intensity (EUI)?," www.energystar.gov/buildings/facility-owners-and-managers/existing-buildings/use-portfolio-manager/understand-metrics/what-energy (last visited July 12, 2020) (describing EUI).

54 Northwest Energy Efficiency Council, *Washington Clean Buildings Act (HB 1257)*, www.neec.net/wp-content/uploads/2019/11/WA-Clean-Buildings-Act-one-pager.pdf [hereinafter NEEC Release], at 1.

55 Policy Brief, Office of the Governor, State of Wash., Washington Takes Bold Steps to Reduce Greenhouse Gas Emissions from Buildings (2019) [hereinafter Policy Brief], at 3, *available at* www.governor.wa.gov/sites/default/files/documents/clean-buildings-policy-brief-bill-signing.pdf.

Continued…

Continued from page 8…

Energy Efficiency Mandates and Impacts to Leases for Existing Buildings

56 *Id.* at 5.

57 NEEC Release at 1.

58 Policy Brief at 3.

59 *Id.* at 3-4.

60 *Id.* at 4.

61 *See generally id.*

62 *Id.* at 4; *see also* RCW 19.27A.210(2)(d)(i) (outlining conditional compliance methods and related issues).

63 Rogier Holtermans & Nils Kok, "On the Value of Environmental Certification in the Commercial Real Estate Market," 47 *Real Estate Econ.* 685 (2017), *available at* https://onlinelibrary.wiley.com/doi/abs/10.1111/1540-6229.12223.

64 Chris Brown, "How High-Performance Leases Help Landlords and Tenants Achieve Sustainability Goals," Inst. for Market Transformation, March 19, 2019, www.imt.org/how-high-performance-leases-give-landlords-and-tenants-something-to-agree-on/.

65 Daniel B. Bogart & Celeste Hammond, *Commercial Leasing: A Transactional Primer*, 81 (2d ed. 2011).

66 *See* "A Better City, Green Leasing: An Effective Tenant/Landlord Strategy for Energy Efficiency" 4 (2014), *available at* www.abettercity.org/docs/abc-rpt%20green%20leasing%20 12%2014.pdf.

67 *See, e.g.*, SMC 22.930.120 (detailing penalties).

68 *See, e.g.*, SMC 22.930.070 (providing that the city of Seattle may share compliance information publicly).

Conducting Estate Planning and Probate and Handling Trust Disputes During COVID-19

Nicholas Pleasants – Pleasants Law Firm, P.S.

It is undeniable that our society has dramatically changed this year. Amidst the various changes, however, our judiciary is working hard to keep cases moving as much as possible. This article will explore the ways that estate planning, probate, and trust dispute practice in Washington has changed this year and what we can do as attorneys to serve our clients better during this unprecedented time.

Estate Planning: Witness Requirements

The Basics

Not much has changed in 2020 for the basic process of preparing an estate plan. The requirements for executing a will under RCW 11.12.20 remain the same:

> Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, and shall be attested by two or more competent witnesses by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request.[1]

Although these core requirements for witnessing a will have not changed, the Washington Legislature recently made an update to provisions concerning witness affidavits under RCW 11.20.020(2).

The plain language of RCW 11.20.020(2) requires the witness attestation to be an affidavit under oath, meaning that it must be notarized. However, in 2006 the Washington Court of Appeals in *In re Estate of Starkel*[2] held that under that statute witness attestations to a will do not need to be notarized.[3] In so holding, the court in *Starkel* relied in part upon RCW 9A.72.085, a provision in the Washington Criminal Code that permits substituting a declaration under penalty of perjury for a sworn affidavit.[4] But in 2019, the Legislature repealed RCW 9A.72.085 (effective July 1, 2021), and Chapter 5.50 RCW will replace it.[5]

RCW 5.50.030(1) provides that unsworn declarations may be used in place of sworn (i.e., notarized) affidavits, but, until 2020, RCW 5.50.030(2)(e) specifically exempted witness affidavits under RCW 11.20.020(2) from the provisions of chapter 5.50 RCW.[6] Accordingly, when the Legislature replaced RCW 9A.72.085 with RCW 5.50.030, many practitioners were concerned that the holding in *Starkel* would no longer apply, meaning every will admitted to probate would require a notarized affidavit, something that had not been the law in Washington since at least 2006. This change might even have invalidated wills that were valid at the time of execution under existing law but lacked a notarized witness affidavit. Fortunately, the Legislature took up the issue in February of this year and enacted Substitute Senate Bill 6028. Section 23 of that bill amends RCW 5.50.030 to delete subsection (2)(e).[7] The effect is that, so long as the testator complies with the other formalities, an unsworn witness declaration should continue to create a "self-proving" will.

Execution of Estate Planning Documents at Home

Because the Legislature, in amending RCW 5.50.030 to delete subsection (2)(e), has made clear that a notary is not necessary for a valid witness affidavit, one less person is needed for a will signing. Generally speaking, that means that basic documents of an estate plan do not need to be executed in the lawyer's office, and clients can choose to execute their wills at home with two disinterested witnesses (e.g., friends or neighbors not inheriting under the will). Similarly, under RCW 11.125.050, clients can execute valid powers of attorney with two disinterested witnesses attesting.[8] And a health care directive can also be executed with two disinterested witnesses and remain in compliance with RCW 70.122.030.[9] However, practitioners will continue to need to take measures to ensure that documents are executed properly. Indeed, many practitioners may still prefer to be a witness to their prepared documents to ensure proper execution and that the firm retains a copy of the executed documents for future reference.

Other planning techniques present more of a challenge to execute. Some common documents are community property agreements, transfer on death deeds, and quit claim deeds, which all require notarization for recording purposes. And planning with a revocable living trust may

Continued from page 10…

Conducting Estate Planning and Probate and Handling Trust Disputes During COVID-19

be particularly difficult, as the trust agreement and all the ancillary documents are typically notarized. What is an estate planner to do with all these documents that need to be notarized?

Remote Online Notarization

A new option is to have documents executed and notarized over the Internet with a webcam through a process known as remote online notarization. This section will briefly describe the multi-step process whereby a Washington notary public may add the electronic notarization endorsement and then apply for remote notary authorization.

The electronic notarization endorsement allows notaries to create notarized documents that are electronic ab initio. The legislation authorizing this procedure was enacted in 2017,[10] but notaries did not widely adopt the process for two reasons. First, the person signing the document needed to be physically present with the notary, so it did not alleviate the burden of the in-person requirement. Second, an electronic records notary is required to use an approved software provider to create the electronically notarized document.[11] The requirement of using a software provider undoubtedly adds to the overhead costs of the notary and has limited advantages. In sum, the 2017 legislation permitted a notary with the electronic notary endorsement to create a "notarized" PDF, but the signer needed to be physically present with the notary even though their signature was captured electronically, with the result that few notaries chose to use the procedure.

Enter Senate Bill 5641 (SB 5641), passed in 2019, which allows electronic notarial acts for remotely located individuals, thereby authorizing remote online notarization service by Washington notaries.[12] Remote online notarization service permits notaries with remote notary authorization to notarize a document regardless of whether the person signing is in Washington state or even in the country. This directly overturns the age-old requirement that a notarial act take place before a notary with both the notary and signer physically present in Washington.

In Washington, a remote online notary (RON) is someone who is already a licensed notary public, has the electronic notary endorsement, and applies to the Department of Licensing to add remote online notarization authority. To allow remote online notarization, SB 5641 implements various safeguards, which are laid out in RCW 42.45.280 and are subject to rulemaking by the Department of Licensing. For example, RCW 42.45.280(3) requires the use of two different types of identity proofing if the signer is not personally known to the notary or verified by a credible witness known to the notary. Of the statutory requirements, an aspiring RON should be especially cognizant of the need to verify the signer's identity remotely, capture the whole process via audio-video software, and maintain the recording for at least 10 years after it is made.

SB 5641 was scheduled to take effect on Oct. 1, 2020. However, due to the outbreak of COVID-19, on March 24, 2020, Gov. Inslee issued Proclamation 20-27, which made SB 5641 effective immediately.[13] The proclamation has been renewed several times, and it is reasonable to expect it will continue to be renewed while the state of emergency resulting from COVID-19 remains in effect.[14]

Proclamation 20-27 sped up the timeline for instituting remote online notarization of documents by Washington notaries public. The Department of Licensing has not finalized rules for remote online notarizations, and an official list of approved technology vendors that assist RONs with the audio-visual capture and archive requirements is not available yet, but some common vendors are listed on the department's website.[15] Presumably, there will be an additional cost to perform each notarial act as a RON because the technology providers charge for assisting with each document and verification of the signer's identity.

In-Person Execution

Given the complexity and added cost of remote online notarization, as well as the uncertainty of clients trying to execute documents on their own, many practitioners likely will continue the traditional practice of having clients execute their estate planning documents in person. Practitioners can work within the framework of RCW 11.12.020 and 11.20.020 to execute valid wills even in these times.

The easiest approach would be to postpone signing documents until social distancing restrictions are lifted. But for clients who wish to or must sign while restrictions are in place, practitioners should follow social distancing guidelines and reduce in-person contact as much as possible. Some practical tips for safely accomplishing an in-person signing include using disposable pens or having clients bring their own, wearing gloves when handling papers, and meeting outside if possible. Even when meeting inside, it is possible to witness documents without being in the same room; for example, individuals may be separated by glass or a window. Indeed, the Court of Appeals in *In re Estate of Lindsay*,[16] held that a witness to a will does not need to actually see the testator sign as long as the witness is told by the testator that the document is his or her will and

Continued…

Continued from page 11…

Conducting Estate Planning and Probate and Handling Trust Disputes During COVID-19

the witnesses sign in the testator's presence.[17] The WSBA has prepared a helpful video CLE on this topic, entitled *Executing Estate Planning Documents During COVID 19: Best Practices*.[18]

Probate

Perhaps a bright spot in these times is the speed with which courts have adapted to allow probate, trust administration, and guardianship matters to be commenced and progressed. For example, the King County Superior Court e-filing and Ex Parte via the Clerk programs allow pleadings to be filed and orders to be presented remotely. Although the Ex Parte via the Clerk program did not have the warmest reception when it was implemented over a decade ago, the idea that practitioners can simply pay $30 to have their routine orders presented for approval by the court clerk is quite attractive during a pandemic.

Ex Parte via the Clerk

Starting a probate proceeding these days has never been easier. Using King County Superior Court as an example, a probate can be commenced in a matter of days, if not the same day. The King County Superior Court Clerk's Office suggests e-filing the petition and paying the $240 filing fee online so that a cause number is issued.[19] The will can then be submitted to the clerk under a cover sheet showing the cause number. Most practitioners will want to submit the will by mail or courier, but in-person drop-off is allowed. Once the will is filed, the petition can be submitted for presentation Ex Parte via the clerk. Include the proof of death or death certificate and the oath of personal representative with the petition to enable letters testamentary to be issued. And for $5, the clerk will provide a certified PDF copy of the letters testamentary via email.

Practitioners on the cutting edge will note that this process predates the pandemic. For routine probates, many counties in Washington have been able to process them entirely remotely for years. The difference during the pandemic is that this is the new normal method to commence a probate. Practitioners should note that the processing times for Ex Parte via the Clerk can vary widely from county to county and week to week, so one must plan accordingly to allow additional time for orders and letters to be issued. That said, except when time is absolutely critical, practitioners have little incentive to return to the days of commencing probates in person: the pandemic has pushed us to utilize technology in new ways to safely transact business, and this is one change that is sure to last beyond the pandemic.

Remote Court Hearings

Courts are also using existing teleconferencing capabilities and adding videoconferencing to allow hearings to take place remotely. Not every probate can be commenced Ex Parte via the Clerk, and most courts have adopted methods to allow contested probate hearings to take place. In many respects, these remote options have lowered the bar to participate in the court process, and thereby increased access to justice, because a participant can simply call in rather than having to drive or even fly to attend.[20]

Telephonic hearings offer a level playing field, with all litigants and the judicial officer out of view so that an in-person litigant does not have advantages such as making eye contact with the judicial officer while a remote litigant cannot. Hearings and trials conducted with video present more unique challenges, as parties' ability to use the technology will vary. Parties participating in a video hearing are also confronted with seeing opposing parties and witnesses face to face on the screen all at once, which can be upsetting during an intense legal dispute and could be more easily avoided in a courtroom.

Trust Disputes—Online Mediation

Another practice method that is seemingly easier during the pandemic is alternative dispute resolution. Online dispute resolution (ODR) existed before the pandemic, but it has become a mainstream method (if not the only method) of mediating disputes during the pandemic. Even as offices reopen, litigants may want to consider ditching the hassle of an in-person mediation and choose to mediate online.

The obvious advantage of ODR is convenience. Traditional mediation requires having a space that can accommodate all of the parties and needs—a conference room for each side of the case, an office for the mediator's use in between sessions, and access to a computer and printer to prepare the settlement agreement. ODR eliminates all of those requirements as parties join remotely, by phone or video, from their own homes or offices. ODR has a huge benefit of allowing practitioners to participate from their own office, with all of their files and notes at their fingertips. Gone are the days of lugging bankers boxes to a mediator's office.

> …the pandemic has pushed us to utilize technology in new ways to safely transact business…

Continued from page 12…

Conducting Estate Planning and Probate and Handling Trust Disputes During COVID-19

Also gone are the days of sending binders of mediation materials: a secure drop box or file upload access is all it takes to get your case documents to the mediator. Even during the mediation, the fact that all of the files are at one's fingertips makes it easy to share specific documents with the mediator or opposing counsel in real time.

With ODR, everything happens much faster. Instead of the mediator walking down the hall, physically shuttling back and forth, he or she can effortlessly (assuming the technology is working well) jump between video calls or breakout rooms to meet with the parties. Parties can message the mediator right away when they are ready to talk, rather than waiting or looking for the mediator down the hall. And when parties do have to wait for the other side to deliberate, they can relax in the comfort of their home instead of being cooped up in a conference room. Also, as with telephonic hearings, ODR lowers the bar to participate in mediation, increasing access to justice.

ODR is not without its disadvantages. The obvious one is the same as one of the advantages—convenience. In-person mediation forces the parties to take time out of their busy lives to go down to the mediator's office and sit there all day until the case settles. ODR lacks the immediacy of trying to resolve the case while everyone has made the trek to the mediator. Although parties sacrifice some time and money to schedule and participate in ODR, there is a certain psychological "pressure" element to sitting in the mediator's conference room that is lacking in a Zoom "room." The parties may feel too comfortable in their own living rooms and be unwilling to make the difficult sacrifices necessary to settle a dispute.

Conclusion

While our country wrestles with the challenges of the pandemic, and especially as many clients confront fears of disability or death due to COVID-19, it is reassuring that estate planning documents can continue to be executed safely either by clients at home, with remote online notarization when needed, or in person with social distancing. Moreover, ex parte departments have facilitated probate cases by implementing telephonic and video hearings and Ex Parte via the Clerk presentation of routine orders. And mediation has never been easier as ODR makes settling cases convenient and comfortable for everyone—even if a little bit too comfortable at times. This convenience and flexibility may be a silver lining that persists as we adapt to new "normal" procedures.

1 RCW 11.12.020(1).

2 134 Wn. App. 364, 134 P.3d 1197 (2006).

3 *Id.* at 373-74.

4 *Id.* at 372-73.

5 *See* SSB 5017, Laws of 2019, ch. 232, §6.

6 This exception appears in the Uniform Unsworn Declarations Acts at Section 4(e), which Washington initially enacted in 2011. *See* HB 1345, Laws of 2011, ch. 22.

7 *See* ESSB 6028, Laws of 2020, ch. 57, §23.

8 RCW 11.125.050(1) provides that the witnesses must be "neither home care providers for the principal nor care providers at an adult family home or long-term care facility in which the principal resides, and who are unrelated to the principal or agent by blood, marriage, or state registered domestic partnership." Using a notary creates a presumption that the principal's signature on the power of attorney is valid. RCW 11.125.050(3).

9 A witness to a health care directive must be someone who is "not related to the declarer by blood or marriage and who would not be entitled to any portion of the estate of the declarer upon declarer's decease under any will of the declarer or codicil thereto then existing or, at the time of the directive, by operation of law then existing. In addition, a witness to a directive shall not be the attending physician, an employee of the attending physician or a health facility in which the declarer is a patient, or any person who has a claim against any portion of the estate of the declarer upon declarer's decease at the time of the execution of the directive." RCW 70.122.030(1).

10 *See* SSB 5081, Laws of 2017, ch. 281, §21.

11 *See* RCW 42.45.190(2), .190(4); *see also* WAC 308-30-130.

12 *See* SB 5641, Laws of 2019, ch. 154. An update to the Revised Uniform Law on Notarial Acts (RULONA) promulgated by the Uniform Law Commission in 2018 laid the framework for RON service. *See* FINAL BILL REP, NO. SB 5641 (2019). On the website of the Uniform Law Commission, Washington is one of 10 states reported as enacting RULONA. *See* www.uniformlaws.org/committees/community-home?communitykey=8acec8a5-123b-4724-b131-e5ca8cc6323e.

13 *See* Proclamation No. 20-27 (Electronic Notary Effective Date), *available at* www.governor.wa.gov/office-governor/official-actions/proclamations (search "20-27"). This has been extended through Sept. 30, 2020, under Proclamation 20-27.7 (Electronic Notary).

14 The governor first proclaimed a state of emergency on Feb. 29, 2020, in Proclamation No. 20-25 (Stay Home – Stay Healthy), and as of the date of publication of this article, had most recently extended it in Proclamation No. 20-25.7 ("Stay Home – Stay Healthy" County-by-County Phased Reopening).

15 The Department of Licensing has a helpful guide to become a RON available at https://info.dol.wa.gov/remote-option-temporarily-available-for-notaries/.

16 91 Wn. App. 944, 957 P.2d 818 (1998).

17 *Id.* at 948-49 ("RCW 11.12.020 does not require that the testator sign the will in the presence of the witnesses, nor does it require that the witnesses sign in the presence of each other. The witnesses need only subscribe their names in the presence of the testator and at his direction or request." (citations omitted)).

18 The *Executing Estate Planning Documents During COVID 19: Best Practices* video is available in the CLE Store at https://www.mywsba.org/PersonifyEbusiness/CLEStore/Executing-Estate-Planning-Documents-During-COVID-19-Best-Practices/ProductDetail/17910850.

19 *See* King County Department of Judicial Administration, Modified Probate Case Filing Procedures, *available at* www.kingcounty.gov/~/media/courts/Clerk/forms/Original-Wills-and-New-Probate-Case-Filing-Procedures.ashx.

20 In theory, telephonic appearances were allowed before the pandemic, but they were somewhat rare in Superior Court and often involved paying a fee and/or jumping through other logistical hurdles.

Tortious Interference with an Expected Inheritance: Should Washington *Resort to the Tort?*

Alison J. Warden & Saul S. Tilden – Stokes Lawrence, P.S.

Washington courts have seen a flurry of recent cases involving the claim of tortious interference with an expected inheritance.

This tort is recognized in at least half of U.S. states (including our West Coast neighbors California[1] and Oregon[2]) and is deemed "widely recognized" by the U.S. Supreme Court.[3] Notwithstanding the tort's widespread acceptance, no Washington appellate court has definitively ruled that the cause of action will be recognized in this state.[4] While Washington courts may be hesitant to accept the tort, the door to its use remains open. This article provides an overview of how courts in Washington have thus far addressed the tort and considers the pros and cons of recognizing the tort as a theory of recovery in this state. Ultimately, the authors advocate for the recognition in Washington of a narrowly tailored claim for tortious interference with an expected inheritance.

Washington Case Law

In the last three decades, Washington courts have considered the claim for tortious interference with an expected inheritance a handful of times. Seven appellate cases (three published) have been decided to date, and in each case the court made its ruling without deciding whether to recognize or reject the tort. Below is a brief overview of these cases:

1991 Published Opinion: In *Hadley v. Cowan*,[5] a Washington appellate court addressed the viability of the tort for the first time. *Hadley* involved a will contest brought by children of the decedent against the decedent's mother, alleging the mother exerted undue influence over her daughter before the daughter's death.[6] After a global settlement of the will contest by the interested parties, the children filed an action alleging various tort claims, including a claim of tortious interference, which the superior court dismissed on summary judgment. On appeal, Division I of the Washington Court of Appeals ruled that the tortious interference claim was barred by the doctrine of res judicata, expressly rejecting the children's argument that "the probate court could not

Continued…

Continued from page 14…

Tortious Interference with an Expected Inheritance

have considered actions in tort, such as … the tort of interference with a parent's testamentary gifts."[7] The court concluded that, although the probate action was ostensibly in rem, it could have res judicata effect in a later in personam tort action, and that in the case at hand, res judicata applied to bar the appellants' claim.[8]

2006 Unpublished Opinion: In *In re Estate of Hendrix*, Division I of the Washington Court of Appeals again declined to recognize the tort where a will contest involving the same parties and allegations had been fully litigated.[9] The court extended the *Hadley* ruling to bar the tortious interference claim, holding that the *Hadley* reasoning "is not limited to a situation where a will contest is settled; the same reasoning should apply to a fully litigated will contest."[10] In so ruling, the *Hendrix* court echoed other jurisdictions' historical resistance to tortious interference claims where the same allegations were or could have been litigated by the plaintiff in a timely filed will contest.[11]

2013 Published Opinion: The next time a Washington appellate court considered a tortious interference with an expected inheritance claim, it did so in dicta. In *Grange Insurance Ass'n v. Roberts*, four sisters alleged that a fifth sister and her husband had induced their mother, by fraud and undue influence, to transfer real property to the fifth sister and husband, and that this act interfered with the four sisters' eventual inheritances.[12] The defendants sought defense from their insurance provider, which filed an action for declaratory relief seeking a determination of its duty to defend or indemnify its insureds.[13] On appeal by the insureds of the trial court's ruling on summary judgment that the insurer had no duty to defend the fifth sister, the Washington Court of Appeals, Division I, examined tortious interference claims in other jurisdictions to determine if the cause of action required a showing of intentional conduct (which would absolve the insurer of the duty to defend the fifth sister). The insureds argued that because the tort was not yet recognized in Washington, it was unknown whether the underlying claim would "require proof of intention to cause the consequential harm, or proof of the intention to undertake the harmful act, or simply proof of reckless disregard or even merely negligence."[14] In addressing this argument, the court began to shape the contours of how the tort may be applied in Washington and previewed one of the more difficult issues in any new tort: what level of intent will be required to constitute the tort? In considering this point, the court cited the definition in the *Restatement (Second) of Torts* of "Intentional Interference with an Inheritance or Gift":[15] "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."[16] The court further noted that in many jurisdictions the tort is treated as an extension of tortious interference with a business expectancy, which also requires an intentional act.[17] The court held that because the defendants' insurance policy excluded coverage for their intentional conduct, the insurance company had no duty to defend them against the tortious interference claim.[18]

2015 Published Opinion: In *In re Estate of Lowe*, the plaintiff claimed tortious interference with an expected inheritance against his brother based on the brother's possession of silver bars and coins that their mother received from their father's estate.[19] The brother initially had taken possession of the coins (presumably to store them) at the mother's instruction while serving as her agent under her power of attorney and then received the coins and bars as a gift from their mother at her death pursuant to a signed writing.[20] The trial court dismissed the action on summary judgment, concluding no tort was committed because the plaintiff could not show that his brother's actions constituted "independent tortious conduct" such as undue influence, fraud, or duress.[21] In the plaintiff's appeal to the Washington Court of Appeals, Division III, he argued that the trial court committed reversible error by requiring proof of independent tortious conduct rather than a mere "improper purpose."[22] The court concluded no reversible error had been committed because the term "independent tortious conduct" amounted to the same thing as "improper purpose," and that acting with improper purpose is a required element of the analogous tort, recognized in Washington, of tortious interference with a business or economic expectancy.[23] The *Lowe* court held that because the appellant could not prove his brother acted with improper purpose when he took possession of the silver bars and coins, the appellant could not meet his burden of proof on the issue of improper purpose, even if the tort were to be recognized.[24] Because the appellant could not prove improper purpose under any standard of proof, the court did not make a ruling on the applicable standard.[25] As the other courts before it, the *Lowe* court sidestepped the question of whether to recognize a claim for tortious interference with an expected inheritance.[26]

Recent Unpublished Opinions: Between 2014 and 2018, three

Continued…

Continued from page 15…

Tortious Interference with an Expected Inheritance

unpublished cases were decided in which a plaintiff asserted a theory of tortious interference with an expected inheritance. As in prior decisions, none of the plaintiffs prevailed on their tortious interference claims. In 2014, the Washington Court of Appeals, Division I, dismissed a tortious interference with an expected inheritance claim in *In re Estate of Perthou-Taylor* on the grounds that the petitioner did not carry her burden by showing an issue of material fact as to several elements of the claim.[27] In 2015, the Washington Court of Appeals, Division II, rejected a claim of tortious interference with an expected inheritance in *Samaan v. Armstrong* on the sole ground that the issue was raised for the first time on appeal.[28] Finally, in 2018, in *Allen v. Zonis*, the trial court refused to admit evidence referencing loss of inheritance. The case involved an affair between Courtney Allen and Todd Zonis.[29] When Allen told Zonis she wished to end the affair, Zonis began a campaign of harassment against Allen and her husband.[30] Allen's husband notified Zonis's parents of their son's behavior, which Zonis alleged led to his loss of inheritance and therefore served as evidence in support of his claim of outrage.[31] In upholding the trial court's ruling, the Washington Court of Appeals, Division I, held that the trial court did not err in refusing to admit the evidence at issue to prove the defendant's conduct was outrageous enough to constitute the tort of outrage.[32]

The takeaway from these cases is that while Washington courts have yet to recognize tortious interference with an expected inheritance as a viable tort, they also have not fully rejected it. The door remains open for its use, particularly for aggrieved Washington litigants whose claims could not have been resolved in a timely filed will contest.

Development of Tort Elements and Standard of Proof

The collection of Washington cases on tortious interference with an expected inheritance has begun to shape the contours of what the tort may look like, if and when it is deemed to be a viable cause of action in Washington. From the cases, we know Washington courts will likely prefer a narrow claim that does not supplant or disrupt established Washington law applicable to the contest of wills. With respect to the element of intent, the cases suggest that Washington would side with the majority of other states in requiring an intentional act.[33]

In states that recognize tortious interference with an expected inheritance, the claim is often viewed as an extension of the tort of tortious interference with a business expectancy.[34] Washington already recognizes tortious interference with a business expectancy, which consists of five elements: (1) existence of a valid contractual relationship or business expectancy, (2) defendant's knowledge of that relationship, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) defendant interfered for an improper purpose or used improper means, and (5) resultant damage.[35]

Upon close examination, these elements are nearly identical to the common elements of the "inheritance" form of the tort that we see in other states, which generally include (1) an expectation of receiving an inheritance; (2) intentional interference with that expectancy by a third party (intent to commit the act) where (3) the interference was independently wrongful or tortious (intent to cause harm) and (4) there was a reasonable certainty that, but for the interference, the plaintiff would have received the inheritance; and (5) damages.[36]

While Washington's requirement for "knowledge" of a business relationship is unique to the tort for interference with a business relationship and is not expressly stated in the typical elements of tortious interference with an expected inheritance, it is implicit in the latter tort's second prong, "intentional interference with that expectancy by a third party."[37] Similarly, in the fifth prong of Washington's interference with a business expectancy claim, "resultant damages" incorporates the causation element of the typical interference with an inheritance claim—the idea "there was a reasonable certainty that, but for the interference, the plaintiff would have received the inheritance."[38] Notably, the court in *Lowe* analyzed the plaintiff's inheritance interference claim under these generally accepted prongs, acknowledging that "independent tortious conduct" in a business expectancy claim is essentially the same as the "improper purpose" element of an inheritance claim, and suggesting that the phrases are interchangeable for the purposes of satisfying the third prong of the latter.[39]

We believe that if a Washington court were to deem the theory viable, it would do so using the guidance of *Grange*. As *Grange* states, "[m]ultiple jurisdictions have adopted tortious interference with an expected inheritance and have uniformly held that the tort is equivalent to tortious interference with an economic relationship."[40] In *Lowe,* the court discussed a recognition of the tort in terms of extending the doctrine of interference with a business expectancy.[41] And as discussed above, the elements of interference with a business expectancy in Washington are essentially identical to the elements of interference with an expected inheritance applied elsewhere.

Continued…

Continued from page 16…

Tortious Interference with an Expected Inheritance

While there is no reason to think that the tort of interference with an expected inheritance will vary in its core elements from the tort as commonly understood in other jurisdictions, any Washington court considering recognition of the tort will have to grapple with the question of standard of proof. So far, the only Washington opinion addressing the standard of proof is the 2006 unpublished *Hendrix* decision. In *Hendrix,* the plaintiff argued that the court should adopt the tort and apply a preponderance of the evidence standard, although the plaintiff had already litigated, and lost, a will contest involving the same nucleus of facts under a standard of clear, cogent, and convincing evidence—a higher standard of proof.[42] The court disagreed, concluding that "even if we were to adopt the tort, we are not persuaded that a lower burden would apply. Because this tort would have essentially the same effect as a will contest—overriding a will—the same elevated burden of proof should be applied in either cause of action."[43] While the decision is unpublished and the discussion comes in dicta, this is persuasive reasoning and a strong indicator of how a Washington court likely would approach the standard of proof with respect to this tort. To allow a lower standard than that applicable to will contests could jeopardize generations of jurisprudence carefully developed in this state to preserve the intent of the testator. Indeed, as the *Hendrix* court went on to note, while some jurisdictions recognizing the tort use a preponderance of the evidence standard and others use an elevated standard, the common, if not invariable, pattern is that each respective jurisdiction applies the same standard of proof for the tort as it does for the will contest.[44] Based on the *Hendrix* court's statements and the established pattern across other jurisdictions, it seems likely that any Washington court would follow suit and utilize a "clear, cogent, and convincing" standard of proof, to match the standard applicable to will contests in Washington, if and when tortious interference with an expected inheritance was recognized as a claim in Washington.

California's *Beckwith* Case

Because the handful of Washington cases cited above have dealt with tortious interference with an expected inheritance claims primarily by denying them on procedural grounds, the court decisions do not include a robust discussion or consideration of the merits of adopting the claim. It is safe to say that Washington courts' failure thus far to recognize the claim indicates hesitancy on their part to find the claim viable. Of course, the optimistic proponent of recognition might counter that the cases presented to the court until now had fatal flaws that kept the court from reaching the heart of the issue. Fortunately for Washington litigants who find themselves arguing that the court should recognize the tort, other jurisdictions have engaged in this analysis.

Perhaps the most thorough consideration of the merits of recognizing a tortious interference with an inheritance claim appears in *Beckwith v. Dahl*, a 2012 California appellate court decision that formally recognized the claim in California. The discussion is comprehensive enough that any estate litigator contemplating claiming tortious interference with an expected inheritance would be wise to review it to better frame an argument for recognition. Notably for purposes of Washington practitioners, only two years after the *Beckwith* holding, the Washington Court of Appeals considered the *Beckwith* discussion in its unpublished *Perthou-Taylor* decision. The *Perthou-Taylor* court pointed to the serious policy considerations raised in *Beckwith* (as well as *Hadley v. Cowan*) of maintaining the "integrity of the probate system" and "avoiding tort liability for inherently speculative claims."[45] But despite the *Beckwith* court's policy concerns, it determined that the policy considerations in favor of recognizing the tort outweighed, in certain circumstances, the considerations against recognition. It is the authors' opinion that it is important to review the *Beckwith* ruling not just because it is thorough, but also because the California appellate court got it right.

The *Beckwith* court began its analysis with a statement that "[t]he tort of IIEI[46] developed under the 'general principle of law that whenever the law prohibits an injury it will also afford a remedy.' … Similarly, it is a maxim of California jurisprudence that, '[f]or every wrong there is a remedy.'"[47] In addition, in California, "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights."[48] This was *Beckwith*'s guiding principle and it should be Washington's as well. Washington must seek to provide a remedy to those who have been harmed, where possible, and where the benefit of providing the remedy is greater than the harm done to any competing public policy interests.

The *Beckwith* court recognized that the push and pull is between the desire, on the one hand, to provide an adequate remedy to those who have been aggrieved, and, on the other hand, to avoid frustrating the probate code's desire for finality and preserving testamentary intent, as well as to avoid assessing damages in cases where they are too speculative. The *Beckwith* court viewed these competing considerations through

Continued…

Continued from page 17…

Tortious Interference with an Expected Inheritance

the lens of California law, but they are just as well established in Washington.

Like California, Washington applies strict requirements to will contests.[49] In doing so, Washington is able to achieve finality in probates and, hopefully, better effect the testator's intent. Both states share a policy concern that, by recognizing the tortious interference claim as a cause of action separate from a will contest, such finality would be frustrated or delayed. One California opinion that the *Beckwith* court discussed went so far as to say that "[i]f we were to permit, much less encourage, dual litigation tracks for disgruntled heirs, we would risk destabilizing the law of probate and creating uncertainty and inconsistency in its place. We would risk undermining the legislative intent inherent in creating the Probate Code as the preferable, if not exclusive, remedy for disputes over testamentary documents."[50]

Though perhaps a bit hyperbolic, these concerns are real. However, Washington has been operating under a statutory "dual track" trusts and estates litigation construct for more than 20 years pursuant to our state's Trust and Estate Dispute Resolution Act (TEDRA), so the courts in this state already have an established statutory mechanism to handle such matters.[51] Further, as discussed earlier, a majority of the states that have adopted the tort of interference with an inheritance have achieved finality in will contest and probate proceeds, while still recognizing the tort, "by prohibiting a tort action to be brought where the remedy of a will contest is available and would provide the injured party with adequate relief."[52] For example, *Beckwith* determined that "[b]y applying a similar last recourse requirement to the tort … the integrity of the probate system is protected because where a probate remedy is available, it must be pursued."[53] If Washington were to recognize the tort it could, should, and likely would do so with a similar caveat—that the tort is only available to those who cannot seek an adequate remedy pursuant to a timely filed will or trust contest.

In addition to concerns over violating the sanctity of the probate process, the *Beckwith* court acknowledged a Californian preference for utilizing non-tort remedies, but also acknowledged that the preference is addressed by limiting recognition of the tort to scenarios where the aggrieved party cannot seek an adequate remedy pursuant to a timely filed will or trust contest.[54] Although the *Beckwith* court resoundingly recognized the tort pursuant to a lengthy discussion and clearly concluded that certain aggrieved heirs deserved protection under the law, it did not discuss specific factual scenarios where the tort might apply. Ultimately, *Beckwith* ruled against the plaintiff on the grounds that the plaintiff alleged only that the defendant failed to follow through on a promise *by the defendant* to gift the plaintiff a share of the testator's estate—not that the defendant had interfered with any promise or intent *by the testator* to give the plaintiff a share.[55] Therefore, the court ruled that the plaintiff did not sufficiently allege the tort.[56]

The *Beckwith* court also voiced a handful of concerns that can be grouped together as stemming from the speculative nature of an inheritance. This is natural given the inherent difficulty in proving a benefit would have been received "but for" the alleged interference.[57] After all, a will is an ambulatory document. Tortious interference could prevent benefit accruing to an aggrieved party, at least in theory, but a later change to a will, which was not procured by any tortious conduct, could erase the prospect of that benefit altogether.

Despite these concerns, the *Beckwith* court decided that notwithstanding the speculative nature of any expectancy of a gift or inheritance, it would recognize tortious interference with an expected inheritance, but only where necessary to afford an injured plaintiff a remedy.[58] After acknowledging that maintaining the integrity of the probate system" and "avoiding tort liability for inherently speculative claims"[59] are very important considerations, it added "[h]owever, a court should not take the 'drastic consequence of an absolute rule which bars recovery in all … cases' when a new tort cause of action can be defined in such a way so as to minimize the costs and burdens associated with it."[60] That is the essence of it all: there are a handful of very real reasons to be wary of extending the tortious interference with a business expectancy to expected inheritances, but recognition of the claim for expected inheritances can provide a much-needed remedy in the right circumstance.

Should the Tort be Viable in Washington?

The *Beckwith* court's analysis is persuasive. By way of example, consider a situation where an employee-caregiver vehemently dislikes one of the testator's adult children. Out of spite and in retaliation for perceived snubs, the caregiver uses his position to influence an ill and weakened testator, by means of persuasion, procurement of documents, and possibly even fraud, to disinherit that child in favor of the testator's *other* adult children under the decedent's will, trust, and several non-probate designations. This is a scenario where the claim of tortious interference, to be brought directly against the caregiver, the caregiver's employer, or the caregiver's insurer, may be the most appropriate cause of action.

Continued…

Continued from page 18…

Tortious Interference with an Expected Inheritance

A will contest would be unlikely to provide an adequate remedy for the aggrieved child, in part because the caregiver does not personally benefit from the conduct and therefore, despite the caregiver's intentionally harmful conduct, a fraud, undue influence, or other claim brought in a will contest may not be viable.[61] Further, because a will contest is brought against the estate and not against the tortfeasor personally (or his insurer), a will contest, even if viable, may not provide the appropriate remedy. Moreover, some of a testator's assets may be non-probate assets and, by definition, require causes of action other than those available under the will contest statute.[62]

If a Washington court were to recognize the tort, but limit it to circumstances where a will contest provides no adequate remedy, Washington would avoid upsetting longstanding principles of probate finality and jurisprudence while offering an important avenue of relief to certain plaintiffs. As most estate litigators realize, there are many ways harm can be done to a beneficiary's inheritance that would not be remedied by a will contest, even if brought timely.

A legitimate concern is how the use of the tort may impact the finality of probate proceedings in Washington. Such finality is a lynchpin of our jurisprudence and deserves protection. In the case of will contests, the Washington Legislature has ensured finality by imposing a four-month statute of repose.[63] In the case of revocable trusts, the applicable statute imposes a two-year period during which contests can be brought, unless notice is given to the would-be contestant, in which case contests must be brought within four months after such notice.[64] In terms of tortious interference, there would be no statute of repose without legislative action, but there would be a viable cause of action against a tortfeasor personally, which might theoretically be brought without affecting the probate proceedings at all. While the substantive elements of the tort could be developed by the courts without legislative assistance, legislative involvement might be advantageous to set boundaries around the tort and ensure that the elements, and perhaps even the standard of proof, are narrowly constrained.

It is the authors' opinion that, while harm caused to an aggrieved beneficiary should have a remedy in the law, that remedy should not impact the finality of probate proceedings. While an analysis of notice and due process protections that would protect the finality of probate is beyond the scope of this article, these issues would benefit from further analysis if the tort is to be viable in Washington.

Conclusion

Washington's general hesitancy to deem tortious interference with an expected inheritance a viable tort foreshadows that, even if the tort is recognized in this state, the courts likely will do what they can to limit the tort's scope and applicability. We expect that Washington would align itself with the majority of jurisdictions in the country that have adopted the tort by limiting it to actions where a will contest or related remedy is not available. While interference with the finality of probate and providing redress for an inherently speculative claim are important concerns that weigh against recognition of the tort, the doctrine can be crafted to minimize these concerns. Washington can and should provide a remedy to those who have been aggrieved by tortious interference with an expected inheritance. In situations where a timely filed will contest cannot provide an adequate remedy for an intentional act that caused harm to an aggrieved heir, a creative estate litigator might consider "resorting to the tort."

1 *See* Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1056, 141 Cal. Rptr. 3d 142 (2012).

2 *See* Frakes v. Nay, 254 Or. App. 236, 295 P.3d 94, 114 (2012); Allen v. Hall, 328 Or. 276, 974 P.2d 199, 204 (1999).

3 Marshall v. Marshall, 547 U.S. 293, 312, 126 S. Ct. 1735, 164 L. Ed.2d 480 (2006).

4 *In re* Estate of Lowe, 191 Wn. App. 216, 236, 361 P.3d 789 (2015) (noting that no Washington court has adopted the tort of interference with an expected inheritance).

5 60 Wn. App. 433, 437, 804 P.2d 1271 (1991).

6 *Id.* at 437.

7 *Id.* at 440.

8 *Id.* at 440, 442-43.

9 *In re* Estate of Hendrix, 134 Wn. App. 1007 (2006) (unpublished opinion) (see Nos. 55711-4-I, 55782-3-I, 2006 Wash. App. LEXIS 1526 (Wash. Ct. App. July 24, 2006) for text of opinion).

10 *Id.* at *49.

11 *See, e.g.*, Jackson v. Kelly, 345 Ark. 151, 161, 44 S.W.3d 328, 334 (2001) (holding that probate offered adequate relief, but leaving open possibility that tort could be recognized where relief was not available); Minton v. Sackett, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996) (recognizing the tort but only if will contest inadequate); DeWitt v. Duce, 408 So.2d 216 (Fla. 1981) (tortious interference claim permitted only if will contest inadequate); In re Estate of Hoover, 160 Ill. App. 3d 964, 112 Ill. Dec. 382, 513 N.E.2d 991 (1987) (same); Garruto v. Cannici, 397 N.J. Super. 231, 936 A.2d 1015 (N.J. Super. Ct. App. Div. 2007) (barring brothers who failed to contest probate of will the ability to collaterally attack will in tort); Youngblut v. Youngblut, 945 N.W.2d 25 (Iowa 2020) (requiring tortious interference claim to be joined with a timely will contest).

12 Grange Ins. Ass'n v. Roberts, 179 Wn. App. 739, 744-45, 320 P.3d 77 (2013).

13 *Id.* at 747.

14 *Id.* at 759.

15 *Id.* at 761 (citing Restatement (Second) of Torts §774B (1979)).

16 Restatement (Second) of Torts §774B (1979).

17 *Id.*

Continued…

Continued from page 19…

Tortious Interference with an Expected Inheritance

18 *Id.* at 765.

19 *In re* Estate of Lowe, 191 Wn. App. 216, 221, 361 P.3d 789 (2015).

20 *Id.* at 223.

21 *Id.*

22 *Id.* at 237-38.

23 *Id.*

24 *Id.* at 238 (noting that the silver passed to the mother from the father's estate by the laws of intestacy, and was properly the mother's, and that the trial court had rejected the plaintiff's arguments as to undue influence and lack of testamentary capacity).

25 *Id.*

26 *Id.*

27 *In re* Estate of Perthou-Taylor, 183 Wn. App. 1015 (2014) (unpublished opinion) (see No. 70953-4-I, 2014 Wash. App. LEXIS 2178 (Wash. Ct. App. Sept. 2, 2014) for text of opinion).

28 Sammann v. Armstrong, 191 Wn. App. 1020 (2015) (unpublished opinion) (see Nos. 46628-7-II, 46635-0-II, 2015 Wash. App. LEXIS 2854 (Wash. Ct. App. Nov. 17, 2015) for text of opinion).

29 Allen v. Zonis, 6 Wn. App.2d 1045 (2018) (unpublished opinion) (see No. 76768-2-I, 2018 Wash. App. LEXIS 2895 (Wash. Ct. App. Dec. 24, 2018) for text of opinion).

30 *Id.* at *2-3.

31 *Id.* at *2, *36-37.

32 *Id.* at *37-38.

33 *See* Grange Ins. Ass'n v. Roberts, 179 Wn. App. 739, 760-65, 320 P.3d 77 (2013) (citing cases from other jurisdictions as persuasive authority for the standard of proof for the tort).

34 Multiple jurisdictions have adopted tortious interference with an expected inheritance and have uniformly held that the tort is equivalent to tortious interference with an economic relationship. As stated in *Grange*, "[t]he elements of the tort [of intentional interference with inheritance] are quite uniform across jurisdictions that have recognized it." *Id.* at 761 (quoting Lindberg v. U.S., 164 F.3d 1312, 1319 (10th Cir. 1999) (internal citations and quotation marks omitted)).

35 *Id.* at 760-61.

36 Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1050, 141 Cal. Rptr. 3d 142 (2012).

37 *In re* Estate of Perthou-Taylor, 183 Wn. App. 1015 (2014) (unpublished opinion) (see No. 70953-4-I, 2014 Wash. App. LEXIS 2178, at *9 (Wash. Ct. App. Sept. 2, 2014) for relevant text of opinion)..

38 *Id.*

39 *In re* Estate of Lowe, 191 Wn. App. 216, 237-38, 361 P.3d 789 (2015).

40 *Grange*, 179 Wn. App. at 761.

41 *Lowe*, 191 Wn. App. at 238.

42 *In re* Estate of Hendrix, 134 Wn. App. 1007 (2006) (unpublished opinion) (see Nos. 55711-4-I, 55782-3-I, 2006 Wash. App. LEXIS 1526, at *20-27 (Wash. Ct. App. July 24, 2006**)** for relevant text of opinion).

43 *Id.* at *49.

44 *Id.* at *49-50.

45 183 Wn. App. 1015 (2014) (unpublished opinion) (see No. 70953-4-I, 2014 Wash. App. LEXIS 2178, at *8 (Wash. Ct. App. Sept. 2, 2014) for relevant text of opinion, quoting *Beckwith*, 205 Cal. App. 4th at 1056).

46 California refers to the tort as intentional interference with an expected inheritance, or "IIEI."

47 *Beckwith*, 205 Cal. App. 4th 1039 at 1051 (quoting Allen v. Lovell's Ad'x, 303 Ky. 238, 197 S.W.2d 424, 426 (1946) and Cal. Civ. Code §3523)).

48 *Id.* (quoting Cal. Civ. Code §1708).

49 *See, e.g.*, RCW 11.24.010 *et seq.*

50 *Beckwith*, 205 Cal. App. 4th at 1052 (quoting Munn v. Briggs, 185 Cal. App. 4th 578, 590, 110 Cal. Rptr. 3d 783 (2010) (internal quotation marks omitted)).

51 RCW 11.96A.010 *et seq.*

52 Minton v. Sackett, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996).

53 *Beckwith*, 205 Cal. App. 4th at 1052.

54 *See id.* at 1053 ("Although there is a similar preference for bringing will contests in probate, there is an important difference between the non-tort remedies already available to address litigation misconduct and the non-tort remedies available through probate. In a trial setting, non-tort measures, such as sanctions, attorney discipline, and criminal penalties, are available to every litigant. In contrast, as discussed above, the tort of IIEI is only available when the aggrieved party has essentially been deprived of access to the probate system.").

55 *Id.* at 1059.

56 *Id.*

57 *Id.* at 1053-56.

58 *Id.* at 1056.

59 *Id.*

60 *Id.* (quoting J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60 (1979)).

61 *See e.g.*, *In re* Estate of Lint, 135 Wn. 2d 518, 533, 957 P.2d 755 (1998) (important factor in determining whether to set aside will for fraud is whether such will was induced by fraudulent representation of person benefitting from the will); see also Dean v. Jordan, 194 Wn. 661, 672, 79 P.2d 331 (1938) (beneficiary's unnaturally large gift under will is one of most important facts in determining whether such beneficiary exerted undue influence over testator).

62 As an example, Washington's TEDRA statute, chapter 11.96A RCW, provides an important mechanism for bringing trust- and estate-related claims, including disputes regarding non-probate assets. TEDRA provides for significant relief to aggrieved parties in estate disputes, but in the view of the authors cannot substitute for the clarity that would be brought by court or legislative recognition of a claim of tortious interference with an expected inheritance, clarification of its elements, and determination of its standard of proof.

63 *See* RCW 11.24.010.

64 RCW 11.103.050.

Practice Tip –
We May Have Less Time Than We Thought: Utilizing the Federal Estate, Gift, and GSTT Exclusions

Lauren M. Visoria – Lane Powell PC

If you search the internet for the latest fashion trend in estate planning right now, you'll find that people are buzzing about estate planning strategies and techniques to ensure full utilization of the current $11.58 million federal gift/estate tax and generation-skipping transfer tax (GSTT) exclusions.

The Tax Cuts and Jobs Act of 2017 brought with it the highest ever federal exclusion amounts, increasing both the estate and gift tax and the GSTT exclusions to $11.18 million per person (indexed for inflation). This exclusion is set to sunset at the close of 2025 and revert back to its former $5 million amount. However, the global pandemic and the upcoming November 2020 election have many professionals in our field predicting that the exclusion amount may see some significant changes prior to 2025.

What does this mean for estate planners and their clients? As planners, we may have less time than we think to help our clients take advantage of significant transfer tax savings. If clients want to ensure they get full utilization of the $11.58 million exclusion amounts, then they need to *use* their exclusion amounts. Under current law, if the exemption amount is reduced by Congress, any unused exemption amounts will be lost.

What are some ways clients can use their exclusion amount? One of the easiest is by gifting. This can be accomplished by making direct gifts to others or by making gifts to various types of trusts. Gifting can be advantageous for assets that may currently be at a lower value due to pandemic disruption, but that are expected to bounce back after the pandemic. Given that Washington has no gift tax, gifting to use the federal exclusion provides an additional planning opportunity for Washington residents who transfer assets during their lifetimes.

For clients who would like to use their exclusion amount, but fear losing all benefit from their assets, a spousal lifetime access trust (SLAT) may be a tool that would fit their needs. A SLAT is an irrevocable trust formed by one spouse for the benefit of the other. The donor spouse relinquishes control of the assets gifted to the trust, thereby using their exclusion amount and removing those assets from their estate. The other spouse then has access to the trust assets as a beneficiary of the SLAT. Because of the irrevocable nature of SLATs and the inability of even the wisest of us to predict or guarantee the future, they require careful analysis of client suitability and cautious drafting, as there are many nuances and traps for the unwary.

Another approach is to examine existing trusts to determine whether distributions to a beneficiary from trust assets that would be included in that beneficiary's estate will allow the beneficiary to take advantage of an exclusion amount that they may never see again in their lifetime. Of course, there are risks associated with this type of distribution as well. For example, the beneficiary would not be obligated to gift the assets consistently with the intent of the original settlor of the trust. Also, after the assets leave the protection of the trust they are exposed to the beneficiary's creditors, potentially including a spouse in the case of divorce.

While this is just a brief overview of possible ways to utilize the federal exclusion amount, it is important to start having conversations with clients *now* to figure out what strategy might work best for them. Clients may have less time to use their exclusions than they thought.

Recent Developments – Probate and Trust

By Maddie Davis – Ryan, Swanson & Cleveland, PLLC

Statute of Limitations for Constructive Trusts: *In re Miller Testamentary Credit Shelter Trust*, 13 Wn. App. 2d 99, 462 P.3d 878 (2020)

In *In re Miller Testamentary Credit Shelter Trust*, the heirs of a testamentary trust sought a declaration of their rights over a disputed one-half community interest in commercial property via a petition under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. The heirs asserted that the testator intended the entire commercial property to be included in the trust. The estate argued that the testator's intent to exclude her one-half interest from the testamentary trust was clear, but in any event the heirs' petition was time-barred under the TEDRA statute of limitations. On appeal of a summary judgment order in favor of the heirs that imposed a constructive trust over the disputed one-half interest, the Court of Appeals, Division I, held that the TEDRA statute of limitations was inapplicable to the case and that issues of fact precluded summary judgment.

Gilbert and Evelyn Miller, husband and wife, purchased commercial real property in Lewis County, Washington in 1953. Gilbert's will created a "Credit Shelter Trust" intended to hold for the benefit of his wife and descendants the maximum amount that could pass free of federal estate tax. Gilbert's will also gave his executor "sole discretion" to decide "which assets shall be transferred" into the Credit Shelter Trust.

Upon Gilbert's death in 1998, Evelyn was appointed personal representative of her husband's estate and transferred Gilbert's one-half community interest in the Lewis County property into the Credit Shelter Trust. In 1999, Evelyn designated herself and the couple's daughter as co-trustees of the Credit Shelter Trust. Gilbert's estate closed in 2000. The Millers' daughter passed away in 2011.

Following the death of her daughter, Evelyn revised her own will. Her revised will made specific bequests and provided that the residue of her estate, which included her one-half interest in the Lewis County property, should be placed in trust for the benefit of the city of Winlock. Evelyn passed away in 2012.

The successor trustee of the Credit Shelter Trust filed a TEDRA petition in 2014 to determine the trust's statutory intestate beneficiaries. In December 2015, the superior court established the identity of the heirs and authorized distribution of trust assets. The heirs learned that Evelyn's community interest in the Lewis County property was not included in the Credit Shelter Trust just before the confirmation hearing. However, they waited until June 2017 to file a TEDRA petition for a declaration of their rights over Evelyn's interest in the property.

In the petition, the heirs alleged that Evelyn had actually intended to place her interest in the property into the Credit Shelter Trust along with her husband's. Evelyn's estate filed a motion to dismiss the TEDRA petition, claiming that it was barred by TEDRA's three-year statute of limitations. The heirs opposed the motion, arguing that because they were seeking a constructive trust over the property, the fraud statute of limitations applied instead. If the fraud statute of limitations applied, the heirs' petition was timely. The superior court agreed with the heirs, denied the estate's motion to dismiss, and set the case for trial.

The estate then filed a motion for summary judgment seeking dismissal of the heirs' TEDRA petition. In its motion, the estate made the same arguments regarding the statute of limitations, and also argued that the undisputed evidence showed Evelyn did not intend to transfer her interest in the property into the Credit Shelter Trust. The trial court denied the motion for summary judgment, and instead ordered summary judgment in favor of the heirs. The court imposed a constructive trust over Evelyn's interest in the property for the benefit of the heirs. Evelyn's estate moved for reconsideration, which was denied, and the estate subsequently appealed. In reversing and remanding to the trial court, the Court of Appeals ruled on three major issues.

First, the court held that the statute of limitations applicable to unjust enrichment, rather than TEDRA or fraud, applied to the constructive trust. Under TEDRA, at RCW 11.96A.070, a beneficiary of an express trust has three years to file a breach of trust claim against a deceased trustee. However, as the court pointed out, the statute specifically excludes constructive trusts from the definition of an "express trust," and accordingly the court held that the TEDRA statute of limitations was inapplicable.

The court then turned to the heirs' argument that the three-year fraud statute of limitations, which may not be "deemed to accrue until the discovery by the aggrieved party of the facts constituting the fraud,"[1] applied. The heirs relied on the Washington Supreme Court's statement in *Goodman v. Goodman* that "[a]n action based on an express

Continued from page 22…

Recent Developments

(or constructive trust) is subject to the three-year statute of limitations contained in RCW 4.16.080."[2]

The Court of Appeals decided that *Goodman* did not apply for three reasons. To start, *Goodman* involved an express trust, and the court concluded the holding on constructive trusts was "mere dicta" because the *Goodman* court had not addressed the legal theory of constructive trusts. Next, *Goodman* was decided prior to the enactment of TEDRA, which explicitly distinguishes between express and constructive trusts, and therefore supersedes prior common law on the issue. Finally, the cases supporting the *Goodman* holding all involved allegations of fraud, but fraud was not alleged in the case at hand.

After rejecting both parties' arguments on the applicable statute of limitations, the Court of Appeals noted that the Washington Legislature had not adopted a specific statute of limitations for constructive trusts. The court determined that, in keeping with the practice of courts in other states and the reasoning of the Washington Supreme Court in *Viewcrest Cooperative Ass'n v. Deer*,[3] it would look to the underlying substantive claim to ascertain the appropriate statute of limitations.

After examining the record below, the Court of Appeals found that the underlying claim in the case was unjust enrichment, because the heirs argued that Evelyn mistakenly failed to fund the Credit Shelter Trust with the whole Lewis County property, which unjustly enriched the city of Winlock. The statute of limitations for unjust enrichment is three years under RCW 4.16.080(3), and the cause of action begins to accrue when the party has a right to apply to a court for relief. Because the heirs did not have standing to file their TEDRA petition on this issue until the court designated them as statutory heirs in December 2015, the court held that their June 2017 petition was timely.

Second, the Court of Appeals held that the trial court did not unlawfully intervene in Gilbert's nonintervention estate by imposing a constructive trust. Evelyn's estate cited *In re Estate of Rathbone*[4] in arguing that the trial court's ruling was an unlawful intervention into the management of Gilbert's estate. In the *Rathbone* case, the Washington Supreme Court held that, once a court declares a nonintervention estate to be solvent, the court has no role in administering the estate except when a statute provides otherwise. Because Evelyn had nonintervention powers to administer her husband's estate, she also had full authority to construe his will. However, the issue before the trial court was whether Evelyn intended to place her share of the Lewis County property into the Credit Shelter Trust, not whether Evelyn had authority to administer her husband's estate without court intervention. Therefore, *Rathbone* did not prevent the trial court from determining Evelyn's intent with respect to the disposition of her own property.

Third, the Court of Appeals decided that material issues of fact precluded the trial court from imposing a constructive trust by summary judgment ruling. Evelyn's estate argued that Evelyn's intent with respect to her one-half interest in the Lewis County property was a disputed issue of fact. The heirs disagreed, arguing that tax records and property management documents, which treated the Lewis County property as fully deeded to the Credit Shelter Trust, showed her clear intent. But the court concluded that these documents showed only that Evelyn's legal and financial advisers were mistaken about their belief that Evelyn had transferred the entire property to the Credit Shelter Trust, noting that those advisers had not testified that Evelyn in fact gave them that information. Further, the record showed that if Evelyn had transferred her community interest into the Credit Shelter Trust along with her husband's, the Credit Shelter Trust would have been overfunded. Because of these material issues of fact, the court held that the trial court erred by imposing a constructive trust on summary judgment, and remanded the case for further proceedings.

---

1 RCW 4.16.080(4).

2 128 Wn.2d 366, 373, 907 P.2d 290 (1995).

3 70 Wn.2d 290, 294-95, 422 P.2d 832 (1967) (concluding fraud statute of limitations governed a constructive trust claim because underlying substantive claim was fraud).

4 190 Wn.2d 332, 412 P.3d 1283 (2018).

Probate and Trust Legislative Update

Tiffany R. Gorton – KHBB Law PLLC

A very special thanks to our Section members who are serving on various legislative subcommittees of the RPPT Section of the WSBA.

The last several months have been very busy with changes in legislation. Here is a summary of several important developments, with links provided for more information:

- **Senate Bill 5641** deals with electronic remote notarization of certain documents.[1] The bill was passed and scheduled to go into effect in October 2020. The effective date was moved up to March 2020 by Gov. Inslee's Proclamation 20-27.[2] The proclamation has been renewed several times, and it is reasonable to expect it will continue to be renewed while the state of emergency resulting from COVID-19 remains in effect. The article in this edition of the *RPPT Newsletter* by Nicholas Pleasants contains more information about legislation concerning electronic remote notarization.

- The new **Uniform Directed Trust Act** was passed and will take effect January 2021.[3]

- A bill regarding significant changes to guardianships and conservatorships was passed.[4] Certain sections of the new **Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act**, RCW Ch. 11.130, will take effect on Jan. 1, 2021, and others on Jan. 1, 2022. A special thanks to the hard work of the folks in the WSBA Elder Law Section on this legislation.

- Following the Washington Supreme Court decision on the scope of a personal representative's authority in ***In re Estate of Rathbone***,[5] two subcommittees have reviewed and vetted certain revisions to sections of RCW 11.68 and RCW 11.96A. The revisions will be submitted in the upcoming legislative session.

- Washington is currently reviewing the **Uniform Fiduciary Income and Principal Act** and the **Uniform Electronic Wills Act** for potential adoption, which will likely occur in the upcoming legislative session.[6]

- A small subcommittee of the RPPT Section legislative committee is currently reviewing a bill concerning the **Uniform Fiduciary Income and Principal Act** for potential adoption, which will likely occur in the upcoming legislative session.[7]

- Most recently, the legislative committee of the RPPT Section was asked to review for comment and potential adoption the **Uniform Power of Appointment Act**. We are currently looking for volunteers to serve on subcommittees.

If you are interested in helping on an RPPT Section legislative committee, please contact Tiffany R. Gorton at *tgorton@khbblaw.com*

1 S.B. 5641, http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/5641.PL.pdf?q=20200804100459.

2 Proclamation by the governor (Mar. 24, 2020), https://www.governor.wa.gov/sites/default/files/proclamations/20-27%20-%20COVID-19%20Notary%20%28tmp%29.pdf.

3 S.B. 6029, http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/6029-S.PL.pdf?q=20200804101141.

4 S.B. 6287, http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/6287-S.PL.pdf?q=20200804101010.

5 190 Wn.2d 332, 412 P.3d 1283 (2018).

6 Bill Revision Request, Electronic Wills Act, http://ulc.wa.gov/Z-0895.2.pdf.

7 Bill Request, UFIPA, http://ulc.wa.gov/Z-0159.1.pdf.

CONTACT US

Section Officers 2019-2020

Stephanie Taylor
Chair
Randall Danskin, P.S.
601 West Riverside Avenue
Spokane, WA 99201-0626
(509) 747-2052
srt@randalldanskin.com

Brian Lewis
Chair-Elect &
Secretary/Treasurer
Ryan, Swanson & Cleveland PLLC
1201 3rd Avenue, Suite 3400
Seattle, WA 98101
(206) 654-2206
lewis@ryanlaw.com

Annette Fitzsimmons
Past Chair
Annette T. Fitzsimmons P.S.
PO Box 65578
University Place, WA 98464-1578
(253) 651-0552
atfitz@comcast.net

Tiffany Gorton
Probate & Trust Council Director
KHBB Law PLLC
705 2nd Ave., Suite 800
Seattle, WA 98101
(206) 382-4414
tgorton@khbblaw.com

Devin McComb
Real Property Council Director
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-3260
dmccomb@perkinscoie.com

EX OFFICIO OFFICERS

Sharon C. Rutberg
Newsletter Editor
Salmon Bay Law Group, PLLC
1734 NW Market St.
Seattle, WA 98107
(206) 735-3177
sharon@salmonbaylaw.com

Alysha A. Yagoda
Assistant Newsletter Editor
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
(206) 224-8005
ayagoda@karrtuttle.com

Michael Safren
Webpage Editor
Barokas, Martin, & Tomlinson
1000 Second Ave, Suite 3660
Seattle, WA 98104
(206) 621-1871
mss@bmatlaw.com

Stephen King
Assistant Webpage Editor
Talis Law PLLC
915 118th Avenue SE, Ste. 360
Bellevue, WA 98005
(425) 943-9968
steve@talislawfirm.com

Michael Barrett
Emeritus
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8615
mbarrett@perkinscoie.com

www.wsbarppt.com