74201-9

No. 74201-9-I

IN THE COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

In Re:

MARITAL TRUST B CREATED UNDER THE LAST WILL AND TESTAMENT OF FELECIA A. GRAHAM DATED OCTOBER 26, 1988 F/B/O FREDERICK A. GRAHAM,

FREDERICK A. GRAHAM,

Appellant,

v.

BANK OF AMERICA, N.A.,

Respondent.

BRIEF OF RESPONDENT

Mathew Harrington (WSBA #33276)
Karolyn Hicks (WSBA #30418)
RoseMary Reed (WSBA #34497)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, Washington 98101-2393
(206) 626-6000
Mathew.Harrington@stokeslaw.com
Karolyn.Hicks@stokeslaw.com
Rosemary.Reed@stokeslaw.com
Attorneys for Respondent

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I. INTRODUCTION

Bank of America, N.A. ("Trustee"), is the trustee of the Marital Trust B created under the Last Will and Testament of Felecia A. Graham dated October 26, 1988 F/B/O Frederick A. Graham (the "Trust"). The current beneficiary is Frederick Graham, the appellant.

Approximately two years ago, Mr. Graham[1] requested the Trustee distribute to him $760,000 annually, which he claimed was his accustomed standard of living. The Trustee conducted an investigation and analysis and concluded that it could distribute $661,974 to Mr. Graham annually until circumstances change, so long as all interests agreed or a court so ordered. Mr. Graham did not believe $661,974 per year was sufficient. After considerable negotiations, the Trustee sought resolution of the issue via a brief petition brought under the Trust and Estate Dispute Resolution Act, chapter 11.96A RCW ("TEDRA"). Mr. Graham instituted a counterclaim for breach of fiduciary duty. The Superior Court, Hon. Judith Ramseyer, granted summary judgment to the Trustee.

[1] Though other family members are discussed in this brief, all references to "Mr. Graham" refer to the appellant, Frederick A. Graham.

The legal issues include:

- First, whether a guardian ad litem ("GAL") was required in the proceedings below to represent the remainder interests in the Trust. The Trustee believes that if the plan of distribution was to be approved, a GAL was absolutely necessary to represent the remainder interests and that Mr. Graham is barred by Washington law from virtually representing interests with whom he has a conflict.
- Second, whether in petitioning the trial court for approval of a plan and taking a position that a GAL was required to approve the plan of distribution, the Trustee somehow breached its fiduciary duties to Mr. Graham. However, under TEDRA and Washington law, the Trustee is permitted to seek guidance from a court and doing so is not a breach of its fiduciary duties.
- Third, whether and from what source legal fees should be paid and/or awarded.

II. STATEMENT OF THE CASE

On January 3, 2001, Felecia A. Graham died a resident of King County. Her Will was admitted to probate on January 8, 2001. Her Will established a trust for the benefit of her husband, Donald Graham, Jr. (Appellant Frederick Graham's father), with the remainder interest directed to her two sons, Frederick and Donald Graham III ("Marital Trust

B"). CP 11-22 (Last Will and Testament of Felecia A. Graham (the "Will"), Article IV.B).

On December 12, 2012, Donald Graham, Jr. relinquished his lifetime interest in Marital Trust B via a non-judicial binding agreement. CP 184. This relinquishment resulted in the Marital Trust B being divided into two subtrusts, one each for the current benefit of the two sons of Felecia and Donald Graham, Jr. *Id.* The Trust at issue was one of the two subtrusts created by this relinquishment, with Frederick Graham as the sole lifetime beneficiary. With the consent and approval of Mr. Graham, Bank of America became the Trustee of the Trust on July 30, 2013. CP 184.

The Trust directs the Trustee to pay the *income* of the Trust to Mr. Graham on an annual basis for the remainder of his life. Mr. Graham is currently 59 years old. The Trust also permits *discretionary distributions* of the Trust's principal to be made under certain circumstances:

> If . . . *in the judgment of the Trustee* the aggregate income payable to any descendant, together with the *other resources and income* of such beneficiary which the Trustee deems to be reasonably available to him or to her for such purposes . . . shall be insufficient to provide for the *proper support* in his or her *accustomed manner of living* . . . then, in any such case, the Trustee may distribute or expend for the benefit

> of such beneficiary such of the principal of [the Trust] as the Trustee shall deem necessary for such purpose under the circumstances, but *not to exceed an amount which bears the same relation to the entire principal of [the Trust].*

CP 13 (Will, Article IV.A.5) (emphasis added).[2]

When the Trustee began serving as trustee in July 2013 it was anticipated that the Trust would generate approximately $200,000 in income that would be distributed to Mr. Graham on an annual basis. CP 183. In late 2013 Mr. Graham requested that the Trust be converted from a net income trust to a four percent unitrust, which would result in annual distributions of four percent of the value of the Trust, or approximately $320,000. *Id.* The Trustee was willing to do this. *Id.* RCW 11.104A.040 allows for modification of a trust to a unitrust so long as the interested parties sign a non-judicial binding agreement under TEDRA. *Id.* However, Mr. Graham soon began requesting ever increasing distributions of income *and* principal, up to $960,000 annually, which could not be accomplished via a unitrust. *Id.* Mr. Graham also requested distributions for other expenses, including paying down debt, making gifts, and paying for a golf membership. *Id.*

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[2] Mr. Graham misstates this provision when he argues that "The Trust directed the Trustee, Bank of America, N.A., to make discretionary annual distributions at a level sufficient to allow Mr. Graham to continue living at the level to which he was accustomed." Appellant's Br. at 1.

Given the significance of the requested distributions both in dollar amount (eventually Mr. Graham requested $760,000 annually) and percentage of the Trust's principal (~10%), as well as the Trust's language, the Trustee believed further due diligence was required before making such significant discretionary distributions. CP 184-208; 209-26. The Trustee was aware that upon the death of Mr. Graham's father, Donald Graham, Jr., Mr. Graham would come into a substantial additional inheritance. The Trust permits the Trustee in exercising its discretion to take into consideration Mr. Graham's other resources. The Trustee thus engaged in an in-depth analysis of multiple factors, with the goal being to establish a plan that would provide Mr. Graham with sufficient distributions to support his accustomed manner of living until he receives the substantial inheritance at his father's death (and thereby has other resources on which to rely). CP 183-208; 209-26. The factors included, among other things: the Trust language; Mr. Graham's father's life expectancy; the period of time before Mr. Graham would receive this substantial inheritance (determined with a 95% degree of confidence to be within 10 years); an analysis of Mr. Graham's spending habits over a five year period in order to draw conclusions about his standard of living; market fluctuations; inflation; income taxation; trust administration expenses; and, a prudent investment strategy. CP 53; 183-208. Based on

its analysis, the Trustee determined that $661,974 was an appropriate amount to distribute to Mr. Graham annually, beginning in 2015, so long as all interested parties agreed or a court approved. Distributing such an amount would require distributing all 2015 income from the Trust as well as substantial amounts of Trust principal.

Mr. Graham disagreed with the Trustee's position that $661,974 was the most it could in its discretion distribute, and continued to demand $760,000 annually. During and following the Trustee's due diligence process, the parties attempted to resolve their disagreements by negotiating a binding, non-judicial agreement under TEDRA. CP 186; RCW 11.96A.220 (providing for binding non-judicial agreements where all parties are represented or virtually represented).

The parties were unable to agree after considerable negotiations and a mediation. CP 299-300; 53; 183-84. Having reached impasse, the Trustee proactively petitioned the Court for instructions under TEDRA. CP 26-52. The Trustee subsequently moved for summary judgment. CP 145-82.

One of the primary issues before the Court is whether there are remainder beneficiaries of the Trust. There are. CP 17 (Will, Art. IV.B.5(a)). These remainder beneficiaries (also referred to herein as the remainder interest) are unascertained, which means their exact identity is

not at present known. CP 30. For that reason, the Trustee sought the appointment of a GAL to represent their interests. CP 32. After the hearing on the cross-motions for summary judgment brought by Mr. Graham and the Trustee, the trial court acknowledged the existence of a "separate remainder interest" in the Trust. CP 342; 357-58.

The trial court also agreed that the Trustee was acting within its scope of authority when it determined $661,974 annually was an appropriate amount of income and principal to distribute to Mr. Graham. CP 342. (Mr. Graham's own expert submitted a declaration which proposed annual distribution amounts not far from the Trustee's plan, and seemed to confirm the reasonableness of the Trustee's methodology. CP 336-38; CP __ (1/26/15 Declaration of Paul Cantor).[3] Per his own expert, it appeared that Mr. Graham was litigating over a difference of approximately $13,000 per year. *Id.*; *see also* 2/6/15 VRP at 8:22-9:14.

In opposing summary judgment, Mr. Graham argued that by not giving him the $760,000 annually and by taking the position that there exists a remainder interest in the Trust, the Trustee breached its fiduciary duties to Mr. Graham. CP 346; 260-61. Mr. Graham sought reconsideration, but the trial court still agreed with the Trustee. CP 357-58.

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[3] An unredacted version of this declaration is provided under seal.

Mr. Graham moved for discretionary review before this Court of Appeal, but his motion was denied. Some discovery ensued, including the deposition of a corporate representative of the Trustee. *See* CP 383 n.3.

Because Mr. Graham asserted there were still triable issues, the Trustee then filed a motion for summary judgment seeking to dismiss Frederick Graham's remaining claims (*i.e.*, the breach of fiduciary duty claims). The Trustee prevailed, CP 434-44, and Mr. Graham filed this appeal.

The trial court agreed with the Trustee on all of the substantive issues it brought to the lower court. CP 340-44; 357-58; 443-44. Mr. Graham filed this appeal seeking review of the three issues outlined above, at 2. He did not appeal the trial court's approval of the Trustee's plan to distribute $661,974 from the Trust to Mr. Graham in 2015. He did not appeal the trial court's approval of the Trustee's methodology for determining future annual distributions to Mr. Graham. Those orders are not at issue here, however, they are intimately tied to all of the other issues presented in his appeal so are addressed as needed.

One of Mr. Graham's primary arguments as to why the Trustee allegedly breached its fiduciary duties is that the Trustee is favoring the remainder beneficiaries above Mr. Graham, in violation of its duty of loyalty. But that is not true. Since the very beginning, with its initial

Petition, the Trustee has consistently noted that its goal is to "create a plan that will provide for Frederick Graham's support, in accordance with the Trust's instructions, for the period between now and when he inherits additional funds. It similarly protects the remainder interest of the Trust by making it more likely than not that there will remain a trust corpus upon Frederick Graham's death." CP 55 (emphasis added). The Trustee's trust officer has also testified that, "Although the Trustee believes that the remainder interest must be represented [in judicial proceedings or non-judicial settlements], the existence of the remainder interest does not materially impact the Trustee's analysis of the sustainable distributions from the Trust." CP 186 (emphasis added). Though the remainder interest exists, the Trustee has been consistent that "preservation of the Trust's principal for the remainder beneficiaries has not been the goal." CP 335-36; *see also* 2/6/15 VRP at 5:6-10. There has never been any favoritism toward the remainder interest.

Rather, the Trustee is aware that Mr. Graham has no sources of income other than this Trust. CP 185 ¶ 9. Keeping in mind that the Trust is Mr. Graham's sole source of support, the Trustee developed a plan for the investment, management and distribution of Trust funds that attempts to ensure to a 95% degree of certainty that the Trust can support Mr. Graham until he inherits additional funds. Giving him everything he

requests now could very well leave him without any funds for a period of years before his next inheritance. CP 336:1-4.

Of course, exact forecasting is impossible. If the Trustee succeeds — that is, if the Trust does not exhaust thereby leaving nothing for Mr. Graham to live on — then something necessarily will be left over for the remainder beneficiary. But the factor limiting the amount of distributions has been a concern that the Trust should not be exhausted while Mr. Graham depends on it. CP 186; CP 335-36; *see also* 2/6/15 VRP at 9:15-10:3, 12:14-19.

This gatekeeper role of the Trustee is precisely what the Trustor intended, and despite Mr. Graham's arguments to the contrary, Mr. Graham does not (and should not) have complete and unfettered "own[ership] and control" over all the Trust assets.

III. ARGUMENT

A. The Trial Court Was Correct that a "Separate Remainder Interest" Exists

Under the terms of the Trust, the Trustee may invade the Trust's principal only under certain circumstances. These distributions are not automatic and are allowed only where the income from the Trust is "insufficient to provide for the proper support in [the beneficiary's] accustomed manner of living." CP 13. Importantly, this determination is to be made "in the judgment of the Trustee." *Id.* A trustee's primary duty

is to manage a trust in accordance with trustor's intent while abiding by its fiduciary duties to the beneficiaries. RESTATEMENT (THIRD) OF TRUSTS § 70. Here, the Trustor's intent was to provide income from the Trust to support her son for his lifetime, while considering the resources available to him outside of the Trust. CP 11-18. These types of provisions are often used when the trustor intends the trust principal to be maintained intact before it is passed to the next set of beneficiaries.

Currently, there are two vested interests in the Trust. First, Mr. Graham has a lifetime beneficial interest in the Trust. Second, Mr. Graham's estate is the default remainder beneficiary of the Trust receiving its interest upon Mr. Graham's death. The Trust provides that upon Mr. Graham's death, his interest in the Trust "shall be distributed as he shall appoint or provide by his will or, in the absence of such appointment or provision, to his estate." CP 17. In default of the exercise of this general power of appointment, Mr. Graham's estate is to receive the remaining Trust assets. *Id.* Under Washington law, a testamentary general power of appointment may only be exercised by the power holder's valid Will. RCW 11.95.060(2). It is unknown to the Trustee whether Mr. Graham has exercised his power of appointment; regardless, a Will is an ambulatory document and thus is not effective until the testator dies. *See, e.g., In re Hall's Estate*, 159 Wash. 236, 241, 292 P.

401 (1930). Thus, Mr. Graham's estate has a vested remainder interest in the Trust that is subject to divestment.

The estate of Frederick Graham, of course, does not exist until Frederick Graham's death, making the remainder beneficiary of the Trust currently unascertainable. Any exercise of the power of appointment could be changed up until Mr. Graham's death. Yet the fact that the beneficiaries may be unascertainable does not destroy the validity of their interests. RESTATEMENT (THIRD) OF TRUSTS § 44. Indeed, for a trust to be valid and to create a beneficial interest, "[i]t is not necessary that the intended beneficiary or beneficiaries be known at the time of the creation of the trust," only that they be ascertainable "at the time when a question of the trust's continuance is to be resolved." *Id.* at Comment a.[4] Here, Mr. Graham's estate (and more specifically the parties who will receive the assets of the estate) will become ascertainable when he dies. That is all the law requires in order to establish a valid beneficial interest in a trust.

Because Mr. Graham's estate has a valid beneficial interest in the Trust, it had to be represented in the proceedings below and in any matter

[4] *See also* 2/6/15 VRP at 28:22-29:2 (GAL William Fleming observing "I think on balance, I agree with the trustee's position. It's inherent in the nature of the trust that there's a life interest and there's a remainder interest. I am not persuaded by the arguments that an estate is merely a bundle of rights and that the personal representative may have no cause of action against a trustee who has distributed all the assets of a trust before the beneficiary's death.").

as defined by TEDRA. RCW 11.96A.030(2) & (5) (defining "matter" and "party"). It is true that in many contexts — for example, if he were to request an accounting from the Trustee — Mr. Graham would be able to virtually represent the estate's interest pursuant to RCW 11.96A.120 (i.e., because his interest and that of the remainder beneficiaries would be wholly aligned). However, where a conflict of interest exists between the representative and the represented party, virtual representation is not permissible or effective. RCW 11.96A.120(9); *see also* RESTATEMENT (FIRST) OF PROPERTY §§ 183(c), 185 (1936); Uniform Trust Code §§ 302-304 (attached hereto as Appendix A). Here, there is a direct and inherent conflict of interest between Mr. Graham and his estate because any discretionary distribution made by the Trustee to Mr. Graham would necessarily reduce the estate's interest in the Trust. A dollar distributed to the lifetime beneficiary is a dollar that the remainder beneficiary or beneficiaries will never enjoy.

The fact that Mr. Graham has a testamentary general power of appointment does not change the fact that he cannot virtually represent the estate in the face of a conflict of interest. The official comments to RCW 11.96A.120, which were adopted as part of TEDRA in 1999 (attached hereto as Appendix B), state:

> For the purposes of this provision, a "conflict" exists only if the party who would be the virtual representative has significantly different economic interests in the matter in issue from those of the parties being virtually represented. If the matter in issue is purely administrative in character (e.g., a change, addition or replacement of Trustee), no conflict exists for the purposes of this provision.

In an article on the subject, the principal drafters of TEDRA have provided an example of such a conflict of interest. They opine that a conflict exists between a life beneficiary and the remaindermen regarding principal distributions to the life beneficiary. In such circumstances, a Special Representative (or Guardian ad Litem) needs to be appointed to represent the remaindermen who were unborn, incompetent or unascertained. Bruce P. Flynn, Richard A. Klobucher, and Douglas C. Lawrence, *Nonjudicial Dispute Resolution Agreements in Trusts and Estates - The Washington Experience and a Proposed Act*, 20 ACTEC Journal 138, 141 (1994) (attached hereto as Appendix C).

RCW 11.96A.120(9), which was adopted in 2011 and modified in 2013, expressly supports this position. The statute was based on the Uniform Trust Code ("UTC") § 302, which similarly precludes representation by a power holder if a conflict exists:

> Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust ... Without the exception for conflict of interest, the holder of the power

> could act in a way that could enhance the holder's income interests to the detriment of the appointees or takers in default, whoever they may be.

Comments to UTC § 302 (Appendix B). While the Comment specifically refers to the power-holder acting to enhance his flow of *income*, the same statement can be made regarding enhancing *principal* distributions. In fact, this is an even more obvious conflict of interest. Here, the matter ultimately at issue is an economic one; a benefit to Mr. Graham, as the life beneficiary, negatively impacts the remainder beneficiary because a discretionary distribution to Mr. Graham reduces the Trust principal.

Moreover, the virtual representation statute provides that

> To the extent there is no conflict of interest between the holder of the power of appointment and the persons represented with respect to the particular question or dispute, the holder of a lifetime or testamentary power of appointment may virtually represent and bind <u>persons who are permissible appointees or takers in default</u> (but only to the extent that they are permissible appointees in the case of a limited power of appointment) under the power, and who are not permissible distributees as defined in RCW 11.98.002.

RCW 11.96A.120(9) (emphasis added). The statue expressly provides that "persons who are permissible appointees or takers in default" may be virtually represented. Mr. Graham's estate is a taker in default. That implies that under Washington law, the estate has an interest — in fact, it is the kind of interest expressly discussed in the virtual representation

statute. If there is a conflict, the taker in default (the estate) cannot be virtually represented by Mr. Graham. Mr. Graham cannot argue that the conflicts of interest analysis does not apply to his estate, because the plain language of the virtual representation statute provides otherwise.[5]

Mr. Graham makes the argument that his Estate is bound by his decisions and that the Trustee is therefore protected from a lawsuit by his Estate or its beneficiaries. Appellant's Br. at 22 (citing RESTATEMENT (SECOND) TRUSTS § 216) ("a beneficiary cannot hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary prior to or at the time of the act or omission consented to it."). The quote from the Restatement, however, has no bearing on whether the Estate or another beneficiary could sue the Trustee, only on whether Mr. Graham can later sue the Trustee (*e.g.*, if it made the distributions he requested and the Trust ran out of funds before he receives his inheritance from Donald Graham, Jr.'s death). Case law shows that the Trustee could be sued by a

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[5] The trial court held that while the remainder beneficiary does have a separate cognizable interest, no conflict existed on these facts because of the possibility that little or nothing would remain for the remainder beneficiary upon Mr. Graham's death. CP 342-43. The Court reserved ruling on whether a conflict might arise in the future. *Id.* This may not have been technically correct, because it is unlikely that the Trust will exhaust precisely when Mr. Graham passes away. Thus, as argued above, there is a conflict between Mr. Graham as the life interest and the remainder interest when it comes to distributions of principal. In any event, the issue is of no moment for this case because the remainder interest was represented and was heard in the trial court. If a conflict of interest arises with regard to future modifications to the Trust, the parties may seek representation of that interest via a special representative or GAL.

subsequent beneficiary. In *State ex. rel. Beardsley v. London & Lancashire Indemnity Co. of America*, the court held that a remainderman could sue a trustee where the beneficiary consented, even when the beneficiary had a general power of appointment. 124 Conn. 416, 200 A. 567 (1938). In *Beardsley*, as here, the beneficiary held a lifetime interest in the trust's income and a general power of appointment that defaulted to her estate if unexercised. She ultimately exercised the power of appointment and was also the trustee of the trust. When she died a few years later it was discovered that the majority of the trust corpus had been lost due to inappropriate investments. The appointees of the remainder interest sued on a trustee's bond, which the bond company defended by arguing that because the trustee consented to the investments, the appointees were bound by her decisions. The court rejected this argument, recognizing that the lifetime beneficiary only had the benefit of the property and the right to appoint it, but never truly owned it. 200 A. at 569 (the rights of the "appointees and beneficiaries were derived from the [original will] and they receive the property thereunder, and from his estate; the legal title to the appointed property never vested in [the beneficiary], the life tenant and donee of the power"). *Beardsley* directly contradicts Mr. Graham's assertion that, because he holds a general power of appointment, his life interest in the Trust and the remainder interest are

the same. Moreover, *Beardsley* makes clear that the appointees (the remainder beneficiar(ies)) derive their rights not from Frederick Graham, the interim beneficiary, but from his mother Felicia Graham, the original testator.

In sum, Mr. Graham and the Trustee agree that Mr. Graham holds the authority to choose *who* receives the Trust assets upon his death. But this is not the same as the authority to choose *whether* any assets remain in the Trust. It is also not the same as the authority to decide *who* receives assets *now*, before Mr. Graham's death. The Trust document provides that the Trustee has certain duties to two interests: Frederick Graham as life beneficiary, and to the unascertained, vested remaindermen of that interest (in this case, more specifically, his estate). The trial court understood this distinction and agreed that a "separate remainder interest" existed. CP 342; 357-58.

B. Mr. Graham's Argument That He Alone Controls the Interest Ignores the Spendthrift Clause

Mr. Graham's attempts to conflate the two interests in the Trust, lifetime and remainder, into one, and his arguments that he can control those interests because he "owns" the remainder should be flatly rejected. Mr. Graham does not own any portion of the Trust as such ownership is

specifically rejected by the Trust's spendthrift clause. CP 18 (Will, Article IV.C.2). The spendthrift clause provides:

> No disposition, charge or encumbrance of either the Income or principal of the trust estates, or any part thereof by any beneficiary under these trusts by way of anticipation shall be of any validity or legal effect, or be In anyway regarded by the Trustee, and neither the Income nor principal of the trust estates, nor any part thereof, shall In anyway be liable to any claim of any creditor of any beneficiary.

CP 18.

Mr. Graham's repeated statements,[6] that he owns the remainder interest because he has a general power of appointment which in default of his exercise pays the remainder to his estate, cannot be reconciled with the Trust's spendthrift clause. At its core the purpose of a spendthrift clause is to give the beneficiary something *less* than 100% of the property rights in the asset, thereby precluding the beneficiary from controlling the asset or from having it accessible by his creditors. This particular spendthrift clause specifically directs the Trustee to disregard the beneficiaries "anticipation" of income and principal of the trust. Bogert on Trusts states "it has been sometimes said that a property owner may give away all or any part of his property, and that by creating a spendthrift trust he is

[6] *See e.g.*, CP 114-20; 243; 253-54; 279-88; Appellant's Br. at 15-24.

giving the beneficiary only a partial interest." Helene S. Shapo et al., LAW OF TRUSTS & TRUSTEES, § 222 at 396 (3d ed. 2007).

The spendthrift clause clearly precludes Mr. Graham from alienating the trust property — principal and income — during his life. If he cannot alienate it now, then he does not own it now. It is fundamental property law that when one owns something, he has the right to possess it, to exclude others, and to dispose of it. *Presbytery v. King County*, 114 Wn.2d 320, 329-30, 787 P.2d 907 (1990), *cert. denied*, 489 U.S. 911 (1990). By using a spendthrift clause that specifically precluded Mr. Graham from disposing of the Trust property, his mother intentionally did not give him all the rights of ownership. If he owned 100% of the property rights then this Trust would either not exist at all or it would exist but *not* be a spendthrift trust (it would be more akin to a revocable trust), and his creditors would be able to reach all the assets in the Trust.

The seminal case on spendthrift provisions of trusts in Washington is *Erickson v. Bank of Cal., N.A.*, 97 Wn.2d 246, 643 P.2d. 670 (1982). While originally a bankruptcy case, it was transferred to the Washington courts to decide an issue of state law. The key question was to what extent a creditor of a beneficiary of a trust can access the assets of the trust to satisfy the beneficiary's debts. The beneficiary in that case intentionally accumulated debt (mostly for medical care) and then filed for bankruptcy

to defraud his creditors. The court held that a creditor who has provided the necessities of life can reach the trust assets to be repaid for providing those necessities since a purpose of the trust was to provide the necessities of life. *Id.* at 251-52. Otherwise, the trust is not available to creditors in bankruptcy. As the Court explained:

> Ordinarily, a property owner has the power to dispose of his property as he wishes, as long as he does not violate public policy. The owner and donor of the property should be free to select the trust beneficiary who will enjoy his bounty, and should be able to put enforceable provisions in the trust which will prevent his trust beneficiary from voluntarily conveying or assigning his interest, thus precluding any creditor from taking that interest away from the beneficiary.

Id. at 250.

Similarly, the Uniform Trust Code Sections 501 and 502 (and comments thereto) provide that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers of a beneficiary's interest, otherwise the interest is vulnerable to creditors. *See* Appendix B. Further, it provides that exercises of powers of appointment are *not* affected by spendthrift provisions because they are not transfers of property (§ 502, Comment at para. 4). There is a clear distinction in trust law: assets in a trust without spendthrift protections may be reached by creditors the same as any other assets owned by the beneficiary. *But*, a

creditor is prohibited from attaching assets held in a spendthrift trust unless certain exceptions apply. *Id.* This clear distinction with respect to assets a beneficiary controls (i.e. ones he can assign to a creditor or a creditor can attach) and ones he does not control cannot be overlooked. Mr. Graham argues and repeatedly states that he "owns and controls" the assets of the trust because they, by default, transfer to his estate at his death. CP 114-20; 243; 253-54; 279-88; Appellant's Brief at 1, 15-24. However, because of the spendthrift provisions in the Trust, his mother opted not to give him the full "bundle of property rights" (to quote Mr. Graham at pages 63, 115, and 123 of the Clerk's Papers). She gave him the benefit of the assets during his life, but by applying spendthrift provisions, did not give him full ownership rights or the power to control these assets in the same manner as he controls his own personal assets.

While Washington law has yet to reach this issue, other jurisdictions hold that even where a lifetime beneficiary has a general power of appointment and wants to terminate a trust early, a spendthrift clause prevents early termination, even if everyone else interested in the trust agrees, because the intent of the trustor would be violated. *See e.g.*, *Bosler's Estate*, 378 Pa. 333, 107 A.2d 443 (1954). Mr. Bosler had an income interest for life in a trust with a general power of appointment at his death. When he was in his 60s he argued that the trust no longer

adequately supported him with income distributions and the trust should be terminated early with all of the principal being distributed to him. All parties interested in the trust agreed. The Supreme Court of Pennsylvania, citing the spendthrift clause and the interests of his deceased mother who created the trust with the spendthrift provisions declined to do so because terminating the trust early would negate the trustor's intent. *Id.* at 337-39; *see also id.* at 336 ("a life estate under a spendthrift trust will not coalesce or merge with an estate in remainder").

In sum, Mr. Graham does not own the entirety of the Trust and he therefore cannot represent all interests in the Trust. There is clearly an interest in the Trust that is distinct from his own. Finding otherwise would be disregarding the existence of the Trust as a whole, and in particular its spendthrift provision. Courts are not to construe trusts in such a way as to render any provision meaningless or superfluous. *Woodard v. Gramlow,* 123 Wn. App. 522, 526, 95 P.3d 1244 (2004), *review denied,* 153 Wn.2d 1029 (2005) (courts read a trust as a whole, giving effect to every provision in the trust instrument) (citing *In re Estate of Price,* 73 Wn. App. 745, 754, 871 P.2d 1079 (1994)).

C. The Trial Court Was Correct that the Trustee's Method for Determining the Amount of Discretionary Distributions Properly Applied the Trust's Terms

As noted above, the Trustee is to distribute income. Principal distributions are not mandatory, though the Trustee may exercise its discretion to provide principal distributions in accordance with "the judgment of the Trustee." CP 13. The Trust provides additional language clarifying how the Trustee should exercise its discretion. It states that principal distributions are appropriate only to "support" the beneficiary's "accustomed standard of living," while giving due consideration to the "resources and income of such beneficiary which the Trustee deems to be reasonably available to him or to her for such purposes." *Id.* Where a Trustee is exercising its discretion, substantial deference is given to the Trustee's decisions. Courts will not override the Trustee's decisions absent an abuse of discretion. *See, e.g., Peoples Nat'l Bank v. Jarvis*, 58 Wn.2d 627, 630, 364 P.2d 436 (1961). Here, the Trustee exercised its discretion and obtained judicial approval that it did not abuse its discretion. Mr. Graham should not be permitted to convert the exercise of the Trustee's discretion into a breach of fiduciary duty claim.

As a preliminary matter, the Trustee was required to determine Frederick Graham's "accustomed standard of living." A beneficiary's "accustomed standard of living" is generally determined at the time of the

trustor's death or when the trust becomes irrevocable. In this case, rather than using Felecia Graham's date of death in 2001 (i.e., the date of irrevocability of Marital Trust B), the Trustee determined that the more relevant timeframe for determining Mr. Graham's "accustomed standard of living" was the timeframe during which Donald Graham, Jr. relinquished his interest in Marital Trust B, circa 2012. CP 53-54. The analysis also requires that the beneficiary be "accustomed" to this standard of living. Out of concern that Mr. Graham's 2012 expenses were an anomaly, the Trustee evaluated five years' worth of Mr. Graham's financial records to determine his "accustomed" standard of living in 2012. *Id.* From this analysis, it became clear that the $760,000 requested by Mr. Graham reflected his accustomed standard of living. *Id.* On this, the parties agreed.

Next, the Trustee evaluated how to provide "proper support" for Mr. Graham's accustomed standard of living. CP 53-54. The Trust utilizes language of "support" rather than language emphasizing a more lavish "happiness" or "comfort" standard. RESTATEMENT (THIRD) OF TRUSTS § 50, comment d (recognizing that trusts may utilize "support" language or more generous "happiness" or "comfort" language when guiding a trustee's decision on discretionary distributions). Moreover, the Trust clearly contemplates that the Trust also serves a protective purpose

by having a spendthrift clause. Last, the Trust provides that in making discretionary distributions, the Trustee should consider "the other resources and income of such beneficiary."

Considering these factors, the Trustee determined that any discretionary distributions must be "small" enough so as to permit the distributions to be made for a period of ten years. CP 54. Ten years was determined to be the proper length of time because that is Donald Graham, Jr.'s maximum life expectancy. *Id*; *see also* Appellant's Br. at 8 n. 3 (citing with approval CP 54-55: "Upon his father's death, Mr. Graham stands to inherit a substantial amount, which should be sufficient to provide for his support at that time."). This approach was appropriate given the Trust's emphasis on providing support while considering "the other resources and income of such beneficiary." Thus, the Trust is seen as a bridge between now and when Frederick Graham receives his larger inheritance. CP 54-55.

After determining the appropriate time period for providing support, the Trustee used a stochastic analysis to determine an appropriate plan. CP 54. A stochastic analysis essentially takes the goal of the portfolio, here to provide supporting distributions to Mr. Graham for at least ten years and to address factors such as inflation, income taxation, trust administration expenses and a prudent investing strategy, and then

incorporates thousands of "what-if" scenarios to generate a wide range of statistically-representative, possible future results. *Id.* Based on whether the goal of the portfolio is met, each result is recorded and deemed to be a success or a failure. *Id.* A plan is then chosen where 95% of the results generated by the "what-if" scenarios resulted in a success. *Id.* This method of financial planning provides a more accurate and reliable depiction of future results and is widely-used in similar situations. *Id.*

After engaging in the above-analysis, the Trustee created a plan that provided an annual discretionary distribution amount that, for 2015, was roughly 18% below Frederick Graham's requested amount. CP 54-55. The annual distribution amount will be recalculated yearly, using the same stochastic analysis and appropriate inputs including Donald Graham, Jr.'s life expectancy and changing market conditions. *Id.* When Mr. Graham receives his inheritance after Donald Graham, Jr.'s death, the Trustee will confirm that no additional support is needed for the benefit of Mr. Graham. If so, then discretionary disbursements of principal from the Trust will cease. *Id.* In this way, the Trustee has created a plan that will provide for Mr. Graham's support, in accordance with the Trust's instructions, for the period between now and when he inherits additional funds. *Id.* When compared to making distributions in the amounts requested by Mr. Graham, the Trustee's plan offers protection of the

remainder interest of the Trust by making it more likely that there will remain a trust corpus upon Mr. Graham's death. *Id.* Yet this was not the factor which limited the amount the Trustee determined it could distribute. Rather, the amount of distribution was limited by the Trustee's concern that the Trust must not run out during Donald Graham, Jr.'s lifetime, leaving Mr. Graham without any source of income or support. *See above* at 9-10.

The trial court determined that the Trustee's discretionary distribution plan was in compliance with the terms of the Trust and that the Trustee did not abuse its discretion or otherwise breach any fiduciary duties. CP 340-44.

D. There Has Been No Breach of Any Fiduciary Duty For Any Action or Position Taken By the Trustee

Mr. Graham has argued repeatedly that the Trustee has breached its fiduciary duty to him by (a) taking the position that a separate remainder interest exists, (b) giving him less than the amount he requested in discretionary distributions, and (c) filing a Petition for Instructions with the trial court. *See e.g.*, CP 59; 62; 68-69; 72-77. As the trial court found, he is incorrect. CP 428-29. There has been no breach of any fiduciary duty.

The primary problem with Mr. Graham's breach of fiduciary duty argument is that the statute governing trust disputes, TEDRA, explicitly allows a party to "have a judicial proceeding for the declaration of rights or legal relations with respect to any matter" where "matter" is defined as "any issue, question, or dispute involving" "[t]he direction of a ... trustee to do or to abstain from doing any act in a fiduciary capacity," or "[t]he determination of any question arising in the administration of an estate or trust . . . that may include, without limitation, questions relating to: . . . The construction of wills, trusts . . . ." RCW 11.96A.030(2)(b) & (c); -.080; -.090. The Trustee need not be disinterested when seeking such instruction. It is entirely appropriate, and indeed required by the Trust document in this case, that the Trustee interpret the Trust document as well as exercise its "discretion." An exercise of discretion necessarily involves making a decision. The Trustee is permitted to articulate its view, in its discretion, to the Court when asking the Court to resolve a question between it and a beneficiary. Holding otherwise would render these sections of TEDRA absolutely meaningless. "A court may not construe a statute in a way that renders statutory language meaningless or superfluous." *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 610, 146 P.3d 914 (2006). A contrary holding

would also absolve trustees from carrying out their duties under the trust document.

Second, a trustee has an absolute right to "[p]rosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties." RCW 11.98.070(37). Mr. Graham's request for $760,000 annually from the Trust had the potential to deplete the Trust (Mr. Graham's sole source of support) before Mr. Graham will inherit additional, substantial amounts following his father's death. CP 54. It would be poor public policy to find a cause of action for breach of fiduciary duty against every Trustee that refuses to be a mere ATM for the trust beneficiaries. In an effort to "protect trust property," the Trustee had to arrive at an amount ($661,974 for 2015) that would take into account Mr. Graham's "accustomed manner of living" while at the same time prevent the depletion of the entire Trust before Mr. Graham receives other assets to provide for his support. (Mr. Graham has no independent sources of income, whether from employment or other sources. He relies exclusively upon the Trust for his livelihood. CP 185 ¶ 9.) The Trustee sought court approval of its actions, which is permissible under both TEDRA and RCW Ch. 11.98 governing trusts (again, the trustee may "[p]rosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect . . . the trustee in the

performance of the trustee's duties"). There can be no breach of duty where the trustee is following the law that governs the administration of trusts and is seeking to preserve the beneficiary's sole source of support until other resources become available to the beneficiary. Mr. Graham might prefer a different plan of distribution, but the plan at issue is a far cry from a breach of fiduciary duty by the Trustee.

Third, this Court of Appeals recently rejected a similar argument to the one Mr. Graham is making. In *Estate of Bernard*, a class of beneficiaries argued that the co-trustees of a trust (and personal representative of an estate) could not appeal a trial court decision in favor of one class of beneficiaries because it would be turning against the very individuals to whom the co-trustees owed fiduciary duties. *In re Estate of Bernard*, 182 Wn. App. 692, 730, 332 P.3d 480 (2014) (Cox, J.). There, the court observed: "[t]he Linger Beneficiaries argue that 'if the Trust were permitted to appeal the trial court's grant of summary judgment, it would place the Trustees in direct conflict with the beneficiaries of the Trust.'" This Court disagreed. In discussing its decision with regard to the co-trustee, the Court provided this helpful analysis:

> A trustee, in his fiduciary or representative capacity, is aggrieved by a judgment which threatens the continuance of the trust in the form directed by the trustor, whether or not the beneficiaries appeal. He is more than a mere

> stakeholder. Trustees have standing and indeed a duty to appeal to protect the integrity and fundamental purpose of the trust.
>
> [...]
>
> An appeal by a trustee may be necessary in order to determine whether the trial court properly ordered its termination. If such an appeal were not allowed, the trial court, when all beneficiaries consent, could completely disregard the provisions of the trust, even though there is no justification for a deviation from its terms. There is no substantial difference in this respect between an order that terminates a trust and an order that modifies it contrary to a specific provision. In either case the litigation does not involve merely the conflicting claims of beneficiaries to a particular fund, but concerns the performance of a duty by the trustees to protect the trust against an attack that goes to the very existence of the trust itself.
>
> [...]
>
> 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.
>
> [...]
>
> Accordingly, the trustee had a similar duty — to protect the plan of the trustor and protect the trust itself.

Id. at 729-30 (internal quotations and citations omitted) (emphasis added).

While *Estate of Bernard* involved the question of whether co-trustees could appeal a trial court ruling in favor of one class of

beneficiaries, seeking interpretation of this Trust via a TEDRA Petition is no more adverse to the beneficiary than was the *Bernard* trustee's filing of an appeal. Both involve seeking guidance from the courts. The analysis and conclusion are directly on point with the situation presented with Mr. Graham's arguments. Division I clarified that a trustee's paramount duty is to "protect the plan of the trustor and the trust itself," which duty is not violated by taking positions in court proceedings that may appear adverse to its beneficiaries. The Trustee here simply did not breach its fiduciary duty by asking the trial court to resolve an impasse between the Trustee and the lifetime beneficiary (and a representative of the remainder beneficiary). Nor did the Trustee breach its duty by asking the trial court to approve its distribution plan and to confirm there is a remainder interest that must be represented in any proceeding or settlement.[7] That Mr. Graham disagreed with the Trustee is not evidence of a breach of fiduciary duty. Rather, it makes clear that the Trustee's filing of a petition for instructions was a prudent and cautious use of the TEDRA mechanism established by the legislature for just such a situation.

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[7] Here, the lifetime beneficiary wanted more out of the Trust than the Trustee was comfortable giving, without either a court order pursuant to a TEDRA Petition or a non-judicial binding agreement under TEDRA, RCW 11.96A.220. CP 53 ¶¶ 5, 7. Because of Mr. Graham's conflict of interest with the remainder beneficiary, the Trustee determined that that interest (an interest provided for in the Trust document) had to be represented. It was appropriate to ask the trial court to confirm the Trustee's determination.

In his Opening Brief, Mr. Graham relies extensively on out-of-state authority to argue the Trustee breached its fiduciary duty. Appellant's Br. at 28-31. His out of state authority is not helpful to his case and is distinguishable. The case he relies upon most heavily is a decision of an Illinois Appellate Court (not the Illinois Supreme Court), *Northern Trust Company vs. Heuer*, 202 Ill. App. 3d 1066, 560 N.E. 2d 961 (1990). In *Heuer*, the question was whether an "equalization clause" in a trust was applicable. *Id.* at 1069. An equalization clause is designed to equalize gifts made to beneficiaries during the grantor's lifetime before the distributive provisions of the trust apply. So if, for example, parents leave their trust 50/50 to their two children, and during their lifetimes the parents gifted one child ("A") $100,000 and the other child ("B") $0, then B would be entitled to $100,000 before the trust was divided 50/50 between children A and B.

There were two children in *Heuer*, the son (Mr. Heuer) and the daughter (Ms. Winterbauer). By arguing to the Court that the equalization clause in the trust was applicable, Northern Trust Company was "representing her [Ms. Winterbauer's] position while resisting the claim of the other beneficiary [Mr. Heuer]." 202 Ill. App. 3d at 1072. The Illinois Appellate Court explained:

> Northern Trust acted properly in seeking the circuit court's construction of the trust agreement concerning the appropriate distribution of the trust. However, when it argued that the trust should be interpreted in a manner beneficial to Winterbauer and detrimental to Heuer, it exceeded its role as trustee and breached its duty of impartiality.

Id. at 1072.

Unlike the Trustee here, Northern Trust clearly took sides (under Illinois law) with one beneficiary over the other on how much each beneficiary should receive from the Trust. Here, the Trustee merely stated, and the trial court agreed, that a remainder interest existed. Again, it did not advocate that the remainder beneficiary should receive more (or any, in fact) funds *instead* of Mr. Graham. The Trustee specifically applied a stochastic analysis that attempted to ensure the Trust remain viable until Mr. Graham is expected to inherit a substantial inheritance from his father. Thus, even if Illinois law applied, the *Heuer* case is not persuasive authority and is clearly distinguishable.

Respondent also relies on another out-of-state case that is likewise distinguishable from the case at bar and not persuasive (and certainly not controlling), *Barnett v. Barnett*, 340 So. 2d 548 (Fla. App. 1976). *Barnett*, like *Heuer*, involved a trustee advocating on behalf of one group of beneficiaries over another, which is not the case here. Indeed, the same

law firm that represented the trustee also represented the other beneficiaries in that case. *Id.* The question in the case was whether the trustee was entitled to have all of his legal fees paid by the trust including those for services rendered to the other beneficiaries, and the Court held trust assets could not be used to pay for legal services rendered to the other beneficiaries. Not only is this case distinguishable, but the holding very likely would *not* be the holding under Washington law where beneficiaries *can* and often *are* awarded fees from the trust. *See generally* RCW 11.96A.150 ("Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party... (b) from the assets of the estate or trust involved in the proceedings...").

The Trustee's reliance on *Estate of Bernard* is neither mistaken nor misplaced as argued by Mr. Graham. Opening Brief at 32. Rather, between TEDRA which permits a Trustee to seek instructions form the Court (RCW 11.96A.030(2)(b)-(c); -.080; & -.090), RCW 11.98.070(37), and *Estate of Bernard*, there is no question that the Trustee properly followed Washington law in seeking instructions from the Court as to two issues: (1) whether to approve its method of calculating discretionary principal distributions to Mr. Graham; and (2) whether Mr. Graham could virtually represent his estate or whether a Guardian ad Litem ("GAL")

would be required to represent the interest of the remainder interest. Again, in *Estate of Bernard*, a class of beneficiaries argued that the co-trustees of a trust (and personal representative of an estate) could not appeal a trial court decision in favor of one class of beneficiaries because it would be advocating for one class of beneficiaries over another. 182 Wn. App. at 730. In that case, "[t]he Linger Beneficiaries argue[d] that 'if the Trust were permitted to appeal the trial court's grant of summary judgment, it would place the Trustees in direct conflict with the beneficiaries of the Trust.'" *Id.* Mr. Graham is making a similar argument in his claim that the Trustee breached its fiduciary duty by arguing for the mere existence of a remainder interest. The Court of Appeals in *Estate of Bernard* disagreed with the argument, and this Court should as well. A Trustee does not breach its fiduciary duties by interpreting the trust document and then seeking instruction from the Court as to whether its interpretation is correct. RCW 11.96A.030(2)(b) & (c); -.080; -.090.

Even the out-of-state authority cited by Mr. Graham in his arguments below (CP 379-84) acknowledges this legal standard. *See e.g.*, *Heuer*, 202 Ill. App. 3d at 1072 ("Northern Trust acted properly in seeking the circuit court's construction of the trust agreement concerning the appropriate distribution of the trust."); *In re Estate of Ferrall*, 33 Cal. 2d 202, 205, 200 P.2d 1, 16 A.L.R.2d 142 (1948) (cited below but not on

appeal) ("Moreover, a trustee may appeal from a decree determining the relative rights of beneficiaries if some of them are unascertained..."); *In re Trust for the Benefit of Duke*, 305 N.J. Super. 408, 439, 702 A.2d 1008, 1023 (Ch. Div. 1995) ("A trustee has a duty to ensure that the estate is distributed in accordance with the testator's wishes and may seek instruction from the court when there is a valid doubt as to the testator's intent."), *aff'd,* 305 N.J. Super. 407, 702 A.2d 1007 (App. Div.1997). Where the cases cited by Mr. Graham draw the line is where the trustee begins advocating for one beneficiary or class of beneficiaries to the detriment of another, which did not happen here (though in Washington, *Estate of Bernard* and TEDRA would allow some latitude here for the Trustee to exercise its discretion in choosing a course of action and then seeking court guidance on that choice).

E. The Court Award on Fees Should Stand, And Fees on Appeal Should be Similar

1. The Trustee's Fees Should be Paid by the Trust

A trustee is entitled to have fees incurred in administering a trust paid by the trust. RCW 11.98.070 ("A trustee... ha[s] discretionary power to ... manage the trust property in accordance with the standards provided by law, and in so doing may:... (27) Employ persons, including lawyers... to advise or assist the trustee in the performance of the trustee's duties or

to perform any act"); *see also Monroe v. Winn*, 19 Wn.2d 462, 142 P.2d 1022 (1943).

In *Monroe*, the Washington Supreme Court explained:

> In the field of the law relating to trusts, trust funds and their administration, cases frequently arise in which interested parties may, in good faith, believe that the trust is not being properly administered and apply to the court for removal of the trustees, or seek other relief which they may believe will be beneficial to the trust estate. The trustees selected to administer the trust may resist the attempt to remove them, or they may be called upon to defend the trust itself. In such cases, the courts are quite in accord that the trust estate must bear the expense incurred as a part of the general cost of administration.

19 Wn.2d at 466 (emphasis added). The Supreme Court went on to hold that because two of the trustees established, via the litigation, their right to continue in its administration, as desired by the trustor, and administrative questions were settled, the "legal expenses incurred should be borne by, and paid out of, the trust estate." *Id.*

2. The TEDRA Fee Provision is Equitable and Flexible in Nature

The Trustee brought and maintained this action under TEDRA. The TEDRA fee provision is equitable and flexible in nature in that it provides as follows:

> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any

> party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable.

RCW 11.96A.150 (emphasis added). This provision can and should be a guiding factor in the Court's ultimate decision on fees. Specifically, it allows the trial court or "any court on appeal" to determine the amount and the manner in which fees should be awarded, if at all, as between parties. *See also* RAP 18.1.

3. The Trustee Agrees Mr. Graham's Reasonable Fees May be Paid by the Trust

The Trustee argued below that Mr. Graham's *reasonable* fees can be paid by the Trust. That result is likewise consistent with the *Monroe* decision, discussed immediately above. *Monroe*, 19 Wn.2d at 466 (beneficiaries who brought action and secured beneficial results were entitled to fees from the Trust). While Mr. Graham has not "secured results beneficial to the trust estate," the Trustee does believe the best result was ultimately achieved below by having opposing positions submitted by both parties to the trial court for its consideration. *Cf.* RCW 11.96A.150 ("In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate,

which factors may but need not include whether the litigation benefits the estate or trust involved."); *but see In re Estate of Moi*, 136 Wn. App. 823, 835, 151 P.3d 995 (2006) ("we will not assess fees against an estate when the litigation could result in no substantial benefit to the estate. Nelson's attempt to take a larger share of the estate did not benefit the estate, and so we decline to award him attorney fees.") (citing *In re Estate of Niehenke,* 117 Wn.2d 631, 648, 818 P.2d 1324 (1991)) (emphasis added), *review denied,* 162 Wn.2d 1003 (2007).

At this stage, Mr. Graham's litigation efforts, including an unsuccessful motion for discretionary review, and this appeal, have been entirely unsuccessful and had the result of depleting the Trust. The Court would be within its discretion to forebear from awarding fees to Mr. Graham for bringing this appeal.

IV. CONCLUSION

The Trustee properly exercised its discretion in carrying out its duties under well-settled Washington law. The Trustee fulfilled its duties to the lifetime beneficiary, Mr. Graham. The Trustee acted consistent with Washington law and at no time favored one class of beneficiaries over another. Trustees are permitted to petition a court in furtherance of a Trustor's interest without opening themselves up to claims of breach of fiduciary duties by disgruntled beneficiaries. The orders of the trial court

should be affirmed. The Trustee should be entitled to payment of its legal fees from the Trust. The Court should exercise its discretion in deciding whether Mr. Graham should be awarded his attorneys fees and costs from the Trust or whether, because his position has at all times only sought to unsuccessfully advance his own personal interests as the current beneficiary, his fee request should be denied.

Dated this 18th day of March, 2016.

By: _____

Mathew Harrington (WSBA #33276)
Karolyn Hicks (WSBA #30418)
RoseMary Reed (WSBA #34497)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, Washington 98101-2393
(206) 626-6000
Mathew.Harrington@stokeslaw.com
Karolyn.Hicks@stokeslaw.com
Rosemary.Reed@stokeslaw.com
Attorneys for Respondent Bank of America, N.A.