

**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.