

72095-3

72095-3

No. 72095-3-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

---

Lula S. Sloans, a single person,

Appellant,

v.

Nadine E. Berry & Robert M. Berry, in their capacity as co-administrators

of the Estate of Betty Jean Berry,

Respondents.

---

**BRIEF OF APPELLANT**

---

ORIGINAL

Robert M. Bartlett, WSBA #19818  
Diana S. Hill, WSBA #36610  
COOK & BARTLETT, PLLC  
Attorneys for Appellant  
3300 West McGraw Street, Suite 230  
Seattle, WA 98199  
Telephone: (206) 282-2710  
Facsimile: (206) 282-2707

2014 OCT -9 PM 2:49  
COURT OF APPEALS  
STATE OF WASHINGTON

TABLE OF CONTENTS

Table of Authorities. . . . . iv

I. Assignments of Error . . . . . 1

II. Statement of the Case . . . . . 5

III. Summary of Argument. . . . . 9

IV. Authority & Argument. . . . . 10

    A. The De Novo Standard of Review Applies to this Appeal . . . 10

    B. The Interplay of TEDRA and the  
        Creditor Claim Statutes. . . . . 12

        1. Sloans Complied with RCW 11.40.100 . . . . . 13

    C. The TEDRA Matters: Specific Facts . . . . . 13

        1. The TEDRA Agreement. . . . . 13

            a. Berry Breaches the TEDRA Agreement. . . . . 15

        2. The Hunter Will . . . . . 17

        3. The Deed . . . . . 17

        4. The Commissioner’s Comments. . . . . 17

    D. TEDRA’s Provisions Confirm their Applicability to  
        Sloans’ Creditor Claims. . . . . 20

        1. Commencement of the Action. . . . . 24

        2. The Legislative History of TEDRA  
            Supports Sloans’ Decision to Commence Suit

on her Rejected Creditor Claims as a TEDRA Action (i.e. a “Special Proceeding”) . . . . .	25
3. The Commissioner’s Comments Reveal the Appellate Court Should Construe and Clarify How TEDRA and Ch. 11.40 RCW Interrelate . . . . .	27
E. Analysis Under RCW 11.40.100. . . . .	28
1. RCW 11.40.100 – Sloans “Brought Suit”. . . . .	28
2. RCW 11.40.100 – Sloans Brought Suit in the Proper Court. . . . .	29
3. RCW 11.40.100 – Sloans Brought Suit against the Personal Representatives. . . . .	29
4. RCW 11.40.100 – Sloans Brought Suit within 30 Days. . . . .	30
F. Conclusion – Rejected Creditor Claims that are TEDRA “Matters” May be Pursued in a TEDRA Action. . . . .	30
1. TEDRA’s Legislative Intent Supports Sloans’ Position. . . . .	31
G. CR 12(b)(6) Issue: Specific Facts. . . . .	33
1. Berry Allowed Damage to Occur to the Property . . . .	33
2. Berry Failed to Pay Taxes on Property. . . . .	34
3. PR’s Claim Fee Title to the Property. . . . .	34
H. CR 12(b)(6) Issue: Argument. . . . .	35
1. The PR’s are Not Entitled to Relief under CR12(b)(6). . . . .	35

2. Motion Should Have Been Handled as a Summary Judgment. . . . .	37
I. The PR's are Not Entitled to Relief under CR 12(b)(1). . . . .	38
J. Attorney's Fees Should Not Have Been Awarded by the Trial Court. . . . .	38
1. The <i>Stover</i> Case. . . . .	39
K. Whether Attorney's Fees and Costs Should be Awarded on Appeal?. . . . .	39
1. Under <i>Stover</i> , No One is Entitled to Fees in this Appeal. . . . .	40
2. If Statutory Construction Issues are Not Novel and Sloans Prevails, She is Entitled to Fees under RCW 11.96A.150 & RAP 18.1 . . . . .	40
a. Sloans' RAP 18.1 Request for Attorney's Fees and Costs. . . . .	40
V. Conclusion. . . . .	41
VI. Appendix. . . . .	Apdx. 1-42
Senate Bill Report, SB 5196. . . . .	Apdx. 1-2
House Bill Report, SB 5196 . . . . .	Apdx. 3-8
WSBA Commentary to TEDRA . . . . .	Apdx. 9-19
Professor Karen Boxx History of TEDRA. . . . .	Apdx. 20-42

TABLE OF AUTHORITIES

Table of Cases

Washington Cases:

Adams v. Great Am. Ins. Companies, 87 Wn. App. 883,  
942 P.2d 1087 (1997) . . . . . 11

Bravo v. Dolsen Companies, 125 Wn.2d 745, 888 P.2d 147 (1995). . . . .36

Caruso v. Local Union No. 690 of Int’l Broth. of Teamsters,  
100 Wn.2d 343, 670 P.2d 240 (1983) . . . . .36

City of Seattle v. Burlington N. R.R. Co., 145 Wn.2d 661,  
41 P.3d 1169 (2002) . . . . . 10

Collins v. Lomas & Nettleton Co., 29 Wn. App. 415,  
628 P.2d 855 (1981) . . . . . 35

Dennis v. Heggen, 35 Wn. App. 432, 667 P.2d 131 (1983). . . . . 35

Fondren v. Klickitat County, 79 Wn. App. 850, 905 P.2d 928 (1995). . . 35

Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630,  
128 P.3d 627 (2006) . . . . . 35

Havsy v. Flynn, 88 Wn. App. 514, 945 P.2d 221 (1997). . . . .36

HomeStreet, Inc. v. State, Dept. of Revenue, 166 Wn.2d 444,  
210 P.3d 297 (2009) . . . . .10

In re Estate of Kordon, 157 Wn.2d 206,  
137 P.3d 16 (2006) . . . . . 12, 18, 19

In re Estate of Stover, 178 Wn. App. 550,  
315 P.3d 579 (2013). . . . .4, 5, 10, 31, 38, 39, 40

Kinney v. Cook, 159 Wn.2d 837, 154 P.3d 206 (2007) . . . . . 10

Ochsner v. Board of Trustees of Washington  
Cmty. Coll. Dist. No. 17, 61 Wn. App. 772, 811 P.2d 985 (1991) . . . . .11

Orwick v. City of Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984). . . . .35

Outsource Services Mgt., LLC v. Nooksack Business Corp.,  
172 Wn. App. 799, 292 P.3d 147 (2013) . . . . . 11

Rozner v. City of Bellevue, 116 Wn.2d 342,  
804 P.2d 24 (1991) . . . . .10

Ruffer v. St. Francis Cabrini Hosp. of Seattle,  
56 Wn. App. 625, 784 P.2d 1288 (1990) . . . . . 11

Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579,  
943 P.2d 350 (1997) . . . . . 11

Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n,  
133 Wn.2d 229, 943 P.2d 1358 (1997) . . . . .11

W.J. Lake & Co. v. King County, 4 Wn.2d 651, 104 P.2d 599 (1940). . . 28

Other cases:

None.

Constitutional Authorities

Washington State Constitution, Article 4, § 6. . . . . 4, 38

Statutes

Title 11 RCW. . . . .4, 8, 18, 19, 27, 29, 39

RCW 11.02.005. . . . .	21
RCW 11.02.005(10) . . . . .	21, 23
Ch. 11.04 RCW. . . . .	22
RCW 11.07.010(5) . . . . .	22
RCW 11.11.010(7) . . . . .	22
Ch. 11.20 RCW. . . . .	12
Ch. 11.24 RCW. . . . .	12
RCW 11.24.050. . . . .	41
Ch. 11.28 RCW. . . . .	12
Ch. 11.40 RCW. . . . .	1, 3, 12, 20, 27
RCW 11.40.100. . . . .	1, 3, 9, 12, 13, 25, 28, 29, 30, 31, 39, 42
Ch. 11.42 RCW. . . . .	12
Ch. 11.56 RCW. . . . .	12
RCW 11.68.070. . . . .	41
RCW 11.88.090(10). . . . .	41
Ch. 11.96 RCW. . . . .	2, 26
RCW 11.96.070. . . . .	25
RCW 11.96.170. . . . .	2, 3, 13
Ch. 11.96A RCW (“TEDRA”). . . . .	1, 2, 3, 4, 8, 9, 12, 13, 18, 19, 20, 21, 23, 24, 25, 26, 27, 29, 30, 31, 32, 38, 39, 40, 41, 42
RCW 11.96A.010. . . . .	31

RCW 11.96A.020. . . . .	31
RCW 11.96A.020(2). . . . .	31
RCW 11.96A.030(2). . . . .	19, 21, 22, 23, 25
RCW 11.96A.030(3) . . . . .	.21
RCW 11.96A.030(5) . . . . .	.20
RCW 11.96A.040. . . . .	4, 29, 38
RCW 11.96A.080(2) . . . . .	.3, 12, 27
RCW 11.96A.090 . . . . .	.29
RCW 11.96A.090(4) . . . . .	.24
RCW 11.96A.100. . . . .	24, 29, 32
RCW 11.96A.100(1) . . . . .	.24
RCW 11.96A.100(2) . . . . .	.24
RCW 11.96A.100(6). . . . .	32
RCW 11.96A.100(10) . . . . .	.32
RCW 11.96A.110. . . . .	32
RCW 11.96A.150 . . . . .	.4, 5, 10, 38, 39, 40, 42
RCW 11.96A.150(1) . . . . .	.41
RCW 11.96A.220. . . . .	13
RCW 11.96A.260. . . . .	32
RCW 11.96A.300. . . . .	8

RCW 11.96A.320. . . . .	32
RCW 36.18.020. . . . .	24

Regulations and Rules

RAP 18.1. . . . .	40
CR 12(b) . . . . .	36, 37
CR 12(b)(1) . . . . .	4, 8, 10, 11, 33, 38
CR 12(b)(2). . . . .	11
CR 12(b)(6). . . . .	4, 8, 10, 11, 33, 35, 36, 37
CR 15(a) . . . . .	36
CR 56. . . . .	37
KCLCR 4(e). . . . .	32

Other Authorities

Black’s Law Dictionary (2 <sup>nd</sup> ed.) . . . . .	28
Black’s Law Dictionary (5 <sup>th</sup> ed., 1979) . . . . .	28
Washington State Legislature, House Bill Report, SB 5196 . . . . .	25
Washington State Legislature, Senate Bill Report, SB5196. . . . .	25
Washington State Bar Association Commentary to TEDRA. . . . .	25, 26
Washington State Bar Association, Continuing Legal Education: <u>Fifth Annual Trust and Estate Litigation Seminar: Handling the Challenges</u>	

(March 13, 2008). . . . .24

Washington State Bar Association,  
Continuing Legal Education: 10<sup>th</sup> Annual Trust and  
Estate Litigation Seminar (April 26, 2013). . . . . 24, 25, 26

## I. ASSIGNMENTS OF ERROR

### Assignments of Error

**No. 1.** The trial court erred by entering its Order Dismissing Lula Sloan's TEDRA Petitions and Forever Barring the Claims Referenced Therein and Awarding Attorneys' Fee entered on May 15, 2014. CP 251-253.

**No. 2.** The trial court erred by entering its Order and Judgment on Personal Representative's Motion to Set Amount of Awarded Attorneys' Fees entered on June 6, 2014. CP 292-295.

### Issues Pertaining to Assignments of Error

**No. 1.** If a "matter," as that term is defined by Ch. 11.96A RCW ("TEDRA"), is the basis of a creditor's claim under Ch. 11.40 RCW may the rejected creditor's claim be pursued as a TEDRA action under RCW 11.40.100? Assignment of Error No.1.

**No. 2.** Did the Legislature intend the term "matter" as defined by TEDRA to be broadly construed? Assignment of Error No. 1.

**No. 3.** Are the terms of an agreement entered into under former RCW 11.96.170 binding on the parties to it, the parties' successors, and the Court? Assignment of Error No. 1.

**No. 4.** Does a "matter" under former Ch. 11.96 RCW fall within the current definition of "matter" in TEDRA? Assignment of Error No. 1.

**No. 5.** Is interpretation and construction of an agreement entered into under former RCW 11.96.170 a "matter" under TEDRA? Assignment of Error No. 1.

**No. 6.** Is interpretation and construction of a will, that is the basis of an agreement under former RCW 11.96.170, a "matter" under TEDRA? Assignment of Error No. 1.

**No. 7.** Is interpretation and construction of a deed, that is the result of an agreement under former RCW 11.96.170, a "matter" under TEDRA? Assignment of Error No. 1.

**No. 8.** Are real estate interests, including a conveyance, that are affected by an agreement under former RCW 11.96.170 a “matter” under TEDRA? Assignment of Error No. 1.

**No. 9.** Are real estate interests, including a conveyance, that are affected by a will that is the basis of an agreement under former RCW 11.96.170 a “matter” under TEDRA? Assignment of Error No. 1.

**No. 10.** Are real estate interests, including a conveyance, that are affected by a deed that is the result of an agreement under former RCW 11.96.170 a “matter” under TEDRA? Assignment of Error No. 1.

**No. 11.** Does commencement of an action under TEDRA constitute “bringing suit” for purposes of RCW 11.40.100? Assignment of Error No. 1.

**No. 12.** Under RCW 11.96A.080(2), by which TEDRA supplements Ch. 11.40 RCW, is a TEDRA action now added to the actions that can be brought under RCW 11.40.100? Assignment of Error No. 1.

**No. 13.** May a trial court dismiss an action under CR 12(b)(6) if the action is brought pursuant to TEDRA and the trial court has considered evidence outside the pleadings? Assignment of Error No. 1.

**No. 14.** May a trial court dismiss an action under CR 12(b)(1) if the action is brought pursuant to TEDRA, when RCW 11.96A.040 and Article 4, §6 of the Washington Constitution place exclusive subject matter jurisdiction in the Superior Court and no other court is suggested as having jurisdiction? Assignment of Error No. 1.

**No. 15.** If the trial court states the interplay of TEDRA with the other chapters of Title 11 RCW is difficult for attorneys to apply, should the Appellate Court construe and clarify that interplay? Assignment of Error No. 1.

**No. 16.** Did the trial court err when it awarded attorney's fees under RCW 11.96A.150 when the action involved novel issues of statutory construction, especially in light of the holding of *In re Estate of Stover*, 178 Wn. App. 550, 315 P.3d 579 (2013)? Assignment of Error No. 2.

**No. 17.** Should the Appellate Court award attorney's fees and costs in this appeal under RCW 11.96A.150 considering the issues involved in light of the holding of *In Re: Stover*, 178 Wn. App. 550, 315 P.3d 579 (2013)? Assignment of Error No. 2.

## **II. STATEMENT OF THE CASE**

The following facts are undisputed. The Will of Lula Mae Hunter (the "Hunter Will") was probated in King County Superior Court under Cause No. 91-4-00994-2 (the "Hunter Estate"). CP 116-119. Article II of the Hunter Will concerned the disposition of Ms. Hunter's residence (the "Property"). CP 116. As part of the Hunter Estate proceedings, that certain Agreement Regarding Residence was filed with the Superior Court concerning the Property (the "TEDRA Agreement"). CP 104-109. The TEDRA Agreement was signed by the Executrix of the Hunter Estate, by Appellant Lula Sloans ("Sloans"), by Sloans' mother (as adult representative for Sloans<sup>1</sup>), and by Betty Berry ("Berry"). CP 107-109. As a result of the TEDRA Agreement, the Hunter Estate recorded that certain Personal Representative's Deed to the Property under King County Recording No. 9108220706 (the "Deed"). CP 110-111.

---

<sup>1</sup> Sloans was a minor when the TEDRA Agreement was signed.

Pursuant to the terms of the TEDRA Agreement and the Deed, Berry took possession of the Property on July 31, 1991. CP 130:7-10. She continuously possessed the Property until her death on August 5, 2013. *Id.* Sloans is now in possession of the Property. CP 158:18-19; 169:18-19.

Berry's Estate was probated by petition in King County Superior Court under Cause No. 13-4-11619-4 SEA (the "Berry Estate"). CP 120-127. That petition claims the Berry Estate owns the Property. CP 121-122.

Sloans filed and served her first creditor's claim with the Berry Estate on December 20, 2013 ("1<sup>st</sup> Claim"). CP 158-168. The 1<sup>st</sup> Claim was based on alleged damage to real and personal property arising out of Berry's obligations under the TEDRA Agreement, and on the unknown basis of the Berry Estate's alleged ownership of the Property. CP 158:24-159:11.

The Berry Estate rejected Sloans' 1<sup>st</sup> Claim on January 21, 2014. CP 179-180. Within thirty days of the rejection, Sloans filed her Petition on Rejection of Creditor's Claims on February 19, 2014 (the "TEDRA Pe-

tion”). CP 1-14, 181, 182, 201. The TEDRA Petition named the Berry Estate’s two personal representatives (the “PR’s”) as the respondent parties. CP 1-14. Summonses to each of the PR’s for the TEDRA Petition were filed the same day. CP 15-16 & 17-18, 181, 182, 201. The filing fee for the TEDRA Petition was paid and accepted by the Clerk, again on the same day. CP 201. The attorney for the Berry Estate PR’s accepted service of the TEDRA Petition and its two summonses. CP 223-224.

Sloans filed and served her second creditor’s claim with the Berry Estate on February 27, 2014 (“2<sup>nd</sup> Claim”). CP 169-178. The 2<sup>nd</sup> Claim was based on Berry’s failure to pay the Property taxes arising out of her obligations under the TEDRA Agreement. CP 169:25-170:2.

The Berry Estate rejected Sloans’ 2<sup>nd</sup> Claim on March 21, 2014. CP 202-203. Within thirty days of the second rejection, Sloans filed her 1<sup>st</sup> Amended Petition on Rejection of Creditor’s Claims on March 25, 2014; it added the claim for the unpaid taxes (the “Amended TEDRA Petition”). CP 23-37. Summonses to each of the PR’s for the Amended TEDRA Petition were filed the same day. CP 38-39 & 40-41. The attorney for the Berry Estate PR’s accepted service of the Amended TEDRA Petition and its two summonses. CP 225-226.

The Berry Estate then moved to dismiss Sloans' Petitions under CR 12(b)(6) & (1). CP 63-71. Sloans filed a Notice of Mediation under RCW 11.96A.300, a section of TEDRA (Ch. 11.96A RCW). CP 72-88. She also filed her response to the Berry Estate's motion. CP 89-239. The Berry Estate filed its reply. CP 240-247.

At the dismissal hearing the trial court heard oral argument and orally opined on the issues raised. RP (5/15/14) 3-15. In particular the trial court stated that a separate (i.e. non-TEDRA) action had not been commenced. RP (5/15/14) 11:17-13:2. It also stated Sloans' reading of what constitutes a "matter" under TEDRA was too broad. RP (5/15/14) 13:3-19. Finally, the trial court acknowledged what it termed a "problem" lawyers have in using TEDRA in conjunction with requirements under the various chapters in Title 11 RCW. RP (5/15/14) 14:23-15:3.

The trial court then entered an order dismissing Sloans' Petitions, barring her claims, and denying mediation. CP 251-253. The issue of attorney's fees requested by the Berry Estate was reserved. CP 252.

The Berry Estate then moved for an award of attorney's fees. CP 254-257. Sloans responded (CP 262-276), and the Berry Estate replied (CP 277-285). The trial court again took oral argument and announced its decision. RP (6/6/14) 3-10.

At the fee hearing the trial court again addressed the interplay of TEDRA and the creditor claim statutes. RP (6/6/14) 5:23-7:5. It then entered judgment in the amount of \$3,598.00 against Sloans. CP 292-295.

This appeal was timely taken. CP 296-304.

### **III. SUMMARY OF ARGUMENT**

The trial court erred when it:

1. Dismissed Sloans' creditor's claims that were brought pursuant to RCW 11.40.100 as a TEDRA action. She asserts the trial court improperly construed TEDRA and RCW 11.40.100 when it determined they were mutually exclusive. In particular, it appears the trial court disregarded or misunderstood that the basis of Sloans' creditor claims is a "matter" under TEDRA. Sloans asserts that a rejected creditor's claim may be pursued as a TEDRA action if the basis of the creditor claim constitutes a "matter" as defined under TEDRA.

2. Awarded attorney's fees against Sloans even though the hearing involved novel issues of statutory construction. Sloans asserts that no fees should have been awarded under RCW 11.96A.150 in light of the holding of *In Re: Stover*, 178 Wn. App. 550, 315 P.3d 579 (2013).

#### IV. AUTHORITY & ARGUMENT

##### A. The De Novo Standard of Review Applies to this Appeal.

The de novo standard applies to all aspects of this appeal. First, this appeal involves the proper interpretation of statutes by the trial court. Statutory interpretation is a question of law that is reviewed de novo. See *HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009); *City of Seattle v. Burlington N. R.R. Co.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002). The primary objective of any statutory construction inquiry is "to ascertain and carry out the intent of the Legislature." *HomeStreet, supra* (citing *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)).

Second, because the Berry Estate's dismissal motion was brought under CR 12(b)(6) & (b)(1) the standard of review is also de novo. *Kinney v. Cook*, 159 Wn.2d 837, 154 P.3d 206 (2007) (rulings under CR

12(b)(6) treated as summary judgment and reviewed de novo); Outsource Services Mgt., LLC v. Nooksack Business Corp., 172 Wn. App. 799, 292 P.3d 147 (2013) (rulings under CR 12(b)(1), (2) & (6) reviewed de novo).

As is well known, when an appellate court reviews a summary judgment de novo (here, a CR 12(b)(6) ruling) it engages in the same inquiry as the trial court. Adams v. Great Am. Ins. Companies, 87 Wn. App. 883, 886, 942 P.2d 1087 (1997). Consequently, as the responding party to the motion to dismiss, Sloans is entitled to have all reasonable inferences drawn in her favor. Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 587, 943 P.2d 350 (1997). This also means affidavits submitted on behalf of the non-moving party must be taken as true for analyzing the CR 12(b)(6) dismissal – just like in a summary judgment. Senate Republican Campaign Comm. v. Pub. Disclosure Comm’n, 133 Wn.2d 229, 245, 943 P.2d 1358 (1997). The Berry Estate’s dismissal motion, treated under the summary judgment standard, should have been denied unless, based on the evidence, reasonable minds could come to but one conclusion. Ruffer v. St. Francis Cabrini Hosp. of Seattle, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990). The burden is on the moving party (*see Ochsner v. Board of Trustees of Washington Cmty. Coll. Dist. No. 17*, 61 Wn. App. 772, 775, 811 P.2d 985 (1991)); in this case the Berry Estate must establish that in

light of all the evidence, with all reasonable inferences resolved in Sloans' favor, no genuine issues of fact exist, and no reasonable jury could conclude after proper statutory construction that it was entitled to judgment as a matter of law.

**B. The Interplay of TEDRA and the Creditor Claim Statutes.**

The probate creditor claim statutes are found at Ch. 11.40 RCW. TEDRA (Ch. 11.96A RCW) supplements that chapter. RCW 11.96A.080(2) states in pertinent part:

. . . The provisions of this chapter shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title, including without limitation those contained in chapter 11.20, 11.24, 11.28, 11.40, 11.42, or 11.56 RCW. . . .

In *In re Estate of Kordon*, 157 Wn.2d 206, 137 P.3d 16 (2006), the Supreme Court ruled that use of the word “supplement” in RCW 11.96A.080(2) means the provisions of TEDRA add to the RCW Chapters it references. *In Re: Kordon*, 157 Wn.2d at 212 (emphasis added). Put another way, RCW 11.96A.080(2) means that both TEDRA (Ch. 11.96A RCW) and the applicable section of the creditor claim statutes (Ch. 11.40 RCW) must be complied with in the same action. The only creditor claim statute at issue is RCW 11.40.100.

Sloans complied with both chapters when she filed her Petitions. As argued below, the basis of Sloans' creditor claims are "matters" as defined by TEDRA, and her commencement of the TEDRA action to resolve those "matters" satisfies RCW 11.40.100.

**1. Sloans Complied with RCW 11.40.100.** To preserve a rejected claim all that is required under RCW 11.40.100 is for a creditor to "... bring suit in the proper court against the personal representative within thirty days after notification of rejection or the claim will be forever barred." As explained below, Sloans complied with each provision of RCW 11.40.100. A necessary pre-requisite to that analysis is confirmation that the basis of Sloans' claims are "matters" under TEDRA.

**C. The TEDRA Matters: Specific Facts.**

**1. The TEDRA Agreement.** The TEDRA Agreement was entered into pursuant to former RCW 11.96.170 (CP 7:7-8), the predecessor statute to current RCW 11.96A.220, a section of TEDRA. According to the WSBA's comments (CP 113), the current RCW 11.96A.220 was a reenactment of former RCW 11.96.170. Under both statutes, the TEDRA Agreement is equivalent to a final court order that is binding on all persons interested in the estate.

The TEDRA Agreement was filed in the Hunter Estate (CP 7) and contains the following pertinent provisions:

- Section 2, “Gift of Residence” confirms the Hunter Will gifted the Property to Sloans with Berry listed as a contingent beneficiary. CP 7:13-20.
- Section 2 (2<sup>nd</sup> Section 2), “Purpose of Agreement” states that because Sloans was a minor Berry would be able to live in the Property under the terms and conditions listed in the TEDRA Agreement, until Sloans desired to live in the Property. CP 7:21-25.
- Section 4, “Property Taxes, Utilities, Etc.” states Berry was to “. . . pay all property taxes, utilities, repairs, maintenance and insurance for the [P]roperty . . .” CP 8:9-14.
- Section 5, “Betty Jean’s Obligations” states she had the following specific obligations (CP 8:15-9:1):

“A. Keep the [Property] in a clean and sanitary condition;...

D. Properly use and operate the electrical, gas, heating, plumbing and other fixtures and appliances and take proper precautions to protect freezing of pipes;

E. Not intentionally or negligently destroy, deface, damage, impair or remove a part of the Property, its appurtenances, facilities, equipment, furniture, furnishings, appliances or fixtures...; [and,]

F. Not permit a nuisance or common waste;...”

- Section 7, “Sublet, Assignment” states Berry’s right to occupy the Property was personal to Berry and that Berry’s right to occupy the Property terminated on her death. CP 9:7-10.
- Section 8, “Alterations” prohibited Berry from altering the Property. CP 9:11-13.
- Section 10, “Condition of Residence” states Berry was to keep the Property in the same condition as when she began her possession, except for reasonable wear and tear. CP 9:16-18.
- Section 11, “Access” gives Sloans the right of access to protect her interest in the Property and to ensure Berry’s compliance with Berry’s duties. CP 9:19-25.

a. Berry Breaches the TEDRA Agreement. Sloans submitted photographic evidence showing damage she asserts occurred while Berry possessed the Property and for which Berry was liable under the terms of the TEDRA Agreement. CP 142-157. The pictures show cracked and stained

ceilings (CP 142-144), soiled furniture (CP 145), damaged furniture (CP 146, 147), soiled walls and door (CP 148), interior water leakage (CP 149, 148), moss growing under the eaves of the Property (CP 151), clogged gutters and clogged and disconnected downspouts (CP 152-154, 157), and a cracked and water stained foundation (CP 155, 156). Sloans also submitted evidence Berry did not pay the Property taxes. CP 137-141. Finally, the PR's claimed fee title to the Property (CP 121-122; 128-136); in light of the Hunter Will's provision that Sloans was the residual recipient of the Property (CP 116, Art. II), the trial court needed to decide if Berry conveyed an interest that breached that will, the TEDRA Agreement, and/or the Deed – and if so, whether monetary damage flowed from that breach or not. CP 7-12; 13-14.

At the dismissal hearing, the Commissioner considered the picture evidence of the damage. RP (5/15/14) 8:8-11:6. He also considered and acknowledged the Property taxes had not been paid. RP (5/15/14) 11:7-16. The Commissioner did not address the issue raised by Sloans regarding whether an impermissible conveyance of the Property by Berry had occurred.

**2. The Hunter Will.** The Hunter Will is found at CP 116-119. In substance, it leaves the Property to Sloans and names Berry as the contingent beneficiary; if neither can use the Property, it becomes part of the Hunter Estate residue. CP 116:¶1. The Hunter Estate residue passes to Sloans – not to Berry. CP 116:¶2.

**3. The Deed.** Pursuant to the TEDRA Agreement, the Hunter Estate recorded the Deed. CP 13-14. At the top of CP 14, the Deed confirms conveyance of the Property referenced in the filed TEDRA Agreement. The applicable terms of the Hunter Will are incorporated into the Deed at CP 13.

**4. The Commissioner's Comments.** During the dismissal hearing, the Commissioner reviewed the picture evidence and construed Berry's obligations under the TEDRA Agreement. RP (5/15/14) 8:8-11:6. The tenor of his comments show he determined Berry had no liability for the Property damage under the terms of the TEDRA Agreement. *Id.* His comments confirmed he construed that Agreement to require Berry to pay the unpaid Property taxes. RP (5/15/14) 11:7-16.

Also during that hearing the Commissioner construed the Kordon case. In Re: Kordon, 157 Wn.2d 206 (2006). The following exchange occurred:

MR. BARTLETT: And, as to the applicability of TEDRA and the Creditor's Claims Statutes.

COMMISSIONER VELATEGUI: That's what you need to address.

MR. BARTLETT: Yes. They are -- they work together. You have to combine them both. That's what supplement means. That's what the [Kordon] case says. You have to use them both.

COMMISSIONER VELATEGUI: You'll remember, the [Kordon] case dismissed the will contest.

MR. BARTLETT: It did. But that's because it failed to follow the Will Contest Statute, and didn't issue a citation.

Here, we've fully followed both statutes.

COMMISSIONER VELATEGUI: They indicated that you couldn't use TEDRA to get around the requirement, and follow the Will Contest Statute.

MR. BARTLETT: They say --

COMMISSIONER VELATEGUI: And by your interpretation of TEDRA, we might just as well wipe out all of the provisions of every chapter of Title Eleven.

I mean you give an expansive reading to the statute. And you don't deal with the thirty day requirement. I mean, you can't -- you can't, just as in [Kordon], where the Court said, "Well, it doesn't say exactly, but within a reasonable time you have to do it."

Here the reasonable time is defined as thirty days.

MR. BARTLETT: The suit was commenced within thirty days. The Clerk took the filing fee; it took the petition; it took the summons that were issued.

RP (5/15/14) 11:17-12:21.

Sloans asserts the Commissioner misapplied the *Kordon* case in making its ruling to dismiss her action. Sloans also asked the Commissioner to address TEDRA's definition of "matter;" in response the Court ruled Sloans reading of "matter" under TEDRA was too broad.

MR. BARTLETT: It -- Your Honor, I would ask you to address, then, the section of TEDRA 11.96[A].030 Sub 2, where it talks about matters.

COMMISSIONER VELATEGUI: Yeah.

MR. BARTLETT: It says,  
"A matter of any issue, question, or dispute involving, with respect to a non-probate asset, or with respect to any other asset... [or property] interest passing at death,... [including . . .] determination of any questions relating to the rights of... [creditors]."

COMMISSIONER VELATEGUI: As I say counselor, you -- your expansive reading of TEDRA would tell us that we could simply wipe out every chapter of Title Eleven except 11.96(A).

MR. BARTLETT: I don't agree with that, Your Honor.

COMMISSIONER VELATEGUI: Well, that's where I think you are.

RP (5/15/14) 13:3-19. During the later attorney fee hearing the Commissioner stated that, as to Ch. 11.40 RCW, TEDRA “. . . just supplements it to the extent the Court might find it necessary. But otherwise, it doesn’t.”  
RP (6/6/14) 6:19-23.

**D. TEDRA’s Provisions Confirm their Applicability to Sloans’**

**Creditor Claims.** TEDRA specifically defines a “Party” to include: “A creditor” and “The personal representative.” RCW 11.96A.030(5). Sloans is “a creditor” (CP 158-168; 169-178) and the PRs are “the personal representatives” of the Betty Berry estate. They are parties under TEDRA.

TEDRA also broadly defines the “Matters” to which it applies:

(2) “Matter” includes any issue, question, or dispute involving:

(a) The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death;

(b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;

(c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation,

questions relating to: (i) The construction of wills, trusts, community property agreements, and other writings; . . . or (v) the determination of fees for a personal representative or trustee;

...

(g) With respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, including joint tenancy property, property subject to a community property agreement, or assets subject to a pay on death or transfer on death designation:

...

(v) The determination of any questions relating to the abatement, rights of creditors, or other matter relating to the administration, settlement, or final disposition of a nonprobate asset under this title;

...

(vii) The resolution of any other matter that could affect the nonprobate asset.

RCW 11.96A.030(2) (emphasis added).

TEDRA states at RCW 11.96A.030(3) the term “Nonprobate assets” has the meaning given in RCW 11.02.005. RCW 11.02.005(10), in turn, defines “Nonprobate Asset” as:

(10) “Nonprobate asset” means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will. “Nonprobate asset” includes, but is not limited to, a right or interest passing under a joint tenancy with right of survivorship, joint bank account with right of survivorship, transfer on death deed, payable on death or trust bank account, transfer on death security or security account, deed or conveyance if possession has been postponed until the death of the person, trust of which the person is grantor and that becomes effective or irrevocable only upon the person's death, community prop-

erty agreement, individual retirement account or bond, or note or other contract the payment or performance of which is affected by the death of the person. "Nonprobate asset" does not include: A payable-on-death provision of a life insurance policy, annuity, or other similar contract, or of an employee benefit plan; a right or interest passing by descent and distribution under chapter 11.04 RCW; a right or interest if, before death, the person has irrevocably transferred the right or interest, the person has waived the power to transfer it or, in the case of contractual arrangement, the person has waived the unilateral right to rescind or modify the arrangement; or a right or interest held by the person solely in a fiduciary capacity. For the definition of "nonprobate asset" relating to revocation of a provision for a former spouse upon dissolution of marriage or declaration of invalidity of marriage, RCW 11.07.010(5) applies. For the definition of "nonprobate asset" relating to revocation of a provision for a former spouse upon dissolution of marriage or declaration of invalidity of marriage, see RCW 11.07.010(5). For the definition of "nonprobate asset" relating to testamentary disposition of nonprobate assets, see RCW 11.11.010(7).

Under the above definition, the TEDRA Agreement Property is a nonprobate asset as it involves the transfer of interests upon the death of a person due to a writing and also involves the Deed and the Hunter Will. Because it meets the definition of a nonprobate asset, the Property and its related documents (the TEDRA Agreement, the Deed and the Will) meet the definition of "matter" in RCW 11.96A.030(2).

Under RCW 11.96A.030(2) the “matters” at issue in Sloans’ action include, but are not limited to, one or more issues, questions or disputes involving:

1. Determination of Sloans’ status as a creditor interested in the estate and also interested in the property interests governed by the TEDRA Agreement that transferred at the death of Berry and Ms. Hunter;

2. Direction of the PR’s as fiduciaries to pay damages for unpaid taxes, property damage, and loss of the Property if Berry conveyed any interest in it contrary to the TEDRA Agreement and related documents;

3. Determination of all questions arising out of the administration of the Berry Estate with respect to the TEDRA Agreement Property (an asset interest passing at death) the construction of writings such as the TEDRA Agreement, the Deed and the Hunter Will, and also the demand of the PR’s to pay Sloans’ damages and attorneys’ fees;

4. Determination of all questions relating to the rights of creditors, such as Sloans, with respect to the TEDRA Agreement Property; and,

5. As to the TEDRA Agreement Property: because it is a non-probate asset under RCW 11.02.005(10), the non-probate asset provisions of TEDRA, including RCW 11.96A.030(2), apply to it as well.

Simply put: the claims listed in Sloans' Petitions are "matters" governed by TEDRA.

Under TEDRA the parties named in Sloans' Petitions (including Sloans, as creditor) meet the statutory definition of "parties" and the matters listed in the petitions meet the statutory definition of "matter." Consequently, TEDRA applies to the action commenced by Sloans. WSBA CLE materials confirm creditors' claims can be asserted in a TEDRA action. CP 231-234; Apdx. 29.

**1. Commencement of the Action.** TEDRA, at RCW 11.96A.100, also determines how a proceeding involving it is commenced. RCW 11.96A.100(1) states a TEDRA action is commenced by filing a petition with the court. Under RCW 11.96A.100(2) a new TEDRA action requires a summons. Under RCW 11.96A.090(4) the civil rules of procedure apply unless inconsistent with TEDRA.

Sloans' initial TEDRA Petition and summonses were filed on February 19, 2014, less than 30 days after the 1<sup>st</sup> Claim was rejected. CP183-196, 181, 182, 201. The Clerk's office accepted the statutory (RCW 36.18.020) \$240 filing fee at that time. CP 201. The PR's attorney then

accepted service of those documents. CP 223-224. This was sufficient under TEDRA and RCW 11.40.100 to commence the action/“bring suit.”

**2. The Legislative History of TEDRA Supports Sloans’ Decision to Commence Suit on her Rejected Creditor Claims as a TEDRA Action (i.e. a “Special Proceeding”).** TEDRA was the culmination of several years of work by the Real Property, Probate and Trust Section of the Washington State Bar Association (“WSBA”). Apdx. 1-2 (Senate Bill Report, SB 5196); Apdx. 3-8 (House Bill Report, SB 5196). The WSBA’s commentary to TEDRA are attached at Apdx. 9-19 and can also be found at [www.wsbarppt.com/comments.htm](http://www.wsbarppt.com/comments.htm). To further aid the Court, Professor Karen Boxx’s history of TEDRA (given at the WSBA-CLE 10<sup>th</sup> Annual Trust and Estate Litigation Seminar (April 26, 2013)) is also attached at Apdx. 20-42.

These materials reveal the definition of “matter” under TEDRA (RCW 11.96A.030(2)) was broadened from its predecessor statute, former RCW 11.96.070. Apdx. 9, TEDRA §104(1); Apdx. 29. The WSBA Commentary also states that under former RCW 11.96.070:

Thus a party commencing an action relating to a matter that is described in RCW 11.96.070 can elect to commence

such action either as a “special proceeding” under chapter 11.96 RCW or as a regular civil action.

Apdx. 12, TEDRA §302, 4<sup>th</sup> paragraph. Logically, this means a “matter” under TEDRA may also be commenced as either: a “special proceeding” (commonly called “a TEDRA action”), or a regular civil action.

A theme in the WSBA Commentary about TEDRA’s goals is the modernization of the Probate Code to allow broader jurisdiction over matters that historically were not subject to American probate court jurisdiction. Apdx. 9, TEDRA §104(1); Apdx. 11-12, TEDRA §301. Professor Boxx’s history of TEDRA confirms the legislature intended a broadened scope of a TEDRA “matter.” Apdx. 29.

The legislative history confirms that Sloans had the option to commence her creditors claim action as either a TEDRA action or as a civil action. The Commissioner’s dismissal of her TEDRA action was contrary to the Legislature’s intent and the plain language of TEDRA.

**3. The Commissioner's Comments Reveal the Appellate Court Should Construe and Clarify How TEDRA and Ch. 11.40 RCW Interrelate.** The Commissioner opined that lawyers are having problems in applying TEDRA to the various chapters of Title 11 RCW. He stated:

COMMISSIONER VELATEGUI: . . . You know, I just stood in front of the State bar and indicated to them this very problem that lawyers are faced with. And that is, can't use TEDRA to get around the specific requirements of those chapters in Title Eleven that require you to do certain things. It's just not an easy-squeezy way around.

RP (5/15/14) 14:23-15:3. At the fee hearing he also stated:

COMMISSIONER VELATEGUI: And 11.40, of course, under TEDRA 11.40 controls absolutely, because TEDRA doesn't supplement, doesn't supplant it. It just supplements it to the extent the Court might find it necessary. But otherwise, it doesn't.

RP (6/6/14) 6:19-23 (emphasis added). In light of TEDRA's mandatory supplementation statute, 11.96A.080(2), this Court should construe and clarify the ability of a party whose basis of a creditor's claim is a TEDRA "matter" to bring that claim as a TEDRA action. RCW 11.96A.080(2) states it "shall" supplement the chapters listed; it is a mandatory supplementation, not a discretionary supplementation as construed by the trial court.

**E. Analysis Under RCW 11.40.100.** To reiterate, all that is required under RCW 11.40.100 is for a creditor to “. . . bring suit in the proper court against the personal representative within thirty days after notification of rejection or the claim will be forever barred.”

As argued above, Sloans’ TEDRA Action is a valid suit. The next issue is whether her TEDRA Action was commenced as described in RCW 11.40.100.

**1. RCW 11.40.100 – Sloans “Brought Suit”.** Our Supreme Court has defined the phrase “bring suit” as follows:

In Black's Law Dictionary, 2d Ed., the phrase ‘bring suit’ is defined as follows: ‘To ‘bring’ an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit. A suit is ‘brought’ at the time it is commenced.

*W.J. Lake & Co. v. King County*, 4 Wn.2d 651, 655, 104 P.2d 599 (1940).

More recent definitions of “bring suit” and “suit” in Black’s Law Dictionary, 5<sup>th</sup> Ed. (1979) are at CP 227-230 and confirm that to “bring suit” means to “commence an action”. Blacks’ definition of “action” is also included in those pages (at CP 230) confirming that “action” and “suit” are synonymous.

In this case, Sloans filed her initial TEDRA Petition and its summonses with the Superior Court (and paid the filing fee), and then filed her Amended TEDRA Petition and its summonses – again, with the Superior Court. CP 1-14, 15-16, 17-18, 201, 23-37, 38-39, 40-41. Sloans’ filings initiated legal proceedings. RCW 11.96A.090 & .100. TEDRA itself refers to legal proceedings under Title 11 RCW as an “action.” RCW 11.96A.090.

By filing her TEDRA Petition and summonses within 30 days after rejection of her 1<sup>st</sup> Claim, and her Amended TEDRA Petition and its summonses within 30 days after rejection of her 2<sup>nd</sup> Claim, Sloans brought suit for purposes of RCW 11.40.100.

**2. RCW 11.40.100 – Sloans Brought Suit in the Proper Court.**

The “proper court” under RCW 11.40.100 for Sloans’ TEDRA Action is the Superior Court. RCW 11.96A.040 (granting the superior court original subject matter jurisdiction over decedents estates in all instances). Sloans’ Petitions were filed in the Superior Court. CP 1, 23, 181, 182.

**3. RCW 11.40.100 – Sloans Brought Suit against the Personal Representatives.** RCW 11.40.100 requires the PR’s to be named as par-

ties. Sloans' Petitions name the Berry Estate PR's as parties (CP 1-6; 23-29) and the summonses issued for both Petitions specifically name each PR. CP 15:20; 17:20; 38:20; 40:20. Sloans met this requirement of RCW 11.40.100.

**4. RCW 11.40.100 – Sloans Brought Suit within 30 Days.** The PR's rejected Sloans' 1<sup>st</sup> Claim on January 21, 2014. CP 179-180. Sloans filed her TEDRA Petition less than 30 days later on February 19, 2014. CP 183-196, 181, 182, 201. The PR's rejected Sloans' 2<sup>nd</sup> Claim on March 21, 2014. CP 202-203. Sloans then filed her Amended TEDRA Petition less than 30 days later on March 25, 2014. CP 23-37. Sloans' timely filed her Petitions under RCW 11.40.100.

Sloans "brought suit"/"commenced an action" in the Superior Court against the PR's within thirty days after rejection of each of her two claims. Namely, she complied with RCW 11.40.100.

**F. Conclusion – Rejected Creditor Claims that are TEDRA “Matters” May be Pursued in a TEDRA Action.** Under the plain language of TEDRA and RCW 11.40.100, a creditor's rejected claims that are TEDRA "matters" may be pursued as a TEDRA action. The legisla-

tive history of TEDRA and its predecessor statutes support this conclusion.

The recent case of *In Re: Stover*, 178 Wn. App. 550, 315 P.3d 579 (2013) also supports this conclusion. *Stover* involved a creditor's claim brought via TEDRA petition under Ch. 11.96A RCW and RCW 11.40.100. *Supra.*, at 555. That action was not dismissed because of the inapplicability of TEDRA to creditors' claims; instead, the appellate court construed both TEDRA and the creditor claim statutes together and determined the *Stover* TEDRA action was commenced more than 30 days after the claim was rejected. Under the logic of *Stover*, a rejected creditor's claim may be commenced as a TEDRA petition and must comply with the creditor claim timing requirements, as Sloans did here. In other words, the trial court committed error by dismissing Sloans' action when the logical result of *Stover* is to endorse her approach.

**1. TEDRA's Legislative Intent Supports Sloans' Position.**

RCW 11.96A.010 & .020 state the Legislature's purpose and intent behind TEDRA. Those statutes repeatedly use the defined word "matters." In particular, the last line of RCW 11.96A.020(2) states the Legislature's intent that TEDRA matters be expeditiously administered and settled.

The trial court's ruling and application of TEDRA is contrary to the Legislature's express intent that matters be expeditiously administered. A comparison of the expedited procedures under TEDRA with the longer civil action procedures under King County local rules bears this out. TEDRA allows for an initial hearing on the merits to decide all issues on twenty day notice. RCW 11.96A.100 & .110. If the initial hearing does not resolve all issues of fact and law the Court may enter any order appropriate including setting a schedule for prompt resolution of the matter. RCW 11.96A.100(10). TEDRA also allows for mediation<sup>2</sup> and arbitration. RCW 11.96A.100(6), 11.96A.260 - .320.

In contrast, civil actions in King County Superior Court are assigned a case schedule under LR 4(e) that results in an approximate one year schedule for resolution. Resolving disputes under the expedited procedures of TEDRA is consistent with the Legislature's express intent, whereas resolving them under a lengthy case schedule is not.

---

<sup>2</sup> Sloans filed a Notice for Mediation (CP 72-88) but the Commissioner denied that request. RP (5/15/14) 13:20-14:10; CP 252.

The trial court's ruling denied Sloans the right to have her TEDRA "matter" (creditor's claims based on alleged breach of a TEDRA Agreement and related Deed) handled expeditiously.

**G. CR 12(b)(6) Issue: Specific Facts.** The PR's motion was based on CR 12(b)(6) and (b)(1). To the extent the trial court made its decision based on those rules, it erred as explained below.

**1. Berry Allowed Damage to Occur to the Property.** CP 142-157 are pictures of damage to the Property. They show cracked and stained ceilings (CP 142-144), soiled furniture (CP 145), damaged furniture (CP 146, 147), soiled walls and door (CP 148), interior water leakage (CP 149, 148), moss growing under the eaves of the Property (CP 151) clogged gutters and clogged and disconnected downspouts (CP 152-154, 157) and a cracked and water stained foundation (CP 155, 156). These pictures are evidence Berry breached Sections 4, 5 and 10 of the TEDRA Agreement (CP 8:9-9:1; 9:16-18) by allowing the Property to be damaged, failing to repair and maintain the Property, and failing to leave the Property in the condition in which she took possession of it. The Commissioner considered this evidence during the hearing. RP (5/15/14) 8:8-11:6.

**2. Berry Failed to Pay Taxes on the Property.** CP 137-141 are printouts from King County showing Berry had unpaid Property taxes for the Property pre-dating her death. By failing to pay the Property taxes, she breached Section 4 of the TEDRA Agreement. CP 8:9-14. The Commissioner appears to have agreed Berry breached the TEDRA Agreement on this issue. RP (5/15/14) 11:7-16.

**3. PR's Claim Fee Title to the Property.** Upon commencing Berry's probate, the PR's claimed title to the Property. CP 121-122. They later commenced a quiet title action against Sloans claiming the Berry Estate is entitled to fee ownership of the Property. CP 128-136. Sloans is unsure if the PR's claim is based on an impermissible conveyance made by Berry in conflict with the TEDRA Agreement, Deed, or Hunter Will – given that Sloans is the residual recipient of the Property under the Hunter Will. CP 116, Art. II. Under the Hunter Will residuary clause which is incorporated into the terms of the Deed, Sloans has fee title to the Property.

**H. CR 12(b)(6) Issue: Argument.**

**1. The PR's are Not Entitled to Relief under CR 12(b)(6).**

Dismissals for failure to state a claim are considered a drastic remedy and are granted only sparingly. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006). Such motions are scrutinized with care, for the effect of granting the motion is to deny the plaintiff his or her day in court. *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 628 P.2d 855 (1981); *Fondren v. Klickitat County*, 79 Wn. App. 850, 905 P.2d 928 (1995).

For purposes of deciding a defendant's (here, respondent's) motion, all of the factual allegations in the complaint (here, a petition) will be accepted as true. *Dennis v. Heggen*, 35 Wn. App. 432, 667 P.2d 131 (1983). The motion will be granted only if it appears beyond a reasonable doubt that the petitioner could prove no facts consistent with the petition that would entitle the petitioner to the relief requested. *Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984).

The court will even consider hypothetical facts when deciding the motion, and the court should deny the motion if any hypothetical situation conceivably raised by the complaint/petition is legally sufficient to support

petitioner's claim. *Havsy v. Flynn*, 88 Wn. App. 514, 945 P.2d 221 (1997). In the case of *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995), which reversed a trial court's dismissal under CR 12(b), the Supreme Court summarized the ground rules as follows (court's citations omitted):

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief .... CR 12(b)(6) motions should be granted only sparingly and with care .... Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.... Hypothetical facts may be introduced to assist the court in establishing the conceptual backdrop against which the challenge to the legal sufficiency of the claim is considered .... We have held that in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, including facts alleged for the first time on appellate review of a dismissal under the rule ... .

In addition, a plaintiff/petitioner should be freely allowed to amend the complaint (here, a petition) in lieu of granting a dismissal, if it appears that by amending the complaint the plaintiff/petitioner may be able to state a cause of action. CR 15(a); *Caruso v. Local Union No. 690 of Int'l Broth. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983).

In light of the foregoing facts and law, a CR 12(b)(6) dismissal was improper. Given that Sloans' had the option to bring her claims as either a civil action or as a special proceeding (i.e. a TEDRA action), amendment of her Petitions should have been ordered – not dismissal.

**2. Motion Should Have Been Handled as a Summary Judgment.** CR 12(b) also states that if matters outside the pleading are presented and not excluded, the motion is to be treated as a summary judgment under CR 56. It also states all parties are to be given reasonable opportunity to present all material pertinent to a summary judgment motion.

Here the trial court considered matters outside of the pleadings; it considered the Property damage picture evidence. RP (5/15/14) 8:8-11:6; pictures at CP 142-157. It also considered the evidence Berry had not paid the Property taxes. RP (5/15/14) 11:7-16; tax statements at CP 137-141. It also construed the language of the TEDRA Agreement. RP (5/15/14) RP (5/15/14) 8:8-11:16; Agreement at CP 7-12.

By considering evidence outside of the pleadings, the dismissal motion should have been handled as a summary judgment motion. It should have been heard using the summary judgment schedule and, based

on the evidentiary inferences to which Sloans was entitled have, that motion should have ultimately been denied.

**I. The PR's are Not Entitled to Relief under CR 12(b)(1).** The PR's motion to dismiss was also based on CR 12(b)(1), which claims the Superior Court lacks subject matter jurisdiction in this matter. To the extent the Commissioner dismissed Sloans' Petitions under this rule, it erred. RCW 11.96A.040 inclusively places subject matter jurisdiction in the Superior Court over all matters involving decedents' estates and settlement of their affairs. This is consistent with Article 4, §6 of the Washington Constitution which vests all jurisdiction in the Superior Court unless exclusively placed elsewhere. The PR's failed to state what other court they allege has exclusive jurisdiction of this action.

Pursuant to the Washington Constitution and RCW 11.96A.040 this court has subject matter jurisdiction over Sloans' action.

**J. Attorney's Fees Should Not Have Been Awarded by the Trial Court.** The trial court awarded fees under RCW 11.96A.150, another section of TEDRA. Sloans asserts the attorney fee award is contrary to the holding of *Stover, supra*.

1. **The Stover Case.** *Stover, supra.* at 564, holds that no fees can be awarded under RCW 11.96A.150 if novel questions of statutory construction concerning TEDRA are at issue. The trial court's stated reason for dismissing Sloans' TEDRA Petition was that TEDRA does not apply to creditor's claim actions. RP (5/15/14) 11:17-12:21; 13:3-19. That statutory construction is contrary to the plain language of TEDRA and RCW 11.40.100, contrary to the legislative history of TEDRA, and contrary to the logic behind the substantive ruling of *Stover*. Logically, the trial court's ruling involved novel issues of statutory construction under Title 11 RCW. Under *Stover*, in light of those novel issues and the trial court's novel statutory construction that TEDRA does not apply to TEDRA "matters" that are creditors' claims, no fees can be awarded. It would be inequitable to do so under the terms of RCW 11.96A.150.

**K. Whether Attorney's Fees and Costs Should be Awarded on Appeal?** If this appeal is determined to involve novel issues of statutory construction, then no fees should be awarded. However, if the statutory construction issues are not novel and Sloans prevails, then she is entitled to an award of fees resulting from this appeal.

**1. Under Stover, No One is Entitled to Fees in this Appeal.** To remain consistent, Sloans asserts no fees under RCW 11.96A.150 should be awarded in this appeal. This is because this appeal involves novel issues of statutory construction and under Stover, supra., a fee award is not allowed under that statute when such issues are present and involving TEDRA.

No fees should be awarded; they are barred by the Stover case and the equitable standard contained in RCW 11.96A.150.

**2. If Statutory Construction Issues are Not Novel and Sloans Prevails, She is Entitled to Fees under RCW 11.96A.150 & RAP 18.1.**

a. Sloans' RAP 18.1 Request for Attorney's Fees and Costs. If the Appellate Court determines the issues in this appeal are not novel and a fee request is not barred by the Stover case, and if Sloans prevails on appeal, she is entitled to a fee and cost award under RCW 11.96A.150. It states:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in

such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

Any such award should be paid by the PR's personally and the Berry Estate assets. RCW 11.96A.150(1).

## **V. CONCLUSION**

Sloans requests the Court:

**A.** Vacate the Order Dismissing Lula Sloan's TEDRA Petitions and Forever Barring the Claims Referenced Therein and Awarding Attorneys' Fee entered on May 15, 2014, with the exception of the trial court's decision regarding mediation. (CP 251-253);

**B.** Vacate the Order and Judgment on Personal Representative's Motion to Set Amount of Awarded Attorneys' Fees entered on June 6, 2014. (CP 292-295);

C. Order Sloans' creditor's claim action reinstated and the attorney's fee award against her vacated;

D. Rule that a TEDRA "matter" that is the basis of a creditor's claim may be pursued under RCW 11.40.100 as a TEDRA action;

E. Deny an award of attorney's fees and costs under RCW 11.96A.150 if this Court finds this appeal involves novel issues of statutory construction;

F. If this appeal does not involve novel issues of statutory construction and Sloans prevails: that she be awarded her attorney's fees and costs under RCW 11.96A.150; and,

G. Enter such other relief as deemed appropriate by the Court.

Dated this 3<sup>rd</sup> day of October, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Robert M. Bartlett", written over a horizontal line.

Robert M. Bartlett, WSBA #19818  
Diana S. Hill, WSBA #36610  
Attorneys for Appellant Lula Sloans

# SENATE BILL REPORT

## SB 5196

---

As Passed Senate, March 4, 1999

**Title:** An act relating to trust and estate dispute resolution.

**Brief Description:** Resolving trust and estate disputes.

**Sponsors:** Senators Johnson, Kline and Winsley.

**Brief History:**

**Committee Activity:** Judiciary: 2/3/99, 2/8/99 [DP].  
Passed Senate, 3/4/99, 48-0.

---

### SENATE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass.

Signed by Senators Heavey, Chair; Kline, Vice Chair; McCaslin, Costa, Goings, Haugen, Johnson, Long and Thibaudeau.

**Staff:** Penny Nerup (786-7484)

**Background:** Currently, matters concerning probate and trusts are codified under Title 11 RCW. Procedures for resolving disputes that occur with trusts and estates are scattered throughout the various sections of this title and provide for resolution of disputes in the state courts or by written agreement between the parties.

The Real Property, Probate and Trust Section of the Washington State Bar has studied Title 11 for the past seven years and suggests that all the procedures for resolving trust and estate disputes be consolidated into a separate section of the probate code which would be referred to as the Trust and Estate Dispute Resolution Act (TEDRA). Centralization makes the procedures easier to locate and follow and would codify current practice in this area.

**Summary of Bill:** The Trust and Estate Dispute Resolution Act is created to centralize all procedures for resolving disputes that occur regarding trusts and estates. The act (1) reaffirms that the courts have full power to administer and settle all matters concerning trusts and estates; (2) specifically provides that the superior courts of each county have original subject matter jurisdiction over the probate of wills and the administration of trusts, identifies in which venue actions may be brought, and provides for a three-year statute of limitations in actions against personal or special representatives for breach of their fiduciary duty; (3) identifies the parties who can sue in state court and the procedures to follow, such as notice requirements, attorney's fees, obtaining jury trials, and execution on judgments; (4) provides mechanisms for resolving disputes by informal binding agreements between parties; and (5) outlines the process by which parties can obtain resolution of disputes using mediation and/or arbitration, methods to select mediators or arbitrators, determine the costs, and to obtain compliance with decisions.

The act also expressly adopts the common law doctrine of "virtual representation," which allows a living person, who is a member of a class of persons, to represent all members of the class in a dispute that determines interests in an estate, trust, or nonprobate asset. For example, if the terms of a trust state that the beneficiaries are the trustee's children during their life and then grandchildren, an adult grandchild could "virtually" represent all grandchildren, even those not yet born, to determine the interests of those grandchildren in the trust.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** January 1, 2000.

**Testimony For:** This bill has been seven years in the making and has been proposed as a national dispute resolution act to the American Bar Association. TEDRA was designed so that any lawyer can understand and use this bill. In addition, the provisions provide greater safeguards for parties involved in disputes of trusts and estates.

**Testimony Against:** None.

**Testified:** PRO: Douglas C. Lawrence, Real Property, Probate and Trust Section, Washington State Bar Association.

# HOUSE BILL REPORT

## SB 5196

---

**As Passed House:**  
April 7, 1999

**Title:** An act relating to trust and estate dispute resolution.

**Brief Description:** Resolving trust and estate disputes.

**Sponsors:** Senators Johnson, Kline and Winsley.

**Brief History:**

**Committee Activity:**

Judiciary: 3/23/99, 4/1/99 [DP].

**Floor Activity:**

Passed House: 4/7/99, 90-0.

**Brief Summary of Bill**

- Clarifies that the superior courts have jurisdiction over matters involving trusts and estates regardless of the amount in controversy.
- Allows more flexibility in the establishment of venue for proceedings involving trusts and estates.
- Allows more flexibility for a court in proceedings involving trusts and estates.
- Codifies the doctrine of virtual representation.
- Allows parties in proceedings involving trusts and estates to enter mediation and arbitration proceedings.
- Changes statutes of limitations relating to special representatives and trusts created before June 10, 1959.

---

HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass. Signed by 12 members: Representatives Carrell, Republican Co-Chair; Constantine, Democratic Co-Chair; Hurst, Democratic Vice Chair; Lambert, Republican Vice Chair; Cox; Dickerson; Esser; Kastama; Lantz; Lovick; McDonald and Schindler.

**Staff:** Jim Morishima (786-7191).

**Background:**

I. Jurisdiction and Venue

The superior courts have original jurisdiction over disputes involving trusts or estates.

Venue for proceedings involving a trust is the superior court of the county in which the situs of the trust is located; *i.e.*, the superior court of the county in which the trust is principally administrated. Venue for proceedings involving a testamentary trust is the superior court of the county in which letters testamentary were granted to a personal representative or any place letters testamentary could have been granted for a will.

Venue for proceedings involving wills and estates depends on several factors. If the decedent was a resident of Washington state at the time of death, venue is the superior court of the county in which the decedent was a resident. If the decedent was not a resident of the state, venue is the superior court of the county in which decedent died. If the decedent did not die in the state, then venue is the superior court of the county in which any part of the estate may be. If there are no assets subject to probate administration, then venue is the superior court of the county in which any nonprobate asset may be.

II. Judicial Proceedings

In exercising their jurisdiction over disputes involving trusts and estates, the superior courts have the power to issue and enforce orders, judgments, citations, notices, summons, and other writs and processes. A person desiring to commence an action must file a petition with the appropriate court and provide notice to all interested parties. At the hearing on the petition, the court may have broad discretion to determine the procedures to be followed in each individual situation. However, a 1990 decision of the Washington Court of Appeals implies that the initial hearing on the petition is a preliminary screening hearing in which the court has little discretion.

III. Nonjudicial Dispute Resolution

If the required parties to a dispute come to an agreement, they must evidence that agreement in writing. The agreement may be filed with a court having jurisdiction over the dispute. Unless a party objects within 30 days of the filing, the agreement becomes binding.

A required party to the dispute may petition the court for a special representative who will represent a required party who is incapacitated, a minor, unborn, or unknown. The special representative must be a lawyer or an individual specially trained in the administration of trusts and estates. The special representative must have no interest in the dispute. The special representative may enter into a binding agreement on behalf of the party or parties he or she represents. Once the written agreement is executed, the special representative is discharged of all duties and obligations with respect to the trust or estate.

#### IV. Statutes of Limitation

An action against a trustee for breach of fiduciary duty must be brought within three years from the earlier of the time the breach was discovered, the discharge of the trustee, or the time of the trust's termination. There is no statute of limitations for actions against express trusts created before June 10, 1959. An action against a personal representative, including a special representative, must be brought before the personal representative is discharged.

---

### **Summary of Bill:**

#### I. Jurisdiction and Venue

It is clarified that the superior court has original jurisdiction over all matters relating to trusts and estates regardless of the amount in controversy.

Venue for proceedings involving a trust is the superior court of the county in which the situs of the trust is located. If the situs of the trust is not located in the state, then venue is the superior court of any county. Venue for proceedings involving testamentary trusts is either the superior court of the county in which letters testamentary were granted to a personal representative or the superior court of the county in which the situs of the trust is located.

Venue for proceedings involving estates is the superior court of any county in Washington. A party may have venue moved for several enumerated reasons so long as the motion for change of venue is brought at least four months before the commencement of the action. If the motion is brought less than four months before the commencement of the action, the court may grant the motion at its discretion. If venue is moved, any actions by the previous court are still valid.

## II. Judicial Proceedings

The procedural rules of the bill govern over any inconsistent provisions of the Civil Rules of Court. Also, the procedural rules of the bill govern over any inconsistent provisions of the procedural rules of court unless otherwise provided by statute or by the court.

Unless otherwise provided by statute or by the court, judicial proceedings must be commenced by filing a petition with the court. A summons must then be served on any interested party, the form of which is provided. The clerk of the court then sets a date for the hearing on the petition. The answer to the petition must be filed within five days of the hearing, and the answer to the answer must be filed within two days of the hearing.

The hearing must be a hearing on the merits unless a party requests otherwise. Testimony of any witness may be by affidavit. A party may move the court for an order relating to a procedural matter, including discovery and summary judgment, at any time. If the initial hearing does not resolve the matter, the court may enter an order as it deems proper. Such an order may resolve issues the court deems proper, determine the scope of discovery, and set a schedule for further proceedings.

The common law doctrine of virtual representation is codified. A party or parties may virtually represent his or her similar class members or future successors in interest. In other words, the judicial resolution of a trust or estate matter involving the virtual representative is binding on the representative's similar class members or future successors in interest. However, if the virtual representative has a conflict of interest with a party or parties regarding the matter, the judicial resolution of the matter will not be binding on that party or parties.

If notice to creditors is given in the probate of a Washington resident's estate, that notice must be published in the county of the decedent's residence.

## III. Nonjudicial Dispute Resolution

### A. Binding Agreements

All parties, including a virtual representative, may enter into binding agreements outside of judicial proceedings. At the election of any party, the agreement may be filed with the court. Filing the agreement creates the same effect on the parties as a court order would create.

A trustee or executor may request the court to appoint a specific individual as special representative. The special representative is discharged upon execution of the agreement or upon the expiration of six months from the special representative's

appointment. A special representative may present the written agreement of the parties to the court for approval. A special representative is not required if a party is represented through the doctrine of virtual representation.

## B. Mediation

Any party may invoke the mediation process unless the court rules otherwise for good cause shown. If the court finds that mediation is not appropriate, it may order a judicial hearing, arbitration, or other judicial proceedings.

The parties subject to mediation must select a mediator. If the parties cannot agree, the court must choose a mediator. The mediator must either be an attorney or a person with special training in the administration of trusts and estates.

The mediation must last at least three hours. If the parties come to an agreement as a result of the mediation, their agreement must be evidenced in writing in the same manner as any other nonjudicial binding agreement.

If a party fails to follow the mediation procedures above, another party can seek a court order compelling them to do so. The costs of obtaining such an order may be awarded to the moving party.

## C. Arbitration

Arbitration is only available to a party if the party has first sought mediation, the court has ruled that mediation is not necessary, the court has ordered arbitration, or all parties agree to proceed directly to arbitration. A party can proceed to arbitration without court authority unless there has already been a judicial hearing on the matter.

Once a party has moved for arbitration, the court must order arbitration unless the court finds for good cause shown that arbitration will not serve the best interests of the parties. If the court decides not to order the parties into arbitration, it may decide the issues itself or order further judicial proceedings.

After being ordered into arbitration, the parties must select an arbitrator. If the parties cannot agree, they may petition the court to select an arbitrator. The arbitrator must be an experienced attorney or other individual with special training or skill with respect to the matter. The arbitrator may be the same person as the mediator. The arbitrator must be compensated by agreement of the parties.

During the arbitration, the rules of evidence and discovery applicable to all civil cases apply unless the parties agree otherwise. Once the arbitrator has reached a decision, the decision must be filed with the court. The decision can be appealed within 30

days of the filing. If the decision is not so appealed, it becomes binding upon the parties. An appeal of an arbitration decision will be heard de novo. Costs of the appeal will be awarded to the moving party.

If a party fails to follow the arbitration procedures above, another party can seek a court order compelling them to do so. The costs of obtaining such an order may be awarded to the moving party.

#### IV. Statutes of Limitation

An action against a special representative must be brought before the earlier of (a) when a court approves a nonjudicial dispute resolution agreement or (b) three years after the representative's discharge. The statute of limitations regarding actions against a trustee for breach of fiduciary duty applies to trusts created before June 10, 1959, beginning after the year 2002.

---

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect on January 1, 2000.

**Testimony For:** This bill provides a comprehensive way to resolve disputes without going to trial. If this bill is enacted, a vast majority of estate disputes will be negotiated by mediation, a few disputes will go to arbitration, and only a small number will proceed to trial.

**Testimony Against:** None.

**Testified:** Senator Johnson, prime sponsor; and Ken Schubert and Watson Blair, Washington State Bar Association.

**COMMENTS TO SB 5196  
(Ch. 42, Laws of 1999)**

**COMMENTS TO THE TRUST AND ESTATE DISPUTE RESOLUTION ACT**

**January 28, 1999**

**TEDRA § 103 (RCW 11.96A.020) - Powers of the Court.**

This was formerly part of RCW 11.96.020 and is intended to have full effect with respect to all procedures provided under this Title. Under this provision, it is intended that the court have all necessary and sufficient powers to cause the administration and final settlement of matters involving the estates, trusts, and nonprobate assets, so that the court can dispose of such matters expeditiously and efficiently.

**TEDRA § 104(1) (RCW 11.96A.030) - Matter.**

The term "matter" establishes the issues, questions and disputes involving trusts and estates that can be resolved by judicial or nonjudicial action under the Act. This term is meant to apply broadly and is intended to encompass matters traditionally within the exclusive province of the courts. This is consistent with the overall purpose of the Act, which is to foster nonjudicial resolution of issues confronting estates and trusts. Subsections (d) and (e) have been changed from the prior provisions of RCW 11.96.070 by removing the requirement that there be a determination that the requested action not be inconsistent with the purposes of the will or trust. By making this change Washington formally accepts recent practice and adopts a rule that allows all interested parties to agree to the resolution of an issue or modification of the applicable document.

**TEDRA § 104(4) (RCW 11.96A.030) - Parties.**

The definition of "parties" is intended to mean and clarify that only those persons having an actual interest in the subject matter of the dispute are required to be participants in the resolution of the dispute. Persons defined in TEDRA § 104(4) (RCW 11.96A.030) are not necessary parties to the resolution of a dispute unless they have an actual interest in the subject matter of the dispute. Any party may be represented by a virtual representative.

The amendments to this section are also intended to clarify that the grantor of a trust or the owner (as defined in RCW 11.18.040) of a nonprobate asset are necessary parties only if they are living at the time of the judicial or nonjudicial proceeding under this section and if they have an interest in the subject matter of the dispute. All other parties with an interest in the dispute (or their special representative, guardian ad litem, or virtual representative under TEDRA § 305 (RCW 11.96A.120)) must participate in the resolution of the dispute.

Thus this term establishes which of the "persons interested in the estate or trust" must participate in a nonjudicial dispute resolution agreement under TEDRA § 402 (RCW 11.96A.220). A

person who is interested in the estate, trust or nonprobate asset, but whose interest is not affected by the matter in issue, is not a required party to the agreement.

**TEDRA § 104(8) (RCW 11.96A.030) - Situs.**

Former RCW 11.96.040 has been incorporated into the general definitional provisions. Language was changed to improve the readability, but the intent remains the same.

**TEDRA § 201 (RCW 11.96A.040) - Original jurisdiction in probate and trust matters - Powers of court.**

This section was previously found at RCW 11.96.001. It clarifies that the superior court has original subject-matter jurisdiction over all matters relating to trusts and estates, regardless of the amount in controversy. (*See also* RCW 2.08.010-.020: The superior courts are courts of general subject-matter jurisdiction and have original, as compared to appellate, jurisdiction over most but not all matters.) TEDRA § 201 (RCW 11.96A.040) deals with subject-matter jurisdiction and is not intended to address any issues relating to personal jurisdiction (e.g. the sufficiency of a party's contacts with the State of Washington and the effects of *Shaffer v. Heitner*, 433 U.S. 186 (1977) and its progeny).

The term "probate" is used at various places in title 11 RCW to refer only to the procedures for proving a particular will, while it is also used at other places in title 11 RCW to refer to the larger process of administering and settling estates. Using "estates" together with the references to the estates of "incapacitated, missing or deceased persons" clarifies that the superior court has original subject-matter jurisdiction over all matters arising in connection with or under title 11 RCW (including without limitation all matters that relate to the administration and settlement of nonprobate assets that arise under RCW 11.18 or 11.42).

**TEDRA § 202 (RCW 11.96A.050) - Venue.**

TEDRA § 202 (RCW 11.96A.050) confirms the intent of the statutory amendments under the Trust Act of 1985 that venue is not jurisdictional. TEDRA § 202 (RCW 11.96A.050) specifies clear rules for determining the situs of a hearing or proceeding if a party does object to the venue where a matter is pending. If venue is moved for any reason, the statute confirms the validity of actions taken by the court before the move.

**TEDRA § 203 (RCW 11.96A.060) - Exercise of powers - Orders, writs, process, etc..**

This section was previously found at RCW 11.96.030. While the order of certain phrases in the statute has been changed from RCW 11.96.030, the purposes remain the same.

**TEDRA § 204 (RCW 11.96A.070) - Statutes of limitation.**

RCW 11.96.060 (the current law establishing statutes of limitation relating to trusts and estates) does not provide a statute of limitations for actions involving express trusts created before

January 1, 1959. The new statute will apply to those trusts three years after the effective date of the statute.

TEDRA § 204(3)(a) (RCW 11.96A.070) revises the statute of limitations for claims against special representatives acting on behalf of minor or after-born children under a nonjudicial dispute resolution agreement. An action by a represented party must be brought against the special representative before the earlier of (i) three years after the discharge of the special representative as provided in section 404 or (ii) the entry of an order approving the nonjudicial dispute resolution agreement under sections 402 and 403. TEDRA § 204(3)(b) (RCW 11.96A.070) provides indemnification protection in the event an action is brought against the special representative after the statute of limitations has run.

The time for bringing any action concerning either the agreement or the acts of a special representative shall not be subject to or extended by any other statute of limitations provision. No case law or statute extending any otherwise applicable statute of limitation shall apply to the agreement or to any action against a special representative for alleged breach of fiduciary duty.

The purpose of this section is twofold: first, to provide a specific period of limitations for actions against a special representative for alleged breach of fiduciary duty, and second, to preclude the application of any other statute of limitations provision, including any tolling provision that would otherwise hold open the period of limitations. This in turn will provide for an expeditious and complete resolution of matters involving trusts and estates, fulfilling the public policy of providing finality in those proceedings.

The statute provides safeguards against malfeasance by a special representative by (i) requiring that the special representative be a lawyer licensed to practice before the courts of this state or an individual with special skill or training in the administration of estates or trusts, (ii) requiring that the special representative not have any financial or familial interest in the estate, (iii) giving responsibilities for the appointment of the special representative to the duly appointed fiduciaries of the trust or estate involved, and (iv) requiring that the court make the actual appointment.

**TEDRA § 301 (RCW 11.96A.080) - Persons entitled to judicial proceedings for declaration of rights or legal relations.**

This section is substantially the same as current RCW 11.96.070 and identifies both those persons who have standing to seek a judicial determination and the subject-matter of such a proceeding.

This section allows judicial proceedings for disputes involving probate estates, trusts, and nonprobate assets.

Subsection (2) clarifies the relationship between various procedures established under title 11 RCW.

It is intended that any interested party may seek judicial review of all matters relating to trusts, estates and nonprobate assets under the special proceedings described in title 11 RCW, and not

just of those matters that have historically been within the limited jurisdiction of American probate courts or other similar courts of equity or limited jurisdiction. In other words, the amendments are intended to provide that all matters that fall within the scope of TEDRA § 301 (RCW 11.96A.080) are "special proceedings" for purposes of CR 81(a) and are therefore subject to the statutory rules of procedure provided in TEDRA.

**TEDRA § 302 (RCW 11.96A.090) - Judicial proceedings.**

Subsection (1) clarifies that any action controlled by the provisions of title 11 RCW is a "special proceeding" as contemplated by Civil Rule 81. Because of this, the procedural and administrative provisions of title 11 RCW are intended to control over any inconsistent provision of the civil rules.

Subsections (2) and (3) were previously part of RCW 11.96.130.

Subsection (4) is new. It is designed to clarify when the procedural rules of title 11 RCW govern and when the court rules will govern the procedures of an action involving trust, estate, or nonprobate asset.

*General discussion regarding court rules and special proceedings.*

In *Petrarca v. Halligan*, 83 Wn. 773, 776, 522 P.2d 827 (1974), the Supreme Court of the State of Washington confirmed the rule that "[w]here rule of court is inconsistent with the procedural statute, the power of this court to establish the procedural rules for the courts of this state is supreme." See also CR 81(b). However, CR 1 and CR 81(a) provide that the civil rules do not apply to special proceedings to the extent that the civil rules are inconsistent with rules or statutes applicable to the special proceedings. See also *Thompson v. Butler*, 4 Wn. App. 452, 453-54, 482 P.2d 791 (1971); *Snyder v. Cox*, 1 Wn. App. at p. 460-61. Rule 98.12W of the Special Proceedings Rules expressly pertains to probate matters and proceedings. TEDRA § 302 (RCW 11.96A.090) confirms that these are special proceedings. Thus a party commencing an action relating to a matter that is described in RCW 11.96.070 can elect to commence such action either as a "special proceeding" under chapter 11.96 RCW or as a regular civil action. A party can also move that the court consolidate the separate action with an existing special proceeding or vice versa.

The introductory phase of this statute is intended to re-affirm that a court has the flexibility to establish appropriate and reasonable procedures; to overrule *Estate of Stockman*, 59 Wn. App. 711, 800 P.2d 1141 (1990) to the extent that the decision mandates a single procedure for all circumstances; and to notify those reading this statute that the rules of court are supreme. *Petrarca v. Halligan*, 83 Wn. 773, 776, 522 P.2d 827 (1974). "Rules of court" has been used in the plural, rather than the singular, to indicate that noncompliance with any single rule of court is acceptable so long as another, more general rule (such as CR 81[a]) provides a total exemption for special proceedings.

### **TEDRA § 303 (RCW 11.96A.100) - Procedural rules.**

The method for commencing an action under chapter 11.96 RCW has frequently been ignored, probably in large part because the rules for commencing proceedings in probate are so different from the normal rules for commencing a civil action. Some of these differences were believed to be necessary to give the court the flexibility needed to promote expediency. Nevertheless, the statutes provide a middle ground by modernizing the procedures in probate and conforming them to the full extent possible without sacrificing all hopes for flexibility and expediency.

While the section refers to a petition, references to "citations" (a terms borrowed from courts of equity) have been deleted and those references are now to "summons." Furthermore, the form of a summons is provided, and the section also specifies certain default provisions so that the pleadings can be simplified. For example, witnesses may testify through affidavits, and no discovery is permitted unless a statute or court states otherwise.

#### *General discussion on procedural rules for probate proceedings.*

As part of the Trust Act of 1984/5 (and RCW 11.96.130), the legislature added a new statute which provides that "[a]ll issues of fact joined in probate or trust proceedings shall be tried in conformity with the requirements of the rules of practice in civil actions." Considerable confusion followed, the most significant manifestation of that confusion being *Estate of Stockman*, 59 Wn. App. 711, 800 P.2d 1141 (1990). In that case, the court suggested that the procedure outlined in chapter 11.96 RCW is that the initial hearing on the petition under RCW 11.96.080 is merely a show cause hearing in which, if the defendant is able to show "cause . . . , the issues of fact would be framed, and after pleadings were filed, the matter could then be noted and set for trial pursuant to [applicable local court rule]." *Id.* at p. 714, fn. 2.

The conclusion reached by the Court of Appeals in *Estate of Stockman* was not intended. The purpose of the reference to the civil rules in RCW 11.96.130 was to fill in the gaps in (and to provide a guide for) the flexible procedures traditionally followed in probate proceedings, in essentially the same manner as the court used the civil rules in *Snyder v. Cox*, 1 Wn. App. 457, 461, 462 P.2d 791 (1969). The purpose was not to eliminate the flexibility that a court previously had. The provisions of Part II of the statute are intended to overrule the decision in *Estate of Stockman* to the extent that the decision mandates multiple hearings. The statutes are intended to clarify that a court may resolve a matter promptly and efficiently at the initial hearing while also providing the court as much discretion and flexibility as possible to establish an appropriate procedure to be followed in any particular proceeding under chapter 11.96 RCW. The statutes also confirm that the court can establish other procedures in more complicated matters (such as a mechanism for requiring a formal answer where a matter is subject to mandatory arbitration or where the issues in dispute need to be identified and framed).

The statutes are not intended to alter or affect the holding in *In re Estate of Palucci*, 61 Wn. App. 412, 810 P.2d 970 (1991) that notice pleading does not require particular nomenclature for pleadings so long as the substance of the statutes and rules are satisfied.

**TEDRA § 304 (RCW 11.96A.110) - Notice in judicial proceedings under title 11 RCW requiring notice.**

This statute is modeled substantially on RCW 11.96.100. The definition of “party to the dispute” has been moved to the general definitional section for the new chapter.

**TEDRA § 305 (RCW 11.96A.120) - Virtual representation - Notice constituting compliance with notice requirements of title 11 RCW.**

This section was enacted originally as part of the Trust Act of 1984/5 to codify the Doctrine of Virtual Representation. This enactment is meant to be supplemental to the common law doctrine. This enactment is not intended to prevent the application of the common law doctrine.

This section and the Doctrine of Virtual Representation provide rules that simplify the requirements for notifying the possible beneficiaries of future interests, particularly unborn and uncertain beneficiaries. *See* Restatement of the Law of Property, sections 180-186 (1936).

The codification of this doctrine is intended to eliminate the expense associated with requiring the appointment of guardians ad litem or special representatives to represent the interests of minor, unborn, or unascertained beneficiaries under certain limited circumstances. A party may virtually represent his or her successors in interest or similar class members only if the virtual representative's interest in the estate or trust is not in conflict with the parties being virtually represented. For purposes of this provision, a "conflict" exists only if the party who would be the virtual representative has significantly different economic interests in the matter in issue from those of the parties being virtually represented. If the matter in issue is purely administrative in character (e.g., a change, addition, or replacement of Trustee), no conflict exists for purposes of this provision.

**TEDRA § 306 (RCW 11.96A.130) - Special notice.**

This statute was previously found at RCW 11.96.120.

**TEDRA § 307 (RCW 11.96A.140) - Waiver of notice.**

This statute was previously found at RCW 11.16.083.

**TEDRA § 308 (RCW 11.96A.150) - Costs - Attorneys' fees.**

This statute was previously found at RCW 11.96.140. Language was added to make clear that the application of this statute is not to be limited by any other specific statute that provides for the payment of costs. It is intended that a court may award costs in any matter subject to title 11 RCW if the court determines that such an award would be equitable.

**TEDRA § 309 (RCW 11.96A.160) - Appointment of guardian ad litem.**

This statute was previously found at RCW 11.96.180.

**TEDRA § 310 (RCW 11.96A.170) - Trial by jury.**

This statute was previously found in RCW 11.96.130.

**TEDRA § 311 (RCW 11.96A.180) - Execution on judgments.**

This statute was previously found in RCW 11.96.130.

**TEDRA § 312 (RCW 11.96A.190) - Execution upon trust income or vested remainder - Permitted, when.**

This statute was previously found at RCW 11.96.150.

**TEDRA § 313 (RCW 11.96A.200) -Appellate review.**

This statute was previously found at RCW 11.96.160.

**TEDRA § 401 (RCW 11.96A.210) - Purpose.** The purpose of part III is to permit interested parties to enter into a binding settlement of an issue, question or dispute involving a trust or estate. This innovation allows parties to settle estate and trust disputes out of court, just as parties can settle disputes involving contracts or torts out of court.

The traditional due process resolution of issues, questions or disputes involving future interests required judicial proceedings, and the judicial appointment of a guardian ad litem to represent the future interests. This part III [sic – refers to sections 401 to 405] allows a judicially appointed "special representative" to represent the future interests without further direct court supervision. This provides an alternative to the appointment of a guardian ad litem and formal court proceedings to bind future interests.

Under the statute, a "special representative" may be appointed by the court if the executor or trustee requests that one be named for any incompetent, unborn, unascertained or unknown beneficiary. The special representative once appointed has authority to enter into a binding agreement on behalf of those for whom he or she is appointed. The special representative must be either a lawyer or an individual having special skill or training in trust administration. In many cases a special representative may not be needed as the agreement can also be approved by an individual who represents others under the doctrine of virtual representation. TEDRA § 305 (RCW 11.96A.120) codifies that doctrine.

The agreement or a memorandum of its terms may be filed with the court if any interested party elects to do so. Once filed, the agreement will be equivalent to a final court order binding on all parties to the agreement.

At any time before the execution of the agreement any party can put the resolution of the matter back into the procedures set out in TEDRA. While the statute allows parties the flexibility of modern nonjudicial dispute resolution, it does not eliminate the option of judicial procedures.

**TEDRA § 402 (RCW 11.96A.220) - Binding Agreement.**

This is a re-enactment of RCW 11.96.170. This statute provides that a written agreement will be final and binding on all interested parties in furtherance of the policy of resolving disputes by agreement. When signed by all appropriate parties, or their representatives, the agreement is binding and conclusive on all persons interested in the estate or trust. There is no specific required form for an agreement.

**TEDRA § 403 (RCW 11.96A.230) - Entry of Agreement with the Court.**

The agreement or memorandum of its terms may be filed with the court if any interested party elects to do so. Filing the agreement or memorandum creates the same rights and obligations among the parties that a court order would create. The same result occurs immediately on filing the agreement or memorandum if all parties waive the notice provided in this section.

**TEDRA § 404 (RCW 11.96A.240) – Judicial Approval of Agreement**

The special representative has the right to present the agreement to the court for review and approval. If the agreement is approved by the court the special representative is granted protections similar to those provided to guardians ad litem under section 204(3)(a). If the agreement is not presented to the court, or if the court does not approve the agreement, actions may be brought against the special representative for a period of three years under section 204(3)(a).

**TEDRA § 405 (RCW 11.96A.250) - Special Representative**

This section provides a method for a "special representative" to be appointed to represent any "person interested in the estate or trust" who is a minor, incompetent, or disabled, or who is yet unborn or unascertained. This may include the representation of a trustor, if applicable. Once appointed, the special representative has authority to enter into the binding agreement contemplated by this statute on behalf of the parties he or she represents.

The special representative shall be either a lawyer or an individual with special skill or training in the administration of estates or trusts. This is to ensure proper representation by a party knowledgeable in trust and estate matters.

The trustee or executor may request that a specific individual having the required skills be appointed. The court appointment of this individual is the only time a judge is required to be involved. The court is involved to ensure that an impartial and qualified person will serve as special representative.

In lieu of appointing a special representative, it is possible to represent the interests of minor, incompetent, disabled or yet unborn or unascertained beneficiaries through the doctrine of virtual representation, which is codified in TEDRA § 305 (RCW 11.96A.120). If the elements needed to make that section applicable are present, a special representative would not be needed.

The special representative has no continuing duty of representation and is discharged on the execution of the agreement by all parties. If an agreement is not signed within six months of the special representative's appointment, this statute provides for an automatic discharge at that time to protect the special representative. If the agreement is not signed within the six month period, the special representative can be reappointed by the court at such time as the agreement is ready to be signed.

The statute of limitations provision applicable to special representatives has also been modified. The special representative can now be discharged by obtaining formal court approval of a nonjudicial dispute resolution agreement under new TEDRA § 404 (RCW 11.96A.240). If court approval is obtained, an action must be brought against the special representative before the date on which the court enters an order approving the agreement. The intent is to provide a discharge mechanism that is similar to the process applicable to guardians ad litem. It also tracks procedures that are applicable to personal representatives. If court approval is not obtained, an action may be brought within three years of the special representative's discharge (which normally occurs on execution of the agreement). See TEDRA §§ 204(3)(a) (RCW 11.96A.070) and 405(3) (RCW 11.96A.250).

#### **TEDRA § 504 (RCW 11.96A.290) - Superior Court - Venue.**

Prior to the commencement of a judicial proceeding, the superior court authorized by TEDRA § 201 (RCW 11.96A.040) will govern the mediation and arbitration procedures to the extent court intervention is required. For example, upon resolution of the dispute, the parties may wish to file a binding agreement authorized by TEDRA § 402 (RCW 11.96A.220) in superior court. If a judicial proceeding is already underway when a party uses the mediation and arbitration provisions, the superior court with jurisdiction of the existing proceeding will oversee application of the mediation and arbitration procedures.

#### **TEDRA § 505 (RCW 11.96A.300) - Mediation Procedure.**

This provision allows any interested person to use the mediation and arbitration process and directs the court to order the use of mediation unless the court finds "for good cause shown" that mediation will not serve the best interests of the affected parties. If the court finds that mediation is not appropriate, the court may decide the matter at the hearing, may require arbitration, or may direct other judicial proceedings. It is not intended that one party's unwillingness to participate alone will constitute "good cause shown."

Once mediation is invoked, the statute provides that the parties will select a mediator. If the parties fail to do so, a party may petition the appropriate court to appoint a mediator. The court-appointed mediator must be either an attorney licensed to practice before Washington courts or a person with special skill or training in the administration of trusts and estates.

The statute further provides for a minimum half-day mediation in order to assure the parties a reasonable opportunity to present their positions and thus to encourage good faith by all parties and their representatives to seek to achieve an acceptable resolution of the dispute.

The statute also provides for the mediator to be paid in accordance with the terms of a Mediation Agreement with the expenses to be borne equally by the parties.

**TEDRA § 506 (RCW 11.96A.310) - Arbitration Procedure.**

This section provides that arbitration will be available only if (a) a party has first sought mediation, (b) the court has ordered arbitration, or (c) all the parties involved agree to proceed directly to the arbitration process.

Arbitration can be commenced by any party to a dispute if all the parties have agreed not to use the mediation procedures or other methods to resolve the dispute. A party can invoke the procedure for arbitration without obtaining authority from any court unless there has already been a judicial hearing on the matter.

Any person involved in a trust or estate dispute has the right to object to the use of arbitration by filing a petition with the court. Arbitration will be ordered by the court unless the court finds “for good cause shown” that it will not serve the best interests of the affected parties. If the court denies arbitration, the court can then decide the issues at the hearing on the petition (if the petition requesting that arbitration be denied has requested such relief) or the court can order further judicial proceedings.

The statute allows for the parties to select the arbitrators, who must follow the mandatory arbitration of civil action rules found at RCW Chapter 7.06 (but without reference to any dollar limits).

Costs of arbitration are to be borne equally by the parties to the dispute who participate in the arbitration, and all other arrangements pertaining to the conduct of the proceedings are to be pursuant to an Arbitration Agreement among all parties to the dispute participating in the arbitration.

The rules of evidence and discovery applicable to civil actions apply unless the parties agree otherwise. Once the arbitrator reaches a decision, he or she must issue a memorandum of the decision to be filed with the Superior Court. The decision can be appealed by filing a notice of appeal with the Superior Court within 30 days after the memorandum is filed with the court. The decision is binding on the parties if it is not so appealed. Appeal of the arbitrator’s decision to the Superior Court will be a review de novo.

In any de novo review, the statute directs the court to award costs, including expert witness fees and reasonable attorney’s fees, to the prevailing party. The policy behind the award of fees and costs is to encourage the use of the arbitration procedures for final resolution of disputes. The policy is also intended to recognize and support appeals based on reasonable grounds by

awarding fees and costs to the prevailing party, and to likewise discourage frivolous appeals by assessing fees and costs against the non-prevailing party.

**TEDRA § 507 (RCW 11.96A.320) - Petition for Order Compelling Compliance.**

If a party fails to comply with the mediation and arbitration procedures, any other party can seek a court order compelling that party's participation in mediation or arbitration as provided in the statutes. Fees and costs of the moving party shall be awarded in such a case unless the court determines that an award should not be made "for good cause shown." The policy for awarding fees and costs to the moving party is to promote cooperation and participation in the required mediation and arbitration process. The legislature intends to provide full and clear authority for a party to pursue mediation or arbitration in solving disputes in trust and estate matters, thus giving specific rights to the parties to petition the court to enforce utilization of these procedures, including the right to be reimbursed for fees and costs incurred.

**TEDRA § 601 (RCW 11.40.020) - Creditors Claims - Notice.**

Language was added to 11.40.020 to ensure that if notice to creditors is given in the probate of a Washington resident's estate, that the notice will be published in the county of the decedent's residence. The reason the change is needed is that RCW 11.96A.060 will allow proceedings to be commenced in any county, irrespective of the decedent's residence. Publication in the county of residence is required since it is most likely that creditors of the decedent will be located in the decedent's county of residence, and creditors are likely to look for information about a debtor in the debtor's county of residence.

**TEDRA §§ 602 to 636 (miscellaneous RCW sections – see codification table)**

These changes were made to update cross references in existing statutes.



WSBA - CLE • The Innovator in Legal Education®

# ***10th Annual Trust and Estate Litigation Seminar***

---

***April 26, 2013 | Seattle, WA***

***Co-Sponsored by***

The WSBA Real Property, Probate and Trust Section

and

Washington State Bar Association  
Continuing Legal Education

---

Approved for 6.5 CLE Credits for Washington Attorneys: 5.5 General and 1.0 Ethics

*Apdx. 20*

CHAPTER SIX-A

**TEDRA: THE HISTORY OF WASHINGTON'S DISPUTE RESOLUTION  
PROCEDURES IN RCW 11.96A**

April 2013

**Professor Karen E. Boxx**

**University of Washington School of Law**  
E-mail: [kboxx@uw.edu](mailto:kboxx@uw.edu)

Prepared: March 2013

**KAREN E. BOXX** is a Professor at the University of Washington School of Law, where she teaches in the areas of trusts and estates, estate planning, community property, conflicts of laws and professional responsibility. She is also of counsel at Keller Rohrback LLP, Seattle, Washington. She is Chair-Elect of the Washington State Bar Association Real Property, Probate and Trust Section, Vice Chair of the Elder Law, Disability Planning and Bioethics Group of the ABA Real Property, Trust and Estate Section, ABA Real Property, Trust and Estate Section liaison to the National Guardianship Network, member of the WSBA Rules of Professional Conduct Committee Task Force and member of the ACLU-WA budget committee. She has been active in legislative reform, including chairing a WSBA Task Force that drafted major revisions to Washington trust law enacted in 2011. She is a Fellow of the American College of Trust and Estate Counsel and a member of its Elder Law Committee. She has run 16 marathons (so far).

6a-2

Apdx. 22

Washington lawyers currently use the term "TEDRA" to refer to any proceeding that can be brought under RCW 11.96A, and to agreements under RCW 11.96A.220 through 11.96A.250. The name of chapter 11.96A is "Trust and Estate Dispute Resolution," and RCW 11.96A was enacted, replacing RCW ch. 11.96, by the Trust and Estate Dispute Resolution Act, passed in 1999 (Senate Bill 5196, Ch. 42, Laws of 1999). However, many of what we now think of as integral parts of TEDRA were in fact codified much earlier, by the Trust Act of 1984 (Senate Bill 5196, Ch. 42, Laws of 1999). Current RCW 11.96A contains many innovative approaches to trust and estate disputes. This article reviews the history of the provisions in RCW 11.96A, with the intent that such history can give some guidance as to how the provisions were intended to be used and how practitioners and the courts should be putting them into practice today. This summary is not a comprehensive review of all of the sections in current RCW ch. 11.96A, however. It instead focuses on those sections that affect the scope of TEDRA.

I. THE 1984 TRUST ACT.

*NOTE:* The primary sources for the following description of the 1984 Act were the text of the bill and the comments by the Trust Task Force, which can be found on the WSBA RPPT section website, <http://www.wsbarppt.com/comments.htm>, and in an article written by several members of the Trust Task Force for the ACTEC Notes: Bruce Flynn, Richard Klobucher, Douglas Lawrence, and Kenneth Schubert, Jr., "Nonjudicial Dispute Resolution Agreements in Trusts and Estates - The Washington Experience and a Proposed Act," 20 ACTEC Notes 138 (Fall 1994).

The WSBA RPPT section formed a Trust Task Force in 1977 to overhaul Washington trust laws. The work of the Task Force took seven years, and the result was the 1984 Trust Act. The trust act covered more than just trust provisions, however. Some of the more notable provisions that are still in force:

- The Act included RCW 11.12.250 and .260, codifying incorporation by reference and authorizing statements of tangible personal property in Wills.
- It added RCW 11.92.140, authorizing a court to permit gifts from guardianship property.
- It revised the power of attorney statute to require specific authorization for gifts of the principal's property and similar transactions.

- RCW 11.95, the power of appointment statute, was revised to specify permissible methods of exercising a power of appointment.

The changes to trust law included expansion of trustee powers, provisions to allow change of trustee and trust situs, updating the trust investment provisions to reflect modern portfolio theory and moving them from Title 30 to Title 11, addition of the significant nonroutine transactions notice and appraisal provisions of RCW 11.98.140, enacted in response to *Allard v. Pacific National Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983), addition of RCW 11.108, allowing construction of gifts in trust to qualify for the marital deduction, and moving several other chapters, such as the charitable trust chapter, into Title 11.

The portion of the Trust Act of interest here is the creation of RCW 11.96, which consolidated the procedural and jurisdictional rules applicable to trust and estate disputes. The jurisdictional and venue provisions, previously located in RCW 11.02 and 11.16, were moved into RCW 11.96. A statute of limitations provision was added that made significant clarifications. Under prior law, as stated in *Hotchkin v. McHaught-Collins Improvement Co.*, 102 Was. 161, 172 Pac. 864 (1918), the statute of limitations for claims against a trustee did not begin to run until the trust was repudiated by the trustee or the trust terminated. It was not clear which statutory period applied, with the range being from one to ten years depending on the wrongdoing alleged. The 1984 act provision set the statutory period as three years from termination of the trust, repudiation by the trustee, or when the alleged breach was or reasonably should have been discovered.

Prior to the 1984 Act, the court's authority to resolve trust and estate disputes was found in RCW 7.24.040, a section of the declaratory judgments act based on the Uniform Declaratory Judgments Act. That statute, enacted in 1935, stated:

A person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que trust*, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

- (1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or
- (2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
- (3) To determine any question arising in the administration of the estate of trust, including questions of construction of wills and other writings.

The 1984 legislation moved the section to RCW 11.96.070 and expanded the scope of the court's authority. It added actions to amend a trust to qualify a gift for the charitable estate tax deduction, actions to give the personal representative or trustee additional powers not otherwise granted that are not inconsistent with the trust purposes, and actions "to resolve any other matter in this title referencing this judicial proceedings section." This expanded list of jurisdictional power was important for the effectiveness of nonjudicial agreement provisions, as discussed below. The statute also specified that RCW ch. 11.96 applied to disputes arising in connection with estates of incapacitated persons, unless otherwise provided for under RCW ch. 11.88 and 11.92.

RCW 11.96.100 was added to specify the procedure for giving notice of any judicial proceeding now authorized under RCW 11.96. It was modeled after the California notice provision (then California Probate Code § 1215) and introduced mailing as a permissible method of notice.

The virtual representation statute was added, codifying and expanding on common law virtual representation. Virtual representation was necessary in order to have notice to all interested parties. Traditional, common law virtual representation allows for minor, incapacitated, unborn and unascertained beneficiaries to be represented by adult predecessors in interest in certain circumstances. See ACTEC chart of virtual representation statutes at [http://www.actec.org/public/Documents/Studies/Virtual\\_Representation\\_Statutes%20Chart\\_06\\_15\\_2010.pdf](http://www.actec.org/public/Documents/Studies/Virtual_Representation_Statutes%20Chart_06_15_2010.pdf); see also Uniform Trust Code § 304. The Washington statute, in the form enacted in 1984 and in its revisions since that time, also allows a competent adult beneficiary to be represented by a predecessor in interest in certain circumstances.

The 1994 ACTEC Notes article explains that the Washington virtual representation statute applies in three situations: first, where the living members of a class can represent the interests of the entire class; second, where a holder of an interest represents successor beneficiaries in the same interest; and third, where a contingent beneficiary can represent interests of more remote contingent beneficiaries. In the first example, competent adult members of the class would receive notice, which is consistent with the common law approach. However, the second two categories are described in the statute without any requirement that the persons being represented are minor, incapacitated, unborn or unascertained. By contrast, section 304 of the Uniform Trust Code, states the general virtual representation rule as: "Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented." The UTC does allow the holder of a general power of appointment to represent takers in default and permissible appointees, without limiting the class of

persons represented to minor, incapacitated, unborn or unascertainable persons. The examples given in the ACTEC Notes article indicate that the Washington statute, by contrast, extends virtual representation to competent adults. As an illustration of the second and third types of representation allowed in the statute, the article gave this example:

For example, a distribution that is contingent on a child's death might pass to that child's issue, "*per stirpes*" and in default of such issue, to the trustor's other then-living "issue, *per stirpes*," and in default of such issue, to a designated charity. In this situation the child's issue can virtually represent the trustor's other issue, and also the charity. The trustor's other issue would be represented by the child under the second situation described above, and the child's issue could represent the interest of the charity, since the charity would receive its interest only on the contingency that none of the child's issue were surviving at the trust termination.

There is no indication in this example that the trustor's other issue who are represented are limited to those who are incapacitated, minor or unborn, and the charity certainly has capacity to represent itself but nevertheless can be represented by the child's issue.

The ACTEC Notes article stated the purpose of the Washington virtual representation statute as follows:

It is intended to operate in situations where the representative person can reasonably be expected to adequately advocate and protect the position of the represented person. By use of this doctrine, the number of necessary parties can be minimized without jeopardizing the interests of the successor beneficiaries.

Virtual representation is not available when there is conflict of interest. If there are minor, incapacitated or unborn parties to a judicial proceeding who cannot be represented by virtual representation, then under the 1984 scheme, a judge would appoint a guardian ad litem to represent those parties. The special representative role is applicable only for nonjudicial dispute resolution.

The Act also added a provision giving the court authority in all proceedings subject to RCW ch. 11.96, to allocate costs and attorneys fees among the parties and the assets of the estate "as justice may require." This provision was taken from California Probate Code § 1232.

According to the ACTEC Notes article, the intention of the drafters was to provide "an up-to-date and modern procedure for the judicial resolution of disputes," and also added a statutory framework for nonjudicial resolution. The changes were intended to address problems of cost and delay, and the nonjudicial dispute resolution was

intended to "reduce the number of disputes that had to go to court for resolution." The nonjudicial agreement was authorized in new section RCW 11.96.170. The statute required that all persons entitled to notice of proceedings (trustees, personal representatives, heirs, beneficiaries, guardians ad litem and persons having an interest in the trust or estate) had to join in the agreement. A minor, incompetent, disabled, unborn, unascertained or missing person with an interest in the trust or estate could be represented by a "special representative" appointed by the court. A special representative could be either a lawyer or "an individual with special skill or training in the administration of estates or trusts." As noted in the ACTEC Notes article, the possibility of nonlawyer special representatives was "innovative" at the time. The statute provided that the special representative would be "discharged of any further responsibility with respect to the estate or trust" once the agreement was signed, and according to the ACTEC Notes article, this was intended to terminate the special representative's future liability. The agreement once signed, or a memorandum of the agreement, could be filed with the court at the option of any of the parties, and if so filed, a procedure similar to filing a Declaration of Completion would be followed. The agreement or memorandum would be mailed to all parties, with a notice that gave the parties 30 days to object. If no objection was filed, then the agreement "will be deemed approved and will be equivalent to a final order binding on all persons interested in the estate or trust."

The ACTEC Notes article notes two important aspects of this new nonjudicial process. First, the expansion of the court's ability to issue declaratory judgments on trust matters, was critical, because the permissible scope of the nonjudicial agreements was tied to whatever the court had authority to decide. Second, any interested party was able at any time during negotiations for a nonjudicial agreement to file a petition with the court and essentially convert it into a judicial proceeding. "The drafters of this legislation were concerned about the potential for fraud in nonjudicial proceedings, and this escape was provided as a solution."

The ACTEC Notes article authors surveyed estate planners in King County regarding their use of the nonjudicial agreement procedure. Responders reported that they had used the nonjudicial agreement for issues such as:

- nonjudicial change of a fiduciary
- termination of a trust no longer serving its purposes
- the modification of documentary provisions to accommodate original intent or changed circumstances
- the resolution of disputes among various beneficiaries
- modification of documentary terms to comply with tax laws.

The ACTEC Notes article proposed a stand alone statute for adoption by other states to take advantage of the nonjudicial agreement. The nonjudicial agreement was not only a solution to the cost and delay of court proceedings. As the article noted, U.S. common law is extremely strict with respect to modification and termination of irrevocable trusts. The general rule for termination of an irrevocable trust where the trustor is unavailable, was first stated in the famous case of *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889), and is now referred to as the Clafin doctrine. That rule holds that an irrevocable trust cannot be terminated earlier than provided for in the trust agreement if termination would defeat a material purpose of the trustor. An additional requirement of trust termination is that all beneficiaries, including remote beneficiaries, must consent. Restatement (Third) Trusts § 65 comment b. A spendthrift provision has traditionally been considered a material purpose, so a court would not authorize early termination of any trust with a spendthrift provision. See UTC § 411 comments. Modification of distributive provisions is only slightly easier: the common law rule is that the court will authorize a modification if there is a change in circumstance not foreseeable by the trustor and because of such change carrying out the purposes of the trust is now impossible or substantially impaired. See Restatement (Second) Trusts § 167. Termination and modification of distributive provisions require court approval, but the nonjudicial agreement can circumvent these stiff requirements because the agreement has the force of a court order when filed with the court. In addition, the expansive definition of virtual representation and special representatives ensure that all beneficiaries' consent can be obtained. The nonjudicial agreement was therefore a tremendous leap in increasing the flexibility of trusts.

## II. AND THEN CAME TEDRA...

*Note:* The primary source of the following description of TEDRA's history was the text of the Act, the TEDRA task force comments available on the WSBA RPPT website, <http://www.wsbarppt.com/comments.htm> and materials from the Forty Fourth Annual Estate Planning Seminar, Estate Planning Council of Seattle and WSBA (Seattle 1999). A copy of the TEDRA task force comments are attached to these materials.

The ACTEC Notes article referred to above was the product of an ACTEC – Washington chapter subcommittee that was formed to draft a nonjudicial dispute resolution statute based on Washington law, to be considered by other states. The members of that committee were Bruce P. Flynn, Kenneth L. Schubert, Jr., Richard A. Klobucher and Douglas C. Lawrence. In studying the Washington law to prepare the proposed statute, the committee members decided that the Washington law could be further improved. The committee added Watson B. Blair as a member and began work on what was to become The Trust and Estate Dispute Resolution Act, enacted in 1999. TEDRA reorganized RCW 11.96, updated some procedures, and expanded the options to reduce cost and delay in trust and estate disputes.

First, the statute was reorganized into five general sections:

- General provisions, including definitions (RCW 11.96A.010-.030)
- Jurisdiction, Venue, Situs and Statutes of Limitation (RCWA 11.96A.040-.070)
- Judicial Dispute Resolution Procedures, including notice and cost provisions (11.96A.080-200)
- Nonjudicial Dispute Resolution (RCW 11.96A.210-.250)
- Party-initiated Mediation and Arbitration (RCW 11.96A.260-.320)

TEDRA clarified that a matter brought under TEDRA is a "special proceeding" so its rules supersede any inconsistent civil rules.

The definitions section replaced the list of issues subject to 11.96 with the definition of "matter." According to the comments, the term is meant to apply broadly. The definition of "matter" included the issues from the 1984 Act and added issues regarding nonprobate assets. One significant change was the removal of the requirement that a grant of powers to a trustee or personal representative, and an amendment of a trust to qualify for tax benefits, be consistent with the purposes of the trust. This requirement was a vestige of the Clafin doctrine and the common law rules of modification and termination of trusts. Removal of the requirement recognized "recent practice" (according to the comments) where interested parties could alter a trust by agreement without constraints of the common law considerations.

The scope of matters that can be brought under TEDRA was clarified. According to the comments,

It is intended that any interested party may seek judicial review of all matters relating to trusts, estates and nonprobate assets under the special proceedings described in title 11 RCW, and not just of those matters that have historically been within the limited jurisdiction of American probate courts or other similar courts of equity or limited jurisdiction. In other words, the amendments are intended to provide that all matters that fall within the scope of TEDRA § 301 (RCW 11.96A.080) are "special proceedings" for purposes of CR 81(a) and are therefore subject to the statutory rules of procedure provided in TEDRA.

TEDRA kept the 1984 Act's inclusion of issues regarding estates of incapacitated persons and added that it supplements but does not supersede the procedures in RCW 11.20 (probate of wills), 11.24 (will contests), 11.28 (issuance of letters testamentary and of administration), 11.40 (creditor claims), 11.42 (nonprobate creditor claim procedure), and 11.56 (sales etc. of estate property). It specifically excluded from TEDRA actions for wrongful death under RCW ch. 4.20. RCW 11.96A.080.

The virtual representation provision of the 1984 Act was preserved, but the TEDRA comments clarified what type of conflict would prevent use of virtual representation:

The codification of this doctrine is intended to eliminate the expense associated with requiring the appointment of guardians ad litem or special

representatives to represent the interests of minor, unborn, or unascertained beneficiaries under certain limited circumstances. A party may virtually represent his or her successors in interest or similar class members only if the virtual representative's interest in the estate or trust is not in conflict with the parties being virtually represented. For purposes of this provision, a "conflict" exists only if the party who would be the virtual representative has significantly different economic interests in the matter in issue from those of the parties being virtually represented. If the matter in issue is purely administrative in character (e.g., a change, addition or replacement of Trustee), no conflict exists for purposes of this provision.

TEDRA did not change the primary Special Representative procedures but did alter the statute of limitations applicable to claims against a Special Representative. Under TEDRA, the Special Representative can obtain court approval of an agreement. If such approval is obtained, then any action against the special representative is cut off as of the date of such approval. If no approval is obtained, then the statute of limitations for claims against the Special Representative is three years after discharge of the Special Representative.

With respect to nonjudicial agreements, TEDRA removed the ability of parties to object to the agreement within 30 days after it was filed with the court. Since all parties had already entered into the agreement, they should be estopped from objecting to it at that time. The requirement that notice be given to parties upon filing of the agreement, with a 30 day waiting period for it to become a binding order, was eliminated by a technical corrections bill in 2001.

The most significant innovation of TEDRA was the addition of the mediation and arbitration provisions. These provisions were an extension of the general goal, beginning with the 1984 Trust Act, to encourage early and economical resolution of trust and estate disputes.

### III. TEDRA AMENDMENTS

In 2001, as part of a bill revising and updating the durable power of attorney statute, the definition of "matter" was amended to include matters that relate to powers of attorney. There was also a technical corrections bill passed that year that corrected some oversights in the original bill. The comments to the technical corrections bill are available on the WSBA RPPT website, [www.wsbarppt.com/comments.htm](http://www.wsbarppt.com/comments.htm)

In 2006, legislation authorizing unitrusts also contained amendments to RCW ch. 11.96A, including references to unitrusts and clarifying some procedural sections. (SB 6597). A procedure to convert existing trusts to unitrusts, which are trusts that distribute a set annual percentage or amount to the current beneficiary rather than a distribution of annual income, was added into the Principal and Income Act, RCW 11.104A.040, and the

TEDRA amendment was necessary to clarify that such procedures would be subject to TEDRA.

In 2007, RCW 11.96A.150, relating to costs and attorneys fees, was modified to allow the court to award fees and costs even without a specific finding that the litigation benefitted the estate or trust involved.

In 2009, when the slayers statute (RCW ch. 11.84) was expanded to include financial abuse of vulnerable adults, the definition of "matter" subject to RCW 11.96A was expanded to include actions under RCW ch. 11.84.

There were several revisions to RCW ch. 11.96A in the 2011 Trust Act, including:

- Including in the definition of "matter," an action to reform a trust or will to correct a mistake, a newly authorized power of the court added in the same legislation.
- Changes to the situs, venue and statute of limitations provisions
- Changes to the notice provision, allowing for electronic notice if the recipient has given permission
- Revisions to the virtual representation statute, primarily reorganizing it and adding the authority of a general power of appointment and certain limited powers of appointment to virtually represent permissible appointees and takers in default
- A codification of the common law doctrine of cy pres was added
- Authorization of correction of mistakes in wills and trusts was added

There is, as of this writing, a bill pending in the legislature that would make further amendments to the 2011 Act provisions. The virtual representation statute would be further reorganized and clarified, and the ability of a parent to accept notice on behalf of a minor child, assuming no conflict of interest, would be added. Also, the Attorney General could represent a charitable beneficiary under certain circumstances. The special representative provision would be amended to allow any party or the parent of a minor or unborn beneficiary to petition for appointment of a special representative. Under current law, only the trustee or personal representative can petition for appointment of a special representative. Also, RCW 11.96A.125, the section authorizing correction of mistakes, would be amended to clarify that the evidentiary standard contained in this section only applies to reformations by judicial procedure.

**COMMENTS TO SB 5196  
(Ch. 42, Laws of 1999)**

**COMMENTS TO THE TRUST AND ESTATE DISPUTE RESOLUTION ACT**

**January 28, 1999**

**TEDRA § 103 (RCW 11.96A.020) - Powers of the Court.**

This was formerly part of RCW 11.96.020 and is intended to have full effect with respect to all procedures provided under this Title. Under this provision, it is intended that the court have all necessary and sufficient powers to cause the administration and final settlement of matters involving the estates, trusts, and nonprobate assets, so that the court can dispose of such matters expeditiously and efficiently.

**TEDRA § 104(1) (RCW 11.96A.030) - Matter.**

The term "matter" establishes the issues, questions and disputes involving trusts and estates that can be resolved by judicial or nonjudicial action under the Act. This term is meant to apply broadly and is intended to encompass matters traditionally within the exclusive province of the courts. This is consistent with the overall purpose of the Act, which is to foster nonjudicial resolution of issues confronting estates and trusts. Subsections (d) and (e) have been changed from the prior provisions of RCW 11.96.070 by removing the requirement that there be a determination that the requested action not be inconsistent with the purposes of the will or trust. By making this change Washington formally accepts recent practice and adopts a rule that allows all interested parties to agree to the resolution of an issue or modification of the applicable document.

**TEDRA § 104(4) (RCW 11.96A.030) - Parties.**

The definition of "parties" is intended to mean and clarify that only those persons having an actual interest in the subject matter of the dispute are required to be participants in the resolution of the dispute. Persons defined in TEDRA § 104(4) (RCW 11.96A.030) are not necessary parties to the resolution of a dispute unless they have an actual interest in the subject matter of the dispute. Any party may be represented by a virtual representative.

The amendments to this section are also intended to clarify that the grantor of a trust or the owner (as defined in RCW 11.18.040) of a nonprobate asset are necessary parties only if they are living at the time of the judicial or nonjudicial proceeding under this section and if they have an interest in the subject matter of the dispute. All other parties with an interest in the dispute (or their special representative, guardian ad litem, or virtual representative under TEDRA § 305 (RCW 11.96A.120)) must participate in the resolution of the dispute.

Thus this term establishes which of the "persons interested in the estate or trust" must participate in a nonjudicial dispute resolution agreement under TEDRA § 402 (RCW

11.96A.220). A person who is interested in the estate, trust or nonprobate asset, but whose interest is not affected by the matter in issue, is not a required party to the agreement.

**TEDRA § 104(8) (RCW 11.96A.030) - Situs.**

Former RCW 11.96.040 has been incorporated into the general definitional provisions. Language was changed to improve the readability, but the intent remains the same.

**TEDRA § 201 (RCW 11.96A.040) - Original jurisdiction in probate and trust matters - Powers of court.**

This section was previously found at RCW 11.96.001. It clarifies that the superior court has original subject-matter jurisdiction over all matters relating to trusts and estates, regardless of the amount in controversy. (See also RCW 2.08.010-.020: The superior courts are courts of general subject-matter jurisdiction and have original, as compared to appellate, jurisdiction over most but not all matters.) TEDRA § 201 (RCW 11.96A.040) deals with subject-matter jurisdiction and is not intended to address any issues relating to personal jurisdiction (e.g. the sufficiency of a party's contacts with the State of Washington and the effects of *Shaffer v. Heitner*, 433 U.S. 186 (1977) and its progeny).

The term "probate" is used at various places in title 11 RCW to refer only to the procedures for proving a particular will, while it is also used at other places in title 11 RCW to refer to the larger process of administering and settling estates. Using "estates" together with the references to the estates of "incapacitated, missing or deceased persons" clarifies that the superior court has original subject-matter jurisdiction over all matters arising in connection with or under title 11 RCW (including without limitation all matters that relate to the administration and settlement of nonprobate assets that arise under RCW 11.18 or 11.42).

**TEDRA § 202 (RCW 11.96A.050) - Venue.**

TEDRA § 202 (RCW 11.96A.050) confirms the intent of the statutory amendments under the Trust Act of 1985 that venue is not jurisdictional. TEDRA § 202 (RCW 11.96A.050) specifies clear rules for determining the situs of a hearing or proceeding if a party does object to the venue where a matter is pending. If venue is moved for any reason, the statute confirms the validity of actions taken by the court before the move.

**TEDRA § 203 (RCW 11.96A.060) - Exercise of powers - Orders, writs, process, etc..**

This section was previously found at RCW 11.96.030. While the order of certain phrases in the statute has been changed from RCW 11.96.030, the purposes remain the same.

**TEDRA § 204 (RCW 11.96A.070) - Statutes of limitation.**

RCW 11.96.060 (the current law establishing statutes of limitation relating to trusts and estates) does not provide a statute of limitations for actions involving express trusts created before January 1, 1959. The new statute will apply to those trusts three years after the effective date of the statute.

TEDRA § 204(3)(a) (RCW 11.96A.070) revises the statute of limitations for claims against special representatives acting on behalf of minor or after-born children under a nonjudicial dispute resolution agreement. An action by a represented party must be brought against the special representative before the earlier of (i) three years after the discharge of the special representative as provided in section 404 or (ii) the entry of an order approving the nonjudicial dispute resolution agreement under sections 402 and 403. TEDRA § 204(3)(b) (RCW 11.96A.070) provides indemnification protection in the event an action is brought against the special representative after the statute of limitations has run.

The time for bringing any action concerning either the agreement or the acts of a special representative shall not be subject to or extended by any other statute of limitations provision. No case law or statute extending any otherwise applicable statute of limitation shall apply to the agreement or to any action against a special representative for alleged breach of fiduciary duty.

The purpose of this section is twofold: first, to provide a specific period of limitations for actions against a special representative for alleged breach of fiduciary duty, and second, to preclude the application of any other statute of limitations provision, including any tolling provision that would otherwise hold open the period of limitations. This in turn will provide for an expeditious and complete resolution of matters involving trusts and estates, fulfilling the public policy of providing finality in those proceedings.

The statute provides safeguards against malfeasance by a special representative by (i) requiring that the special representative be a lawyer licensed to practice before the courts of this state or an individual with special skill or training in the administration of estates or trusts, (ii) requiring that the special representative not have any financial or familial interest in the estate, (iii) giving responsibilities for the appointment of the special representative to the duly appointed fiduciaries of the trust or estate involved, and (iv) requiring that the court make the actual appointment.

**TEDRA § 301 (RCW 11.96A.080) - Persons entitled to judicial proceedings for declaration of rights or legal relations.**

This section is substantially the same as current RCW 11.96.070 and identifies both those persons who have standing to seek a judicial determination and the subject-matter of such a proceeding.

This section allows judicial proceedings for disputes involving probate estates, trusts, and nonprobate assets.

Subsection (2) clarifies the relationship between various procedures established under title 11 RCW.

It is intended that any interested party may seek judicial review of all matters relating to trusts, estates and nonprobate assets under the special proceedings described in title 11 RCW,

and not just of those matters that have historically been within the limited jurisdiction of American probate courts or other similar courts of equity or limited jurisdiction. In other words, the amendments are intended to provide that all matters that fall within the scope of TEDRA § 301 (RCW 11.96A.080) are "special proceedings" for purposes of CR 81(a) and are therefore subject to the statutory rules of procedure provided in TEDRA.

**TEDRA § 302 (RCW 11.96A.090) - Judicial proceedings.**

Subsection (1) clarifies that any action controlled by the provisions of title 11 RCW is a "special proceeding" as contemplated by Civil Rule 81. Because of this, the procedural and administrative provisions of title 11 RCW are intended to control over any inconsistent provision of the civil rules.

Subsections (2) and (3) were previously part of RCW 11.96.130.

Subsection (4) is new. It is designed to clarify when the procedural rules of title 11 RCW govern and when the court rules will govern the procedures of an action involving trust, estate, or nonprobate asset.

General discussion regarding court rules and special proceedings.

In *Petrarca v. Halligan*, 83 Wn. 773, 776, 522 P.2d 827 (1974), the Supreme Court of the State of Washington confirmed the rule that "[w]here rule of court is inconsistent with the procedural statute, the power of this court to establish the procedural rules for the courts of this state is supreme." See also CR 81(b). However, CR 1 and CR 81(a) provide that the civil rules do not apply to special proceedings to the extent that the civil rules are inconsistent with rules or statutes applicable to the special proceedings. See also *Thompson v. Butler*, 4 Wn. App. 452, 453-54, 482 P.2d 791 (1971); *Snyder v. Cox*, 1 Wn. App. at p. 460-61. Rule 98.12W of the Special Proceedings Rules expressly pertains to probate matters and proceedings. TEDRA § 302 (RCW 11.96A.090) confirms that these are special proceedings. Thus a party commencing an action relating to a matter that is described in RCW 11.96.070 can elect to commence such action either as a "special proceeding" under chapter 11.96 RCW or as a regular civil action. A party can also move that the court consolidate the separate action with an existing special proceeding or vice versa.

The introductory phase of this statute is intended to re-affirm that a court has the flexibility to establish appropriate and reasonable procedures; to overrule *Estate of Stockman*, 59 Wn. App. 711, 800 P.2d 1141 (1990) to the extent that the decision mandates a single procedure for all circumstances; and to notify those reading this statute that the rules of court are supreme. *Petrarca v. Halligan*, 83 Wn. 773, 776, 522 P.2d 827 (1974). "Rules of court" has been used in the plural, rather than the singular, to indicate that noncompliance with any single rule of court is acceptable so long as another, more general rule (such as CR 81[a]) provides a total exemption for special proceedings.

**TEDRA § 303 (RCW 11.96A.100) - Procedural rules.**

The method for commencing an action under chapter 11.96 RCW has frequently been ignored, probably in large part because the rules for commencing proceedings in probate are so different from the normal rules for commencing a civil action. Some of these differences were believed to be necessary to give the court the flexibility needed to promote expediency.

Nevertheless, the statutes provide a middle ground by modernizing the procedures in probate and conforming them to the full extent possible without sacrificing all hopes for flexibility and expediency.

While the section refers to a petition, references to "citations" (a terms borrowed from courts of equity) have been deleted and those references are now to "summons." Furthermore, the form of a summons is provided, and the section also specifies certain default provisions so that the pleadings can be simplified. For example, witnesses may testify through affidavits, and no discovery is permitted unless a statute or court states otherwise.

General discussion on procedural rules for probate proceedings.

As part of the Trust Act of 1984/5 (and RCW 11.96.130), the legislature added a new statute which provides that "[a]ll issues of fact joined in probate or trust proceedings shall be tried in conformity with the requirements of the rules of practice in civil actions." Considerable confusion followed, the most significant manifestation of that confusion being Estate of Stockman, 59 Wn. App. 711, 800 P.2d 1141 (1990). In that case, the court suggested that the procedure outlined in chapter 11.96 RCW is that the initial hearing on the petition under RCW 11.96.080 is merely a show cause hearing in which, if the defendant is able to show "cause . . . , the issues of fact would be framed, and after pleadings were filed, the matter could then be noted and set for trial pursuant to [applicable local court rule]." Id. at p. 714, fn. 2.

The conclusion reached by the Court of Appeals in Estate of Stockman was not intended. The purpose of the reference to the civil rules in RCW 11.96.130 was to fill in the gaps in (and to provide a guide for) the flexible procedures traditionally followed in probate proceedings, in essentially the same manner as the court used the civil rules in Snyder v. Cox, 1 Wn. App. 457, 461, 462 P.2d 791 (1969). The purpose was not to eliminate the flexibility that a court previously had. The provisions of Part II of the statute are intended to overrule the decision in Estate of Stockman to the extent that the decision mandates multiple hearings. The statutes are intended to clarify that a court may resolve a matter promptly and efficiently at the initial hearing while also providing the court as much discretion and flexibility as possible to establish an appropriate procedure to be followed in any particular proceeding under chapter 11.96 RCW. The statutes also confirm that the court can establish other procedures in more complicated matters (such as a mechanism for requiring a formal answer where a matter is subject to mandatory arbitration or where the issues in dispute need to be identified and framed).

The statutes are not intended to alter or affect the holding in In re Estate of Palucci, 61 Wn. App. 412, 810 P.2d 970 (1991) that notice pleading does not require particular nomenclature for pleadings so long as the substance of the statutes and rules are satisfied.

**TEDRA § 304 (RCW 11.96A.110) - Notice in judicial proceedings under title 11 RCW requiring notice.**

This statute is modeled substantially on RCW 11.96.100. The definition of "party to the dispute" has been moved to the general definitional section for the new chapter.

**TEDRA § 305 (RCW 11.96A.120) - Virtual representation - Notice constituting compliance with notice requirements of title 11 RCW.**

This section was enacted originally as part of the Trust Act of 1984/5 to codify the Doctrine of Virtual Representation. This enactment is meant to be supplemental to the common law doctrine. This enactment is not intended to prevent the application of the common law doctrine.

This section and the Doctrine of Virtual Representation provide rules that simplify the requirements for notifying the possible beneficiaries of future interests, particularly unborn and uncertain beneficiaries. See Restatement of the Law of Property, sections 180-186 (1936). The codification of this doctrine is intended to eliminate the expense associated with requiring the appointment of guardians ad litem or special representatives to represent the interests of minor, unborn, or unascertained beneficiaries under certain limited circumstances. A party may virtually represent his or her successors in interest or similar class members only if the virtual representative's interest in the estate or trust is not in conflict with the parties being virtually represented. For purposes of this provision, a "conflict" exists only if the party who would be the virtual representative has significantly different economic interests in the matter in issue from those of the parties being virtually represented. If the matter in issue is purely administrative in character (e.g., a change, addition, or replacement of Trustee), no conflict exists for purposes of this provision.

**TEDRA § 306 (RCW 11.96A.130) - Special notice.**

This statute was previously found at RCW 11.96.120.

**TEDRA § 307 (RCW 11.96A.140) - Waiver of notice.**

This statute was previously found at RCW 11.16.083.

**TEDRA § 308 (RCW 11.96A.150) - Costs - Attorneys' fees.**

This statute was previously found at RCW 11.96.140. Language was added to make clear that the application of this statute is not to be limited by any other specific statute that provides for the payment of costs. It is intended that a court may award costs in any matter subject to title 11 RCW if the court determines that such an award would be equitable.

**TEDRA § 309 (RCW 11.96A.160) - Appointment of guardian ad litem.**

This statute was previously found at RCW 11.96.180.

**TEDRA § 310 (RCW 11.96A.170) - Trial by jury.**

This statute was previously found in RCW 11.96.130.

**TEDRA § 311 (RCW 11.96A.180) - Execution on judgments.**

This statute was previously found in RCW 11.96.130.

**TEDRA § 312 (RCW 11.96A.190) - Execution upon trust income or vested remainder - Permitted, when.**

This statute was previously found at RCW 11.96.150.

**TEDRA § 313 (RCW 11.96A.200) -Appellate review.**

This statute was previously found at RCW 11.96.160.

**TEDRA § 401 (RCW 11.96A.210) - Purpose.**

The purpose of part III is to permit interested parties to enter into a binding settlement of an issue, question or dispute involving a trust or estate. This innovation allows parties to settle estate and trust disputes out of court, just as parties can settle disputes involving contracts or torts out of court.

The traditional due process resolution of issues, questions or disputes involving future interests required judicial proceedings, and the judicial appointment of a guardian ad litem to represent the future interests. This part III [sic – refers to sections 401 to 405] allows a judicially appointed "special representative" to represent the future interests without further direct court supervision. This provides an alternative to the appointment of a guardian ad litem and formal court proceedings to bind future interests.

Under the statute, a "special representative" may be appointed by the court if the executor or trustee requests that one be named for any incompetent, unborn, unascertained or unknown beneficiary. The special representative once appointed has authority to enter into a binding agreement on behalf of those for whom he or she is appointed. The special representative must be either a lawyer or an individual having special skill or training in trust administration. In many cases a special representative may not be needed as the agreement can also be approved by an individual who represents others under the doctrine of virtual representation. TEDRA § 305 (RCW 11.96A.120) codifies that doctrine.

The agreement or a memorandum of its terms may be filed with the court if any interested party elects to do so. Once filed, the agreement will be equivalent to a final court order binding on all parties to the agreement.

At any time before the execution of the agreement any party can put the resolution of the matter back into the procedures set out in TEDRA. While the statute allows parties the flexibility of modern nonjudicial dispute resolution, it does not eliminate the option of judicial procedures.

**TEDRA § 402 (RCW 11.96A.220) - Binding Agreement.**

This is a re-enactment of RCW 11.96.170. This statute provides that a written agreement will be final and binding on all interested parties in furtherance of the policy of resolving disputes by agreement. When signed by all appropriate parties, or their representatives, the agreement is binding and conclusive on all persons interested in the estate or trust. There is no specific required form for an agreement.

**TEDRA § 403 (RCW 11.96A.230) - Entry of Agreement with the Court.**

The agreement or memorandum of its terms may be filed with the court if any interested party elects to do so. Filing the agreement or memorandum creates the same rights and obligations among the parties that a court order would create. The same result occurs immediately on filing the agreement or memorandum if all parties waive the notice provided in this section.

**TEDRA § 404 (RCW 11.96A.240) – Judicial Approval of Agreement**

The special representative has the right to present the agreement to the court for review and approval. If the agreement is approved by the court the special representative is granted protections similar to those provided to guardians ad litem under section 204(3)(a). If the agreement is not presented to the court, or if the court does not approve the agreement, actions may be brought against the special representative for a period of three years under section 204(3)(a).

**TEDRA § 405 (RCW 11.96A.250) - Special Representative**

This section provides a method for a "special representative" to be appointed to represent any "person interested in the estate or trust" who is a minor, incompetent, or disabled, or who is yet unborn or unascertained. This may include the representation of a trustor, if applicable. Once appointed, the special representative has authority to enter into the binding agreement contemplated by this statute on behalf of the parties he or she represents.

The special representative shall be either a lawyer or an individual with special skill or training in the administration of estates or trusts. This is to ensure proper representation by a party knowledgeable in trust and estate matters.

The trustee or executor may request that a specific individual having the required skills be appointed. The court appointment of this individual is the only time a judge is required to be involved. The court is involved to ensure that an impartial and qualified person will serve as special representative.

In lieu of appointing a special representative, it is possible to represent the interests of minor, incompetent, disabled or yet unborn or unascertained beneficiaries through the doctrine of virtual representation, which is codified in TEDRA § 305 (RCW 11.96A.120). If the elements needed to make that section applicable are present, a special representative would not be needed.

The special representative has no continuing duty of representation and is discharged on the execution of the agreement by all parties. If an agreement is not signed within six months of the special representative's appointment, this statute provides for an automatic discharge at that time to protect the special representative. If the agreement is not signed within the six month period, the special representative can be reappointed by the court at such time as the agreement is ready to be signed.

The statute of limitations provision applicable to special representatives has also been modified. The special representative can now be discharged by obtaining formal court approval of a nonjudicial dispute resolution agreement under new TEDRA § 404 (RCW 11.96A.240). If court approval is obtained, an action must be brought against the special

representative before the date on which the court enters an order approving the agreement. The intent is to provide a discharge mechanism that is similar to the process applicable to guardians ad litem. It also tracks procedures that are applicable to personal representatives. If court approval is not obtained, an action may be brought within three years of the special representative's discharge (which normally occurs on execution of the agreement). See TEDRA §§ 204(3)(a) (RCW 11.96A.070) and 405(3) (RCW 11.96A.250).

**TEDRA § 504 (RCW 11.96A.290) - Superior Court - Venue.**

Prior to the commencement of a judicial proceeding, the superior court authorized by TEDRA § 201 (RCW 11.96A.040) will govern the mediation and arbitration procedures to the extent court intervention is required. For example, upon resolution of the dispute, the parties may wish to file a binding agreement authorized by TEDRA § 402 (RCW 11.96A.220) in superior court. If a judicial proceeding is already underway when a party uses the mediation and arbitration provisions, the superior court with jurisdiction of the existing proceeding will oversee application of the mediation and arbitration procedures.

**TEDRA § 505 (RCW 11.96A.300) - Mediation Procedure.**

This provision allows any interested person to use the mediation and arbitration process and directs the court to order the use of mediation unless the court finds "for good cause shown" that mediation will not serve the best interests of the affected parties. If the court finds that mediation is not appropriate, the court may decide the matter at the hearing, may require arbitration, or may direct other judicial proceedings. It is not intended that one party's unwillingness to participate alone will constitute "good cause shown."

Once mediation is invoked, the statute provides that the parties will select a mediator. If the parties fail to do so, a party may petition the appropriate court to appoint a mediator. The court-appointed mediator must be either an attorney licensed to practice before Washington courts or a person with special skill or training in the administration of trusts and estates.

The statute further provides for a minimum half-day mediation in order to assure the parties a reasonable opportunity to present their positions and thus to encourage good faith by all parties and their representatives to seek to achieve an acceptable resolution of the dispute. The statute also provides for the mediator to be paid in accordance with the terms of a Mediation Agreement with the expenses to be borne equally by the parties.

**TEDRA § 506 (RCW 11.96A.310) - Arbitration Procedure.**

This section provides that arbitration will be available only if (a) a party has first sought mediation, (b) the court has ordered arbitration, or (c) all the parties involved agree to proceed directly to the arbitration process.

Arbitration can be commenced by any party to a dispute if all the parties have agreed not to use the mediation procedures or other methods to resolve the dispute. A party can invoke the procedure for arbitration without obtaining authority from any court unless there has already been a judicial hearing on the matter.

Any person involved in a trust or estate dispute has the right to object to the use of arbitration by filing a petition with the court. Arbitration will be ordered by the court unless the court finds "for good cause shown" that it will not serve the best interests of the affected parties. If the court denies arbitration, the court can then decide the issues at the hearing on the petition (if the petition requesting that arbitration be denied has requested such relief) or the court can order further judicial proceedings.

The statute allows for the parties to select the arbitrators, who must follow the mandatory arbitration of civil action rules found at RCW Chapter 7.06 (but without reference to any dollar limits).

Costs of arbitration are to be borne equally by the parties to the dispute who participate in the arbitration, and all other arrangements pertaining to the conduct of the proceedings are to be pursuant to an Arbitration Agreement among all parties to the dispute participating in the arbitration.

The rules of evidence and discovery applicable to civil actions apply unless the parties agree otherwise. Once the arbitrator reaches a decision, he or she must issue a memorandum of the decision to be filed with the Superior Court. The decision can be appealed by filing a notice of appeal with the Superior Court within 30 days after the memorandum is filed with the court. The decision is binding on the parties if it is not so appealed. Appeal of the arbitrator's decision to the Superior Court will be a review de novo.

In any de novo review, the statute directs the court to award costs, including expert witness fees and reasonable attorney's fees, to the prevailing party. The policy behind the award of fees and costs is to encourage the use of the arbitration procedures for final resolution of disputes. The policy is also intended to recognize and support appeals based on reasonable grounds by awarding fees and costs to the prevailing party, and to likewise discourage frivolous appeals by assessing fees and costs against the non-prevailing party.

#### **TEDRA § 507 (RCW 11.96A.320) - Petition for Order Compelling Compliance.**

If a party fails to comply with the mediation and arbitration procedures, any other party can seek a court order compelling that party's participation in mediation or arbitration as provided in the statutes. Fees and costs of the moving party shall be awarded in such a case unless the court determines that an award should not be made "for good cause shown." The policy for awarding fees and costs to the moving party is to promote cooperation and participation in the required mediation and arbitration process. The legislature intends to provide full and clear authority for a party to pursue mediation or arbitration in solving disputes in trust and estate matters, thus giving specific rights to the parties to petition the court to enforce utilization of these procedures, including the right to be reimbursed for fees and costs incurred.

#### **TEDRA § 601 (RCW 11.40.020) - Creditors Claims - Notice.**

Language was added to 11.40.020 to ensure that if notice to creditors is given in the probate of a Washington resident's estate, that the notice will be published in the county of the decedent's residence. The reason the change is needed is that RCW 11.96A.060 will allow

proceedings to be commenced in any county, irrespective of the decedent's residence. .  
Publication in the county of residence is required since it is most likely that creditors of the decedent will be located in the decedent's county of residence, and creditors are likely to look for information about a debtor in the debtor's county of residence.

**TEDRA §§ 602 to 636 (miscellaneous RCW sections – see codification table)**

These changes were made to update cross references in existing statutes.