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Supreme Court Requires Counties to Protect Instream Flows from Exempt Wells

A Review of the Hirst *Decision*

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On October 6, 2016, the Washington Supreme Court ruled in *Whatcom County v. Hirst* that individual counties in Washington state, rather than the Department of Ecology ("Ecology"), bear the responsibility of ensuring that water is legally and actually available before permitting development.[1] The decision requires counties to go beyond the minimum flow rules adopted by Ecology and conduct their own analysis as to the legal availability of water for rural development, including developments that intend to rely on permit-exempt wells. The *Hirst* decision squarely precludes the unchecked growth of single-family residences relying on permit-exempt wells in rural areas. The decision will have significant and lasting impacts on Washington water and land use law, as well as on future development within Washington state.

The Prior Appropriation Doctrine and Minimum Flow Rules

A review of Washington state water law and the Growth Management Act[2] ("GMA") is helpful to understand the impacts of the *Hirst* decision. Washington state is a prior appropriations state, meaning that water rights are determined by the rule "first in time, first in right."[3] This long-established approach to water law means that an impairment of a senior water right, even a de minimis impairment, is not allowed.[4] In order to properly grant an application for a new water permit, Ecology must be satisfied that the permit meets the following four criteria: (1) water is available for appropriation; (2) water will be put to a beneficial use; (3) an appropriation will not impair existing rights; and (4) an appropriation will not be detrimental to the public welfare.[5]

In 1971 the establishment of base (or minimum) flows in rivers and streams was mandated by the Water Resources Act, which provides in part:

> The quality of the natural environment shall be protected and, where possible, enhanced as follows: … Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.[6]

Pursuant to this legislative direction, Ecology adopted rules establishing minimum flows, enacted for the purpose of preserving instream flows in various watersheds throughout the state at specified levels.[7] Minimum flow rules are established by administrative rule, and each such rule is itself a water right having a priority and effectiveness as of the date such rule is adopted.[8] These minimum flows established by rule are, in most respects, like any other water appropriation and are generally subject to the prior appropriation doctrine.[9] Most existing land uses within the state rely upon water rights that predate minimum flow rules, and are therefore senior to the minimum flows.

"[M]inimum flows are exactly that: flows or levels 'to protect instream flows necessary for fish and other wildlife, recreation and aesthetic purposes, and water quality.'"[10] While there is a statutory exception to these minimum flows, the Washington Supreme Court has been, by its own

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characterization, "extremely protective" of withdrawals pursuant to that statute.[11] Many minimum flow rules were set at levels expected to be met 90 percent of the time. This means that all subsequent water rights would likely be interrupted 10 percent of the time, which renders such rights unusable for potable purposes according to the Washington State Department of Health guidelines. Similarly, subsequent rights will be very difficult to use for virtually any out-of-stream use, as unpredictable interruptions create losses to crops or any other economic activity that might be related to the water use.

Permit Exempt Wells

Washington's Groundwater Code provides a limited exemption from the ordinary permit application process required by Ecology for domestic and industrial uses involving groundwater withdrawals when such withdrawals will be less than 5,000 gallons per day (a "permit-exempt well").[12] Notably, the Washington Supreme Court has previously ruled that such permit-exempt wells are exempt from the permitting process only, and still subject to the prior appropriation doctrine and, therefore, the minimum flow rules outlined above. As stated in the *Hirst* decision:

> There is no question that a permit-exempt well may not infringe on an earlier-established right to water under the doctrine of prior appropriation. We reiterated this point in *Swinomish Indian Tribal Community*, recognizing that an appropriator's right to use water from a permit-exempt well is subject to rights with priority in time, including minimum flows.[13]

Growth Management Act

The GMA requires counties to ensure an adequate water supply exists before granting a building permit or subdivision application, and "requires counties to consider and address water resource issues in land use planning."[14]

The Washington Supreme Court has held that local governments must regulate development to some extent to assure that land use is not inconsistent with available water resources, thereby protecting water resources in their land use planning.[15] The GMA provides that the rural and land use elements of a local government's plan must include measures that protect groundwater resources.[16] Additionally, the GMA requires that local governments assure potable water is available when issuing building permits and approving subdivision applications.[17] Specifically:

> A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for . . . potable water supplies . . . .[18]

In addition to the requirements for platting, subdividing and dedicating land set forth under RCW Ch. 58.17, RCW 19.27.097 requires that applicants for building permits for buildings that need potable water provide evidence of an adequate water supply for the intended use of the building.

A series of cases, including the recent *Hirst* decision, have found an increasing obligation on the part of local governments and land use permitting agencies to confirm how the land use proposed in an application will be reliably supplied with potable water. Meanwhile, because the minimum flow rules were created while considering all flows and water sources that are typically available in years of average rainfall, such rules are invariably not satisfied at least periodically throughout times of drought. This means that during times of drought, any water right obtained with a priority date after the date of the minimum flow rule is subject to curtailment or interruption in order to satisfy the minimum flow rule, unless special permission is granted that allows an exception from such curtailment.

While the GMA requires local governments to ensure reliable water resources exist, the GMA also mandates that local governments accommodate growth. One of the specific planning goals under the GMA is to "[e]ncourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner."[19] Many local governments with fully appropriated watersheds in their jurisdiction thus find themselves in a difficult dilemma of weighing those competing obligations, made more complicated by the recent holding of *Hirst*.

Hirst Case Background

The *Hirst* decision arose from a lawsuit filed by a group of environmentalists against Whatcom County, alleging that the county was not satisfying its obligations to ensure an adequate water supply exists before granting a building permit or subdivision application under the GMA.

Whatcom County's comprehensive plan essentially adopted Ecology's rules and assumed that there was an adequate supply to provide water for a permit-exempt well unless Ecology has expressly closed the subject area to permit-exempt appropriations.[20] The development regulations allowed a subdivision or building permit applicant to rely on a private well only when the well site "proposed by the applicant does not fall within the boundaries of an area where [Ecology] has determined by rule that water for development does not exist."[21]

The specific minimum flow rule at issue in *Hirst* is known as the Nooksack Rule, adopted by Ecology in 1985.[22] The Nooksack Rule closed most streams in the subject watershed to new, permitted water uses in order to protect stream flows needed for fish.[23] Ecology interprets the Nooksack Rule to allow for permit-exempt wells in most

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of the watershed.[24] Ecology filed an amicus brief with the Washington Supreme Court, urging the court to rule in favor of Whatcom County, and affirm Ecology's interpretation and implementation of its own rule. Ecology stated in its amicus brief that the intention of the Nooksack Rule was not to regulate permit-exempt wells and that Whatcom County should be able to rely on the Nooksack Rule and Ecology's interpretation of that rule in its development permitting process.[25]

The plaintiffs challenged Whatcom County's efforts to protect water resources, alleging that such measures failed to protect water resources and did not take into account the impacts of permit-exempt wells in making a determination of water availability in connection with development permit applications.[26] The plaintiffs argued "that [Whatcom] County's [comprehensive] plan does not require the County to obtain evidence that water is legally available before issuing building permits or approving subdivisions that rely on permit-exempt appropriations. Thus, the plaintiffs asserted that the comprehensive plan results in water withdrawals that impact minimum instream flows."[27]

Decision

The Washington Supreme Court held in *Hirst* that Whatcom County's local regulations result "in the County's granting building permits for houses and subdivisions to be supplied by a permit-exempt well even if the cumulative effect of exempt wells in a watershed reduces the flow in a water course below the minimum instream flow" and therefore, "the County's comprehensive plan does not satisfy the GMA requirement to protect water availability."[28] "By deferring to Ecology's Nooksack Rule, the County authorizes building permits on a presumption of water availability in lieu of the GMA's requirement of 'evidence of adequate water supply.'"[29] "[E]ach water use appropriation requires a fact-specific determination."[30] "The GMA places an independent responsibility to ensure water availability on counties, not on Ecology."[31]

In support of its decision, the court noted changes in understanding of hydraulic continuity since the time minimum flow rules like the Nooksack Rule were adopted by Ecology, stating:

> Ecology adopted the Nooksack Rule in 1985, and the rule has not been amended. We have since recognized that Ecology's understanding of hydraulic continuity has altered over time, as has its use of methods to determine hydraulic continuity and the effect of groundwater withdrawals on surface waters. When Ecology adopted the minimum instream flow rules, such as those contained within the Nooksack Rule, it did not believe that withdrawals from deep confined aquifers would have any impact on stream flows. However, we now recognize that groundwater withdrawals can have significant impacts on surface water flows, and Ecology must consider this effect when issuing permits for groundwater appropriation.[32]

The court thus held that "the same standard applies to counties when issuing building permits and subdivision approvals."[33] "The GMA requires that an applicant for a building permit for a single family residence or a development must produce proof that water is both legally available and actually available."[34] "Were we to read the GMA to require counties to assure merely that water is physically underground, it would allow the county to condone the evasion of existing water rights, contrary to law."[35] Moreover, the court found that Whatcom County's deference to the Nooksack Rule as a substitute for its own individual determina-

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tions with each permit application allows permit-exempt appropriations to interfere with established minimum flows, resulting in "an unchecked reduction of minimum flows unless and until Ecology closes a basin to all future appropriations."[36] The court further stated:

> The County's comprehensive plan allows the unchecked growth of single domestic dwellings relying on permit-exempt wells in rural areas; this is precisely the 'uncoordinated and unplanned growth' that the legislature found to 'pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.'[37]

After the *Hirst* decision was issued, Ecology's website initially stated: "While we're not a party to this case, we have a strong interest. We are disappointed the Supreme Court did not defer to our interpretation of the water management (Nooksack) rule. We're committed to working closely with county leaders and stakeholder groups to best manage water."[38] Ecology's website has since been updated, and states, among other background information and case analysis:

> The [Nooksack] rule allows landowners to use permit-exempt wells in most of the watershed. Whatcom County's development regulations followed our instream flow rule. During the court challenge, we contended that the county's land-use plan, which allows domestic use under the permit exemption, is consistent with Washington water laws because it aligned with the basin's instream flow rule.[39]

Three justices signed a dissenting opinion stating that the majority incorrectly interpreted RCW 19.27.097, which the justices argued should be interpreted to allow counties to integrate Ecology's water determinations into their comprehensive plans and rely on them when reviewing building permit applications.[40] Such an interpretation, the dissenting justices argued, would promote "consistent water management throughout a basin, recognizing that basins cross county lines."[41] "The majority's holding will lead to county-by-county decisions on water use that directly undermine [the Water Resource Act's] mandate for a comprehensive water management plan."[42]

Looking Ahead

The *Hirst* case primarily speaks to the permitting and land use authority of Washington counties. When it comes to a county's responsibility to assure water availability in connection with permitting development, the county cannot rely solely on the minimum flow rules adopted by Ecology and must engage in its own analysis. The county must affirmatively find that water is both legally and actually available in order to properly grant a building permit or subdivision application, and it cannot simply assume, without specific evidence, that water is available for a permit-exempt well.

Many experts (as well as the dissenting Supreme Court justices) say that the practical result of the *Hirst* decision will be to stop some counties from granting building permits that rely on permit-exempt wells, halting further rural growth.[43] The decision also has the potential to place individual counties at odds with Ecology with respect to water availability findings, and could result in impossible burdens on landowners, including the requirement that such landowners produce expensive hydrogeology reports in order to obtain a basic residential building permit.[44]

Many counties have adopted emergency development moratoria to suspend development using permit-exempt wells in the wake of the *Hirst* case. Whatcom County initially adopted an emergency moratorium for new project applications that rely on permit-exempt wells for water supply throughout most of the Nooksack River basin.[45] On December 6, 2016, the Whatcom County Council adopted an interim ordinance to end the moratorium and enact code to implement the requirements of the *Hirst* decision.[46] Spokane County passed an interim ordinance on November 1, 2016 that restricts all new development in the Little Spokane River watershed and requires applicants to demonstrate they would not impair existing water users in the rest of the county.[47]

Other counties have adopted emergency procedures to require independent findings of water availability in connection with development permit review, which on their face appear to be consistent with *Hirst*'s requirements. Okanogan County adopted an emergency ordinance on November 8, 2016 that requires a public hearing by the county's hearing examiner for all land-use decisions requiring a water source, including building permits.[48] The ordinance provides that applicants are required to show legal and physical availability of water in order to obtain a permit. As cautioned by the dissent in *Hirst*, ordinances of this nature appear to have the potential of placing individual counties at odds with Ecology with respect to water availability findings, because an independent finding by the county does not appear to be constrained by prior Ecology rules and findings. Some argue that this is correct and consistent with *Hirst*, by rightfully placing the responsibility and discretion with the individual counties (e.g., potentially allowing counties to take into account all hydrologic elements that change as a result of the permit issuance, such as recharged groundwater resulting from

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trees removed in the building footprint no longer consuming groundwater).[49]

Other counties have watershed plans for certain watersheds within their boundaries, such as Chelan County and Clallam County, which include legislatively-approved reserve water for future growth.[50] As a result of the legislative declarations in SB 6513, which provides that these reservations of water are "consistent with legislative intent and are authorized to be maintained and implemented by [Ecology]," SB 6513 provides authority to Ecology to process applications allocating the Wenatchee and Dungeness reservations, and also likely provides some legal cover to those counties to process development applications utilizing portions of those water reserves.[51]

And still other counties have implemented their own water banking system. For example, in Kittitas County there are some areas within the county where water is banked and available for purchase by landowners and developers in connection with their projects.

One expected development is a closer scrutiny of the exact net impacts of proposed projects, which has been absent from previous evaluations. Specifically, many anticipate that the independent evaluations by the counties will include calculation of the contributions such projects might make to water availability by substituting existing flora that consumes substantial quantities of water for rooftops, roadways and other development features that do not consume water.

Conclusion

The Washington Supreme Court's decision in *Hirst* is a monumental water law case, with significant and lasting impacts on rural development and land use planning. The decision places an affirmative land use planning burden on counties to ensure that water is legally available before permitting development and requires actual evidence of water availability in order for a county to permit a development that intends to rely on a permit-exempt well. Counties may no longer simply assume that water is available for development and allow permit-exempt wells, and instead must now revamp their permitting process and comprehensive plan to provide for the review process outlined by the Washington State Supreme Court.

1 Whatcom County v. Hirst, 186 Wn.2d 648, 381 P.3d 1 (2016).
2 RCW Ch. 36.70A.
3 RCW 90.03.010; Postema v. Pollution Control Hr'gs Bd., 142 Wn.2d 68, 79, 11 P.3d 726 (2000).
4 RCW 90.03.290.
5 RCW 90.03.290(3).
6 RCW 90.54.020(3).
7 *See, e.g.*, WAC Ch. 173-507 (establishing rules for the instream resources protection program for the Snohomish River Basin).
8 RCW 90.03.345; , 142 Wn.2d at 81.
9 RCW 90.03.345.
10 Hirst, 186 Wn.2d at 668 (citing Swinomish Indian Tribal Cmty. V. Dept. of Ecology, 178 Wn.2d 571, 592, 311 P.3d 6 (2013)).
11 Id.; see also Foster v. Dept. of Ecology, 184 Wn.2d 465, 362 P.3d 959 (2015) (holding that withdrawals of water that impaired minimum flows based on overriding considerations of public interest were required to be temporary, and that such exception allowing impairment of minimum flows was not intended to be utilized in routine questions of urban growth and increased water need).
12 RCW 90.44.050.
13 Hirst, 186 Wn.2d at 684 (internal citations omitted).
14 Id. at 660 (citing Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd., 172 Wn.2d 144, 178, 256 P.3d 1193 (2011) for the proposition that counties must regulate to ensure land use is not inconsistent with available water resources).
15 *See* Kittitas County, 172 Wn.2d at 178-79.
16 *Id.*; *see also* RCW 36.70A.070(1), (5)(c)(iv).
17 RCW 58.17.110.
18 RCW 58.17.110(2).
19 RCW 36.70A.020(1).
20 Hirst, 186 Wn.2d at 658.
21 *Id.* at 659.
22 WAC Ch. 173-501.
23 *See* UNDERSTANDING THE WHATCOM COUNTY VS. HIRST, FUTUREWISE, ET AL. DECISION, www.ecy.wa.gov/programs/wr/nwro/hirst.html (last visited Jan. 5, 2017) (explaining the purpose of the Nooksack Rule).
24 *Id.*
25 Dept. of Ecology, Amicus Curiae Br., Case No. 91475-3, at 11-12.
26 Hirst, 186 Wn.2d at 665.
27 Hirst, 186 Wn.2d at 665.
28 *Id.* at 658.
29 *Id.* at 687.
30 *Id.*; RCW 19.29.097(1); RCW 58.17.110.
31 *Hirst*, 186 Wn.2d at 665.
32 *Id.* at 666 (internal quotations and citations omitted).
33 *Id.*
34 *Id.* at 674.
35 *Id.* at 675 (internal quotations and citations omitted).
36 *Id.* at 677.
37 *Id.* at 680 (citing RCW 36.70A.010).
38 UNDERSTANDING THE WHATCOM COUNTY VS. HIRST, FUTUREWISE, ET AL. DECISION, www.ecy.wa.gov/programs/wr/nwro/hirst.html (visited Oct.17, 2016).
39 UNDERSTANDING THE WHATCOM COUNTY VS. HIRST, FUTUREWISE, ET AL. DECISION, www.ecy.wa.gov/programs/wr/nwro/hirst.html (last visited Jan. 5, 2017).
40 Hirst, 186 Wn.2d at 705.
41 *Id.*
42 *Id.* at 705-06.
43 Hirst, 186 Wn.2d at 700 (Stephens, J., dissenting) ("The practical result of this holding is to stop counties from granting building permits that rely on permit-exempt wells.").
44 *Id.*
45 Whatcom County Ordinance 2016-048.
46 Whatcom County Ordinance 2016-066.
47 Spokane County Resolution No. 16-0833.
48 Okanogan County Ordinance 2016-5.
49 *See*, Washington State Groundwater Association Newsletter, November 2016, *available at* http://www.wsgwa.org/docs/different-way-look-at-water-availability-post-hirst-decision_wsgwa.pdf.
50 *See* SB 6513 (2016 Special Session Bill) (authorizing Ecology to maintain and implement its current water reserve rules for Chelan County).
51 SSB 6513, *available at* http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/6513-S.pdf#page=1 (last visited Jan. 5, 2017).

RCW 11.94 is Dead. Long Live RCW 11.125!

How to Revise Your Durable Power of Attorney Form to Comply with Washington's New Uniform Power of Attorney Act

By Jenifer Jewkes & Jamie Lanier – Lane Powell PC

Washington's new Uniform Power of Attorney Act ("UPAA"), codified at Chapter 11.125 RCW, repealed and replaced the previous Power of Attorney Act effective January 1, 2017. An existing power of attorney document ("POA") that was valid when executed will remain valid, but new POAs executed on or after January 1, 2017 will be valid only if they comply with the execution requirements of the new law.[1] This means it is time for practitioners to update their POA form. The following is a summary of some of the most significant provisions of the UPAA from the perspective of an estate planning practitioner, as well as recommended best practices for updating POA forms.

Highlights of Chapter RCW 11.125

Execution Requirements. A POA must be signed and dated by the principal, and the signature must either: (a) be acknowledged before a notary or (b) be attested to by two or more disinterested witnesses.[2] Home care providers, care providers at an adult family home or long-term care facility in which the principal resides, and individuals related to the principal by blood, marriage, or domestic partnership are not considered disinterested witnesses.[3]

Durability. The agent's authority under a POA will terminate when the principal becomes incapacitated unless the document contains the words: "This power of attorney shall not be affected by the disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or "Similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's incapacity."[4]

Effective Date. A POA will be treated as immediately effective unless it states otherwise and specifies when or what will trigger its effectiveness.[5]

Persons Acting as Co-Agents. The UPAA allows a principal to designate co-agents; however, such co-agents must exercise their authority jointly, not separately, unless the POA provides otherwise.[6] A co-agent may delegate his or her authority to another co-agent.[7]

Termination of POA. A POA terminates when: (i) the principal dies; (ii) the principal becomes incapacitated (unless the power of attorney contains the durability language discussed above); (iii) the principal revokes the POA; (iv) the POA provides for termination upon the happening of a certain event; (v) the purpose of the POA is accomplished; or (vi) the principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the POA does not provide for a successor agent.[8]

The agent's authority under a POA terminates when: (i) the principal revokes the agent's authority; (ii) the agent dies, becomes incapacitated, or resigns; or (iii) an action is filed for dissolution or annulment of the agent's marriage or state registered domestic partnership to the principal, or for their legal separation (unless the POA provides otherwise).[9] In addition, if a court appoints a guardian of the principal's estate or other fiduciary charged with management of *all* of the principal's property, then the POA is terminated, unless the court provides otherwise.[10] Note, however, if a limited guardian or fiduciary is appointed, the POA will not be terminated or modified, except to the extent ordered by the court.[11]

An existing POA is *not revoked or terminated* upon the execution of a new POA unless the new POA expressly revokes the prior POA.[12]

Resignation of Agent. Unless the POA has been terminated by the court, as set forth above, or the POA otherwise provides for a method of resignation, an agent may resign from his or her role by giving notice to the principal.[13] If the principal is incapacitated, notice should also be provided to a conservator or guardian, if appointed, and a co-agent or successor agent.[14] If none of those individuals are available, then notice may be given to a person reasonably believed to have a sufficient interest in the principal's welfare, to a governmental agency with the authority to protect the welfare of the principal, or by filing notice with the county recorder's office in the county in which the principal resides.[15]

Agent's Fiduciary Duty. A POA can waive some, but not all, of the agent's duties to the principal.[16] The following duties cannot be waived: (i) the duty to act in accordance with the principal's reasonable expectations and otherwise in the principal's best interests; (ii) the duty to act in good faith; and (iii) the duty to act within the scope of the agent's authority under the POA.[17] The following duties can be waived in the POA: (i) the duty of loyalty; (ii) the duty to refrain from creating a conflict of interest that impairs the agent's impartiality; (iii) the duty to act with the care, competence, and diligence of an ordinary agent in similar circumstances; (iv) the duty to keep records; (v) the duty to cooperate with the principal's agent for health care decisions; and (vi) the duty to attempt to preserve the principal's estate plan, to the extent the agent knows of the plan and preservation is in the principal's best interests.[18]

Agent for Health C are. An agent does not have authority to make health care decisions on behalf of the principal unless the POA explicitly grants the agent authority with respect to health care matters.[19] A general grant of authority with respect to health care matters is deemed

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RCW 11.94 is Dead. Long Live RCW 11.125!

to include authorization to act as the principal's personal representative under the Health Insurance Portability and Accountability Act ("HIPAA").[20] Thus, the POA need not include a separate HIPAA waiver in order for the agent to access the principal's health care information.

Overview of Agent's Authority Under the UPAA

Subject to certain exceptions, which are set forth in RCW 11.125.240, if a POA gives an agent "the authority to do all acts that a principal could do," or words to that effect, then an agent will have very broad authority to act on behalf of the principal and with respect to the principal's property. Specifically, the agent will have the authority to do all acts described in RCW 11.125.260 through 11.125.410.[21] Moreover, a reference in the POA to a section of RCW 11.125.260 through 11.125.410 incorporates the entire section as if it was laid out in full in the POA.[22]

Powers That Must Be Expressly Granted in the POA. As noted above, an agent does not have the powers set forth in RCW 11.125.240 *unless* such powers are expressly granted in the POA. Many of these powers are pertinent to estate planning. Thus, *subject to certain limitations*, an agent does not have the following powers unless they are expressly granted in the POA:

[The power to:] (a) Create, amend, revoke, or terminate an inter vivos trust; (b) Make a gift [except as provided in RCW 11.125.390]; (c) Create or change rights of survivorship; (d) Create or change a beneficiary designation; (e) Delegate some, but not all, of the authority granted under the power of attorney, except as otherwise provided in RCW 11.125.110(1); (f) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; (g) Exercise fiduciary powers that the principal has authority to delegate; (h) Exercise any power of appointment in favor of anyone other than the principal; (i) Create, amend, or revoke a community property agreement; (j) Cause a trustee to make distributions of property held in trust under the same conditions that the principal could; (k) Make any other provisions for nonprobate transfer at death contained in nontestamentary instruments described in RCW 11.02.091; (l) Make health care decisions for the principal, or give informed consent to health care decisions on the principal's behalf.[23]

In addition, unless expressly provided in the POA, the agent does not have the power to make transfers or gifts of the principal's property for the purpose of qualifying the principal for Medicaid or long-term care coverage.

Practice Tips for Post-January 1, 2017 Drafting:

- A POA must explicitly state in the document itself that it is a "power of attorney" in order to be treated as such.
- Terminology has now shifted to use of the term "agent" instead of "attorney-in-fact."
- A POA must be acknowledged before a notary or attested by two or more disinterested witnesses.
- A POA terminates upon the principal's incapacity unless the POA explicitly provides that it is not affected by the disability of the principal.
- Co-agents must act jointly unless the POA provides otherwise.
- The POA should explicitly address the scope of an agent's gifting power.
- An existing POA is not revoked upon the execution of a new POA unless the new POA expressly revokes the prior POA.

General Authority – Powers Under *RCW 11.125.260* through 11.125.410. The UPAA grants an agent the following broad powers (as set forth in RCW 11.125.260 through 11.125.410):[24]

1. General Powers. Pursuant to RCW 11.125.260, an agent has the authority to obtain relief or other value to which the principal may be entitled, contract and execute documents on the principal's behalf, participate in claims or settlements, seek assistance for the principal from the court or governmental agencies, engage professional advisors, communicate on the principal's behalf, and do any lawful act with respect to a subject and all property related to that subject.

2. Real Property. The authority granted under RCW 11.125.270 allows an agent to act with respect to the principal's real property, including, but not limited to, the power to buy, sell, lease, pledge or mortgage, manage and conserve, insure, and improve the real property.

3. Tangible Personal Property. The authority granted under RCW 11.125.280 allows an agent to act with respect to the principal's tangible personal property, including, but not limited to, the power to buy, sell, grant a security interest in, manage or conserve, insure, secure, or change the form of title in the tangible personal property.

4. Stocks, Bonds, and Financial Instruments. The authority granted under RCW 11.125.290 allows an agent to act with respect to the principal's stocks, bonds, and financial

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instruments, including, but not limited to, the power to buy or sell, establish, modify, or terminate accounts, pledge as security, exercise voting rights, or exercise options with respect to stocks, bonds, and financial instruments.

5. Banks and Financial Institutions. The authority granted under RCW 11.125.300 allows an agent to act with respect to a bank or financial institution, including, but not limited to, the power to continue, modify, or terminate accounts, establish new accounts, contract services, withdraw funds, and access account information or a safety deposit box.

6. Operation of a Business or Entity. The authority granted under RCW 11.125.310 allows an agent to act with respect to the principal's business interests, including, but not limited to, the power to buy or sell an interest, perform a duty of the principal, enforce terms of an ownership agreement, participate in litigation related to the ownership interests, invest additional capital in, reorganize, and sign returns or documents related to a business entity.

7. Insurance and Annuities. The authority granted under RCW 11.125.320 allows an agent to act with respect to the principal's insurance and annuities, including, but not limited to, the power to make payments on, modify, sell, terminate, or procure a new or additional insurance policy or annuity; use an insurance or annuity as security for a loan; exercise elections or powers related to a contract of insurance or annuity; apply for and procure benefits on a contract of insurance or annuity; and use proceeds to pay a tax levied on the insurance or annuity contract.

8. Estates, Trust, and Other Beneficial Interests. The authority granted under RCW 11.125.330 allows an agent to act with respect to a trust, probate estate, guardianship, conservatorship, escrow, or custodianship, or a fund from which the principal is or may be entitled to, including, but not limited to, the power to accept payment from the fund, demand or obtain money to which the principal is entitled, exercise a general or special power of appointment held by the principal, participate in litigation regarding an instrument or transaction affecting the principal's interests, participate in any "matter" as that term is defined in RCW 11.96A.030, transfer a property interest of the principal to the trustee of a revocable trust created by the principal as settlor (subject to certain limitations); and disclaim, release, or consent to a modification of payment from a fund.

9. Claims and Litigation. The authority granted under RCW 11.125.340 authorizes the agent to act with respect to claims and litigation without the need to appoint a guardian or guardian ad litem.

10. Personal and Family Maintenance. The authority granted under RCW 11.125.350 authorizes the agent to act with respect to personal and family maintenance, including but not limited to performing acts that "maintain the customary standard of living" of the principal's spouse, domestic partner, children, and other individuals whom the principal has "customarily supported or indicated the intent to support." For example, the agent could expend the principal's funds to provide such individuals with shelter, vacations, clothing, food, education, health care expenses, transportation, and credit/debit accounts.

11. Government Program and Civil and Military Service Benefits. The authority granted under RCW 11.125.360 allows an agent to act with respect to any benefit, program or assistance provided under a statute or regulation including Social Security, Medicare, and Medicaid. For example, the agent would have the power to execute vouchers in the name of the principal for payments by the government to the principal, enroll in or discontinue the principal in a benefit or program, and enter into litigation concerning a benefit to which the principal may be entitled.

12. Retirement Benefits and Deferred Compensation. The authority granted under RCW 11.125.370 allows an agent to act with respect to the principal's retirement benefits and deferred compensation, including, but not limited to, the power to select the form and timing of payments in, withdraw benefits from, make contributions to, and establish a new retirement plan. The agent may also exercise investment powers over a plan or borrow from a retirement plan.

13. Taxes. The authority granted under RCW 11.125.380 authorizes the agent to prepare, sign and file tax returns, pay related taxes, exercise tax elections available, and act for the principal before the Internal Revenue Service or other taxing authority.

14. Gifts. Generally, under RCW 11.125.240(1)(a), an agent does not have the power to make gifts absent an express grant of gifting authority in the POA. However, RCW 11.125.390 appears to provide that, notwithstanding RCW 11.125.240(1)(a), a general grant of authority with respect to gifts authorizes an agent to make gifts to or for the benefit of a person that do not exceed the annual exclusion amount (or double the exclusion amount if the principal's spouse agrees to gift split).[25] A reference in RCW 11.125.240 to RCW 11.125.390 would clarify the interaction of these two sections, but absent such clarification, these authors believe that this is the most reasonable interpretation of the statute. A gift for the benefit of a person includes, but is not limited to, the creation of a trust, an UTMA account, and a §529 account.[26] The agent's authority to make annual exclusion gifts is further limited to those gifts that are consistent with the principal's objectives, or if the principal's objectives are unknown, those gifts that are in the principal's best interest.[27] Relevant factors to determine what gifts are in the principal's best interest include: the value and nature of the

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RCW 11.94 is Dead. Long Live RCW 11.125!

property, the principal's foreseeable obligations and need for maintenance, minimization of taxes (including income, estate, inheritance, gift, and GST), eligibility for a statutory benefit, and the principal's history of gift making.[28]

15. Health Care. Absent an express grant of authority in the POA, an agent does not have authority to make health care decisions on behalf of the principal.[29] However, pursuant to RCW 11.125.400, an express grant of general authority with respect to health care matters gives the agent the authority to act as the principal's personal representative and access information pursuant to HIPAA, §1171 through §1179 of the Social Security Act, 42.U.S.C. §1320(d), and applicable regulations.[30] Such authority also authorizes the agent to provide informed consent for health care decisions on the principal's behalf.[31] Unless an agent is the spouse, registered domestic partner, parent, or sibling of the principal, none of the following persons may act as an agent for the principal: any of the principal's physicians, the physician's employees, or the owners, administrators, or employees of the health care facility or long-term care facility where the principal resides or receives care.[32]

16. Principal's Minor Children. Absent a provision to the contrary in the POA, RCW 11.125.410 allows the principal to authorize an agent to make health care decisions on behalf of a minor child for whom the principal is the legal guardian if there is no other parent or legal representative available and authorized to give consent.[33] This section also allows a person to nominate a guardian(s) of the person and/or estate of a minor child, whether or not such child is born before or after the POA is executed.[34] However, the authority of a court-appointed guardian supersedes any authority designated by a POA.[35] Finally, if there is a conflict between the provisions of a will nominating a testamentary guardian and the nomination of a guardian under the authority of the POA, the most recent designation controls.[36]

Updating POA Forms – Best Practices

Given the sweeping changes made in the UPAA, all practitioners must update their POA forms as of January 1 in order to ensure that their forms remain valid under the new law. Below are some suggested steps for updating your POA forms.

Step #1 – Necessary Changes. Many practitioners may have been caught off guard by the enactment of the new legislation on January 1 and may not necessarily have a new form at the ready. For practitioners who may be looking for a simple or "quick fix," these are the most basic and necessary revisions that must be made to a current POA form to help ensure that, at a minimum, the POA form is valid under the new law. The changes include:

- Changing statutory references from Chapter 11.94 RCW (now superseded) to Chapter 11.125 RCW;
- Changing references from "attorney-in-fact" to "agent";
- Ensuring that your documents clearly state that a POA is durable (as RCW 11.125 now presumes that POAs are not durable unless specified); and
- Ensuring all new POAs are signed before a notary or two disinterested witness.

Step #2 – Opt In to General Powers. The new Act now provides agents with a comprehensive list of general powers that an agent may hold under the law. These powers are codified in RCW 11.125.260 through .410. Practitioners should review these powers carefully and determine whether they wish for their forms to opt in to some or all of the listed powers. The wording of RCW 11.125.250 states that if a POA grants to an agent "authority to do all acts that a principal could do" or contains wording to a similar effect, then the agent is deemed to have the general powers described in RCW 11.125.260 through .410. As a result, a POA form no longer needs to list all of the agent's powers individually, but instead the POA form need only reference the general powers listed in the statute as follows:

- In order to "opt in" to the general powers listed under the statute, the POA forms should grant the agent "authority to do all acts that a principal could do."[37]
- The form may also grant general authority under the statute by referencing each of RCW 11.125.270 through .410 along with their descriptive terms of the powers granted.[38] By referencing the statute and descriptive terms, the entire list of powers set forth in that statute will be incorporated by reference. For example, a POA would incorporate the entire list of powers set forth in RCW 11.125.270 by simply stating, "I grant to my agent all powers listed in RCW 11.125.270 with regard to real property."
- RCW 11.125.250(4) provides that a form may modify any general power incorporated by reference.[39] Thus, practitioners should review RCW 11.125.270 through .410 carefully and determine if they wish to amend any general grant of power prior to opting into it. Likewise, practitioners should be careful not to unintentionally modify a general power granted under the statute by use of language intended to illustrate the powers rather than modify them.

Authors' Note: Provide Guidance Regarding the Agent's Statutory Authority. These authors recommend drafting a POA that, on its face, provides sufficient guidance to a

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principal, agent, and third parties regarding the scope of the agent's authority. The goal is to draft a stand-alone document rather than a document that must be supplemented with a copy of the statute itself. Thus, following a particular grant of authority in the POA, the POA should include specific examples of common actions that fall within the scope of that power. For example, a POA may provide: "With respect to my real property, my agent shall have all of the powers set forth in RCW 11.125.270, including but not limited to, the power to buy, sell, lease, pledge or mortgage, manage and conserve, insure, and improve my real property."

Step #3—Address Specific Powers and Duties. RCW 11.125.240 lists specific powers that must be expressly granted to an agent in the POA form if the principal wishes the agent to have such powers. These powers include the power to amend or revoke a revocable trust, make gifts, change beneficiary designations, and revoke community property agreements, to name just a few. In addition, RCW 11.125.140 lists an agent's duties and liabilities under the new Act. These duties and liabilities may be altered by the POA form. A practitioner should carefully review the powers provided for in RCW 11.125.240 and duties and standard of care provided for in RCW 11.125.140 to determine whether to expressly opt in (in the case of the powers) or opt out or modify (in the case of the duties and standards of care) as follows:

- The practitioner should review the list of specific powers in RCW 11.125.140 and decide whether to grant some or all of the powers set forth therein in the POA form. Practitioners may wish to provide principals with the ability to select which powers they wish to opt into with a "check-the-box" form;
- The agent's gifting powers, including for purposes of Medicaid planning, should be specifically addressed. Under the Act, a general grant of gifting authority under RCW 11.125.240 gives the agent the power only to make annual exclusion gifts that are in the best interest of the principal, and power to make larger gifts must be expressly provided; and
- The practitioner should determine whether to waive or modify some or all of the agent's statutory duties under RCW 11.125.140, including addressing potential conflicts of interest that could impair an agent's ability to act.

Author's Note: Expressly Listing Gifting Powers. These authors recommend explicitly addressing the scope of the agent's gifting powers in the POA. Listing the amounts, purposes, and classes of persons to which an agent may make gifts can be very helpful to the agent and others who must discern the principal's intent. For example, the POA may provide that the agent is authorized to make gifts to or for the benefit of the principal's spouse, descendants, and their spouses up to (or in excess of) the annual exclusion amount, and for medical and educational expenses under IRC §2503(e). In addition, practitioners may want to grant an agent authority to make gifts to charitable organizations.

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1 RCW 11.125.060.
2 RCW 11.125.050(1).
3 *Id.*
4 RCW 11.125.040.
5 RCW 11.125.090.
6 RCW 11.125.110(1).
7 *Id.*
8 RCW 11.125.100(1).
9 RCW 11.125.100(2).
10 RCW 11.125.080(2).
11 RCW 11.123.080(3).
12 RCW 11.125.100(7). This can create confusion regarding concurrent authority; therefore, the option to revoke or not to revoke a prior POA should be carefully considered.
13 RCW 11.125.180.
14 RCW 11.125.180(1).
15 RCW 11.125.180(2).
16 RCW 11.125.140(1), (2).
17 RCW 11.125.140(1).
18 RCW 11.125.140(2).
19 RCW 11.125.240(1).
20 RCW 11.125.400(1).
21 RCW 11.123.250(1).
22 RCW 11.125.250(3).
23 RCW 11.125.240(1).
24 RCW 11.125.250.
25 RCW 11.125.390(2).
26 RCW 11.125.390(1).
27 RCW 11.125.390(3).
28 RCW 11.125.390(3)(a)-(d).
29 RCW 11.125.240(1).
30 RCW 11.125.400(1).
31 RCW 11.125.400(2).
32 RCW 11.125.400(3).
33 RCW 11.125.400(1).
34 RCW 11.125.400(2).
35 RCW 11.125.400(3).
36 RCW 11.125.400(4).
37 RCW 11.125.250(1) If a practitioner chooses to use language simply granting the agent all the powers that the principal would have under the statute, then it is recommended that the practitioner attach a copy of RCW 11.125.240-.410 to the POA Form for both the principal's and agent's review.
38 RCW 11.125.250(2) & (3).
39 RCW 11.125.250(4).

Recent Developments

Real Property

By Brian L. Lewis – Ryan Swanson & Cleveland PLLC

Time-Barred Deed of Trust, *Washington Federal v. Azure Chelan, LLC*, 195 Wn. App. 644, 382 P.3d 20 (2016).

In *Washington Federal v. Azure Chelan, LLC*, 195 Wn. App. 644 (2016), Division III of the Court of Appeals affirmed summary judgment in favor of a junior lienholder where the senior lienholder failed to take action to enforce its deed of trust lien within six years after accelerating its debt. In so doing, the Court of Appeals upheld the lower court's order quieting title in the junior lienholder under RCW 7.28.300.

Azure Chelan LLC ("Azure") held a first-position deed of trust lien on property located in Chelan County. Azure's deed of trust encumbered property known as the "Phase 2 Property." In 2007, the property owner ("LHDD1") obtained a building loan from Horizon Bank ("Horizon"). Horizon's loan was secured by a deed of trust lien against both the Phase 2 Property and other property known as the "Phase 1 Property." Horizon's assets were later assigned to the Federal Deposit Insurance Corporation ("FDIC"). The FDIC subsequently transferred the Horizon loan to Washington Federal Bank.

LHDD1 ultimately defaulted under both loans. Azure prepared several notices of default addressed to LHDD1, some of which were signed and some of which were not. At least one of Azure's notices was signed in May 2007 and referenced a prior statutory Notice of Default purportedly served under the Deed of Trust Act[1] in April 2007. That notice referred to Azure's debt as having been "accelerated" and equaling $6,116,545. Other than issuing these notices, Azure did not take formal enforcement action against LHDD1 under either its promissory note or deed of trust.

In 2010, Washington Federal commenced nonjudicial foreclosure proceedings under the Horizon deed of trust. A trustee's sale was held in early 2011, at which Washington Federal was the prevailing bidder. However, the legal description set forth in the trustee's deed to Washington Trust did not match the legal description contained in the Horizon deed of trust. The opinion does not state which of the descriptions was erroneous.

In 2014, Washington Federal brought suit to quiet title to both the Phase 1 Property and the Phase 2 Property pursuant to the trustee's sale. Washington Federal's claim was largely based on RCW 7.28.300, which generally permits a "record owner" of real estate to quiet title as against a mortgage or deed of trust where enforcement of the mortgage or deed of trust would be barred by the applicable statute of limitations. The statute is a streamlined method of clearing title against "stale" or outdated mortgage liens.[2]

Azure raised four arguments in opposing summary judgment: First, Azure argued that Washington Federal lacked standing to proceed under RCW 7.28.300 because it was not the "record owner" of the Phase 2 Property. Second, Azure argued that its deed of trust contained a restriction on further encumbrances rendering any further encumbrance of the Phase 2 Property, such as Horizon's deed of trust, void. Third, Azure argued that the trustee's alteration of the legal description from that contained in the Horizon deed of trust rendered the trustee's deed void. Fourth, Azure argued that questions of fact existed as to whether, and when, it had accelerated its debt, thereby precluding summary judgment on the applicable six-year statute of limitations.

The court first considered RCW 7.28.300 and determined that the plain meaning of the statute dictates that a foreclosure sale purchaser falls within the term "record owner." Because Washington Federal was the record owner pursuant to the trustee's deed, it had standing under RCW 7.28.300.

The court then considered restraints on alienation under Washington law and, specifically, whether Azure's deed of trust created a "disabling restraint" rendering Horizon's deed of trust void. The court identified three types of restraints that can occur: disabling restraints, forfeiture restraints, and promissory restraints. Disabling restraints expressly prohibit further alienation of the subject property and are generally disfavored by public policy as being repugnant to fee interests. Although no Washington case has enforced a disabling restraint in the context of restrictions on further encumbrances, the court noted that a properly drafted disabling restraint could possibly be enforced. Regardless, the language of Azure's deed of trust was clearly drafted as a covenant by LHDD1 to not further encumber the Phase 2 Property, thereby making the covenant a promissory restraint. LHDD1 breached Azure's deed of trust by further encumbering the Phase 2 Property with Horizon's deed of trust. Accordingly, Azure had a valid claim for breach of contract at that time, but the breach did not render Horizon's deed of trust (and therefore Washington Federal's trustee's deed) void.

Next, the court considered the discrepancies between the legal descriptions contained in the Horizon deed of trust and the trustee's deed. As noted above, the opinion does not state which description, if either, was correct or which, if either, was erroneous. Regardless, because the trial court quieted title in Washington Federal using the legal description from the deed of trust foreclosed, any

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discrepancy in the trustee's deed was immaterial. Relying on *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903 (2007), and RCW 61.24.050, the court found the issuance of a trustee's deed following nonjudicial foreclosure to be a "ministerial act." If the trustee's deed is defective or otherwise improper, the foreclosure sale purchaser may then seek to reform the deed.[3]

Finally, the court considered Azure's argument that questions of fact existed as to when it actually accelerated its debt and, therefore, when the applicable six-year statute of limitations began to run. For claims arising from breach of a deed of trust, the six-year statute of limitations (RCW 4.16.040) begins to run when the secured party is entitled to enforce the secured obligation. If the secured obligation is a promissory note, any acceleration of the obligation must be clearly and unequivocally expressed to the debtor. Although Azure disputed much of the evidence Washington Federal presented to prove when LHDD1's debt to Azure was accelerated, Azure itself admitted evidence that its debt had been accelerated as early as April 2007, more than six years before Washington Federal brought its claim to quiet title under RCW 7.28.300. Azure claimed to have relied on LHDD1's verbal assurances and other commitments to cure its default, but could not produce admissible evidence of those. Accordingly, the court found that enforcement of Azure's deed of trust was barred by the six-year statute of limitations and that title was properly quieted in Washington Federal under RCW 7.28.300.

Innocent Third Party Exception to Merger Doctrine, *WT Properties, LLC v. Leganieds, LLC*, 195 Wn. App. 344, 382 P.3d 31 (2016).

In *WT Properties, LLC v. Leganieds, LLC*, 195 Wn. App. 344 (2016), Division I of the Court of Appeals affirmed summary judgment in favor of the purchaser's quiet title action to confirm ownership in an easement where the prior easement owner owned both the servient and dominant estates. The Court of Appeals upheld the trial court's ruling that the merger doctrine does not extinguish an easement if the rights of an innocent third party would be prejudiced.

Binod and Basant Prasad (the "Prasads") owned property adjacent to S. 170th Street in Burien. In October 2006, the Prasads conveyed to Rehabitat Northwest Inc. ("Rehabitat") two non-adjacent parcels ("Parcels I and II") directly to the south of 170th Street. The Prasads continued to own the land directly to the south of Parcels I and II ("Parcels A and B"). The deed to Rehabitat expressly reserved an ingress, egress, and utility easement from 170th Street to Parcels I and II (the "Access Strip").

In February 2007, the Prasads delivered a deed of trust to Parcels A and B to Viking Bank. The granting clause in the Deed of Trust included a grant of any easements. In May 2007, the Prasads and Rehabitat pursued a boundary line adjustment to Parcels I and II that resulted in title to the Access Strip vesting in the Prasads. Additionally, the Prasads held the easement in the Access Strip.

In time, the Prasads defaulted on their loan, and in 2011, Parcels A and B were foreclosed on in a nonjudicial foreclosure. WT Properties, LLC ("WT") was the successful bidder at the trustee's sale and was granted the trustee's deed to Parcels A and B but not to the Access Strip. In 2012, the Prasads conveyed title of the Access Strip to Leganieds, LLC ("Leganieds"). In 2014, WT brought suit to quiet title in the Access Strip to confirm existence of the easement of record, and Leganieds counterclaimed to quiet title to remove the easement.

In October 2014, the trial court granted summary judgment in favor of Leganieds as fee owner of the Access Strip but did not determine whether WT had an easement. In April 2015, WT moved for summary judgment to quiet title in the easement, and Leganieds made a cross motion for summary judgment to quiet title in the Access Strip. The trial court ruled that WT had an easement in the Access Strip. Leganieds appealed and argued that the doctrine of merger extinguished the easement.

An easement is generally extinguished when the dominant and servient estates of an easement are vested in the same person.[4] One exception to the doctrine of merger is "where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united, …. [or when merger] ***would prejudice the rights of innocent third persons.***"[5]

The Court of Appeals, recognizing that the Washington Supreme Court and the lower courts have long recognized the innocent third party exception, found that the trial court was correct to rule WT had an easement in the Access Strip. The Court of Appeals determined that extinguishing the easement would have prejudiced Viking Bank in two ways: (i) it would have caused Viking Bank to lose part of its collateral of the loan, and (ii) in the event of a foreclosure, it would have lost access to 170th Street.

Leganieds made three arguments as to why the merger doctrine extinguished the easement in the Access Strip. First, it cited *Schlager v. Bellport* to support the proposition that "Washington courts have no trouble applying the merger doctrine to easements."[6] The court rejected this argument and found that *Schlager* did not support it, as in that case the dominant and servient lots were not unified by outstanding interests. Second, Leganieds argued that WT was not an innocent third party. The court determined that WT's innocence or lack thereof was immaterial and ruled that the material fact was that Viking Bank had a security interest in the property at the time when the Prasads

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Recent Developments

Probate & Trust

By Tony Ramsey – Karr Tuttle Campbell

Federal Gift Taxes Paid Includible in Washington Taxable Estate for Washington Estate Tax Purposes. *Estate of Barry A. Ackerley v. Wash. Dep't of Revenue*, ___ **Wn. ____ (February 16, 2017).**

The Washington Supreme Court has ruled that $5.5 million in federal gift taxes paid within three years of a decedent's death were includible in the decedent's Washington taxable estate.

This case involved the estate of former Seattle SuperSonics owner Barry Ackerley. Ackerley died on March 21, 2011. In 2008 and 2010, Ackerley made significant gifts resulting in over $5.5 million in federal gift taxes paid. Upon Ackerley's death, these gifts were required to be included in Ackerley's federal taxable estate under I.R.C. § 2035(b) because he died within three years of making the gifts. Ackerley's estate included the gift taxes paid on the federal estate tax return; however, the gift taxes paid were not included on the Washington estate tax return. The Department of Revenue issued a notice of assessment to Ackerley's estate indicating that additional Washington estate taxes were owed on the federal gift taxes paid. Ackerley's estate petitioned for review in Thurston County Superior Court ,which held that the estate was required to pay the federal gift taxes paid because those fall within the definitions of "transfer" and "Washington taxable estate" under RCW 83.100.020. Upon appeal, the Court of Appeals certified the case to the Washington Supreme Court for review.

The Washington Supreme Court affirmed the decision of the Superior Court. It reasoned that the Washington taxable estate is defined as the federal taxable estate under RCW 83.100.120(15). The federal taxable estate is defined under RCW 83.100.020(6) as the taxable estate as determined under Chapter 11 of the Internal Revenue Code, which includes gifts made within three years of death under I.R.C. § 2035(b). The court therefore held that the DOR properly included the federal gift tax paid in Ackerley's Washington taxable estate because the federal gift tax paid is included in the federal taxable estate and the federal and Washington taxable estate are defined as the same under Washington law.

Despite an argument by the Ackerley estate that the tax on gifts made within three years of death is not technically a tax on a transfer at death, the court indicated that this reading goes against the Washington legislature's intent that transfers be construed broadly. The court held that the relevant transfer "is not determined by looking at each individual element of the taxable estate" but that instead, the relevant transfer is "the single transfer that occurs to the entire taxable estate upon death," and that because "gift tax paid was part of the taxable estate" the gift tax "transferred upon Ackerley's death."

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owned such property. Third, Leganieds argued that the merger doctrine did not include a "mortgage" exception. The court did not accept that the Prasads' existence of a deed of trust, instead of a mortgage, barred application of the rule, as courts have long recognized that the holder of a deed of trust is a "species" of mortgage.

This case also addressed the issue of ripeness. At the trial court, Leganieds claimed the easement violated a use restriction in the plat that prohibited uses other than "residential," and thus the easement should be extinguished. The trial court dismissed this claim on the grounds it was not yet ripe. At the Court of Appeals, Leganieds argued dismissal of this claim was an error. Leganieds brought forth two arguments regarding the restrictive covenant: first, that the easement was invalid upon its formation. Second, that in the event the easement existed, its use must be enjoined. Because WT brought several defenses to Leganieds' restrictive covenant arguments, the Court of Appeals found that further factual developments were necessary.

The Court of Appeals affirmed the lower court's ruling that the issue of whether a restrictive covenant existed that restricted the property's use subject to the easement to "residential" purposes was not ripe for review. In reaching its conclusion, the Court of Appeals outlined the three elements of ripeness: (1) the issues raised are primarily legal, (2) further factual development of the issues are not required, and (3) the challenged action is final. The court determined that because further factual development of the issues was required, one of the elements of ripeness had not been met, and the lower court properly dismissed Leganieds' claim as not ripe.

1 RCW 61.24.
2 See Bank of New York v. Hooper, 164 Wn. App. 295 (2011).
3 See GLEPCO, LLC v. Reinstra, 175 Wn. App. 545 (2013).
4 Radovich v. Nuzhat, 104 Wn. App. 800, 805, 16 P.3d 687 (2001) (citing *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960)); § 7.5 (Am. Law Inst. 2000).
5 *WT Properties* at 22 (quoting *Radovich*, 104 Wn. App. at 805 (emphasis added) (quoting *Mobley*, 14 Wn.2d at 282).
6 *Schlager v. Bellport*, 118 Wn. App.536, 76 P.3d 778 (2003).

Practice Tip

Don't Be Misled By the Title: The Agricultural Foreign Investment Disclosure Act of 1978 Applies to More Than Just Agricultural Transactions

By Marisa Bocci, Eric Jay, and Kari Larson, K&L Gates LLP[1]

Under the Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA"), foreign persons acquiring any interest in agricultural land, whether by purchase or lease, or by acquisition of a direct or indirect interest in a company that owns or leases the land, may be required to submit a report on the transfer or acquisition with the United States Department of Agriculture; failure to timely file a report can subject the foreign person to penalties, which may be financially significant. Surprisingly, this statute may apply in contexts not conventionally considered a transfer of agricultural land – for example, transactions involving wind or solar energy assets on properties with historical farming use, corporate acquisitions of food processing companies with underlying interests in farmland assets, or investments in milling companies with large timber holdings. Accordingly, practitioners should be aware of the federal reporting requirements involved in the acquisition of agricultural land in the state of Washington by foreign entities.

What is AFIDA, and When is Reporting Required?

AFIDA was enacted in 1978 to create a nationwide system for the collection of information pertaining to foreign ownership in U.S. agricultural land. Pursuant to 7 U.S.C. § 3501(a), "[a]ny foreign person who acquires or transfers any interest, other than a security interest, in agricultural land shall submit a report to the Secretary of Agriculture not later than 90 days after the date of such acquisition or transfer."[2]

Who is a "Foreign Person"?

The threshold of foreign ownership necessary to trigger the reporting requirement is fairly low. An entity is a "foreign person" if it is organized under the laws of a foreign government or its principal place of business is located outside the United States.[3] In addition, a domestic entity is a foreign person if a person described above (or a foreign individual or government) holds a "significant interest or substantial control" over that entity,[4] which means (i) a single foreign person owns an interest of 10 percent or more, (ii) multiple foreign persons acting in concert own an interest of 10 percent or more in the aggregate, or (iii) multiple foreign persons own an interest of 50 percent or more in the aggregate, whether or not acting in concert.[5]

What is an "Interest" in "Agricultural Land"?

Under AFIDA, an "interest" in land is "all interests acquired, transferred or held in agricultural lands," subject to enumerated exceptions.[6] Those exceptions include (a) leaseholds of less than 10 years, (b) contingent future interests (i.e., options), and (c) easements unrelated to agricultural production.[7]

The definition of "agricultural land" under AFIDA is quite broad and may therefore be included in transactions where such designation is not central to the acquisition. Under AFIDA, "agricultural land" means land "currently used for, or, if currently idle, land last used within the past five years, for farming, ranching, or timber production."[8]

What are the Penalties for Failure to Comply?

The initial report is required to be filed within 90 days after the applicable acquisition or transfer. The penalty for failure to report (or making a knowingly false report) is 25% of the fair market value of the land, as determined by the Farm Service Agency.[9] The penalty for a late report is 0.1% of the fair market value of the land for each week that the violation continued.[10]

How to File an AFIDA Report?

The AFIDA reporting obligations must be satisfied by delivering an AFIDA Report Form FSA-153 to the County Farm Service Agency (FSA) Office where the tract of land is located.[11]

What's the Bigger Picture?

As discussed herein, reporting is required within 90 days of the completion of a qualifying transaction. Accordingly, given the broad definition of agricultural land and what constitutes an interest therein, and the relatively low percentage of interest held by a foreign person that can trigger the application of the statute, it is best practice for practitioners to include in their deal checklists verification as to whether an AFIDA filing is necessitated by the transaction. As noted above, part of this inquiry is to consider whether or not the land could be used for agriculture, even if the business purpose of the transaction is not agricultural-related. Also, this inquiry involves confirming the intended direct and indirect ownership interests in the acquisition, and whether or not any foreign person is involved in the transaction over the AFIDA reportable levels.

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Practice Tip

1 This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.
2 Note also, while Washington does not have an analogous state statute to AFIDA, many other states do. *See* N.D. Cent. Code § 47-10.1-02 (Westlaw through Feb. 24, 2017 of the 2017 Reg. Sess. of the 65th Legis. Assemb.), "[a]n individual who is not a citizen of the United States, a citizen of Canada, or a permanent resident alien of the United States may not acquire directly or indirectly any interest in agricultural land," unless certain requirements are met.
3 7 CFR § 781.2(g)(2)(2016).
4 7 CFR § 781.2(g)(4)(2016).
5 7 CFR § 781.2(k)(2016).
6 7 CFR § 781.2(c)(2016).
7 *Id*.
8 7 CFR § 781.2(b)(2016). Note, however, that there is an exception for land not exceeding 10 acres, in the aggregate, if annual gross receipts from agricultural or timber use do not exceed $1,000. *Id*.
9 7 CFR § 781.4(b)(2)(2016). The fair market value is determined at the time the penalty is assessed or, if the land is not currently used for agricultural purposes, then as of the last date that it was so used. 7 CFR § 781.4(c)(2016).
10 7 CFR § 781.4(b)(1)(2016).
11 https://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/FSA153.PDF.

Notice of Annual Meeting

Real Property, Probate and Trust Section

The annual meeting of the members of the Real Property, Probate and Trust Section will be held on June 9, 2017 at 5:00 p.m. at the Marcus Whitman Hotel, 6 West Rose Sweet, Walla Walla, Washington 99362. The purpose of the meeting is to elect the incoming executive committee members of the Real Property Council, the incoming executive committee members of the Probate and Trust Council and the executive committee Real Property Council Director.

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