

TEDRA Litigation

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Introduction:

Washington adopted the Trust & Estate Dispute Resolution Act in 2000. In addition to providing a means for non-judicial resolution of disputes, TEDRA provides a procedural framework for litigation of matters relating generally to trusts and estates. These proceedings are considered special proceedings, and as such have their own rules which supersede inconsistent provisions of the Civil Rules. RCW 11.96A.090(1).

TEDRA's rules, as well as the statutory and common law principles and evidentiary rules that have evolved over time, are designed to protect the intent of the testator and to provide a method for efficient and economical dispute resolution. Although the title and statement of purpose focus on non-judicial resolution, chapter 11.96A RCW also provides procedural rules which govern judicial proceedings. RCW 11.96A.010.

1. Scope

The scope of TEDRA is broad.

(1) Subject to the provisions of RCW 11.96A.260 through 11.96A.320, any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030; the resolution of any other case or controversy that arises under the Revised Code of Washington and references judicial proceedings under this title; or the determination of the persons entitled to notice under RCW 11.96A.110 or 11.96A.120.

RCW 11.96A.080(1).

“Matters” for purposes of TEDRA means any conflict or question involving a trust or estate, including:

- Determination of classes of persons interested in the estate or assets passing at death, including creditors, heirs, legatees, etc.;
- Questions involving the administration of a trust or estate or any asset passing at death;
- Direction to a trustee or executor or grant of power not otherwise provided by law or the governing instrument;
- Actions to determine whether a beneficiary is a slayer or abuser under chapter 11.84;
- The reformation of a will or trust; and
- Will contests.

In guardianships, TEDRA's application is limited to disputes relating to the estates of incapacitated persons, and only where chapters 11.88 and 11.92 RCW do not have their own procedures. RCW 11.96A.080(2).

Likewise, where other statutes within Title 11 have their own procedures, TEDRA supplements the procedures within those chapters, and does not supersede them. RCW 11.96A.080(2). Examples include will contests, chapters governing the administration of the will, proof of lost or destroyed wills, and nonintervention estates.

2. Commencement, Parties and Notice

Proceedings under TEDRA are commenced as a new action by filing a petition with the superior court. RCW 11.96A.090(2), .100(1). Once the matter has been commenced, the parties or the court may move to consolidate it with an existing matter, such as a probate matter. RCW 11.96A.090(3).

A summons or notice must be served on all parties in accordance with TEDRA and (where not inconsistent) with the civil rules. RCW 11.96A.100(2). TEDRA defines parties broadly to include all persons who have an interest in the matter to ensure that those persons who may have a right to weigh in on the issues raised in the TEDRA petition have an opportunity to do so:

[A]ny person who has a legal or equitable interest in, or who holds a power or claim with respect to, the subject of the matter. Each of the terms “party” or “parties” must be construed liberally in its context to fulfill the purposes of the procedural rules contained in this chapter as supplemented by the court rules and to promote justice, without creating new substantive rights that do not exist under the laws of this state or principles of equity....

RCW 11.96A.030(5). Subsection 5 goes on to provide a long non-exclusive list of persons that fall within this category and who are entitled to notice under RCW 11.96A.100(2).¹ The definition of party under TEDRA is considerably broader than under the civil rules.

Where a party to the new action is already a party to an existing proceeding, notice by summons is not required. RCW 11.96A.100(2). Although not clear from the face of the statute, the respondents to a petition should be served with a summons, regardless of whether they are parties to an existing matter.

A summons is the means for joining an adverse party to a proceeding. At least within the context of a will contest, the Washington Supreme Court has found that notice without personal service of a summons is insufficient to join a necessary party, even if the necessary party is already a party to an existing proceeding. See In re Estate of Kordon, 157 Wn.2d 206, 213, 137 P.3d 16 (2006). Given the different purposes of a summons versus notice, the holding of Kordon likely extends to require service of summons on all respondents to a TEDRA petition, regardless of their status in an existing proceeding, in order to complete commencement.

¹An amendment to RCW 11.96A.030(5) is effective January 1, 2022.

Keep in mind that some parties may be wearing more than one hat, which may require separate summons or notices. Other persons are parties for purposes of TEDRA only by virtue of their representation of a person who has an interest in the subject matter. They must be served as well. See RCW 11.96A.030(5)(j) – (l), .100(2). Where the doctrine of virtual representation applies, notice must be made to the representative of the interested person. RCW 11.96A.030(5)(l), .120.

Once the parties and the respondent have been properly identified, the petition must be served (or mailed, if appropriate) at least 20 days prior the hearing on the petitioner’s claims. RCW 11.96A.110(1). Proof of service must be filed at or before the hearing. RCW 11.96A.110(2). Effective January 1, 2022, RCW 11.96A.110(1) is amended to clarify that notice must be personally served or mailed “to all parties or the parties’ *legal or* virtual representatives *and to any other persons to whom notice may be required under applicable law...*”

If a party fails to follow the procedural requirements of RCW 11.96A.100, the court may refuse to consider the claims as not properly before the court. In re Estate of Wimberly, 186 Wn. App. 475, 516-17, 349 P.3d 11 (2015). The act of filing becomes a nullity if the remaining requirements for commencement are not timely met. State ex rel. Uland v. Uland, 36 Wn.2d 176, 179, 216 P.2d 756 (1950). A petition will also fail to establish jurisdiction where separate procedural requirements under Title 11 are not met. In those cases, TEDRA’s requirements do not replace existing requirements. Matter of Estate of Rathbone, 190 Wn.2d 332, 345, 412 P.3d 1283 (2018).

3. Standing

It is not unusual for heirs to come to an attorney with the mistaken idea that they have standing to sue on behalf of the trust or estate because they were negatively impacted by actions directed at the decedent. Prior to heading down the litigation path, it’s a good idea to stop and ask whether this is a claim that is held by the estate.

“Under RCW 11.48.010, only the personal representative has the authority to maintain and prosecute actions on behalf of the Estate.” Matter of Estate of Boatman, 17 Wn. App. 2d 418, 423, 488 P.3d 845 (2021); see also, Rummens v. Guaranty Trust Co., 199 Wash. 337, 345-46, 92 P.2d 228 (1939).

RCW 4.20.046(1) likewise provides that “[a]ll causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former. . .” Washington courts have clarified that the survival statute does not create a cause of action for the decedent’s survivors, but merely preserves the causes of action a person could have maintained had he not died. Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 931, 231 P.3d 1252 (2010). The decedent’s personal representative recovers damages on behalf of the decedent’s estate. Id. His heirs have no standing to do so.

If the personal representative refuses to act, the beneficiaries' remedy is to ask the court to replace him. RCW 11.28.250. Any claim that would have belonged to the decedent during life and/or that belongs to the estate may then be brought by the new personal representative.

4. Which Rules Apply?

After commencement, parties in TEDRA litigation must continue to consider whether TEDRA, the civil rules, or a separate statute under Title 11 determines a procedural issue.

a. Answer and Initial Hearing

The initial hearing on a TEDRA petition is set by the court and can occur no sooner than 20 days after the petition is filed and served on all parties. RCW 11.96A.110(1). Rather than requiring an answer within a definitive number of days, TEDRA provides that answers to petitions are due not later than five days before the hearing set to hear the claims in the petition. RCW 11.96A.100(3), (5). Replies to counterclaims or cross claims must be served and filed within two days of the hearing. RCW 11.96A.100(5).

The default under TEDRA is resolution of all issues of fact and law raised in the petition at the initial hearing. RCW 11.96A.100(8). Witnesses may testify by affidavit, and parties may move for summary judgment in their initial pleadings rather than filing a separate motion under CR 56. RCW 11.96A.100(7), (9).

If a matter is one which cannot or should not be determined in a single hearing, the parties must advise the court in their initial pleadings, and may include in the petition or answer a request for appropriate procedural orders. RCW 11.96A.100(8) – (10).

b. Discovery

TEDRA limits discovery to proceedings commenced by petition under TEDRA or those proceedings in which the court has entered an order allowing discovery:

In all matters governed by this title, discovery shall be permitted only in the following matters:

(1) A judicial proceeding that places one or more specific issues in controversy that has been commenced under RCW 11.96A.100, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules; or

(2) A matter in which the court orders that discovery be permitted on a showing of good cause, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules unless otherwise limited by the order of the court.

RCW 11.96A.115.

The court of appeals has stated that the use of the term “shall” in the introductory sentence of RCW 11.96A.115 “indicates not that discovery is mandated in such situations, but that discovery may be had *only* in these particular situations and not in others.” In re Estate of Fitzgerald, 172 Wn. App. 437, 447, 294 P.3d 720 (2012) (emphasis added). Likewise, the legislature’s second use of “shall” indicates only that where discovery is allowed by the court, it must be conducted in conformance with the civil rules. Id.

Given this interpretation of RCW 11.96A.115, parties should seek an order allowing discovery under RCW 11.96A.100(9), rather than assuming that because the matter falls within RCW 11.96A.115(1) no order is required.

Additionally, because TEDRA does not supersede other procedural rules in Title 11, consider whether a more specific statute prohibits discovery. RCW 11.96A.080(2). Where, for example, an issue arises within the context of a non-intervention estate, the court does not have authority to allow discovery without first limiting or revoking the PR’s non-intervention powers. RCW 11.68.070; In re Estate of Harder, 185 Wn. App. 378, 382, 341 P.3d 342 (2015).

c. **Juries**

RCW 11.96A.170 allows a trial by jury if demanded and if a party is entitled to a trial by jury. The right to a jury trial in disputes arising from a trust or estate is extremely limited. Foster v. Gilliam, 165 Wn. App. 38, 46, 268 P.3d 945 (2011).

Washington follows the historical test in determining whether claims sound in equity or in law, in that courts look to whether the claims in question (or a claim analogous thereto) were the exclusive jurisdiction of the equity courts when the state constitution was adopted. Auburn Mech. Inc. v. Lydig Const., Inc., 89 Wn. App. 893, 897-98, 951 P.2d 311 (1998); State ex rel. Evergreen Freedom Foundation v. Washington Education Association, 111 Wn. App. 586, 594, 609, 49 P.3d 894 (2002). Traditionally, there is no right to a jury trial in matters arising in probate, as probate courts were courts of equity. Foster, 165 Wn. App. at 45- 46.

If a petition presents both equitable and legal claims, the trial court has discretion to allow a jury trial, based upon whether the overall case is primarily legal or equitable. Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 367, 617 P.2d 704 (1980). Because the court is to look at the case broadly, rather than focusing on a single claim, the tendency is to find that cases under TEDRA are primarily equitable, even where the petitioner seeks legal remedies.

d. **Evidentiary Standards**

Because the primary goal in trust and estate law is to protect the intent of the testator (or trustor), Washington’s common law and statutes generally place a greater burden on the

party challenging the content of the instrument and restrict testimony concerning the testator's intent.

For example, in will contests, an order of the court probating the will is prima facie evidence of the legality of the will. RCW 11.24.030. Overcoming the presumption of validity requires proof by clear, cogent and convincing evidence. *Id.* Additionally, the standard for competency sufficient to execute a will is low, while the standard for undue influence is high.

When it comes to evidence of the decedent's intent, the deadman's statute prohibits a party in interest from testifying about transactions with, or statements made by, a deceased person. RCW 5.60.030; 5A Wash. Prac. § 601.18. "A 'party in interest' ... is 'one who stands to gain or lose in the action in question'" and need not be a party to the suit. Estate of Lennon v. Lennon, 108 Wash. App. 167, 174, 29 P.3d 1258, 1263 (2001) citing Bentzen v. Demmons, 68 Wash. App. 339, 344, 842 P.2d 1015 (1993); see 5A Wash. Prac. § 601.17 ("[a] witness is considered a party in interest: (1) if the witness stands to either gain or lose as a direct result of the judgment; or (2) if the record may be used as evidence against the witness in some other action.").

An interested party can testify to his or "her own feelings or impressions, so long as they do not concern a specific transaction or reveal a statement made by the decedent." *Id.* at 575, 291 P.3d at 913. This feelings or impression testimony cannot indirectly reveal the transaction or decedent's statements. See In re Estate of Miller, 134 Wash. App. 885, 143 P.3d 315 (2006). Documents are not barred under the statute, but "[t]estimony regarding the intended meaning of those documents may ... be prohibited." *Id.* And, documents cannot be offered as "a substitute for live testimony," such as affidavits. See Wildman v. Taylor, 46 Wash. App. 546, 731 P.2d 541 (1987).

e. ADR

TEDRA includes a number of statutes designed to promote non-judicial resolution. RCW 11.96A.210 et seq. Any party can request that a matter or issue be submitted to mediation and, following mediation, to arbitration. RCW 11.96A.280.

Parties may invoke mediation by serving a notice of mediation on all parties or their representatives. RCW 11.96A.300. Unless a party objects within 20 days, the mediation process will begin with the parties exchanging lists of acceptable mediators within 30 days of receipt of the notice. RCW 11.96A.300(1)(a). TEDRA defines who is a qualified mediator, requires resolution to be evidenced by a dispute resolution agreement, and provides that the parties bear their own costs and split equally the cost of mediation. RCW 11.96A.300(4)(b), (7), (8).

Once the ADR provisions of TEDRA are invoked, judicial resolution is only available by complying with those provisions. RCW 11.96A.280.

The dispute resolution agreement must be signed by all parties or their representatives. The amendments going into effect on January 1, 2022, clarify that the ADR provisions of TEDRA apply to persons interested in non-probate assets and other property passing at death, and not only to those persons interested in the trust or estate. RCW 11.96A.220, .230(2). The agreement may be presented to the court within 30 days, but only with the written consent of the special representative, if any. RCW 11.96A.230.

A special representative is a person (usually a lawyer) who has no interest in the proceedings, who is appointed by the court to represent a minor, an incapacitated person, an unborn party, or a party whose identity or address is unknown. RCW 11.96.250(1), (3). Special representatives may enter into a binding agreement on behalf of the represented person. RCW 11.96A.250(1)(c). The special representative has the option to note a hearing for judicial approval of the TEDRA agreement. RCW 11.96A.240. If he or she does so, notice must be provided to each party whose address is known and proof of notice must be filed with the court. *Id.* The court will then determine whether the interests of the represented persons have been adequately protected in the agreement. *Id.*

If mediation is unsuccessful, the parties agree to forego mediation, or the court has determined that it is not required, the parties may proceed to arbitration. RCW 11.96A.310(1). Where there is no agreement not to mediate, a party who desires arbitration must serve notice of arbitration no later than twenty days after the conclusion of mediation or after entry of an order providing that mediation is not required. RCW 11.96A.310(2).

Just as with mediation, a party may file an objection to arbitration with the court. RCW 11.96A.310(3). Arbitration under TEDRA largely follows the procedural rules of chapter 7.06 RCW, except where inconsistent with TEDRA or any applicable provision under Title 11. RCW 11.96A.310(5).

The arbitrator must issue a decision within 30 days, but the decision need not be filed with the court. RCW 11.96A.310(7), (8). The decision may be appealed to the superior court for trial de novo. RCW 11.96A.310(9). The notice of appeal must be filed within 30 days after the decision was served on the parties. *Id.* The prevailing party on appeal must be awarded their costs and attorney's fees, which are charged to the nonprevailing parties "in such amount and in such manner as the court determines to be equitable." RCW 11.96A.310(10).

5. Types of Disputes

Because TEDRA defines the matters to which it applies very broadly, the scope of potential claims and issues to which it applies is also broad. The following is a discussion of some of the more common types of disputes that arise.

a. Will Contests

Once a will has been admitted to probate, a will contest is the sole means for invalidating the will. In re Estate of Black, 153 Wn.2d 152, 170, 102 P.3d 796 (2004); In re Nielsen's Estate, 198 Wn.2d 124, 130, 87 P.2d 198 (1939).

Will contests are governed by chapter 11.24 RCW. That chapter includes its own requirements for commencement that are strictly enforced. RCW 11.24.010, .020; In re Estate of Jepsen, 184 Wn.2d 376, 381, 358 P.3d 403 (2015). Because the probate of the will is final or binding if no will contest is commenced within the four-month statute of repose, it is important to get the requirements for commencement right.

A will contest must be commenced by filing a petition within four months of the date the will is admitted to probate. RCW 11.24.010. Because the personal representative is charged with defending the will, he or she is a necessary party to a will contest and must be personally served with a summons and a copy of the petition. RCW 11.24.010; In re Riley's Estate, 78 Wn.2d 623, 665, 479 P.2d 1 (1970). If personal service on the PR is not made within 90 days, the will contest will be deemed to have not been commenced. RCW 11.24.010.

RCW 11.24.020 identifies additional necessary parties to a will contest, who must be provided notice in conformance with RCW 11.96A.100 upon filing of the petition. See In re Estate of Van Dyke, 54 Wn. App. 225, 230, 772 P.2d 1049 (1989) (holding that the categories of persons identified in RCW 11.24.020 are necessary parties to a will contest). The categories identified are (1) executors or administrators of the will, (2) all legatees named in the will or their representatives, and (3) all persons interested in the matter, as defined by RCW 11.96A.030(5). Any member of a listed category who has an interest in the subject of the proceeding is a necessary party under TEDRA because he or she has a direct interest in the settlement of the will contest. In re Estate of Becker, 177 Wn.2d 242, 247-49, 298 P.3d 720 (2013).

After commencement, the petitioner must go on to prove the invalidity of the will by clear, cogent and convincing evidence. RCW 11.24.030. A frequent basis for a will contest is an allegation of undue influence. This too has a high bar. To be “undue” the influence exerted must overcome the will of the testator, destroying free agency. In re Estate of Marks, 91 Wn. App. 325, 333, 957 P.2d 235 (1998). Advice, arguments, persuasion, suggestions, or entreaties generally do not rise to the level of undue influence. Id.

Other challenges to a will's validity include lack of mental capacity, lack of formalities, fraud, a subsequent will, or forgery.

Attorney's fees in will contests are discretionary. The court may assess fees against contestants unless it appears they acted in good faith with probable cause. RCW 11.24.050.

b. Actions under chapter 11.84 RCW

Chapter 11.84 RCW provides a means to deem as predeceased those persons who were responsible for the death of the testator or who abused or financially exploited the testator. The statutes concerning abusers were added in 2009 as part of the vulnerable adult protection act. In regards to alleged abusers, the legislature imposed a high evidentiary bar that must be overcome before a designation in the will is made ineffective.

Unless there is a criminal conviction for an act that constitutes financial exploitation or abuse, the burden of proof that one is an abuser is clear, cogent and convincing. RCW 11.94.150, .160. For slayers the burden is a preponderance of the evidence that the alleged slayer “participated in the willful and unlawful killing of the decedent.” RCW 11.84.140.

The definitions of financial exploitation, and vulnerable adult for the purposes of determining whether one is an abuser rely upon the statutory definitions in RCW 74.34.020. RCW 11.84.010, (3), (6). These include specific bases for each element, so it’s important to review RCW 74.34.020 before filing to ensure that there is a reasonable basis for alleging that the decedent qualified as a vulnerable adult and that the alleged conduct rises to the level of financial exploitation. Also bear in mind the temporal requirement that the decedent was a vulnerable adult (as defined by RCW 74.34.020(22)) at the time the financial exploitation occurred. RCW 11.84.160(1)(a).

Another important consideration is standing. In an unpublished decision, Division Three has held that only the personal representative has standing to bring an action under chapters 74.34 and 11.84 RCW because those claims belong to the estate. Matter of Estate of Primiani, 198 Wn. App. 1067, 2017 WL 1655759 (Div. 3, May 2, 2017) (UNPUBLISHED). This is consistent with RCW 74.34.210, which provides that after the death of the vulnerable adult, the right to initiate or maintain a cause of action for damages belongs to the estate.

c. Petitions within Non-Intervention Estates

Where the decedent directs that his chosen personal representative should administer the estate without intervention from the court, respect for the express intent of the testator should frame the court’s analysis. Matter of Estate of Rathbone, 190 Wn.2d 332, 338, 412 P.3d 1283 (2018).

Under chapter 11.68 RCW, the court’s authority is statutorily limited to those exceptions to non-intervention created by the legislature. Id. at 339. Unless the personal representative or another person with statutorily conferred authority properly invokes the limited authority of the court provided under chapter 11.68 RCW, the trial court has no power to intervene in a non-intervention estate. Id.

During the administration of the estate, beneficiaries may petition the court for an order directing the personal representative to deliver a report of the affairs of the estate. RCW 11.68.065. Upon completion of probate, interested parties may obtain an accounting under RCW 11.68.110. The court’s authority under RCW 11.68.110 is narrow, however, and limited to allowing the court to approve fees and to order an accounting in response to a petition filed after the personal representative has filed a declaration of completion of probate. RCW 11.68.110 (2); Rathbone, 190 Wn.2d at 340-41.

RCW 11.68.070 provides a means for the court to intervene in response to a petition alleging misconduct on the part of the personal representative. That statute has been

extensively revised by the 2022 amendments to Title 11, to add bases for relief against a PR and specific remedies, including monetary damages. The amendment retains the court's ability to revoke or restrict the personal representative's non-intervention powers. Once those powers are revoked, the authority of the court to address concerns raised by heirs is much less restricted.

6. Attorney's Fees

TEDRA grants the trial court discretion under RCW 11.96A.150 to order costs and reasonable attorney's fees to any party from any party to the proceedings, from the assets of the estate, or from any nonprobate asset subject to the proceedings. The ability to pay is not an equitable basis for the award. Matter of Estate of Reugh, 10 Wn. App. 2d 20, 70, 447 P.3d 544 (2019). "Rather, equity requires some finding of fault that in fairness requires a party to pay." Id.

The court may consider whether the litigation benefited the estate. Matter of Estate of Petelle, 8 Wn. App. 2d 714, 726, 440 P.3d 1026 (2019). But, the trial court does not abuse its discretion by awarding fees from an estate even without a substantial benefit to the estate or trust. In re Estate of Mower, 193 Wn. App. 706, 728, 374 P.3d 180 (2016). A party need not substantially prevail to qualify for an award of attorney's fees under RCW 11.96A.150. Id.