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Look Before You Leap – Pre-Immigration Estate Planning

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The Seattle metropolitan area is changing rapidly. From the Dorsey & Whitney offices on the 60th floor of the Columbia Tower, one can see 16 cranes dotting the Seattle skyline. Although Amazon may have a lot to do with the most recent building boom, there is also a strong flow of foreign capital bolstering Seattle's recent economic growth. This foreign capital is taking advantage of today's low interest rates, combined with Seattle's strong housing market, talented workforce, and manufacturing and services expertise. The sources of foreign capital are varied, but wealthy Chinese individuals, families, and institutions based in mainland China, Hong Kong, and Taiwan are leading the charge. One needs to look no further than the

Columbia Tower, which was sold to Gaw Capital Partners of Hong Kong for \$711 Million in August of 2015.¹

Seattle is a desirable landing spot for the growing number of Chinese citizens immigrating to the Seattle metropolitan area. For starters, Seattle's proximity to Asia is attractive. It also has an established community network, which includes the Industrial and Commercial Bank of China ("ICBC") and NanHai. ICBC, which is the world's largest bank by assets,² opened the first Northwest banking center for a mainland China financial institution here last fall.³ NanHai is a Chinese Cultural organization that launched the Seattle Biz-Tech Summit in 2013 with an aim toward fostering global business collaboration between the U.S. and China.⁴ Seattle's desirability is evident in the available foreign investment data. In 2015, Chinese buyers of real estate (a particularly desirable asset class) spent \$28.6 billion on homes in the U.S., eight percent of which (about \$2.3 billion) was invested in Washington state, second only to California, which garnered 35 percent of the total Chinese investment.⁵

A variety of additional factors contribute to foreign investment and Chinese investment in particular in the Seattle area: (i) China's policy of "Go Global" that has encouraged state-owned companies to invest in the U.S.;⁶ (ii) slowing of the Chinese domestic economy, which encourages individuals and businesses to look for returns in the U.S.;⁷ (iii) a desire to educate children in the U.S. combined with top schools in Washington state;⁸ (iv) a fear of increased capital controls and increased scrutiny in sending money abroad (Chinese citizens are entitled to purchase \$50,000 of U.S. dollars per year);⁹ and (v) a relatively weak U.S. dollar, which made U.S. investments comparatively inexpensive until recently (this trend is now reversed).

With an influx of foreign capital comes an influx in
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moneyed foreign immigrants. As estate planners, we need to be aware of strategies that can be utilized by clients before immigrating to the U.S.

The focus of this article is an area of estate planning that deserves careful examination: “cross-border estate planning.” We will provide a working definition of pre-immigration estate planning, including a definition of residency and its implications, and describe several effective strategies while highlighting some common planning pitfalls.

A. What is Pre-Immigration Estate Planning

At its very core, pre-immigration or pre-residency planning seeks to: (a) pinpoint exactly when a person not domiciled (a “non-domiciliary”) for U.S. gift, estate, and generation-skipping transfer tax purposes (“transfer tax”) will become domiciled for transfer tax purposes; and (b) determine what steps should be taken proactively to maximize creditor protection and minimize future transfer taxes before the non-domiciliary becomes a U.S. domiciliary.¹⁰

Cross-border *estate* planning should be contrasted with pre-immigration *income tax* planning. Cross-border income tax planning merits a parallel inquiry to determine: (a) when a non-resident alien (“NRA”) will become a resident for U.S. income tax purposes; and (b) what steps should be taken proactively to minimize future U.S. income taxes. Though there are some mechanisms to minimize or defer future U.S. income tax prior to becoming a U.S. income tax resident, the U.S. has severely limited most types of pre-immigration income tax planning. For example, one can realize capital gains in a lower-tax jurisdiction before entering the U.S., or one can establish an irrevocable trust in a lower tax jurisdiction at least five years before entering the U.S. In addition, the U.S. has imposed several anti-deferral rules intended to prevent foreign persons who are residents in the U.S. from avoiding current income tax on their non-U.S. assets.¹¹ Therefore, in most circumstances pre-immigration income tax planning is focused primarily on (a) avoiding U.S. income tax residency and (b) realizing capital gain before becoming a U.S. citizen.

B. What Does It Mean to Be “Domiciled” in the U.S. for Income versus Transfer Tax Purposes

Notably, an individual’s U.S. residency for *transfer tax* purposes is determined separate and apart from residency for *income tax* purposes. Surprisingly, the different manner in which residency is determined for income tax purposes as opposed to transfer tax purposes yields a strange result; an individual can simultaneously be a resident for income tax purposes but not a resident for transfer tax purposes, or vice versa (a “non-resident” may also be referred to as a “non-domiciliary”).

1. Residency for Income Tax Purposes

Residency for income tax purposes is generally based on: (i) U.S. citizenship, (ii) possession of a green card (lawful permanent resident status),¹² or (iii) a mathematical formula based on the number of days present in the U.S. in the current year and each of the preceding two years or possession – the substantial presence test.¹³ The mathematical “substantial presence test” is triggered if a non-resident individual spends *more than* 182 days in the U.S. in a given year, or more than 120 days on average over a three-year period, based on a mathematical formula. The outcome of the substantial presence test can be altered if an individual possesses certain types of visas (such as a student visa), the possession of which allows an individual to exclude days from the calculation¹⁴ if the individual can establish a closer connection to a foreign country,¹⁵ or if there is an income tax treaty with the foreign country that affords the individual the opportunity to file a treaty-based position.¹⁶

The primary consequence of being a U.S. income tax resident is that the U.S. will tax the individual on his or her worldwide income. Taxation occurs regardless of whether that income is effectively connected with the conduct of a U.S. trade or business or otherwise income derived from sources within the U.S. that is not effectively connected with the conduct of a trade or business within the U.S. (i.e., fixed, determinable, annual or periodic income, or “FDAP”). So, an individual who is a U.S. tax resident is taxed by the U.S. on all of his or her annual income.

Therefore, it is critically important for international estate and tax planners to have a firm understanding of the residency rules. This understanding is especially true for clients who do not possess U.S. citizenship or a green card, but desire to spend a significant portion of their time each year in the U.S. For example, an individual who does not possess a green card can spend up to 120 days per year every year in the U.S. without triggering the substantial presence test.¹⁷ For clients who intend to count the exact number of days in the U.S. to avoid the substantial presence test, planners must emphasize to them the importance of maintaining accurate records that fully support the days spent in the U.S. *and* the days spent outside the U.S. in a given year. The client must be prepared to provide those records on request by the IRS to support his or her filing position. Examples of records include passport stamps and other border crossing records, flight logs or boarding passes, and hotel receipts.

2. Residency for Transfer Tax Purposes

Unlike residency for income tax purposes, residency for gift and estate tax purposes is based on domicile (i.e., one’s physical residency coupled with an intention to remain indefinitely, based on objective factors).¹⁸ A person acquires

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a domicile in a place by living there, for even a brief period of time, provided that he or she has no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.¹⁹ Put another way, “domicile” is the place selected freely by an individual as their center of domestic and legal relations, including their principal and permanent residence, provided the individual has no present intention of leaving. Mere residence without the intention to remain indefinitely does not constitute domicile.²⁰

Helpfully, there is a presumption that an individual intends to continue his or her original domicile. This presumption must be rebutted by the IRS by demonstrating facts supporting a change in an individual’s domicile. Despite this presumption, it is clear that this test is not as straightforward as the mathematically-based substantial presence test used to determine income tax residency.

The non-exclusive list of factors that the IRS might weigh to determine whether an individual is a U.S. domiciliary for transfer tax purpose includes, but is not limited to: (i) green card status; (ii) statement of intent (in visa applications, tax returns, will, etc.);²¹ (iii) length of US residence;²² (iv) style of living in the US and abroad;²³ (v) ties to former country;²⁴ (vi) location of business interests;²⁵ (vii) places where community, club and religious affiliations, voting registration, and driver licenses are maintained.²⁶ One can think of these factors, and others, as grains of sand on each side of a scale. In close cases, reasonable people might disagree on whether one is a U.S. domiciliary for transfer tax purposes. Therefore, it is important to have as many factors as possible on the non-U.S. side of the scale, if the goal is to avoid U.S. domicile, at least until the pre-immigration estate planning is complete.

Not surprisingly, if a foreign person is treated as a resident for income tax purposes, he or she will be at significant risk of being treated as a U.S. domiciliary for gift and estate tax purposes. This can be particularly fraught with peril if an individual is in possession of a U.S. green card because possession of the green card itself is strong, but not dispositive, evidence of an individual’s intention to permanently reside in the U.S.

In order to determine whether, based on the facts and circumstances, the client is likely a non-resident for transfer tax purposes, international estate and tax planners assisting clients with pre-immigration estate planning should develop a comprehensive checklist and questionnaire to provide to clients, preferably in their native language, and should thoroughly interview these clients.

Pitfalls to be aware of include: the possession of a green card, or, in the absence of a green card, significant time spent in the U.S. each year, or affirmations or other statements made under penalty of perjury on visa applications, U.S. tax returns, state filings (including driver’s license applications), and existing estate planning documents.

If, after the planner completes a comprehensive analysis of the client’s circumstances, it appears that the client is not presently domiciled for U.S. transfer tax purposes, then the planner should explore with the client several different planning techniques that may effectively minimize or eliminate the client’s exposure to U.S. transfer tax. Those techniques are discussed in the following section.

C. Application of U.S. Estate and Gift Tax Rules to Non-U.S. Domiciliaries

If a client is not domiciled (i.e., a non-U.S. domiciliary) for transfer tax purposes, then the following rules apply:

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1. Federal Estate Tax

With respect to a non-U.S. domiciliary, the federal estate tax exclusion at death is fixed at a mere \$60,000 per person. In other words, any U.S. situs assets in excess of the \$60,000 exclusion are subject to the U.S. federal estate tax.²⁷ That compares quite unfavorably to the \$5,450,000 per person federal estate tax exclusion that currently applies to U.S. citizens and domiciliaries (in 2016). The \$60,000 exclusion may be modified if the U.S. has entered into a tax treaty regarding the estate tax with the non-domiciliary's home country.²⁸ For example, the U.S. – Canada Tax Treaty provides some treaty relief to Canadian citizens and residents.²⁹ Specifically, for a Canadian citizen, the estate tax exclusion is the greater of \$60,000 or an amount equal to the exclusion available to a U.S. person (currently \$5,450,000 in 2016) multiplied by the ratio of the decedent's U.S. situs assets to their worldwide assets. So, for example, if a non-domiciliary dies with a \$10 million worldwide estate, including \$1 million of U.S. situs assets, the exclusion would be \$545,000, or 10 percent of the \$5,450,000 exclusion available to a U.S. person.³⁰ Japan is the only Asian country that has entered into an estate tax treaty with the U.S.; the U.S. does not have an estate tax treaty with China, Hong Kong, or Taiwan.

A non-U.S. domiciliary is only subject to federal estate tax on U.S. situs assets.³¹ Therefore, an important question for a non-U.S. domiciliary is whether or not an asset is a U.S. situs asset. The rules defining U.S. situs assets are not always clear, but generally: (a) real property has a situs in the country where it is located;³² (b) the situs of tangible personal property (i.e., essentially physical items) is generally determined by the location of the property at the time of the decedent's death;³³ (c) physical currency situated in the U.S., including deposits with a U.S. bank³⁴ and shares of stock in U.S. corporations have a situs in the U.S. while shares of stock in foreign corporations do not;³⁵ (d) with some exceptions, debt obligations of a U.S. person have a U.S. situs;³⁶ and (e) there are no clear rules with regard to the situs of partnership interests for U.S. estate tax purposes, but there is some weight of authority that suggests that if the partnership does not qualify as a separate legal entity and the underlying assets of the partnership are situated in the U.S. the interest will be a U.S. situs asset subject to estate tax.³⁷

2. Federal Gift Tax

Provided that the gifted assets are foreign situs, the U.S. has no claim of right to tax the non-U.S. domiciliary. In contrast, when a non-domiciliary gifts U.S. situs assets, in general, there is *no lifetime exclusion* from the U.S. gift tax. However, the \$14,000 annual gift tax exclusion does apply, as do the exclusions for direct medical and tuition payments.

Importantly, for a non-U.S. domiciliary, U.S. federal gift tax is imposed only on a non-U.S. domiciliary if that individual makes a lifetime gift of U.S. situs real property,³⁸ tangible personal property that is present in the U.S. on the date of the gift,³⁹ or physical currency (whether U.S. or foreign) that is situated within the U.S. (including cash on deposit with a U.S. financial institution).⁴⁰ On the other hand, intangible property gifted by a non-U.S. domiciliary is generally not subject to U.S. gift tax, though caution should be taken when evaluating whether a gift of a partnership or limited liability company interest will be treated as an intangible for U.S. gift tax purposes.⁴¹ Helpfully, while shares of stock in a U.S. corporation held by a non-U.S. domiciliary are subject to U.S. federal estate at a non-U.S. domiciliary's death, those same shares are deemed intangible (non-U.S. situs) property for purposes of the gift tax, and therefore, can be gifted free of U.S. gift tax during life.⁴²

Moreover, a non-U.S. domiciliary may be able to avail himself or herself of a favorable treaty provision that enables the non-U.S. domiciliary to avoid the imposition of U.S. gift tax on a gift of an asset that would otherwise be deemed to be situated in the U.S. For example, under the U.S. - German Tax Treaty, a gift of cash, tangible personal property or debt obligations by a German domiciliary is subject to tax only in Germany *even if* those assets are situated in the U.S. on the date of the gift.⁴³

D. Planning Opportunities for Non-U.S. Domiciliaries

The limitations upon which the U.S. can impose U.S. gift tax during the life of a non-domiciliary or U.S. estate tax at the death of a non-domiciliary open up significant planning opportunities for individuals who desire to immigrate to the U.S., invest in the U.S., or send their children or grandchildren to the U.S.

The key for a non-U.S. domiciliary is to implement effective strategies designed to minimize exposure to federal estate and gift tax *before* becoming a U.S. domiciliary. These strategies should be carefully evaluated based on an individual's unique circumstances. Some common strategies include:

1. Gift of Foreign Situs Assets Either Outright or to a U.S. Trust for the Beneficiary

If the non-domiciliary has children or grandchildren in the U.S., or anticipates that their children or grandchildren will eventually establish residency in the U.S., the non-domiciliary should consider gifting non-U.S. situs (i.e., foreign) assets to them. Such gifts would be free of U.S. gift tax. However, if the gifts are substantial, then the gifts may eventually become subject to U.S. gift or estate tax if the U.S. beneficiary gives away the asset or dies with a taxable

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estate. Accordingly, the non-U.S. domiciliary might instead consider funding a U.S. trust rather than a gift outright.

The non-domiciliary could fund a trust with shares of stock of a U.S. corporation, an insurance policy (even if written by a U.S. insurer),⁴⁴ or (with substantial care) cash on deposit with a foreign financial institution not situated in the U.S. As long as the assets gifted to the trust are *intangible*, the gift should not be subject to U.S. gift, estate or generation-skipping transfer tax in the non-domiciliary's estate nor in the estates of the trust beneficiaries. Moreover, if the non-U.S. domiciliary selects a jurisdiction with favorable trust laws, such as South Dakota, an unlimited amount of assets may escape federal estate, gift, and generation-skipping transfer taxation *in perpetuity*.⁴⁵ Contrast this result to U.S. citizens and domiciliaries who are currently limited to a \$5,450,000 per person (\$10,900,000 per couple) generation-skipping transfer tax exemption, which caps the amount that any such U.S. person can give to a trust that will avoid federal transfer tax in perpetuity.

2. Complete Gifts Prior to Residency

Alternatively, if the non-U.S. domiciliary intends to become domiciled in the U.S. at some point in the future, but his or her children, grandchildren or other friends or family do not intend to also reside in the U.S., then the non-U.S. domiciliary might consider making gifts of appreciated or income-producing property directly to the non-U.S. family members.

3. Establish a Foreign Corporation to Hold Assets

If the non-domiciliary anticipates investing in U.S. assets, he or she should consider establishing a foreign corporation to hold what would otherwise be U.S. situs assets. The foreign corporation is not considered a U.S. situs asset, so the non-U.S. domiciliary would then have no interest in a U.S. situs asset at his or her death, and shares in the foreign corporation could also be gifted by the non-U.S. domiciliary during life. For example, capitalizing a foreign corporation and then subsequently having the foreign corporation acquire U.S. real estate is a common technique used to exclude the value of the U.S. real estate for estate and gift tax purposes. While this might seem like a simple answer to avoid the imposition of U.S. transfer taxes when a non-U.S. domiciliary wants to own interest in U.S. real estate, direct or indirect ownership of U.S. real estate by a foreign corporation may result in other undesirable income tax consequences, including the loss of long-term capital gains preference on the later sale of the real estate.⁴⁶

4. Purchase U.S. Assets in a Trust

Trusts are often used to purchase U.S. situs assets, in-

cluding residential real estate. Generally, the trust (whether foreign or domestic) must be established and funded well before there is any commitment to purchase U.S. situs assets. In the case of U.S. real estate, the trust should preferably be funded before a desirable property is identified, and certainly before a real estate purchase and sale agreement is signed. The trust, rather than the creator of the trust or any family member, would purchase the U.S. real estate. The creator of the trust should not be the trustee or a beneficiary. However, the person's spouse and/or children may be beneficiaries. In many cases, it would be natural for the creator of the trust to occasionally use the property as a guest of family members who are beneficiaries, so long as there is no express or implied understanding or agreement at the time the trust is funded that this will be the case. Alternatively, the creator of the trust could pay the trust fair market rent for the use of the property, and that rent would of course be subject to U.S. income tax. As discussed above, other non-U.S. situs assets could also be gifted or sold to the trust. Note that if the individual is not domiciled for U.S. transfer tax purposes, but is a resident for income tax purposes, then the funding of a foreign trust may not be advisable because among other things, the trust will be subject to the U.S. throwback rules as to accumulation distributions made to any U.S. beneficiary, and the trust may recognize capital gain on its assets if the client terminates U.S. income tax residency.⁴⁷

Theoretically, the creator of the trust can be a discretionary beneficiary of an irrevocable trust, and nevertheless make a completed gift to the trust that will be outside of the creator's estate for federal estate tax purposes.⁴⁸ To accomplish this desirable result, the trust must be established in and governed by the laws of a jurisdiction, such as South Dakota, that provides creditor protection with respect to the creator of such a "self-settled" trust. However, if the facts and circumstances demonstrate that there is an express or implied agreement that the trustee will exercise its discretion in favor of the grantor, then there is a significant risk that U.S. transfer tax will be imposed upon the death of the creator of the trust, as if the trust had not been established and the creator of the trust owned the U.S. real estate directly. Any history of distributions to the creator of the trust, or use and enjoyment of the trust assets by the creator of the trust, will be viewed in a negative light. Therefore, it is normally recommended that the creator of the trust not be a beneficiary.

5. Reliance upon Treaty Relief

If there is an estate and/or gift tax treaty, the non-U.S. domiciliary may prefer to rely on the treaty exemption, or tie-breaker rules established in the appropriate treaty, that determine domicile for U.S. estate and gift tax purposes.⁴⁹

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E. Planning Pitfalls

A cross-border estate planner must be on the lookout for the numerous planning pitfalls that abound. Although not a complete list, following are a few pitfalls we have witnessed and regard as particularly important for planners to be wary of.

1. Gift of Cash

A gift by a non-U.S. domiciliary of amounts on deposit at U.S. financial institutions, or a U.S. branch of a foreign financial institution, will be treated by the IRS as tangible personal property, potentially subjecting those deposits to U.S. gift tax if a non-U.S. person makes a gift of those deposits.⁵⁰ In this day and age, cash on electronic deposit with a bank is somewhat of a fiction. The deposit is an insured obligation of the bank to pay out (or wire transfer) an identical sum on demand by the depositor, but the bank is not holding the identical currency to that deposited by the depositor. Instead, the bank has invested that amount which will pay it a higher rate of interest (or return) than the interest owed to the depositor. Nevertheless, the IRS views amounts on deposit at U.S. financial institutions as tangible personal property. This includes a gift of an amount by check, because in the IRS view, the gift by check is not completed until the funds are withdrawn from the donor depositor's bank account and transferred to the donee.⁵¹ The act of withdrawal is a transfer of tangible personal property (the currency) that occurs in the U.S., the result of which is a gift of U.S. situs tangible personal property.⁵²

On the other hand, a payment of funds from a non-U.S. domiciliary's foreign bank account to a U.S. donee (by check or wire) should not be subject to U.S. gift tax because by the same logic the act of withdrawal occurred in a foreign jurisdiction and therefore even if the cash is tangible personal property it does not have situs in the U.S.⁵³

Therefore, careful planning is required to ensure that a gift of cash by a non-U.S. domiciliary is not subject to U.S. gift tax.

2. The Step-Transaction Doctrine

The IRS has been successful in collapsing or ignoring transactions where the true intent of the foreign person has been to make a gift of U.S. situs property (such as U.S. situs real property), or in instances where the steps "are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the other steps," or where there is a "binding commitment" that the parties were required to complete the steps to achieve the end result.⁵⁴

The step-transaction doctrine can be invoked to thwart a number of cross-border planning techniques. In particular, planners should be on the lookout for transfers to foreign

corporations or U.S. or foreign trusts close in time to the acquisition of U.S. situs real estate by the foreign corporation or trust. For example, assume that non-U.S. domiciliary "A" transfers cash to a trust for the benefit of A's descendants, none of whom are U.S. citizens or residents at the time of transfer. Shortly thereafter, the trustee purchases U.S. situs property from A. The position of the Service in this situation is that at least for generation-skipping transfer tax purposes, the effect of the transaction is to transfer U.S. situs property from the transferor to the trust.⁵⁵ A variation on this analysis would be for the IRS to collapse the transaction for gift tax purposes and assert that the non-U.S. domiciliary made a gift of U.S. real estate, that would be subject to U.S. gift tax to the extent that the value exceeded \$14,000 per recipient.

Another example of the collapse of an otherwise gift tax-free transaction would be the conversion by a non-U.S. domiciliary of U.S. situs assets (such as cash on deposit with a U.S. bank) into non-U.S. situs assets (such as stock in a U.S. corporation which is excluded for gift tax purposes) followed by an immediate gift of those shares.

The cross-border estate planner must be on the lookout for potentially troublesome transactions such as these and advise the non-U.S. domiciliary client accordingly.

3. Foreign Reporting

Even if a transaction is not subject to U.S. gift tax, the donee may still need to report the transaction on a timely filed Form 3520. For example, a Form 3520 must be filed by the trustee of a U.S. trust to report the receipt of a gift from a non-U.S. domiciliary. In addition, the U.S. beneficiary of a foreign trust who receives a distribution from the trust must also report the distribution on Form 3520. The non-U.S. domiciliary may also have a filing requirement if a foreign trust structure is utilized and the non-U.S. domiciliary is a resident for U.S. income tax purposes.⁵⁶ Lastly, a U.S. donee must file a Form 3520 to report a direct gift or bequest from a non-U.S. domiciliary (or the estate of a non-domiciliary) if the amount received in a taxable year is more than \$100,000.

Failing to file the Form 3520 can have grave consequences, including the imposition of penalties that can be as high as the greater of \$10,000 or five percent of the amount of the foreign gift.

Of equal importance is that Form 3520 is the taxpayer's footprint with regard to character (including situs) of the property received from the non-U.S. domiciliary and will be a key document that the taxpayer and the IRS will refer to in the event of an audit. Failing to file the Form 3520 paints a picture of non-compliance that can leave the taxpayer hard-pressed to rebut an assertion made by the IRS during the course of an audit, absent other key records.

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Once a non-U.S. domiciliary becomes a U.S. resident for *income tax* purposes, a number of reporting rules apply to the newly minted U.S. person's foreign assets, including rules under FBAR and FATCA.⁵⁷

F. Conclusion

The U.S. laws governing cross-border estate planning present estate planners and their clients with significant opportunities upon which to capitalize to reduce exposure to potential future U.S. transfer tax. As the Seattle metropolitan area continues to thrive with respect to international investment and remains a desirable place to immigrate, estate planners will encounter these issues and opportunities with greater frequency. Therefore, it is vital that estate planners who advise international clients with significant net worth have a thorough understanding of the rules of the road and potential pitfalls in this fascinating but complicated area of tax law.

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- 9 Peter Coy, *China's Capital Flight*, Bloomberg Business Week, January 14, 2016, available at <http://www.bloomberg.com/news/articles/2016-01-14/china-capital-flight-and-gabriel-wildau-china-steps-up-capital-controls-to-stem-outflows>, Financial Times, January 8, 2016, available at <http://www.ft.com/cms/s/0/9e25a772-b5df-11e5-aad2-3e9865bc6644.html#axzz4ABFggxI7>.
- 10 See Spero, *Asset Protection: Legal Planning, Strategies and Forms*, Chapter 7 (2016).
- 11 See e.g., IRC §679 (rules governing foreign trusts with one or more U.S. beneficiaries), IRC §957 (controlled foreign corporation or CFC rules), and IRC §1297 (passive foreign investment company or PFIC rules).
- 12 IRC § 7701(b)(1)(A)(i).
- 13 *Id.* at (b)(1)(A)(iii).
- 14 *Id.* at (b)(5). IRS form 8843 must be filed to exclude the days.
- 15 *Id.* at (b)(3). The closer connection exception must be claimed on IRS form 8840, which must be attached to the individual's U.S. tax return, or if none is required, sent directly to the IRS.
- 16 Treas. Reg. § 301.7701(b)-7. The treaty based position must be claimed on IRS form 8833.

- 17 120 days spent in each of the three most recent years, count: (i) all of the days in the current year (120 days); (ii) plus 1/3 of the days in the prior year (40 days); and (iii) 1/6 of the days two years prior (20 days). The total number of days equals 180 days, which is less than the triggering number (183 days).
- 18 See e.g., *Mitchell v. United States*, 88 U.S. at 350, 353 (1875) and Treas. Reg. § 20.0-1(b)(2).
- 19 *Id.* at 1(b)(1).
- 20 Thomson Reuters *Federal Tax Coordinator, 2d.*, ¶R-8003 (2016) available at RIA Checkpoint.
- 21 Estate of Jan Willem Nienhuys, 17 TC 1149 (1952).
- 22 Rev. Rule 80-209; 1980-2 CB 248 (1980).
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 Rev. Rule 80-209.
- 27 IRC § 2102(b)(1).
- 28 The U.S. has entered into tax 18 separate tax treaties that address relief from double taxation of estate and/or gift tax. See <https://www.irs.gov/businesses/small-businesses-self-employed/estate-gift-tax-treaties-international>.
- 29 See Tax Convention, U.S. – Canada, Paragraph 2 of Article XXIX B (Taxes Imposed by Reason of Death) (1995 Protocol).
- 30 *Id.*
- 31 See IRC §§ 2101, 2103, and 2104.
- 32 Treas. Reg. § 20.2104-1(a)(1).
- 33 *Id.* at -1(a)(2).
- 34 See e.g., *Blodgett v. Silberman*, 277 U.S. 1 (1928) (“But we think that money, so definitely fixed and separated in its actual situs from the person of the owner as this was, is tangible property that cannot be distinguished from ... paintings and furniture) and IRS Gen. Couns. Memo. 36860 (1976) (in the gift tax context the IRS held that a gift of currency (by check) on deposit with a U.S. Bank was subject to gift tax), and PLR 7737063 citing *Blodgett* (cash is tangible property).
- 35 IRC § 2104(a).
- 36 Treas. Reg. § 20.2104-1(a)(7).
- 37 Glenn G. Fox, *U.S. Estate Planning for Nonresident Aliens from Treaty Countries, a comparison of Germany, Austria, France and the United Kingdom* at 5, citing *Sanchez v. Bowers*, 70 F.2d 715 (2d Cir 1934) (holding that U.S. property held by an “association” between husband and wife under Cuban law was properly included in the decedent's U.S. gross estate).
- 38 Treas. Reg. §§ 25.2511-3(a)(1) and (b)(1).
- 39 *Id.*
- 40 See Treas. Reg. § 25.2511-3(b) (provides that while a debt obligation is an intangible asset for gift tax purposes, currency is not a debt obligation, therefore implying that currency is tangible) and IRS Gen. Couns. Memo. 36860 (1976).
- 41 Diana S.C. Zeydel and Grace Chung, *Estate Planning for Noncitizens and Nonresident Aliens: What Were Those Rules Again*, 106 Journal of Taxation 1 (2007) (“Neither the Code nor the regulations address the situs of partnership interests for gift tax purposes. . . and case law and rulings are inconclusive. [While], in general an equity interest in an entity is treated as an interest in intangible property not subject to U.S. gift tax, regardless of the situs of the entity, one of the areas in which the Service will not issue a private letter ruling is whether a partnership interest is intangible property for U.S. gift tax purposes”).
- 42 IRC § 2511(b)(1) and Treas. Reg. § 25.2511-3(b)(3).
- 43 See Estate and Gift Tax Treaty, U.S. – Germany, at Article 9 (entered into force 1986).
- 44 IRC § 2105(a). See also Zena Tamler and Katherine DeMamiel, *Planning for the Non-Citizen Spouse*, 124 Journal of Taxation 6 (2016) (“The proceeds of life insurance held on the life of an individual who is not a U.S. citizen or domiciliary is not considered to be a U.S. situs asset and therefore is not includable in the U.S. taxable estate of such individual. This means that a non-U.S. Person spouse may hold insurance on his or her life without incurring U.S. estate tax on his or her death.”)
- 45 See South Dakota Stat. § 43-5-8 (Rule against perpetuities not in force in South Dakota). In contrast, RCW 11.98.130 provides that Washington's rule against perpetuities for trusts is 150 years.
- 46 IRC §§ 1(h)(1) & 1201.
- 47 See IRC § 684 and Treas. Reg. § 1.684-2(c), ex. 2 (the transfer to the foreign trust is treated as made as of the moment of the transferor's death) and Treas. Reg. § 1.684-4. See also IRC § 665(b) (regarding the throw back rules).
- 48 See e.g., Rev. Rul. 76-103, 1976-1 C.B. 293 (“If and when the grantor's dominion

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The Long-Awaited Shakeup to Valuation Discount Planning for Family-Controlled Entities: A Brief Overview of Proposed Regulations for §2704

By Jason Appelgate and Eric Reutter, Appelgate Reutter, PLLC

This article will provide a brief overview of the major provisions of the proposed regulations to Internal Revenue Code (IRC) Section 2704, with a special focus on: (1) the three-year rule applicable to lapses under 2704(a), (2) the new categories of disregarded restrictions, and (3) modifications to the definition of applicable restrictions.

Background

In 1990, Congress enacted IRC §2704 in an effort to restrict family-controlled entities from taking advantage of valuation discounts. Despite the passage of §2704, family-controlled entities have taken advantage of valuation discounts by using statutory and regulatory exceptions to §2704, exceptions that the IRS and some others believe allow for abusive tax practices. As early as the 1990s, the Clinton administration attempted, unsuccessfully, to do away with valuation discounts while creating a carve out for ongoing active businesses. More recently, the Obama administration encouraged Congress to reform §2704. With Congress appearing unlikely to pass new legislation in the near future, the IRS recently issued the long-awaited proposed regulations to §2704 on August 4, 2016.

Three Major Categories of Changes

Three-Year Rule – Lapses Under 2704(a)

IRC §2704(a) treats the lapse of a voting or liquidation right as the basis to impose the negative tax consequence of either a deemed gift or inclusion in the transferor's gross estate. Under current IRS regulations, however, a lapse in a voting or liquidation right is disregarded for purposes of §2704(a) so long as the "rights with respect to the transferred interest are not restricted or eliminated." *Treas.*

Reg. §25.2704-1(c)(1). The IRS has long taken the position that this regulatory exception should not apply if such a transfer is made on the transferor's deathbed. The IRS, in its background to the proposed regulations, acknowledged that this subjective deathbed analysis is an unsatisfactory tool to combat abuse of this regulatory exception and, in the proposed §2704 regulations, has instead promulgated a bright-line three-year standard for when such transactions will be deemed abusive.

The new three-year bright-line rule functions similarly to other three-year claw back provisions seen elsewhere in the Internal Revenue Code. Once an individual transfers entity ownership interests that qualify for the exception to IRC §2704(a) found in *Treas. Reg. §25.2704-1(c)(1)*, three years must pass before the transferor has assurance that the strategy has succeeded. If the transferor dies within three years of the transfer, the IRS regulations, in effect, undo the transferor's tax saving benefits. If the transferor instead dies after the three-year time period expires, then the transferor will have secured the benefit of the valuation discounts and, in such case, the strategy has succeeded in reducing tax liability on the family.

The ambiguous language of the regulations makes the exact formula of the regulation's claw back mechanism unclear, but some commentators have taken the view that the regulations have created a formula that may, in effect, return the transferred asset's value to the transferor's estate.

Applicable Liquidation Restrictions – Restrictions No More Restrictive than Default State Law Provisions Now Ignored; Only Mandatory State Law Considered

IRC §2704(b)(1) provides that, for certain transferred

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and control of the trust assets ceases, such as by the trustee's decision to move the situs of the trust to a State where the grantor's creditors cannot reach the trust assets, then the gift is complete for Federal gift tax purposes under the rules set forth in section 25.2511-2 of the regulations.....") and PLR-103772-09 ("[T]he trustee's discretionary authority to distribute income and/or principal to Grantor, does not, by itself, cause the Trust corpus to be includible in Grantor's gross estate under § 2036[, however] [w]e are specifically not ruling on whether Trustee's discretion to distribute income and principal of Trust to Grantor combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion) may cause inclusion of Trust's assets in Grantor's gross estate for federal estate tax purposes under § 2036.")

49 See *supra* at 38.

50 See *supra* at 35.

51 *Id.* See also M. Read Moore, *Practical Estate Planning for Nonresident Aliens*, ALI CLE Estate Planning Course Materials Journal 2014 at 44 available

at http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/EP-CMJ1410_Moore_thumb.pdf.

52 *Id.*

53 See *id.*

54 See, e.g., *Davies v. Comm'r*, 40 T.C. 525 (1963) and *Goldschmidt-Rothschild v. Comm'r*, 9 T.C. 325 (1947) *aff'd*, 168 F.2d 975 (2d. Cir 1948) (conversion of U.S. situs assets into foreign situs assets followed by a reconversion into U.S. situs assets).

55 Prop. *Treas. Reg. § 26.2663-2(e)(1)*, ex 2.

56 See instructions to form 3520.

57 See, e.g., 31 U.S.C. §§ 5314, 5321; 31 C.F.R. §§ 1010.350, 1010.306(c); FinCEN Form 114, Report of Foreign Bank and Financial Accounts and IRC § 6038D (enacted pursuant to the Foreign Account Tax Compliance Act (FATCA), that requires individuals to file Form 8938 with their income tax returns for tax years starting after March 18, 2010).

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The Long-Awaited Shakeup to Valuation Discount Planning for Family-Controlled Entities...

interests of family-controlled entities, any “applicable restriction” will be disregarded for the purposes of valuing the transfer. An applicable restriction is defined as a restriction that effectively limits the ability of the entity to liquidate, but which, after the transfer, either in whole or in part, will lapse or may be removed by the transferor or the transferor’s family, either alone or collectively.

Section 2704(b)(3)(B) provides an important exception from the definition of an applicable restriction for any restriction required to be imposed by either federal or state law. Current **Treas. Reg. §25.2704-2(b)** amplifies this concept by limiting applicable restrictions to only those restrictions that are more restrictive than default restrictions that would apply under state or local law. While this limitation was effective when drafted, state default laws have changed so drastically that the regulation now allows tax advisors to take advantage of restrictive default laws to decrease the amount of applicable restrictions in partnership agreements. The proposed regulations, therefore, remove the taxpayer-friendly language of the current Treasury Regulations, and provide instead that restrictions that are no more restrictive than default state law provisions will now be disregarded. The proposed regulations also clarify that the exception for mandatory state law restrictions will be applicable only if the purportedly mandatory state laws cannot be avoided. Washington state’s laws governing entity restrictions are default in nature, and not mandatory, and therefore *restrictions that are no more restrictive than Washington’s default laws will be disregarded for valuation purposes under the proposed regulations.*

Disregarded Redemption Restrictions Added Pursuant to 2704(b)(4)

The IRS, in its proposed regulations, asserts that four new types of restrictions fit within the statutory precondition of a reduction in transfer tax but an undiminished value to the transferee. The IRS will disregard any restrictions that: (a) limit the ability to compel liquidation or redemption of the transferred interest; (b) limit the liquidation proceeds to an amount that is less than a minimum value; (c) defer the payment of the liquidation proceeds for more than six months; or (d) permit the payment of the liquidation proceeds in any manner other than in cash or other property, other than certain notes.

Section 2704(b)(4) gives the IRS regulatory power to select and add future restrictions to be disregarded for valuation purposes, so long as the selected disregarded restrictions have the effect of reducing the value of the transferred interest for transfer tax purposes but do not ultimately reduce the value of the interest to the transferee.

The “Deemed Put Right” Debate – The End of Lack of Control and Marketability Discounts for Transfers of Interests in Family-Controlled Entities?

Tax professionals have debated whether the language of the proposed regulations will cause the end of minority or lack of marketability interests via the concept of a “deemed put right.” Those who assert that a deemed put right exists focus on the language of the proposed regulations governing disregarded restrictions. The instructions in the proposed regulations for these new §2704(b) disregarded restrictions provide that the fair market value of the transferred interest is to be valued “as if the restriction (whether in the governing documents, applicable law, or both) does not exist.” Left unclear is whether this language applies only to disregarded restrictions contained within the written partnership agreement, or also to all disregarded restrictions found in local law (sometimes referred to as “silent” restrictions). If this disregarded restriction language applied also to the local law silent restrictions, then such restrictions would be disregarded for valuation purposes, and lack of control or marketability discounts would be inapplicable to nearly any transfer of a controlled family entity interest. If, however, a disregarded restriction is not assumed under local law, then lack of control or marketability interests are still appropriate when valuing the transferred interest.

The IRS has stated that the proposed regulations are not intended to eliminate any minority or marketability discounts. Instead, the proposed regulations are expected to ignore certain restrictions, but do not create an implied put or redemption right. However, as described above, the language of the proposed regulations is far from clear.

Other Miscellaneous Changes

In addition to the topics discussed above, the proposed regulations would (1) establish a very broad definition for the types of entities subject to **IRC 2704**; (2) curtail the ability to avoid the application of §2704 by transferring an entity interest to an assignee; and (3) apply the provisions of §2704 to the grant of an insubstantial interest in the entity to a non-family member.

Effective Date

A public hearing regarding the proposed regulations will be held on December 1, 2016. While it is unclear when the IRS will finalize the regulations, the proposed regulations provide that the disregarded restrictions provisions would come into effect 30 days after the regulations are finalized. Therefore, the proposed regulations may be effective as early as January 1, 2017.

Living in a Committed Intimate Relationship? Planning for Unmarried Couples

By Paul Firuz, Miller Nash Graham & Dunn LLP

It is quite common to encounter clients who live together and are not married. Of course, marital status doesn't affect a person's right to dispose of his or her estate at death, but the existence of a significant nonmarital relationship can impact a client's estate planning needs, and can also lead to estate litigation if not properly planned for. This is because, under Washington's "Committed Intimate Relationship" doctrine, even if no formal legal steps have been taken to solemnize an intimate relationship, such a relationship may still be deemed to have affected each party's rights in property acquired while they were together. Therefore, if such a relationship existed, it could mean that some assets titled in the decedent's name are not actually (or not entirely) part of the decedent's estate.

This article (1) traces the history of how Washington courts have treated committed intimate relationships and the evolution of the current doctrine; (2) discusses how to identify relationships that may be deemed significant enough to change the parties' equitable rights in property acquired during the relationship; (3) details how parties' ownership rights are affected when such a relationship is found; (4) examines the application of the doctrine to relationships that terminate upon death; and (5) gives some tips on how (and why) to encourage clients in these kinds of relationships to plan ahead.

1. History of the Committed Intimate Relationship Doctrine

A couple cannot enter a common-law marriage in Washington,¹ and community property rights are derived only through marriage.² In the past, intimate relationships existing outside the bounds of marriage were characterized as "meretricious" under Washington law,³ and historically, the rights of couples living together over a long period were not affected by these nonmarital relationships.⁴ The courts' position until the mid-1980s was that any property acquired during a "meretricious" relationship belonged to the party in whose name legal title stood, and that without any evidence to the contrary, the law would presume that the parties had disposed of their property as they intended to.⁵ That is, if parties lived together but were not married, property would be divided according to title, and a court would not presume that the relationship had given rise to any legal rights of the partner not on title.

In 1984, however, in *In re Marriage of Lindsey*,⁶ Washington's Supreme Court overruled its history of presuming that a long-term committed intimate relationship should have no effect on the couple's property rights. The *Lindsey* court held that when such a relationship exists, Washington courts must examine the property accumulations during the relationship, and must make a "just and equitable" disposition of the couple's property upon termination.⁷

Despite continuing to use the demeaning moniker of "meretricious," courts did recognize that certain nonmarital relationships could be so significant as to give rise to some equitable rights in each partner. In 2007, Washington's Supreme Court decided that the term "meretricious" should no longer be used to describe such relationships, and adopted instead the phrase "committed intimate relationship."⁸

Of course, many couples now live together in committed relationships before marriage, or without ever being married. Whether these couples know it or not, Washington's laws regarding committed intimate relationships ("CIRs") may govern the disposition of their property if they break up or when one member of the couple dies.⁹

2. Recognizing a CIR

The most salient feature of a CIR is generally cohabitation. If a client is living with a romantic partner and the two are not married or registered as domestic partners, the estate planner should inquire further about the duration and nature of the relationship, how the couple manages its assets, and what each party's intent is with regard to ownership of assets acquired during the relationship.

The hallmarks of a CIR were defined by Washington's Supreme Court in *Connell v. Francisco*,¹⁰ which involved the separation of a gay couple who could not have been legally married at that time. Although the couple was not (and indeed could not have been) legally married, the *Connell* court recognized that the relationship was "marital-like" under the court's reasoning in *Lindsey*, and found that property acquired by the couple during their relationship should be subject to the same presumption of joint ownership that it would have if the parties had been married.¹¹ In its determination that the relationship was significant enough to give rise to a community-like presumption, the *Connell* court considered five factors:

1. Continuous cohabitation;
2. Duration of relationship;
3. Purpose of relationship;
4. Pooling of resources and services for mutual benefit; and
5. The parties' intent.

Subsequent cases have clarified that the *Connell* factors are not exclusive, that they are not meant to be hyper-technical, and that none of them is necessarily more important than any other.¹² It is unclear whether all five *Connell* factors must be met in order to determine that a CIR exists, though. In an unpublished case, the Court of Appeals ruled that the five *Connell* factors, while not exclusive, are in fact minimum requirements for finding a CIR; while unpublished, this case suggests that a CIR may not be found when one or more of those five *Connell* factors is

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not proved.¹³ In that case, the court noted that Washington's Supreme Court "has never held that there was a CIR in the absence of one of the *Connell* factors."¹⁴ The Supreme Court has to date still not found a CIR that did not at least meet the five *Connell* factors, but there is no definitive ruling that the bar set out in *Connell* must, in fact, be met in order to find the existence of a CIR. At this point, it is fairly clear that if the five *Connell* factors can be met, a CIR may well exist. Whether a CIR exists when one or more factor cannot be met is still up for debate. The one thing that can be said with certainty is that whether a CIR exists will be determined on the unique facts of each case.¹⁵

Note: CIRs Can Exist Before Marriage or Domestic Partnership

The CIR doctrine does not apply only to couples who never marry or register as domestic partners—it can also apply to the period *before* a couple legally formalizes the relationship. In *In re Domestic Partnership of Walsh*,¹⁶ the Court of Appeals dealt with the case of a lesbian couple whose CIR predated the legal recognition of their relationship. The court held that it was error to pin the beginning of the couple's CIR to the date they registered as domestic partners, and that the trial court should have weighed the length of time the couple lived together without considering their domestic partnership status.

The *Walsh* decision stands for the proposition that although community property can be created only after parties legally formalize their relationship, equitable community-like rights can begin accruing in property acquired by a couple long before they ever say "I do." The *Walsh* decision also affirms that the passage of marriage equality and domestic partnership laws does not affect the status of preexisting CIRs, and does not mean that the doctrine of CIR will be done away with. CIR is a common-law doctrine—an "equity relationship"—and does not depend on the legality or formality of the parties' relationship.¹⁷

3. How Does a CIR Affect the Interests of Each Member of the Couple?

When a couple has a significant relationship that rises to the level of a CIR, Washington courts will protect each party's interest in property acquired and used by the couple during the CIR.¹⁸ This "protection" has sometimes been deemed to be the prevention of the unjust enrichment of one partner when the relationship ends.¹⁹

Therefore, couples currently living in CIRs should not assume that property acquired during the relationship in the name of only one partner belongs solely to that partner. The historical approach originally taken in *Creasman v. Boyle* of distributing the property acquired during a nonmarital relationship according to title was overruled by the *Lind-*

sey court, which held that when a CIR exists, courts must examine the relationship and the property accumulated during the relationship, and "make a just and equitable disposition of the property."²⁰

Since the *Lindsey* decision, courts have clarified that the power to compel a "just and equitable" disposition applies only to property that would have been community property had the parties been married. Again, the *Connell* decision clarified what the new CIR doctrine created under the *Lindsey* decision would mean:

We hold that income and property acquired during a [CIR] should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a [CIR] is presumed to be owned by both parties. This presumption can be rebutted. All property considered to be owned by both parties is before the court and is subject to a just and equitable distribution. The fact [that] title has been taken in the name of one of the parties does not, in itself, rebut the presumption of common ownership.²¹

Later cases have reaffirmed the *Connell* court's stance that only property accumulated during the CIR was divisible at that CIR's end—property of one partner that would have been his or her separate property had the couple been married is not subject to distribution by the court at the termination of a CIR.²²

4. What Happens When One Member of a CIR Dies? (a) Applying the CIR Doctrine When Relationship Ends at Death

The *Lindsey* court recognized that partners in a CIR may have some rights in property acquired during the relationship, and the *Connell* court better defined which relationships rise to the level of CIR status and what property may be justly and equitably disposed of. But both of those cases dealt with couples parting ways during life, and the question of what (if any) rights a surviving partner would have after the death of one member of a CIR remained unanswered until 2001, when Washington's Supreme Court decided *Vasquez v. Hawthorne*.²³ The *Vasquez* matter involved a relationship of almost 30 years that ended when one member of the couple died. The trial court held that there had been a CIR, but the Court of Appeals held that since the relationship was between two men who could not legally marry, a CIR could not be found. The case might be most remembered for the Washington Supreme Court's vacation of that decision and remand for trial, which was a victory for same-sex partners who could not marry at the time. It was also the first time that the CIR doctrine had been interpreted to apply at the death of one member

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of the couple, although two concurring justices expressed doubt about whether the CIR doctrine should be applied at all to relationships terminated at death.

That doubt was assuaged when the court in *Olver v. Fowler* finally decided the matter in 2007: Washington's Supreme Court was again confronted with a CIR that had terminated at death, and this time definitively held that the CIR doctrine applies when a relationship is terminated by the death of one (or even both) partners.²⁴

(b) Rights of Surviving Partner

When a party to a CIR dies, even if it has been established that the CIR existed, the surviving partner does not stand in the same shoes as a surviving spouse would have in terms of his or her right to inherit from the decedent.²⁵ In *Peffley-Warner v. Bowen*,²⁶ Washington's Supreme Court answered a question from the Ninth Circuit regarding whether the surviving partner of a CIR should be treated as a widow under Washington's inheritance statutes, in light of the *Lindsey* court's overruling of the traditional *Creasman* approach.

The couple in question had been living together for 22 years before one party died, and the United States District Court for the Eastern District of Washington concluded that a CIR existed. The surviving partner sought both intestate inheritance rights and rights as a widow under the Social Security Act. The trial court found that the surviving partner was not the "spouse" of the decedent, and therefore was not entitled to the legal rights afforded a surviving spouse. The surviving partner appealed to the Ninth Circuit, arguing that the new rules under *Lindsey* meant that she should be treated as a surviving spouse.

The Ninth Circuit certified the question of the surviving partner's status under Washington law to the Washington Supreme Court. That court concluded that because the surviving partner was not a legal spouse during life, she should not be treated as a legal spouse following the death of the other member of the CIR. The *Peffley-Warner* court did not overrule *Lindsey's* recognition of the rights of partners in a CIR, but held that these rights are based on equity, not inheritance.²⁷

The *Peffley-Warner* court clarified that the surviving member of a CIR is not a "surviving spouse" under Washington law. Therefore, CIR partners are not entitled to receive an intestate share of the decedent's estate under **RCW 11.04.015**,²⁸ may not petition for awards under **RCW 11.54**,²⁹ and cannot recover for the wrongful death of the other partner or loss of consortium.³⁰

(c) A Note on Real Property

There is no reason to believe that Washington's tradi-

tional interpretation regarding what is separate and what is community property, and how character is determined, will not hold in the CIR context.³¹

When a couple lives in a home acquired by one partner before the relationship, the surviving partner *may* have an equitable interest in the property even though it would not be characterized as community, or "community-like," property.³² It is important to note, however, that under Washington law as expressed by the state's Supreme Court in *In re Marriage of Miracle*, "[a] right to reimbursement may not arise if the contributing spouse received a reciprocal benefit flowing from the use of the property."³³ That is, use of community funds expended toward one party's separate property may be offset by the community's beneficial use of that separate property. The Court of Appeals, citing the *Miracle* precedent in an unpublished decision, noted that equitable liens are generally imposed only when the circumstances require it.³⁴

The question whether the community has already been reimbursed for its expenditures to maintain a separate property residence will likely turn on the facts of each case, but there is no reason to believe that the court's logic in prior equitable lien cases will not apply to CIRs.

5. Planning for Unmarried Couples

The single best piece of advice to give clients whose relationships might meet the five *Connell* factors is to be as clear as possible about what role the relationships play in their lives, and what (if any) property rights they intend to create in and share with their partners.

Clients should be advised about the existence of the CIR doctrine, and what a court will weigh in order to determine whether a CIR existed. Clients should also be advised that their relationships may give rise to some equitable rights in their partners—this may come as a surprise to people who have intentionally not married or registered as domestic partners because they do not want their romantic relationships to affect their legal rights.

(a) Plan to Protect Property Rights

Some clients have intentionally declined to make their relationships "official" because they do not want to alter their rights under the law. But under the CIR doctrine, courts may find that a couple's rights have been affected despite the fact that the parties chose not to marry or register as domestic partners. If clients intend to keep all property separate, that intent should be made explicit in order to avoid a messy dispute when the relationship ends, whether during life or at death.

The Court of Appeals recently held in *In re Parentage of G.W.-F.*³⁵ that an oral agreement between the parties to

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a CIR could be enough to rebut the presumption that all property acquired during the relationship should be community-like.³⁶ In order to rebut the presumption, though, the agreement must (like a prenuptial agreement) be both procedurally and substantively fair, and the parties must have actually performed the agreement.³⁷ The *In re G.W.-F.* decision also clarified that the *Connell* five-part test requires that *both* parties intend to be in a CIR in order for the courts to find that one existed. Thus, a CIR may be terminated by *one party alone* who communicates unequivocally that he or she intends to end the relationship.³⁸ As of yet, no case law clarifies that a person could, by expressing his or her intent not to be in a CIR, continue to be in an intimate relationship without creating any equitable property rights in the partner. But since the intent of both parties is required to form a CIR, it seems that a court would not find that a CIR existed if one party had clearly and unequivocally expressed that he or she did not intend to form a CIR.

(b) Plan to Protect a Partner

Couples who are pleased to find that the law may give some rights to their partners—or who already assumed that living together for a long period of time would give rights to their partners—should also be cautioned to make their intentions clear. Although the CIR doctrine is now well established, each case will be decided on its own facts. And as with any other element of a person's estate plan, lack of clarity can lead to disputes. If a decedent leaves a surviving partner to the CIR doctrine, the decedent has also left the burden of proving the CIR, tracing the property, and hiring lawyers to pitch a fight with other parties interested in the estate. Although a couple in a CIR may not want to take any steps to make their relationship more formal, they should be cautioned that failing to leave behind any evidence of their intentions could result in a fight between the survivor of them and the deceased partner's estate or heirs at law. To avoid the potential for such fights, the members of a couple should make clear their intentions about the relationship and their partner's rights in assets acquired during the relationship.

(c) Plan Because it is the Most Efficient Course

It is important to note that determining a party's intent after that party has died can be extremely difficult. Unlike relationships that end during life, for which each party has their own version of the facts, in estate cases, not only is the deceased member of the couple unable to testify, but the "Deadman's Statute" could prevent anyone with an interest in the estate from testifying about the decedent's intent.³⁹ Parties trying to prove the existence of a CIR (or the opposite) must necessarily embark on a fact-intensive search

through old records; this is time-consuming and expensive, and there is no guarantee that the decedent's true intent with regard to his or her property will be discerned from old e-mails, valentines, and the ephemera of a shared life. Sorting through the collection of written evidence on the topic of the decedent's intimate relationships is certainly less efficient than reviewing a document that one or both members of the CIR prepared during life, and then giving effect to its terms.

The best way to ensure that a client's wishes with regard to his or her property are carried out is to document some expression of those wishes. Litigation is an expensive way to try to sort out what belonged to the decedent and how assets should be divided, can be painful for family and loved ones, and does not necessarily yield accurate results. In *In re Estate of Langeland v. Drown*,⁴⁰ the decedent and his partner engaged in a years-long legal battle to answer these simple questions. The decedent and his partner had lived together in a CIR for almost 20 years, from 1991 until the decedent died in 2009. The couple shared household duties and expenses, maintained separate bank accounts, tracked expenses, and repaid one another to "settle their accounts" at the end of every month. The surviving partner and the decedent's daughter went to trial to determine what property belonged to the decedent, and what the surviving partner's rights were. After trial, the matter was appealed. The Court of Appeals remanded, and the case went to trial again. And then the trial court's findings were again challenged at the Court of Appeals. Most clients would wish to avoid such a fight, whether to protect the daughter or the partner, or just to avoid the sheer waste of time, energy, and assets spent in attorneys' fees.

6. Conclusion

Couples in CIRs have obviously chosen not to take the steps necessary to formalize their relationship under law, and will likely not get married just because their estate planners tell them that doing so would make for an easier administration of their estates. That said, partners who live together but are not married can and should be advised about the five *Connell* factors and should be further advised that they should be clear about whether they intend for their relationship to affect their property rights, either in their basic estate planning documents or in an agreement regarding the character of property.

1 *In re Gallagher's Estate*, 35 Wn.2d 512, 515, 213 P.2d 621 (1950).

2 RCW 26.16.030.

3 *See, e.g., Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995).

4 *See, e.g., Creasman v. Boyle*, 31 Wn.2d 345, 196 P.2d 835 (1948).

5 *Id.* at 356.

6 101 Wn.2d 299, 678 P.2d 328 (1984).

7 *Id.* at 304.

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Recent Developments

Real Property

By Brian L. Lewis – Ryan Swanson & Cleveland PLLC

Title Insurer's Duty of Care to Third Parties, In Centurion Properties III v. Chicago Title Insurance Company, 186 Wn.2d 58 (2016).

In *Centurion Properties III v. Chicago Title Insurance Company*, 186 Wn.2d 58 (2016), the Washington State Supreme Court answered a certified question from the Ninth Circuit Court of Appeals regarding the existence and scope of a title insurer's duties to third parties when recording legal instruments. The court held that title insurers in Washington do not owe a duty of care to non-client third parties when recording facially valid legal instruments.

Plaintiff Centurion Properties III ("CP III") owned commercial property in Richland, Washington. CP III purchased the property with a mortgage loan from General Electric Capital Corporation ("GECC"). Chicago Title served as the title and escrow agent for the closing. GECC's loan documents and CP III's operating agreement prohibited further encumbrances on the Richland property.

After closing the GECC loan, CP III granted three junior deeds of trust against the property: two in favor of Centurion Financial Services ("Centurion") and one in favor of Trident Investments, Inc. Chicago Title recorded all three deeds of trust, each of which was facially valid.

When GECC later learned of the unpermitted junior liens, it accelerated its loan and commenced foreclosure proceedings. In response, CP III filed bankruptcy.

CP III and an affiliate then filed civil actions against various parties, including a claim for negligence against Chicago Title alleging damages arising from its recording of the unpermitted liens. The District Court dismissed that claim on summary judgment and CP III appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit then certified the following question to the Washington State Supreme Court:

"Does a title company owe a duty of care to third parties in the recording of legal instruments?"

The court first defined a duty of care as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Affiliated FM Ins. Co. v. LTK Consult Services, Inc.*, 170 Wn.2d 442, 449 (2010). The court will consider logic, common sense, justice, policy and precedent, as applied to the facts of the case, when determining whether a duty of care exists.

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8 *Olver v. Fowler*, 161 Wn.2d 655, 658, 168 P.3d 348 (2007).
 9 The effect of the termination of a CIR while both members of the couple are alive is not examined here.
 10 127 Wn.2d 339.
 11 *Id.* at 351.
 12 In re Marriage of Pennington, 142 Wn.2d 592, 601, 14 P.3d 764 (2000).
 13 *Seven v. Stoel Rives, LLP*, 159 Wn. App. 1003, 2010 WL 5477191 (Dec. 20, 2010) (unpublished), *review denied*, 171 Wn.2d 1022 (2011). Interestingly, in *Seven*, one issue in dispute is whether an attorney for the estate (acting as co-personal representative) had a duty to advise Ms. Seven of her rights as a surviving partner of a CIR after the decedent's death. The trial court held (and the Court of Appeals affirmed) that because Ms. Seven could not prove that all five *Connell* factors were met, no CIR existed.
 14 *Id.* at *6.
 15 Pennington, 142 Wn.2d 592.
 16 183 Wn. App. 830, 335 P.3d 984 (2014).
 17 *Id.* at 849; *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107, 33 P.3d 735 (2001).
 18 In re Marriage of Byerley, 183 Wn. App. 677, 686, 334 P.3d 108 (2014).
 19 *Id.*
 20 *Lindsey*, 101 Wn.2d at 304.
 21 *Connell*, 127 Wn.2d at 351 (internal quotation marks and citation omitted).
 22 *Olver*, 161 Wn.2d 655; *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007); In re Meretricious Relationship of Long & Fregeau, 158 Wn. App. 919, 244 P.3d 26 (2010); *Matter of Estate of Langeland v. Drown*, 195 Wn. App. 74 (2016).
 23 145 Wn.2d 103.
 24 161 Wn.2d 655.

25 *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 778 P.2d 1022 (1989). *See also* In re Estate of Lint, 135 Wn.2d 518, 957 P.2d 755 (1998); *McDaniels v. Carlson*, 108 Wn.2d 299, 738 P.2d 254 (1987); *Foster v. Thilges*, 61 Wn. App. 880, 812 P.2d 523 (1991).
 26 113 Wn.2d 243.
 27 *Peffley-Warner*, 113 Wn.2d at 253.
 28 *Id.*
 29 *Id.*
 30 *Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 732 P.2d 1021 (1987).
 31 For a detailed discussion of Washington's presumptions regarding community and separate property, see In re Estate of Borghi, 167 Wn.2d 480, 219 P.3d 932 (2009).
 32 *See, e.g.*, *Peffley-Warner*, 113 Wn.2d at 247; *Olver*, 161 Wn.2d at 665-66; *Merkel v. Merkel*, 39 Wn.2d 102, 113-15, 234 P.2d 857 (1951).
 33 In re Marriage of Miracle, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984); *see also* In re Marriage of Johnson, 28 Wn. App. 574, 625 P.2d 720 (1981); *Merkel*, 39 Wn.2d 102; In re Woodburn's Estate, 190 Wash. 141, 66 P.2d 1138 (1937).
 34 *Tanner v. Tanner*, 181 Wn. App. 1019, 2014 WL 2547611 (June 3, 2014) (unpublished).
 35 170 Wn. App. 631, 634, 285 P.3d 208, 210 (2012).
 36 *Id.* at 634.
 37 *Id.*
 38 *Id.*
 39 RCW 5.60.030 prohibits a party in interest from testifying about transactions with a decedent or statements made by a decedent.
 40 195 Wn. App. 74 (2016).

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CP III made several arguments alleging that Chicago Title owed (and breached) a duty of care when it recorded the unpermitted junior liens, all of which the court rejected. First, the court noted that under *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528 (2002), a title insurer in Washington does not even owe its own clients a duty to search for and/or disclose title defects when preparing a preliminary commitment for title insurance. A preliminary commitment is not an abstract of title, and does not constitute a representation by the title insurer intended to be relied upon by the proposed insured. Instead, a preliminary commitment is merely an offer to issue a title policy subject to the conditions and stipulations of the commitment. RCW 48.29.010(3)(c). Because no duty to disclose title defects exists with respect to a title insurer's own clients, the court declined to extend such a duty to the insurer's non-clients.

The court also examined the holding in *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442 (2010), where an engineering firm was held bound to a duty of care in favor of a non-client. In *Affiliated FM*, an engineering firm contracted with the City of Seattle for services related to the monorail. Seattle Monorail Services ("SMS") contracted with the City to operate the monorail. SMS suffered significant economic damage resulting from a fire aboard one of the trains allegedly caused by the engineering firm's negligence. Although the engineering firm had no contractual relationship with SMS, the Washington Supreme Court held that the firm owed a duty to SMS because of the significant interest in public safety related to the firm's engineering services. Because there is no significant interest in public safety in the title insurance context, the court declined to follow the *Affiliated FM* holding.

Mortgage Lender's Right to Pre-Foreclosure Possession, *Jordan v. Nationstar Mortgage*, 185 Wn.2d 876 (2016).

In *Jordan v. Nationstar Mortgage* 185 Wn.2d 876, the Washington Supreme Court examined a deed of trust beneficiary's right to pre-foreclosure possession of real property collateral. In response to two certified questions from the United States District Court, the court ruled that (i) contractual provisions granting the beneficiary pre-foreclosure possessory rights conflict with Washington law and (ii) receivership is not the exclusive remedy by which a mortgage lender may gain access to its collateral prior to foreclosure.

In 2007, Laura Jordan purchased a home with a loan secured by a deed of trust. Nationstar Mortgage LLC ("Nationstar") serviced the loan. The deed of trust contained a provision allowing the deed of trust beneficiary or its agent to "do and pay for whatever is reasonable or appropriate to

protect the Lender's interest in the property." This provision specifically reserved to the lender the right to "secure" the property and change the locks, board up windows, drain water from pipes, and have utilities shut off.

Four years after purchasing the property, Jordan defaulted on her mortgage payments. Pursuant to the deed of trust, a Nationstar representative changed the locks on the home. Nationstar did not provide prior notice of its intent to do so. Instead, the representative left a notice at the time he changed the locks, stating that the home had been secured to protect against unauthorized entry. The notice provided a phone number that Jordan could call to regain access to the property. Jordan followed these instructions. Upon re-entering her home, Jordan gathered her belongings and vacated.

Jordan and 3,600 other similarly situated homeowners sued in a certified class action for trespass, breach of contract, violations of the Washington Consumer Protection Act, and violations of the federal Fair Debt Collection Practices Act. Nationstar removed the case from Chelan County Superior Court to the United States District Court. The District Court certified two questions to the Washington Supreme Court: first, whether under Washington's lien theory of mortgages, parties may contractually agree that a lender has a right of entry after default but prior to foreclosure; second, whether Washington's receivership scheme provides the exclusive remedy for a mortgage lender to gain access to its collateral prior to foreclosure.

Pursuant to RCW 7.28.230, "a mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law." This statute codifies the lien theory of mortgages in Washington. Under the lien theory of mortgages, a mortgage is viewed by courts as a lien on the property and does not permit the mortgagee to possess the property. The court examined whether Nationstar's exercise of rights under its purported "mortgagee possession agreement" constituted "possession" for purposes of the statute. In interpreting "possession" the court looked to the law of other states including Colorado, Idaho, and Utah, which have all enacted statutes invalidating similar "entry provisions." Although the Washington legislature has not explicitly enacted any prohibition of mortgagee possession agreements, the court held that does not mean they do not conflict with Washington law.

Under tort law and real property law, the definition of "possession" consistently requires some element of control. The court found that the act of rekeying Jordan's property "had the effect of communicating to Jordan that Nationstar now controlled the property." Although Jordan had the ability to call the number provided in the notice and

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Recent Developments

Probate & Trust

By Kristina Ash – Smith & Zuccarini, P.S.

Joint Property in a Committed Intimate Relationship; Restitution of Court-Ordered Payment of Attorney Fees. In Re: the Estate of Langeland, 195 Wn. App. 74 (July 18, 2016, Div. I).

This case involves the intestate distribution of the estate of Randall Langeland, who up until his death, had been in a committed intimate relationship (CIR) with Sharon Drown for more than 17 years. In a previous appeal, the Court of Appeals decided that the property acquired during the Langeland/Drown relationship was joint property subject to equitable division, including the couple's house, sailboat and proceeds from the sale of a software company.¹ On remand, the trial court awarded half of the joint property assets to Drown. It also found that equity required that most of the estate's interest in the joint property be awarded to Drown. It awarded Langeland's daughter, Janell Boone, half of the proceeds from the sale of the sailboat and a 2002 Honda. Finally, it awarded more than \$9,000 to Drown for having to defend against a motion for reconsideration and vacated its \$70,000 attorney fee award to Boone.

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regain access to her property, Nationstar became the only "middle man" through which that access could actually be obtained. The court held the entry provision allowed the lender unlawful possession and control of the property in conflict with **RCW 7.28.230**.

As to the second certified question, the court disagreed with Jordan's argument that receivership is the exclusive means by which a mortgage lender may gain access to its collateral without foreclosure. The relevant portions of the Washington Receivership Act¹ concerning mortgaged real property set out the requirements for obtaining a court-appointed receiver, but do not affirmatively require lenders to seek one in the context of borrower default. Although the court did not provide any examples of alternative means by which a lender may gain pre-foreclosure access to its collateral following a borrower's default, the plain language of **RCW 7.60.025** establishes that receivership is a discretionary remedy and explicitly references "other available remedies." Accordingly, the court held, the Receivership Act is not the exclusive remedy for mortgage lenders to gain access to a borrower's property following default but prior to foreclosure.

¹ Ch. 7.60 RCW.

The Court of Appeals again held that the property acquired during the couple's CIR was joint property and that the law of the case doctrine barred Boone's challenges to the contrary. Boone then argued that at Langeland's death, his interest in the couple's joint property became his separate property and that the court lacked the power to distribute his separate property to Drown. The court rejected that argument, relying on the Supreme Court's decision in *Olver v. Fownler*, 161 Wn.2d 655 (2007).

Boone next argued that the court erred in ordering the distribution of estate assets without considering property that Drown acquired during the CIR. The court held that the inventory prepared by Boone listed Langeland's assets, and because Boone did not challenge the inventory through trial, appeal, or remand, she could not challenge it on the second appeal.

Finally, Drown appealed the trial court's decision not to award her restitution. After the first trial, Drown's attorney paid to the court all funds under his control (\$98,035.80). Boone asked for the entire amount in fees and costs, and the trial court ordered a total amount of \$70,000. The court mistakenly paid the entire amount (now \$101,498.82) to Boone's counsel, Helsell Fetterman, instead of the \$70,000 ordered. The trial court also ordered Drown to pay \$683 per month to the court registry. The Court of Appeals vacated the \$70,000 judgment, but the trial court refused to grant Drown's plea of restitution for \$61,085.50, the share that Drown contended was owed to her from Helsell Fetterman.

The Court of Appeals cited the general rule that a person who paid a judgement to another was entitled to restitution. It noted that there was an exception to that rule where restitution would not serve the purpose of unjust enrichment, such as where a judgment creditor's attorney receives fees from the client and retains those fees as payment for legal services. In this case, apparently because the court ordered the payment of attorney fees to Boone's law firm rather than to Boone directly, Boone's law firm became a "real party in interest" and was liable to Drown for the restitution of attorney fees.

It's not entirely clear from the decision, but Helsell Fetterman may have had more success in getting its fees paid if (1) the order required payment to Boone's trust account rather than to Helsell Fetterman directly, thus avoiding becoming a real party in interest and (2) if Helsell Fetterman had corrected the court error by returning the excess payment of \$31,498.82 (\$101,498.82 less \$70,000).

This case is useful for illustrating the expansive power that a court has in ordering equitable disposition of joint property stemming from a committed intimate relationship. It could also support the position that when a party

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asks for attorney fees, the attorney should make sure that the fees are paid to the client's trust account rather than to the attorney directly.

Specifying the Disposition of Insurance Proceeds in a Will. *In re the Estate of Collister, 195 Wn. App. 371 (August 9, 2016, Div. II).*

In her will, Carol Collister specified that she wished the proceeds of her \$25,000 life insurance policy to go to her two sisters and the proceeds of her \$60,000 life insurance policy to go to her ex-husband, Rocky Feller. Collister's will also named Feller as her Personal Representative. Unfortunately, Collister's \$25,000 life insurance policy named Feller, not her two sisters, as the beneficiary of the policy.

Under the Testamentary Disposition of Nonprobate Assets statute (the "TDNAA"), also commonly known as the Superwill Statute, life insurance is specifically exempted from the definition of a nonprobate asset, so the Court of Appeals held that the statute did not authorize testators to disburse life insurance proceeds via the will.

Nonetheless, the court held that where the evidence shows that the policy is payable to the personal representative in his representative capacity, such proceeds could be distributed according to the testator's will. Unfortunately for Collister's two sisters, the court did not find such intent in this case.

This case shows that as long as the personal representative is the beneficiary of a life insurance policy, the testator's will can direct the personal representative to use the proceeds in a particular manner. Certainly, the will could direct the beneficiary as executor to pay the debts of the estate using the policy, but this case suggests that the will could also direct the personal representative to pay the proceeds of a life insurance policy to other beneficiaries.

¹ *In re Estate of Langeland, 177 Wn. App. 315 (2013).*



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A Case For Sections

By Jody M. McCormick, Real Property, Probate and Trust Section Chair

There are several initiatives by the Washington State Bar Association (“WSBA”) that have challenged lawyers’ understanding of the role of WSBA and the relationship between WSBA and its 28 sections. Washington is a mandatory unified bar association where the admission and regulatory functions of the bar are combined in the same organization with professional association functions. These dual functions create an inherent tension in the WSBA as it tries to strike a balance between protecting the public and regulating lawyers on one hand, and serving its members on the other hand.

In June of 2014, this tension was highlighted in the *Report and Recommendations* by Washington State Bar Association Governance Task Force, dated June 24, 2014 (the “Governance Report”). The Governance Report concluded that:

The primary function of the WSBA is the regulation of the legal profession. This stems from the duty of the [Supreme] Court ‘to protect the public from the activity of those who, because of lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar.’ [citations omitted].

...

Although the organization is cast as an association of lawyers, its purpose is not that of a traditional “trade association” that operates for the primary or exclusive benefit of its members. ... Rather, the WSBA is charged with the protection and enhancement of the legal system. Other permitted activities further that goal. For example, member services are permitted ... not because they serve the interests of the membership, but because they promote a more competent and skilled body of legal professionals to the benefit of the public.

Governance Report at pgs. 6-7.

To the extent that sections are seen as member benefits, one could argue that the Governance Report pulled the rubber band even tighter and increased the tension between WSBA and its sections. The Governance Report is clear – if the WSBA must choose between public benefit and member benefit, the interest of the public prevails.

The question becomes where do sections fall along the continuum between public and member benefit? It is my view that sections benefit the public by making better lawyers.

1. Sections in Washington Provide High Quality, Low-Cost Continuing Legal Education (“CLE”) to Lawyers, Which Improves the Legal Advice the Public Receives.

WSBA is charged with the responsibility of

“[a]dminister[ing] programs of legal education.” GR 12.1(a)(8). The Real Property Probate and Trust Section provides four full-day CLEs and one multi-day CLE to lawyers in Washington. Members of our section, often experts in their fields, graciously donate their time and expertise to educate their peers. Section-sponsored CLEs permit lawyers to “cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.” *Preamble to Rules of Professional Conduct* ¶ 6. CLEs provide not only benefits to lawyers, but to the clients they serve. A well educated lawyer is a good lawyer.

2. Sections Improve Lawyer Collegiality, Lowering Cost of Legal Services

One of the purposes of WSBA is to “[f]oster collegiality among its members and goodwill between the bar and the public.” GR 12.1(a)(5). While there are nearly 35,000 lawyers in Washington, there are approximately 2,500 members of RPPT Section. Sections allow lawyers to work together not as adversaries, but as peers. A cooperative and collegial bar reduces costs and diminishes delay in the administration of justice. Sections are the perfect forum for collegiality to flourish.

3. Sections Review and Evaluate Pending Legislation

The WSBA strives to promote an effective legal system. GR 12.1(a)(2). General Rule 12.1 specifically authorizes the WSBA to “[m]aintain a legislative presence to inform members of new and proposed laws and to inform public officials about bar positions and concerns.” GR 12.1(b)(17). In conjunction with WSBA’s Legislative Affairs Manager, sections further that goal by reviewing and providing feedback on pending legislation. In the past five years, the RPPT has reviewed hundreds of bills referred to it by the WSBA. Section feedback on legislation helps legislators propose better legislation and consider unintended consequences of proposed legislation. The sections educate legislators through testimony and by bringing attention to legislation that may impact the practice of law or the administration of justice. Clear, concise and well-considered legislation protects the public and reduces the cost of litigation associated with judicially sorting out legislation that does not meet these standards.

While WSBA section members may feel that their interests and the interests of the public are at odds, they need not be. In fact, sections permit WSBA to further its public service objectives. Sections provide benefits to its members, who, in turn, provide benefits to the public. Therefore, the role of the sections within the WSBA should be maintained, preserved, and embraced.

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