Supreme Court No. 90696-3
Court of Appeals Division One No. 69608-4-I
(Consolidated with No. 69702-1-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In the Matter of the Estate of

J. THOMAS BERNARD,

Deceased.

APPELLANTS' ANSWER TO PETITION FOR REVIEW

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I. COUNTER STATEMENT OF THE CASE

This case concerns the testamentary documents of J. Thomas Bernard ("Tom"), and focuses in particular on two related TEDRA agreements between Tom and his son, James Bernard ("James"). As the Court of Appeals recognized, because of the procedural posture of the case, Tom must be presumed on this appeal to have had full capacity and not to have been subject to any undue influence when he executed the documents. Op. at 10-11. Put differently, the TEDRA agreements must be treated as agreements entered into freely by two adults with full capacity. Petitioners' repeated efforts to question Tom's capacity are a transparent effort to prejudice consideration of the straightforward legal issues correctly decided by the Court of Appeals.

On March 25, 2009, Tom and his trustees executed a revocable trust agreement ("Trust"). On March 27, 2009, Tom and James also entered into a TEDRA agreement ("March TEDRA"). The March TEDRA imposed three restrictions on Tom's ability to revoke or modify the Trust ("Modification Restrictions"): (1) filing a petition under RCW 11.96A, (2) serving a summons on James and otherwise complying with RCW 11.96A, and (3) obtaining a court order authorizing the revocation or modification. The only parties to the March TEDRA Agreement were

Tom and James. The March TEDRA does not name or indirectly refer to Petitioners.

Paragraph 3.1 of the Trust provided that Tom reserved the right to revoke or modify the Trust, and Paragraph 3.2 of the Trust provided that any revocation or modification is valid and effective upon the delivery by Tom of written notice to the trustees. Paragraph 3.3 of the Trust acknowledged the existence of the March TEDRA and summarized its terms (including the Modification Restrictions). Additionally, Paragraph 3.3 provided that if the March TEDRA were determined to be unenforceable, then the March TEDRA (including the Modification Restrictions) would be incorporated by reference into the Trust.

Tom and James executed a second TEDRA agreement effective August 27, 2009 ("August TEDRA"). The August TEDRA authorized a modification of the Trust ("Trust Amendment"), to which Tom and the trustees jointly agreed in writing, also effective August 27, 2009.

Petitioners prevailed at the trial level in invalidating the August TEDRA and Trust Amendment. The Personal Representative and Co-Trustees sought instruction from the Court about whether they could appeal the decision, and another trial judge ruled they could not.

The Court of Appeals ruled that: (1) the Modification Restrictions were not incorporated by reference into the Trust; (2) Tom and James

were entitled jointly to amend the March TEDRA; (3) Petitioners were not "necessary parties" to the August TEDRA; (4) Tom and James complied with all relevant provisions of RCW 11.96A; (5) the Trust Amendment was valid and effective; and (6) the Personal Representative and Co-Trustees not only could appeal but also have a duty to take all steps necessary to uphold the testator's last stated intent. Op. at 13, 19, 21, 31, 32, 35, 38-39.

II. REVIEW SHOULD BE DENIED

Review should be denied. The decision of the Court of Appeals represents the application of settled law to the specific testamentary documents and related TEDRA agreements at issue in this case. The decision breaks no new ground, does not create any conflict with any other decision, and does not raise any issue of substantial public interest. There is no question whatsoever as to what Tom and James intended to accomplish by way of the August TEDRA, and no reasonable argument that they owed any duty to others when they chose to amend their agreement. Moreover, Petitioners seek a ruling that will undermine the public interest in reducing court congestion served by RCW 11.96A.220, which authorizes parties who are interested in a trust or a related proceeding to enter into non-judicial binding agreements exactly of the sort Tom and James entered into here. They further ask the court to

undermine the public interest now codified in RCW 11.103.040 which provides that potential future beneficiaries under a revocable trust agreement have no enforceable rights during the lifetime of the trustor.

A. Tom Substantially Complied, and in Fact Strictly Complied, With the Method of Modification Required by the Trust.

The Court of Appeals correctly ruled that Tom at least substantially complied with the modification requirements of his Trust and that the Trust Amendment was therefore valid and effective. Op. at 27. Washington law has long recognized that substantial compliance with the modification methods set forth in a trust is effective to validate a trust amendment. *See Williams v. Bank of Cal.*, 96 Wn.2d 860, 867-68, 639 P.2d 1339 (1982). The Court of Appeals did not err in applying this established doctrine to the facts here, where Tom and James (the sole other party to the March TEDRA) signed a new TEDRA agreement and filed a memorandum of that agreement with the court, giving it the effect of a court order under the TEDRA statute.[1]

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[1] The Court of Appeals cited *In re Estate of Button*, 79 Wn.2d 849, 852, 490 P .2d 731 (1971), for the proposition that Tom substantially complied with the common law requirement that a trustor of a revocable trust must use the method of amendment specified in the trust to unilaterally modify it. Petitioners' assertion that *Button* supports them is wrong, as the Court of Appeals recognized. Indeed, *Button* would have been decided differently, even under pre-TEDRA law, if that trustor and his trustees had jointly amended that revocable trust in writing, like Tom and his trustees did. That result is even more certain under the subsequently enacted RCW 11.96A.220, which supersedes any possible application of *Button* to the Trust Amendment by expressly authorizing the modification of Tom's Trust by the written agreement of all of the then-interested parties (Tom, his trustees and by virtue of the March TEDRA only, James).

Petitioners allege that the doctrine of substantial compliance should not apply because the August TEDRA was "wrongful" and Tom "intentionally subverted" the March TEDRA. They further mischaracterize the August TEDRA as a failed attempt by Tom unilaterally to comply with an otherwise applicable contractual obligation. These assertions, never argued below and first made in the Petition, are pure fiction with no basis at all in the record. As the Court of Appeals recognized, this is a case where two adults, conclusively presumed on this appeal to have had full capacity, entered into a TEDRA agreement and later amended their agreement. Parties to a contract cannot "subvert" their own contract by later amending it; nor can a testator "subvert" his own estate plan by later making changes to it. Petitioners' suggestion to the contrary has no basis in the law or in common sense. And their repeated assertions that Tom departed from the terms of the March TEDRA "simply because it was more convenient" in fact demonstrate the very public policy rationale for the TEDRA statute, which is to make the resolution of matters more efficient through the use of non-judicial binding agreements.[2]

Moreover, consideration of the common law doctrine of substantial compliance presumes that "Tom and James were not trying to change the

[2] *See* RCW 11.96A.010.

[Modification Restrictions] but *instead*, were trying to comply with them." Op. at 21 (emphasis added). Because the Court of Appeals held that there was substantial compliance, it did not need to reach the issue of whether Tom strictly complied with the Modification Restrictions. Op. at 35.

In fact, Tom did not merely substantially comply, but rather strictly complied. In that regard, Tom and James did not attempt to amend the Modification Requirements, but instead changed them by agreeing in the August TEDRA that they *would not apply at all* to the Trust Amendment. The Modification Restrictions were created by a TEDRA agreement, and they could be and were changed by a subsequent TEDRA agreement.

The Court of Appeals held that the August TEDRA satisfied the requirements of the relevant provisions of TEDRA.[3] Op. at 35 ("the August TEDRA "complied with the relevant provisions of TEDRA."). Under RCW 11.96A.220, which provides that parties may non-judicially

[3] Though satisfied by Tom and James, the common law substantial compliance doctrine upon which the Petitioners focus is in fact irrelevant since the Court of Appeals correctly held that the requirements of RCW 11.96A were satisfied. Under RCW 11.96A.220, Tom and James, as all the necessary parties to the August TEDRA, and Tom and his trustees, as all the necessary parties to the Trust Amendment authorized by the August TEDRA, can simply *agree*, per express statutory authority, that an otherwise applicable common law requirement will not apply. Thus, although the Court of Appeals was correct in ruling that the common law substantial compliance doctrine is satisfied, that specific ruling is dictum because the dispositive ruling was that the August TEDRA "complied with the relevant provisions of TEDRA." *Manary v. Anderson*, 176 Wn.2d 342, 346, 292 P.3d 96, (2013):"Here, whether Homer satisfied the common law is irrelevant because Manary's claim is based on the [Testamentary Disposition of Nonprobate Assets] Act").

agree to resolve "any" matter relating to a trust or proceeding, Tom and James were free to modify, add to, or remove the Modification Restrictions to which they had contractually agreed in the March TEDRA through the use of a further TEDRA agreement, and they chose to do so.

The August TEDRA provides:

> 5. **Amendment**. ... Tom desires, and James desires for Tom, to modify Article 8 in the form of the attached Exhibit A and his Will in the form of the attached Exhibit B. The Parties agree and acknowledge that because the ***Modification Restrictions are imposed solely by virtue of the Agreement between the Parties***, the Parties agree and represent that they are the sole necessary parties and have the power to modify such restrictions by further agreement. ... The Parties agree that ***the [March TEDRA] Agreement is hereby amended*** to provide that notwithstanding any provision of the Agreement, Trust or Will, the Parties agree that ***the Trust and Will are hereby amended*** as of the effective dates of such documents in the manner provided in the attached Exhibits A and B, respectively. ***Following the execution of the First Amendment and the First Codicil, the Modification Restrictions shall remain in full force***, subject to further unanimous amendment of the Parties."

(Emphasis added).

The language of the August TEDRA thus makes clear that Tom and James intended to amend the March TEDRA so as to exempt the Trust Amendment from the Modification Restrictions, and to apply the Modification Restrictions again only to future Trust modifications. Tom

therefore strictly complied with the Modification Restrictions as they are stated in the March TEDRA as amended by the August TEDRA.

Moreover, the relevant method of modification under *Button* is that method specified *in the trust itself.* The only modification requirement imposed by the Trust itself here was satisfied by the delivery by Tom of written notice to the trustees, proof of which is evidenced by the trustees' signatures that appear on the Trust Amendment.

Thus, Tom complied strictly with the requirements to modify the terms of the Trust. And, even if there were any doubt on that score, the doctrine of substantial compliance would apply even *ignoring* the application of RCW 11.96A, as the Court of Appeals held. In short, the Court of Appeals applied established Washington law and committed no error in ruling that the Trust Amendment is valid and effective.

B. The Court of Appeals Recognized that the Co-Trustees have a Duty to uphold the Trustor's Last Expressed Intent Equivalent to the Long Recognized Duty of a Personal Representative to Uphold a Testator's Last Expressed Intent

The Court of Appeals correctly held that the Co-Trustees and Personal Representative were entitled to appeal from the trial court's rulings because it is "a duty of the executor to take all legitimate steps to uphold the testamentary instrument. Likewise, a trustee may appeal an adverse ruling that goes to the validity of the trust itself." Op. at 36-37 &

n. 93, 94 (and cases cited therein). Tom's fiduciaries are duty-bound to uphold his last stated intent, which here appears in the August TEDRA, the First Codicil and the Trust Amendment. The Personal Representative and Co-Trustees are not siding with one class of beneficiaries over another, as argued by Petitioners, but rather are taking all legitimate steps to uphold Tom's last stated intent. Moreover, the Court of Appeals correctly noted, "a trustee who is a party to an action in a representative capacity need not have a personal interest in the controversy to have a right to appeal if it is his duty to appeal *in order to protect the interests of those whom he represents.*" (emphasis added).

The Personal Representative and Co-Trustees represent Tom, not either class of beneficiaries, and, again, it is their duty to protect *his* last stated intent. The Court of Appeals correctly recognized that as fiduciaries the Trustees must defend Tom's interests, stating: "To deny the trustees an appeal under these circumstances would render them helpless to prevent invasions of the corpus *that might defeat the plan of the trustor* or even destroy the trust itself." Op. at 38 (quoting *In re Ferrall's Estate,* 33 Cal.2d 202, 200 P.2d 1 (1948)). Petitioners fully conceded that Tom wanted to, and indeed sought to, change his contingent remainder beneficiaries when he executed the First Amendment, the First Codicil, and the August TEDRA Petitioners dispute whether Tom's efforts were

successful, but do not question his intent. Tom's fiduciaries were obligated to seek to vindicate his intent.

Consistent with the Court of Appeals decision, Washington courts have repeatedly held that a personal representative has a duty to defend the terms of a will. *See, e.g., Estate of Jolly,* 3 Wn.2d 615, 623-25, 101 P.2d 995 (1940); *Estate of Shaugnessy*, 104 Wn.2d 89, 95-96, 702 P.2d 132 (1985); *In re Klein's Estate*, 28 Wn.2d 456, 475, 183 P.2d 518 (1947) (cited by Court of Appeals for the rule that "it is the duty of the executor to take all legitimate steps to uphold the testamentary instrument."); *see also Estate of Reilly*, 78 Wn.2d 623, 479 P.2d 1 (1970); *In re Chapin's Estate*, 19 Wn.2d 770, 782, 144 P.2d 738 (1944); *In re Richardson's Estate*, 96 Wash. 123, 165 P. 656 (1917); *In re Estate of Moulton*, 1 Wn. App. 993, 465 P.2d 419 (1970).

The Court of Appeals likewise correctly ruled that a trustee has a duty to defend the terms of a trust. Opinion at 39 ("Accordingly, the trustee had a similar duty [to the Personal Representative] -- to protect the plan of the trustor and protect the trust itself."); *see also* Restatement (Third) of the Law of Trusts § 79, Reporter's Notes to comment c and d (2012) (a trustee may appeal an order that attacks the validity of a trust). (quoting *In re Ferrall's Estate,* 33 Cal.2d 202, 200 P.2d 1 (1948)). In sum, the trial court did not decide between competing groups of

beneficiaries based on some interpretation of Tom's last testamentary documents. Instead, the trial court held that the First Amendment and First Codicil were invalid. Tom's fiduciaries had the right (indeed, the duty) to defend Tom's final testamentary documents.

C. The Court of Appeals has not "Redefined," but Simply Reaffirmed, Well-Established Washington Law, as well as Broadly Accepted Common Law, Regarding Standing, Interested Parties and Real Parties in Interest under TEDRA.

For the first time in their motion for reconsideration filed after the decision of the Court of Appeals, and again in the Petition, Petitioners contend that TEDRA was invoked in this case to "settle the guardianship issue," and that invocation entitled them to notice of any court proceeding to modify Tom's estate plan. CP 420-421 & CP 447-450. That contention, for which Petitioners cite no authority, is demonstrably false. No orders regarding Tom's estate planning were ever entered in a guardianship proceeding, and guardianship proceeding rules have no application here.

Rather, the March TEDRA addressed disputes and potential disputes solely between the signatories to that agreement—Tom and James. The March TEDRA recited no less than three[4] times that the only

[4] The March TEDRA provides on page 1: "collectively, Tom and James are referred to herein as the "Parties"; on page 2: "The Parties hereby agree that the subject matter of this Agreement is appropriate for a binding non-judicial agreement executed under RCW 11.96A.220 et seq *and that all necessary parties have been made a party*

parties to the agreement and the only intended beneficiaries of the agreement were Tom and James. Likewise, the August TEDRA reconfirmed that Tom and James considered themselves to be the sole parties to and intended beneficiaries of the March TEDRA. This is entirely consistent with the intended purpose of non-judicial binding agreements under TEDRA—they are contractual agreements between the parties.

As contracts, non-judicial binding agreements may be changed by the parties to the agreement:

> It is well settled in Washington that 'a contract may be modified or abrogated by the parties thereto in any manner they choose, notwithstanding provisions therein prohibiting its modification or abrogation except in a particular manner.'

Pac. Nw. Group A. v. Pizza Blends, 90 Wn. App. 273, 278, 951 P.2d 826 (1998) (quoting *Kelly Springfield Tire Co. v. Faulkner*, 191 Wash. 549, 555, 71 P.2d 382 (1937)); *see also Columbia Park Golf Course, Inv. v. City of Kennewick*, 160 Wn. App. 66, 82, 248 P.3d 1067 (2011)). Nothing in TEDRA expands the necessary parties to an agreement. To the contrary, TEDRA is specific that necessary parties must also be individuals with standing.

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hereto." Emphasis added.; and on page 5: "The undersigned Parties to this Agreement comprise *all necessary persons to a non-judicial agreement pursuant to, and in accordance with, Sections 11.96A.210 through 11.96A.250* of the Revised Code of Washington ("RCW') [emphasis added]").

Standing to sue requires the potential party to possess sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy, *i.e.*, a legally protected right.[5] Consistent with standing, albeit a distinct legal theory, CR 17(a) requires that "every action shall be prosecuted in the name of the real party in interest"—the person who possesses the right sought to be enforced. *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 982 P.2d 1202 (1999).

TEDRA attends to this fundamental aspect of standing and defines "[p]ersons interested in the estate or trust" as "all persons *beneficially interested in the estate or trust*" (emphasis added). Under Washington law, a "[b]eneficial interest has been defined as the profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control." *Christiansen v. Dep't of Soc. Sec.*, 15 Wn.2d 465, 467, 131 P.2d 189 (1942).

In the absence of contractual rights to the contrary, contingent beneficiaries under a revocable living trust have no enforceable beneficial interest or rights in the trust during the lifetime of the trustor. Until death, an individual's estate plan is malleable; no contingent beneficiary has a

[5] *See Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008) (debtor has no standing to enforce a claim that belongs to his bankruptcy estate); *Mack v. Armstrong*, 147 Wn. App. 522, 195 P.3d 1027 (2008) (property owner was given standing to sue to enforce covenants in the plain language of the covenants).

current, beneficial interest in the assets, which may or may not exist upon the testator's death, and, consequently, the court lacks jurisdiction over an individual's estate plan. *See Pond v. Faust*, 90 Wash. 117, 120-121, 155 P. 776, 778 (1916) ("courts have no power to inquire into the validity of wills prior to the death of the maker, to determine the incompetency of the maker").

Likewise, it is a critical aspect of the common law applicable to trusts that "the nature of a beneficiary's interest differs materially depending on whether the trust is revocable or irrevocable." *Empire Properties v. County of Los Angeles*, 44 Cal.App.4th 781, 787 (1996). "With the creation of an irrevocable trust, trust beneficiaries acquire a vested and present beneficial interest in the trust property, and their interests are not subject to divestment as with a revocable trust." *Id.* In contrast, "[r]evocable living trusts are merely a substitute for a will. The gifts over to persons other than the trustor are contingent; the trust can be revoked or those beneficiaries may predecease the trustor." *Id.* at 788. A beneficiary's interest in a revocable trust is therefore "'merely potential' and can 'evaporate in a moment at the whim of the [settlor].'" *Steinhart v. Cnty. of L.A.*, 47 Cal.4th 1298, 1319 (2010) (citing *Johnson v. Kotyck*, 76

Cal. App. 4th 83 (1999)).[6] Washington has codified this principle at RCW 11.103.040 ("While a trust is revocable by the trustor, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the trustor.").

Petitioners were not beneficially interested in the Trust during Tom's lifetime because they were merely contingent beneficiaries to a revocable trust, and they were not parties to the March TEDRA. Consequently, they do not meet the RCW 11.96A.030(5) definition of a "party with an interest in the subject of the particular proceeding." Nor do they meet the RCW 11.96A.030(6) definition of "persons interested in the estate or trust." Not even James was an interested party in the absence of the March TEDRA, because absent the March TEDRA, Tom could change his revocable trust at any time and in any way at his sole discretion.

Nor can Petitioners claim to be beneficiaries of the March TEDRA and assert claims arising from that contract. A third-party beneficiary

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[6] *See also Lewis v. Star Bank, N.A.*, 630 N.E.2d 418 (Ohio Ct. App. 1993) (trustor's children and grandchildren, as beneficiaries of her revocable trust with interests subject to "complete divestment," had no absolute entitlement to anything prior to her death and were not "vested"); *Ullman v. Garcia*, 645 So. 2d 168, 169 (Fla. Dist. Ct. App. 1994) (revocable trust is "a unique instrument" that has "*no legal significance until the settlor's death*"; "[T]he devisees of a settlor's revocable trust do not come into possession of any of the trust property until the event of [the settlor's] death, and even this interest is contingent upon her not exercising her power to revoke. Since she is the sole beneficiary of the trust during her lifetime, she has the absolute right to call the trust to an end and distribute the trust property in any way she wishes." (emphasis added; internal quotations omitted)); *Linthicum v. Rudi*, 122 Nev. 1452, 1455-56 (2006) (dismissing challenge to revocable trust during trustor's lifetime because challengers were not "interested persons" but merely holders of unvested contingent interest until the trustor's death).

contract exists only when the parties intend to create an obligation to third parties:

> It is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions.

Ridder v. Blethen, 24 Wn.2d 552, 556, 166 P.2d 834 (1946) (quoting *Sayward v. Dexter Horton & Co.*, 72 F. 758, 765, (9th Cir.1896)).

Mere references to RCW 11.96A in the March TEDRA do not make Petitioners "parties" to the March TEDRA or "trust beneficiaries," as those terms are statutorily defined, where such a result was clearly not intended by the trustor, Tom. The radical interpretation of Washington law argued for by Petitioners would conflict with not only the language of the March TEDRA and August TEDRA themselves, and the long-standing law providing that the beneficiaries of a revocable trust have no interest in the trust while the trustor is still alive, but also the general rule that the court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent. *In re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972). The Court of Appeals made this point well, as its

well-reasoned holding honored what was indisputably Tom's last testamentary intent.

Moreover, even if the March TEDRA somehow made Petitioners necessary parties to the August TEDRA (which it does not), they still must establish that James could not virtually represent them as to the August TEDRA. The applicable statute at the time of the initial litigation in this matter was RCW 11.96A.120(2)(c) , which read as follows:

> 11.96A.120(2)(c): Except as otherwise provided in this subsection, where an interest in an estate ... has been given to a person [e.g., James] or a class of persons, or both upon the happening of any future event [e.g., Tom's death], and the same interest or a share of the interest is to pass to another person or class of persons [e.g., all contingent beneficiaries], or both, upon the happening of additional future event [e.g., James's death], notice may be given to the living person [e.g., James] or persons who would take the interest upon the happening of the first event [e.g., Tom's death] and the living person [e.g., James] or persons shall virtually represent the persons or class of persons [e.g., all other contingent beneficiaries] who might take on the happening of the additional future event [e.g., James' death].

Here, James was the sole remainder beneficiary prior to Petitioners and the charities under the original Trust, and Petitioners' and charities' interests matured only if James did not survive Tom and had no surviving descendants at Tom's death. James was the vertical virtual representative. Thus, to the extent that Petitioners claim any interest in the Trust during

Tom's lifetime arising from the March TEDRA, James bound them by acting as their virtual representative.

D. The Court of Appeals Correctly Applied the Law Relating to Incorporation by Reference.

Without reference to authority, and supported only by incorrect statements expressly contradicted by the governing documents, the Petition alleges that the Court of Appeals committed error in ruling that, under the "plain words" of paragraph 3.3 of the Trust, the Modification Restrictions were not incorporated by reference into the Trust because the condition precedent that the March TEDRA be deemed unenforceable never occurred.

The Court of Appeals' holding reflects the plain meaning of the controlling documents. In particular, those documents reflect Tom's intent that the Modification Restrictions are imposed by the March TEDRA only, and are not incorporated into the Trust, save in one unlikely specific circumstance that never happened. In particular, the Modification Restrictions are incorporated into the Trust if and only if the March TEDRA was unenforceable. That never happened and so the Modification Restrictions were never incorporated into the Trust.

Established Washington law is clear that "[c]onsiderable caution must be exercised in applying the doctrine of incorporation by reference."

Baarslag v. Hawkins, 12 Wn. App. 756, 763, 531 P.2d 1283 (1975). "[I]ncorporation by reference must be clear and unequivocal." *Navlet v. Port of Seattle*, 164 Wn.2d 818, 845 n.15, 194 P.3d 221 (2008). Article 3.3 states that Tom's rights to revoke or amend the Trust are "subject to" the March TEDRA, and the Court of Appeals was correct in holding that this language does not incorporate the March TEDRA into the Trust. To read the language any other way would have rendered the last sentence of Article 3.3, which incorporates the Modification Restrictions only if the March TEDRA is deemed unenforceable, superfluous. *See First Interstate Bank v. Lindberg*, 49 Wn. App. 788, 794, 746 P.2d 333 (1987) ("We prefer to construe the trust so as to give meaning to all words used.").

Ignoring the plain language of the documents and Tom's clearly manifested intent therein, the Linger Parties attempt to shift the focus to a purported public policy argument about less restrictive alternatives to guardianship proceedings. This argument makes no sense. TEDRA cannot be used to resolve guardianship actions, *see* RCW 11.96A.220, and the March TEDRA did not purport to resolve a guardianship proceeding or whether a guardian should be appointed for Tom.[7] Furthermore,

[7] The only guardianship proceeding to which Petitioners could possible refer is the petition for guardianship of Tom's *person*, which James filed on April 10, 2008. CP 114, 169-177. James did not seek guardianship of Tom's *estate*, the assets of which are what are in dispute in this case.

Petitioners' argument ignores the stated purpose of the TEDRA, which is to facilitate more efficient means of resolving matters *without* the involvement of courts. Whatever the merits of Petitioners' argument on policy grounds, however, it is not relevant here because the plain language of the documents at issue and Tom's intent were *not* to incorporate the Modification Restrictions into the Trust, and the March TEDRA was not resolving a guardianship matter.

III. CONCLUSION

The decision of the Court of Appeals breaks no new ground. It applies established Washington law to the particular facts of this case. In doing so, the Court of Appeals honored both the plain language of the documents at issue and Tom's final testamentary intent. To the extent that Petitioners contend that Tom lacked capacity or was subject to undue influence, those issues must be addressed on remand. For purposes of appeal, this is a straightforward case in which the Court of Appeals applied as written the TEDRA agreements between Tom and James and Tom's testamentary documents. There is no good reason for this Court to accept the case for review.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

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CERTIFICATE OF SERVICE

I, Susan Cartozian, hereby certify that on October 3, 2014, I served a copy of the foregoing document (Answer to Petition for Review by the Personal Representatives of the Estate of J. Thomas Bernard and the Trustees of the J. Thomas Bernard Trust) on the parties listed below via e-mail and U.S. mail, first-class postage prepaid:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 3rd day of October, 2014.

Susan Cartozian

Susan Cartozian, Paralegal

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To: Susan Cartozian
Subject: RE: Estate of J. Thomas Bernard; Supreme Court No. 90696-3.

REc'd 10/3/14

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Subject: Estate of J. Thomas Bernard; Supreme Court No. 90696-3.

Re: In the Matter of the Estate of J. Thomas Bernard
Washington Supreme Court No. 90696-3
Filed by: Karen R. Bertram, WSBA No. 22051, Attorneys for Personal Representative

Dear Clerk: Per Karen Bertram's request, I am attaching the following document for filing with the Supreme Court regarding the above referenced matter:

Appellants' Answer to Petition for Review

Thank you for your assistance.

Sincerely,

Susan Cartozian
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