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ADR Gone Wild!: One State's Experience with a Radical Trust and Estate Dispute Resolution Act

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I. INTRODUCTION

Imagine that Grandpa Ed recently died and left a will. Ed was never able to finish high school, but through hard work and diligent savings was able to amass a substantial estate. It was Ed's greatest dream that he would be able to put his grandsons through college, providing them with what he was never able to achieve himself. He executed a will five years ago to this effect, unambiguously stating his intention to leave his entire estate in trust for the boys, with the express command that the money was to be paid for

their education. Ed was proud to be able to do so much for his grandson's education and regularly told friends and family that if anything happened to him, he was content knowing that his grandson's future "would be taken care of." At the time of Ed's death, his grandsons Nathan and Josh were eighteen and twenty, had started working in the family business, and had no interest in ever going to college. After learning of the will, Nathan and Josh were interested in getting the money immediately. Using the provisions of TEDRA, Nathan and Josh would quickly able to come to an agreement between themselves, splitting Ed's estate between them immediately. Under the law in states which have enacted "TEDRA" statutes, this result is possible.

In 1999, the Washington State Legislature drastically changed the Washington form of probate and trust law when it passed the Trust and Estate Dispute Resolution Act, commonly known as TEDRA.[1] While TEDRA was enacted as a means of providing for alternative dispute resolution in the area of trusts and estates,[2] its impact on the area of trust and estate litigation as well as estate planning has the potential to be significant in many unanticipated ways.

Despite the member of the Legislature's good intentions of conserving judicial resources and following the trend of favoring alternative dispute resolution in the area of wills and trusts, several flaws in the drafting of TEDRA potentially allow unintended results for the estate of a decedent and allow frustration of the original intent of the testator. Such results are inconsistent with the longstanding principle and codified law in

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[1] 1 KELLY KUNSCH, WASHINGTON PRACTICE: TRUST AND ESTATE DISPUTE RESOLUTION ACT -- IN GENERAL § 30.73A (4th ed. 2005). *See also* WASHINGTON STATE LEGISLATURE (2006), http://www.leg.wa.gov/pub/billinfo/1999-00/senate/5175-5199/5196_history.txt.

[2] REV. CODE WASH. ANN. § 11.96A.010 (West 2006).

the area of wills and trusts that the intent of the testator controls.[3] This paper provides an overview of the central provisions of TEDRA as they impact the intent of the testator or settlor and also presents a brief outline of the issues and problems which may arise from the application of TEDRA.

II. THE TREND TOWARD MEDIATING WILL AND TRUST DISPUTES

Research suggests that wills are more likely than any other legal instrument to be the target of litigation.[4] When lengthy and expensive disputes are brought, both parties to the litigation can ultimately be left "worse off emotionally, and possibly financially as well."[5] Likewise, trust litigation presents similar problems, and "often and perhaps the majority of the time will have the potential to affect the interests of all beneficiaries, if only because fees might be charged against the corpus of the trust."[6] Legal commentators argue that mediation is especially suited to will disputes, as "applying mediation to will contests has the potential to avoid the costs, time delays, and the adversarial, winner-take-all atmosphere of litigation… [and] mediation can resolve the disputes while maintaining the family relationships that may otherwise be devastated by litigation."[7] In addition, not only do such actions cost the parties involved, they cost the court systems as well through the consumption of limited and already burdened judicial resources. Based on this, many argue that mediation is well suited to achieving the two

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3 *See* REV. CODE WASH. ANN. § 11.12.230 (West 2006) (Intent of testator controlling).

4 Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code,* 18 OHIO ST. J. ON DISP. RESOL. 197, 197 (2002) (*citing* Denis W. Collins, *Avoiding a Will Contest - The Impossible Dream?,* 34 Creighton L. Rev. 7, 7 (2000).

5 Stimmel, *supra* note 4, at 197.

6 LADD B. LEAVENS, ADVANCED PROBATE #00444, 5-5 (Wash. St. Bar Assn. Continuing Legal Education, July 13, 2000).

7 Stimmel, *supra* note 4, at 197.

primary goals of probate reform – "to reduce litigation and to facilitate estate planning."[8] It is not difficult then to understand the popularity of alternative dispute resolution and to see its increasing application in the area of wills and trust disputes.

III. INTENT OF THE TESTATOR CONTROLS

Each state has laws governing the distribution of an individual's personal and real property upon their death.[9] Commonly, an individual will draft a will or trust, or alternatively if they do not do so and die *intestate*, the state statute of decent and distribution will control where their property goes upon their death.[10] A will is "a document by which a person directs his or her estate to be distributed upon death."[11] Further, "'[t]he word 'will' has two distinct meanings. The first, and strict, meaning is metaphysical, and denotes the sum of what the testator wishes, or 'wills,' to happen on his death. The second, and more common, meaning is physical, and denotes the document or documents in which that intention is expressed.'"[12] Inherent in the idea of making a will is that the individual who creates the will, the testator, expressly and intentionally acts to distribute his or her property in a in a specific way rather than to simply let the laws of decent and distribution control where his or her property goes by default, as the state has decided. It follows that goal of the attorney in drafting a will or trust instrument is to

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8 *Id.* at 217.

9 "In one form or another, all 50 states and the District of Columbia have enacted laws governing most aspects of estate planning and probate -- legal validity of wills, creation of trusts, the probate process, and more." FINDLAW, http://estate.findlaw.com/probate/probate-court-laws/estate-planning-law-state-probate.html (last visited June 17, 2006).

10 REV. CODE WASH. ANN. § 11.04.015 (West 2006) (Descent and distribution of real and personal estate).

11 Black's Law Dictionary (8th ed. Westlaw 2004).

12 Black's Law Dictionary (8th ed. Westlaw 2004) *citing* Anthony R. Mellows, *The Law of Succession,* 6 (3d ed. 1977).

"clearly and unambiguously" reflect the intent of the testator who has reached some decision on the most appropriate distribution of his or her estate.[13]

Certain formalities must be met in order to ensure that the intent of the testator is carried out when he or she dies with a will, or *testate*.[14] In general, there are four major grounds on which a will may be challenged, apart from its compliance with statutory formalities: lack of testamentary capacity, fraud and duress, undue influence, and forgery.[15] One of the fundamental requirements of a valid will is that the testator must have the mental capacity to understand the significance of the property distribution they are making.[16] Regarding testamentary capacity, the legal requirements for valid execution of a will demand that "the testator must have sufficient mind and memory to understand the transaction in which he is then engaged, to comprehend generally the property which constitutes his estate and of which he is contemplating disposition, and to recollect the objects of his bounty."[17] Further, the will must not be the product of undue influence or duress, to ensure that someone else's intentions and will have not been substituted for the testator's and that the true intent of the testator is fulfilled.[18]

Therefore, with few exceptions and as long as the statutory formalities are complied with, the testator "is generally free to direct the distribution of his or her estate in whatever manner the testator desires."[19] It is a long-standing and widely accepted

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13 Stimmel, *supra* note 4, at 197.
14 *See* REV. CODE WASH. ANN. § 11 et seq., (West 2006).
15 Restatement (Third) of Property (Wills & Don. Trans.) § 8.5 (2003).
16 "Any person of sound mind who has attained the age of eighteen years may, by last will, devise all his or her estate, both real and personal." REV. CODE WASH. ANN. § 11.12.010 (West 2006).
17 *In re Riley's Estate,* 78 Wash.2d 623, 650, 479 P.2d 1, 17 (1970).
18 Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 (2003). *See also* Richard A. Lord, *Duress and Undue Influence,* 28 Williston on Contracts § 71:50 (4th ed.).
19 Stimmel, *supra* note 4, at 198.

principle of wills and trusts law that the intent of the testator is supreme.[20] It has been established that it is not only the purpose, but also the duty of the court "in construing a will is to give effect to the testator's intent."[21] This concept is codified by Washington statute, which commands that "[a]ll courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them."[22] Therefore, in Washington as elsewhere, when a dispute relating to a will arises "it is the testator's intent that is of utmost importance when a court is called upon to give force to the language of a will"[23] because "the 'law of will contests focuses on ensuring that the true intent of the testator is carried out.'"[24]

IV. WASHINGTON'S TRUST AND ESTATE DISPUTE RESOLUTION ACT (TEDRA)

The Washington State Legislature enacted TEDRA as a means of providing for mandatory alternative dispute resolution in the area of trusts and estates, namely mediation, arbitration, or private agreement between the parties.[25] Since 1999 when it was adopted, practitioners and "certain legal observers have reached differing conclusions as to whether TEDRA represents a comprehensive fine-tuning of the now-

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20 *See* REV. CODE WASH. ANN. § 11.12.230

21 *In re Estate of Campbell,* 87 Wn. App. 506, 510, 942 P.2d 1008, 1011 (1997) (West 2006).

22 REV. CODE WASH. ANN. § 11.12.230 (West 2006) (Intent of testator controlling.)

23 Stimmel, *supra* note 4, at198.

24 *Id.* at 199 (*quoting* Ronald Chester, Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests, 37 Duq. L. Rev. 173, 174 (1999)).

25 REV. CODE WASH. ANN. § 11.96A.010 (West 2006)

repealed RCW Chapter 11.96 or a wholesale restatement and rearrangement of all probate procedures."[26]

A. The Legislative History of TEDRA

The series of statutes which comprise TEDRA are codified at R.C.W. § 11.96A et seq.[27] While the state legislature enacted TEDRA in 1999, the Act became effective on January 1, 2000.[28] The passage of this Act has been referred to as "the first significant change to the statutory trust and estate dispute resolution procedures since the Trust Act of 1984."[29] Prior to 1999, TEDRA's predecessor, the Trust Act of 1984, "addressed similar issues and formed the basis for Washington's current streamlined approach to both judicial and nonjudicial resolution of trust and estate disputes."[30] The current TEDRA legislation "updates existing procedures in light of problems that have arisen in the course of grappling with the Trust Act of 1984, and also provides new mediation and arbitration options that are intended to permit more rapid and less costly resolution of trust and estate disputes."[31]

As revealed by the legislative history, TEDRA was widely supported. Details of the 56th Legislature during the 1999 Regular Session indicate that TEDRA was passed by the Senate on March 4, 1999 by a vote of forty-eight to zero, and then passed by the

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[26] Stephen M. Gaddis, et al., TEDRA IN A TEACUP: A BRIEF LOOK AT THE TRUST AND ESTATE DISPUTE RESOLUTION ACT, WASH. ST. BAR NEWS, v.56 no.12, http://www.wsba.org/media/publications/barnews/archives/2002/dec-02-tedra.htm.

[27] REV. CODE WASH. ANN. § 11.96A et seq. (West 2006) (Trust and Estate Dispute Resolution).

[28] § 11.96A.902.

[29] Leavens, *supra* note 6, at 5-2.

[30] GAIL E. MAUTNER, TEDRA FUNDAMENTALS: LITIGATION, ARBITRATION AND MEDIATION UNDER THE TRUST AND ESTATE DISPUTE RESOLUTION ACT, 1-4 (3rd Ann. Trust and Estate Litigation Seminar, Wash. St. Bar Assn. Continuing Legal Education, April 21, 2006).

[31] Leavens, *supra* note 6, at 5-2.

House on April 7, 1999 by a vote of ninety to zero.[32] While it had its first reading in the legislature on January 17, 1999, it was signed into law by Washington's then-Governor Gary Locke on April 20, 1999 – the entire process taking barely over three months.[33] Subsequently, during the 2001 legislative session, the Washington State Bar committee responsible for proposing the law suggested technical amendments to TEDRA which were then adopted.[34] The latest round of legislative amendments involving TEDRA were signed into law by Governor Christine Gregoire on March 30, 2006 and became effective on June 7, 2006.[35]

B. The Purpose of TEDRA

The overarching purpose of the legislature in creating Chapter 11.96A was "to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter, to provide nonjudicial methods for the resolution of matters, such as a mediation, arbitration and agreement, and to provide judicial resolution of disputes if other methods are unsuccessful."[36] More specifically, the stated purpose of R.C.W. §11.96A.220 through §11.96A.250 is "to provide a binding nonjudicial procedure to resolve matters though written agreements among the parties interested in the estate or trust."[37] Accordingly, TEDRA expressly states that the procedures it sets forth are meant to be "supplemental to, and may not derogate from, any

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[32] H. B. Rep., *available at* http://www.leg.wa.gov/pub/billinfo/1999-00/senate/5175-5199/5196_hbr.pdf (last visited June 17, 2006); S. B. Rep., *available at* http://www.leg.wa.gov/pub/billinfo/1999-00/senate/5175-5199/5196_sbr.pdf (last visited June 17, 2006); Certification of Enrolment Senate Bill 5196, *available at* http://www.leg.wa.gov/pub/billinfo/1999-00/senate/5175-5199/5196_sl_04281999.txt (last visited June 17, 2006); *See also* http://www.leg.wa.gov/pub/billinfo/1999-00/senate/5175-5199/5196_history.txt (last visited June 17, 2006).

[33] Leavens, *supra* note 6, at 5-3.

[34] Gaddis, *supra* note 26.

[35] Mautner, *supra* note 30, at 1-4.

[36] 1 KELLY KUNSCH, WASHINGTON PRACTICE: TRUST AND ESTATE DISPUTE RESOLUTION ACT -- IN GENERAL § 30.73A (4th ed. 2005) (*citing* R.C.W. § 11.96A.010 (West 2006)).

[37] REV. CODE WASH. ANN. § 11.96A.210 (West 2006).

other proceeding or provision" allowed under other statutes or the common law."[38] TEDRA is a procedural statute, therefore "it does not create new or independent claims or causes of action, and instead, provides mechanisms by which such claims may be presented, heard, and resolved" as they related to issues which arise in the context of probate and trust administration."[39]

On a larger scale, the goal of TEDRA legislation is the "expeditious and complete resolution of matters involving trusts and estates" which fulfils "the public policy of providing finality in those proceedings."[40] Comments to Senate Bill 5196, indicate that the purpose of TEDRA sections RCW 11.96A.210 through 11.96A.250 is to "permit interested parties to enter into a binding settlement of an issue, question, or dispute involving a trust or estate."[41] The Comments refer to this as an "innovation" which "allows parties to settle estate and trust disputes out of court, just as parties can settle disputes involving contracts or torts out of court."[42] By creating procedures whereby the parties enter into written agreements, which are final and binding, this serves the additional goal of allowing disputes to be resolved by agreement rather than judicial intervention.[43]

V. THE UNIQUE PROVISIONS OF TEDRA

While TEDRA appears to serve commendable and worthy ends, it brings with it the substantial danger of overriding the intent of the testator or settlor. Many of the

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38 § 11.96A.210.
39 Mautner, *supra* note 30, at 1-4.
40 Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999 (Jan. 28, 1999), at 7, *available at* http://www.wsbarppt.com/comments/tedra99.pdf.
41 *Id.*
42 *Id.* at 8.
43 *Id.*

provisions which make TEDRA unique and innovative also pose the very real threat of upsetting carefully crafted and expensive estate plans which were drafted to reflect the important wishes and intent of the testator. Significant parts of TEDRA may be more inventive than innovative, and the cost savings to the judicial system are at the expense of the intent of the testator and predictable estate planning.

A. A General Overview of the Most Significant Provisions of TEDRA

The most unique feature of TEDRA is that it "affords great latitude to parties to effect a voluntary resolution of a probate matter."[44] When parties are engaged in a dispute regarding any trust, estate, or nonprobate matter, the Act provides any party with the right to first explore nonjudicial resolution procedures, namely mediation and arbitration, before litigation begins and the court system becomes involved.[45] It was the intent of the legislature "to provide for the efficient settlement of disputes in trust, estate, and nonprobate matters through mediation and arbitration by providing any party the right to proceed first with mediation and then arbitration before formal judicial procedures may be utilized."[46] Parties to a TEDRA petition may easily effect such a voluntary, nonjudicial resolution of any of the matters described by simply entering into a written agreement signed by all parties involved.[47] Once signed, this written agreement becomes "binding and conclusive" on *all* persons interested in the estate or trust.[48]

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[44] Gaddis, *supra* note 26.
[45] REV. CODE WASH. ANN. § 11.96A.260 (West 2006).
[46] § 11.96A.270 (Intent -- Parties can agree otherwise).
[47] § 11.96A.220; *See also* 1 KELLY KUNSCH, WASHINGTON PRACTICE: TRUST AND ESTATE DISPUTE RESOLUTION ACT -- IN GENERAL § 30.73A (4th ed. 2005).
[48] *Id.*

Interestingly, the agreement reached may be kept confidential from both the public as well as successor beneficiaries, even those who were virtually or specially represented.[49]

The term "party" is broadly defined under the statue to encompass fourteen categories of generally known or reasonably ascertainable "persons who [have] an interest in the subject of the particular proceeding."[50] Most importantly this list includes, but is not limited to the following: a trustee, living trustor, personal representative, heir, beneficiary, surviving spouse, guardian ad litem, virtual representative, creditor, and *any other person who has an interest in the matter*.[51]

Part of TEDRA's expansive power comes from the statutory provision which allows it to reach such a wide range of issues involving estates, trusts, and nonprobate assets, all defined in very broad terms.[52] Under R.C.W. 11.96A.020, the Court is vested with the power to administer and settle "[a]ll matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving *nonprobate* assets and powers of attorney" and "[a]ll trust and trust matters."[53] It was the intent of the legislature in drafting the definition of the term "matter" in R.C.W. 11.96A.030 to "establish[] the issues, questions and disputes involving trusts and estates that can be resolved by judicial and nonjudicial action under the Act."[54] One commentator, when faced with the question "does TEDRA apply?" stated that the short answer is: "if you are dealing with an issue in a trust or estate that could be or is in dispute, TEDRA almost

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49 Gaddis, *supra* note 26.
50 REV. CODE WASH. ANN. § 11.96A.030(4) (West 2006).
51 § 11.96A.030(4)(a)-(n) (West 2006).
52 *See* REV. CODE WASH. ANN. § 11.96A.030(1)(a)-(f) (West 2006).
53 REV. CODE WASH. ANN. § 11.96A.020 (West 2006).
54 Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999 (Jan. 28, 1999), at 1, *available at* http://www.wsbarppt.com/comments/tedra99.pdf.

always applies."[55] Most importantly, the definition provided under the statute is sweepingly broad and includes "any issue, question, or dispute" involving the following:

> (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; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee;
>
> (d) The grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law;
>
> (e) The amendment, reformation, or conformation of a will or a trust instrument to comply with statutes and regulations of the United States internal revenue service . . . ; and
>
> (f) 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:
>
> (i) The ascertaining of any class of creditors or others for purposes of chapter 11.18 or 11.2 RCW;
>
> (ii) The ordering of a qualified person, the notice agent, or resident agent, as those terms are defined in chapter 11.42 RCW, or any combination of them, to do or abstain from doing any particular act with respect to a nonprobate asset;
>
> . . . .
>
> (iv) The determination of any question arising in the administration under chapter 11.18 or 11.42 RCW of a nonprobate asset;
>
> (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;
>
> (vi) The resolution of any matter referencing this chapter, including a

[55] Mautner, *supra* note 30, at 1-4.

> determination of any questions relating to the ownership or distribution of an individual retirement account on the death of the spouse of the account holder as contemplated by RCW 6.15.020(6);
>
> (vii) The resolution of any other matter that could affect the nonprobate asset.[56]

According to legislative history, the term "matter" is further "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."[57] The only circumstances in which TEDRA does not apply are identified by RCW. 11.96A.080 - wrongful death actions and disputes already covered by RCW Chapter 11.88 and RCW Chapter 11.92.[58] However, "with regard to several chapters of Title 11 (specifically, chapters governing Custody, Proof and Probate of Wills; Will Contests; Letters Testamentary and of Administration; Claims Against Estates; Settlement of Creditor Claims for Estates Passing Without Probate; and Sales, Exchanges, Leases, Mortgages and Borrowing), RCW 11.96A.080(2) provides that TEDRA supplements, but does "not supersede . . . any otherwise applicable provisions and procedures contained in this title."[59]

B. TEDRA's Most Problematic Provisions

The Washington Bar Association, referring to TEDRA, states that "it is a unique feature of Washington law that the beneficiaries of a testamentary trust can agree with the trustee to amend or dissolve a trust prior to its stated term."[60] Two problems with the

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56 REV. CODE WASH. ANN. § 11.96A.030(1)(a)-(f) (West 2006).
57 Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999 (Jan. 28, 1999), at 1, *available at* http://www.wsbarppt.com/comments/tedra99.pdf.
58 Mautner, *supra* note 30, at 1-5.
59 Mautner, *supra* note 30, at 1-5.
60 JAMES K. TREADWELL ET AL., WASHINGTON ESTATE PLANNING DESKBOOK § 11.6(2) (Thomas R. Andrews et al. eds., 2005), *citing* REV. CODE WASH. § 11.96A.220.

mediation and arbitration and private agreement process arise relating to the danger that the intent of the testator or settlor may not be protected by the processes allowed by TEDRA.

First, and most significantly, TEDRA allows that parties may agree privately and bypass mediation and arbitration altogether, removing any last safeguard that a neutral third party will attempt to preserve the intent of the testator as reflected in the will or trust instrument. The parties have broad authority to reach an agreement and they may do this privately. There is no express requirement in TEDRA that the nonjudicial agreement be reached though formal mediation or arbitration processes. TEDRA was intended to provide general nonjudicial dispute resolution methods, and expressly provides this may take the form of "mediation, arbitration, *and agreement*."[61] In fact, "if the parties agree, the requirements of mediation and arbitration can be waived…parties can 'agree' not to mediate or arbitrate through their conduct, by not requesting mediation or arbitration."[62]

Secondly, if parties do elect to pursue the mediation-arbitration sequence provided for by TEDRA, there is no assurance that the mediator used to resolve the dispute is adequately trained or experienced in the unique area of wills and trusts law. Such training would assure at least some minimum level of awareness and sensitivity toward preserving as much of the original intent of the testator or settlor as possible in each case. Amazingly, it is the parties themselves who are called upon to select a mediator first before the court ever becomes involved.[63] The comments to TEDRA allow that "[o]nce mediation is agreed or ordered, the parties have ten (10) days to pick their mediator, or if they cannot do so, petition the court to pick from the list of acceptable

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61 REV. CODE WASH. ANN. § 11.96A.010 (West 2006).
62 Leavens, *supra* note 6, at 5-11.
63 REV. CODE WASH. ANN. § 11.96A.300 (4)(a) (West 2006).

mediators submitted to the court *by each party*."[64] Specifically, RCW 11.96A.300(4)(a) provides that a qualified mediator may be an attorney with five years of experience in the area of wills and trusts, an individual with "special skill or training in the administration of trusts and estates, or any individual "with special skills or training as a mediator."[65] By allowing *any* experienced mediator to resolve a trust and estate dispute TEDRA does nothing to assure adequate protection that the mediation process will factor in the original intent of the testator or settlor.

VI. LACK OF COURT OVERSIGHT

In addition to the dangers posed by TEDRA's lax requirements regarding how an agreement is reached, TEDRA further fails to protect the intent of the testator by the striking absence of even minimal judicial oversight or review of the agreement reached. Interestingly, the legislature expressly grants to the court "full and ample power" to administer and settle "[a]ll matter concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney . . . and all trusts and trust matters."[66] According to TEDRA, the Superior Court of every county is vested with "original subject matter jurisdiction over the probate of wills and administration of estates of incapacitated, missing, and deceased individuals in all instances"[67] as well as the "original subject matter jurisdiction over trusts and all matters relating to trusts."[68]

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64 Mautner, *supra* note 30, at 1-17 (emphasis added).
65 REV. CODE WASH. ANN. § 11.96A.3004(4)(b) (West 2006).
66 REV. CODE WASH. ANN. § 11.96A.020 (West 2006).
67 1 KELLY KUNSCH, WASHINGTON PRACTICE: TRUST AND ESTATE DISPUTE RESOLUTION ACT -- IN GENERAL § 30.73A (4th ed. 2005) (*citing* REV. CODE WASH. § 11.96A.040(1)).
68 REV. CODE WASH. ANN. § 11.96A.040(2) (West 2006).

A judicial proceeding brought under TEDRA is considered a special proceeding, and "may be commenced as a new action or as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset."[69] Further, unique procedural rules have been adopted in TEDRA, "believed to be necessary to give the court the *flexibility* needed to promote *expediency*," two words which are woven through the policy behind TEDRA and which are often used to justify its unique provisions.[70] The official comments to RCW 11.96A.020 state: "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."[71] If a judicial proceeding is brought under R.C.W. § 11.96A.090, "the 'first' hearing can be, and often is, the only hearing on the merits and can thereby result in a final order resolving the issue or dispute."[72]

Another unique provision of TEDRA is that it is at the discretion of the parties how, *or if*, the agreement is submitted to the court. According to the Act, any party or their legal representative "*may* file the written agreement or a memorandum summarizing the written agreement with the court" therefore it is at the option of the parties whether or not to file any document with the court.[73] Amazingly, if any interested party does elect to do so, the agreement or memorandum of its terms may be filed without ever being shown to a judge.[74] Nonetheless, upon filing the agreement "will be deemed approved by the court and is equivalent to a final court order binding on all persons interested in the estate

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69 1 KELLY KUNSCH, WASHINGTON PRACTICE: TRUST AND ESTATE DISPUTE RESOLUTION ACT -- IN GENERAL § 30.73A (4th ed. 2005).

70 Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999 (Jan. 28, 1999), at 5, *available at* http://www.wsbarppt.com/comments/tedra99.pdf.

71 *Id.* at 1.

72 Mautner, *supra* note 30, at 1-13 (*citing* REV. CODE WASH. § 11.96A.100(7) though (10)).

73 REV. CODE WASH. ANN. § 11.96A.230 (West 2006).

74 Gaddis, *supra* note 26.

or trust."[75] Therefore, "[f]iling the agreement or memorandum creates the same rights and obligations among the parties that a court order would create."[76] In addition, RCW 11.96A.220 contains "suggested, but not mandatory, elements of a nonjudicial dispute resolution agreement, "[77] and gives no guidance as to form and content other than to state that "[t]he agreement shall identify the subject matter of the dispute and the parties."[78] This vagueness is not accidental, as the comments to TEDRA acknowledge that "[t]here is no specific required form for an agreement."[79] One note by a practitioner summarizes this provision as follows:

> Particularly where a nonjudicial dispute resolution agreement has been reached without the matter being resolved having been placed in the public record (through a petition or otherwise), the parties' interests in privacy can be protected by choosing not to file the agreement at all *or* by filing the 'memorandum summarizing the written agreement' authorized by RCW 11.96A.230. The memorandum can be carefully drafted to omit details regarding specific dollar amounts or other information that is not necessary to place in the public record.[80]

Additionally, the special representative has the right, and therefore may elect to submit the written agreement to the court for review and judicial approval.[81] In those cases the court will conduct a hearing to review the agreement to determine whether or not the interests of those individuals or parties represented by the special representative have been protected.[82] Based on the striking shortage of TEDRA court cases in

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75 REV. CODE WASH. ANN. § 11.96A.230(2) (West 2006); *See also* 1 KELLY KUNSCH, WASHINGTON PRACTICE: TRUST AND ESTATE DISPUTE RESOLUTION ACT -- IN GENERAL § 30.73A (4th ed. 2005).

76 Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999 (Jan. 28, 1999), at 8, *available at* http://www.wsbarppt.com/comments/tedra99.pdf.

77 Mautner, *supra* note 30, at 1-20.

78 REV. CODE WASH. ANN. RCW 11.96A.220 (West 2006).

79 Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999, Pg. 8 (Jan. 28, 1999), *available at* http://www.wsbarppt.com/comments/tedra99.pdf.

80 Mautner, *supra* note 30, at 1-21 (emphasis in original).

81 REV. CODE WASH. ANN. § 11.96A.240 (West 2006). *See also* Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999 (Jan. 28, 1999), at 8, *available at* http://www.wsbarppt.com/comments/tedra99.pdf.

82 REV. CODE WASH. ANN. § 11.96A.240 (West 2006).

Washington, and complete absence of TEDRA cases regarding the intent of the testator, one may either conclude that TEDRA is rarely being applied or, alternatively, that the agreements are being created and carried out entirely outside of the vision and watchful eye of the court.[83] One may argue that under TEDRA the court does not become involved until they are asked to. TEDRA basically proscribes that parties are free to reach their own decisions about the will or trust, and the parties would only go to the court if a special representative was involved as good practice in order to avoid future liability. As a result of the above TEDRA provisions, there is lack of virtually any direct court supervision over the agreements reached, both privately and though formal mediation and arbitration processes.

VII. THE INTENT OF THE TESTATOR IS IRRELEVANT UNDER TEDRA

It has been reasoned that "inherent in the testamentary freedom to benefit those whom the testator favors and so chooses to benefit is, of course, the corresponding freedom to refrain from benefiting certain others."[84] Testamentary freedom is the freedom of the testator to exercise "great control in dividing their estates in whatever manner they believe best suits the situation and their personal wishes."[85] While there are many benefits to mediation, it should also be noted that "mediation of will contests is not

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[83] As of June 25, 2006, this author could only find the following published cases which addressed TEDRA: *Niemann v. Vaughn Community Church,* 154 Wn.2d 365, 113 P.3d 436 (2005); *In re Estate of Jones,* 152 Wn.2d 1, 93 P.3d 147 (2004); *In re Estate of Kordon,* 126 Wn. App. 482, 108 P.3d 1238 (Wn. App. Div. 3, 2005); *Vandercook v. Reece,* 120 Wn. App. 647, 86 P.3d 206 (2004); *In re Estate of Black [Black II],* 116 Wn.App. 492, 66 P.3d 678 (Wn. App. Div. 3, 2003); *In re Estate of Jones,* 116 Wn. App. 353, 67 P.3d 1113 (2003); *In re The Jean F. Gardner Amended Blind Trust,* 117 Wn. App. 235, 70 P.3d 168 (2003), *rev. denied*, 150 Wn.2d 1029 (2004); *In re Marriage of Petrie,* 105 Wn. App. 268, 19 P.3d 443 (2001).

[84] Stimmel, *supra* note 4, at 199-200.

[85] *Id.* at 204.

without its drawbacks, and there are certain practical and ideological difficulties."[86] Importantly, the following was noted:

> [T]he mediation process may in many ways ignore the intent of the testator by altering the distribution that he or she planned. This may seem to be troublesome in a society that so respects private property and the testamentary freedom that allows people to dispose of their property at death as they see fit.[87]

One of the most significant, and likely unintended, consequences of TEDRA is that the parties are free to come to an agreement regarding the will, trust or other related matter which is completely different from what the testator or trustor intended. It is clear that under TEDRA, the parties are completely free to reach any agreement, so long as every party involved agrees to it, even if it would result in a final disposition of an estate that is completely different from what the trustor ever contemplated, would have wanted, or even embodying provisions the testator expressly spoke out against. This is completely opposed to the principal that in formulating the outcome one is supposed to be looking at the intent of the donor. This paper argues that TEDRA reverses the rule that it is the intent of the donor that controls. It is a fact that this Act encourages agreement, above all else, even if it is against the will of the testator. Comments to the Trust and Estate Dispute Resolution Act are illuminating on this issue. Referring to R.C.W. 11.96A.030, the section codifying the definitions, the comments state the following:

> 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 purpose of the will or trust. By making this change Washington formally accepts recent practice and adopts a rule that allows all interested parties

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[86] *Id.* at 212.
[87] *Id.* at 213.

> to agree to the resolution of an issue or modification of the applicable document.[88]

This danger has not been lost on many practitioners, however. A recent Washington Bar Continuing Legal Education course on advanced probate matters raised some issues and problems with TEDRA.[89] The question was raised regarding whether the use of mediation was inappropriate for certain issues, specifically actions to interpret wills and trusts.[90] After stating that the "normal rule is that the principal function of a court in interpreting wills and trusts is to ascertain [the] intent of [the] testator" the question was posed: "should [the] testator's intent be determined by mediation?"[91]

VIII. PROPOSED SOLUTIONS: HOW TO PROTECT THE INTENT OF THE TESTATOR IN WASHINGTON

Planning for TEDRA and preventing its application are two different things entirely. It has been said that "[t]wo of the primary goals of probate reform are to reduce litigation and to facilitate estate planning," however TEDRA may actually hinder the second of these, according to the following comment:

> As to facilitating estate planning, however, the availability to the survivors of mediation may have the opposite effect by requiring additional precautions by the testator to ensure that his or her testamentary intentions are ultimately carried out. By its very nature, mediation focuses almost exclusively on the needs and interests of the survivors and not on the preferences of the decedent. [FN123] A testator, writing his or her will, precisely planning the exact distribution of the assets accumulated over a lifetime, cannot help but feel uneasy when looking forward to the possible mediation process in which his or her carefully laid plans are summarily discarded. This foresight, however, may have the beneficial effect of causing the testator to be much more clear about his testamentary

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88 Off. Cmts. to S.B. 5196, Ch. 42, Laws of 1999 (Jan. 28, 1999), at 1, *available at* http://www.wsbarppt.com/comments/tedra99.pdf.
89 Leavens, *supra* note 6, at 5-13.
90 *Id.*
91 *Id.*

> intentions, to adhere more closely to the statutory formalities, to dot every "i" and cross every "t," both figuratively and literally, in order to ensure that the estate plan is "impregnable."[92]

The Washington State Bar Association ("the Bar") specifically addresses the issue of TEDRA's impact on estate planning and trust longevity, noting the fact that "in addition to being used to resolve true disputes, the nonjudicial dispute resolution provisions of TEDRA can be used to terminate or amend trusts to the same extent that a court could if called upon, provided *only* that all interested parties consent."[93] The Bar found that clients nearly universally wish to prevent the application of TEDRA to their estate plans for those purposes.[94] In response, the Bar crafted a model provision, created for the express purpose of deterring the trustee and beneficiaries from utilizing the provisions of Chapter 11.96A to terminate a trust prior to the intended end of its term as set forth in the trust instrument.[95] To perpetuate the trust, the Bar recommends drafting into the instrument the following statement:

> *"I am aware of the authority conferred under RCW 11.96A to modify, and terminate, trust arrangements. It is my intent that the trusts and trust shares created herein shall remain in effect after my death. With this in mind, I admonish the Trustee to exercise its powers under RCW 11.96A with restraint. I further intend that, absent compelling circumstances, the trusts and trust shares created herein last for the periods stated herein."*[96]

Further, the Bar advises the drafting attorney to give "very careful consideration" when deciding on the appointment of fiduciaries.[97] This is so because, upon the death of the testator or settlor, it is the fiduciary who will have the "principal responsibility for

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92 Stimmel, *supra* note 4, at 217-218.

93 JAMES K. TREADWELL ET AL., WASHINGTON ESTATE PLANNING DESKBOOK § 11.6(2) (Thomas R. Andrews et al. eds., 2005) (emphasis added).

94 *Id.*

95 *Id.*

96 *Id.*

97 WATSON B. BLAIR, WASHINGTON ESTATE PLANNING DESKBOOK § 16.5(2)(d) (Thomas R. Andrews et al. eds., 2005).

upholding the testator's and settlor's wishes and intent."[98] Based on this, the Bar ultimately makes the recommendation of appointing an "institutional fiduciary" to act as the trustee, for those individuals "particularly concerned about the possibility of premature trust termination."[99] This would likely be the most effective of the two approaches suggested, "given the general conservatism of institutional fiduciaries and their usually strict adherence to the stated intentions of testators"[100] despite the fact that they are technically interested parties.[101]

However, neither of the options suggested are guaranteed to be effective in preserving the testator's intent for two reasons. First, once the parties have filed the agreement or memo with the court, there is no process whereby a court reviews the agreement or memorandum to determine if it is consistent with the wishes and intent as expressed by the testator or settlor. Because the court is not required to review the will or trust document once the parties have come to a written agreement they almost assuredly will not.[102] Therefore, the court may never know, or have reason to know that the agreement will result in a disposition inconsistent or contrary to the testator or settlor's intent. Secondly, the court may simply ignore the provision. While including the above suggested provision in a will or trust may give its maker some measure of comfort, it certainly is not binding on a court. To date, there is no provision in TEDRA which requires that an agreement be consistent with the testator or settlor's intent or desires as expressed in a will or trust document, even if the instrument contains a specific, clear and

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98 *Id.*

99 JAMES K. TREADWELL ET AL., WASHINGTON ESTATE PLANNING DESKBOOK § 11.6(2) (Thomas R. Andrews et al. eds., 2005).

100 *Id. See also* 76 Am. Jur. 2d Trusts § 331 (Westlaw 2006).

101 § 11.96A.030(4)(b) (West 2006).

102 *See* REV. CODE WASH. ANN. § 11.96A.220 (West 2006) (Binding agreement).

unambiguous direct statement of the testator's wishes. Additionally, it should be kept in mind that the agreement "may" be filed with the court, so conversely, it may *not.* Further, while a fiduciary should be protecting the intent of the testator, they are expressly allowed under TEDRA's provisions to enter into a nonjudicial binding agreement or engage in mediation or arbitration with the ability to reach any result with the guidance only that it is acceptable so long as all the interested parties agree.[103]

In order to preserve the intent of the testator, one suggestion is to revise TEDRA to include a provision requiring that if a testator or settlor expressly drafts into the instrument a statement that TEDRA shall not apply then the court shall be bound by this – essentially an "opt-out" clause. After all, "the consensus of those in practice appears to be that the procedures set forth in Title 11 prior to the enactment of TEDRA remain in place, and *additionally* the practitioner is given tools provided by the TEDRA amendments."[104] Therefore, any interested parties to a dispute have other legal remedies available to them outside of TEDRA. In this case, the TEDRA provisions may be seen as only a supplement to the traditional framework in which wills, trusts, and nonprobate assets are resolved.[105]

Additionally, TEDRA could be amended only minimally, and continue to allow mediation and arbitration, but not allow agreements to be created outside of a formal mediation or arbitration process which brings the aid of neutral, trained third parties. Such a requirement would keep the will or trust from being modified without the parties consulting or being guided by professionals trained and experienced in the area of wills and trusts.

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[103] *Id.*
[104] Gaddis, *supra* note 26.
[105] *Id.*

IX. THE FUTURE OF "TEDRA" MODELED ACTS AND A.D.R.

While TEDRA may appear to be fairly unusual in many respects, the idea of codifying procedures for nonjudicial trust and estate dispute resolution also appear to be favored by many courts eager to keep such disputes from consuming already thin judicial resources, and the trend may be for other TEDRA-modeled legislation to be adopted in other jurisdictions.[106] In 2005, the State of Idaho, one of two states bordering Washington, adopted their own Trust and Estate Dispute Resolution Act.[107] One may project that the overall increasing popularity of alternative dispute resolution and its growing application in the area of wills and trusts matters will only increase.

X. CONCLUSION

One commentator stated in 2002 that "some of the more expansive doctrines [of TEDRA] will have to await appellate approval or interpretation before they can be fully utilized with confidence. Only the test of time will disclose whether the substantial grant of authority given to parties of non-judicial agreements."[108] Yet in 2006, even though very few cases have been brought involving TEDRA, it is unknown what the TEDRA impact has been in the nonjudicial setting. The fact remains that under TEDRA beneficiaries and other interested parties are free to rewrite wills and amend or terminate trusts, allowing these individuals to substitute their own ideas about the "correct" property distribution rather than to carry out their loved one's last wishes. TEDRA is so expansive that it departs from traditional mediation and arbitration and allows private

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106 *See e.g.,* Stimmel, *supra* note 4.
107 IDAHO CODE ANN. § 15.8.101 *et seq.* (West 2006).
108 Gaddis, *supra* note 26.

agreement with no oversight or review of how the agreement was reached. The Act's provisions continue to allow parties to reach agreements which may ultimately frustrate the true wishes of the decedent. These issues can easily be remedied by three simple steps: (1) allow the testator or settlor draft into their will or trust a "TEDRA opt-out" provision which is binding on the parties and the courts; (2) continue to allow parties the option to explore mediation and arbitration if they wish but prohibit private agreements between the parties; and finally (3) require that mediators be trained and experienced specifically in the law of wills and trusts. The above provisions would continue to provide many of the benefits TEDRA was enacted for while still affording some protection that the intent of the testator will be preserved.