Replaces Petition for Review filed 3/11/20

SUPREME COURT NO. 98268-6

NO. 79261-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Frederick A. Graham,

Petitioner,

v.

Bank of America, N.A.,

Respondent.

CORRECTED PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Frederick A. Graham, appellant in the Court of Appeals and Petitioner in the King County Superior Court proceeding.

II. COURT OF APPEALS DECISION

Petitioner Frederick A. Graham seeks review of the published decision filed December 30, 2019 by Division I of the Washington Court of Appeal that is attached hereto as Appendix A.

III. STATEMENT OF THE CASE

A. Felicia Graham's Will

Felicia Graham died testate in 2000. On her death, her Will created two trusts: Trust A and Trust B. CP 37; 41. Trust B was divided into two separate trusts, one for Mr. Graham and one for his brother. The trust for Mr. Graham (the "Trust") is the subject of this Petition.

Article IV(B)(5)(a) of the Will contains the contested language and provides, in pertinent part, that when Mr. Graham dies, "his share of the net assets of the trust estate 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 42. Thus, the Will provides, in effect, that when Mr. Graham dies, the Trust terminates, and the property currently held in the Trust is vested in the estate of Mr. Graham subject to a "divestment" he may make in his will through his exercise of the power of appointment.

B. Procedural Background

In earlier TEDRA proceedings related to Mr. Graham's Trust distributions ("TEDRA-I"), the trial court accepted Bank of America's (the "Trustee") position that there is a separate remainder interest in the Trust, but failed to address what rights the unascertained remaindermen have with respect to the Trust and its administration, and when a guardian ad litem (GAL) is required to represent the remainder interest. CP 31-32. Mr. Graham appealed the decision, but the Court of Appeals declined review, concluding that the ownership of any remainder interest in the Trust was "superfluous" to the question of the existence of any remainder interest. *Id*.

On September 10, 2018, Mr. Graham filed a second TEDRA Petition ("TEDRA-II") for Declaration of Rights regarding the ownership and associated rights of any future interest in the Trust. CP 1-10. The Petition requested an Order declaring that Mr. Graham may represent and bind any remainder interest that exists in the Trust. CP 9. The Petition was denied on October 16, 2018. CP 89-90. Ignoring the fact that the rights (if any) of the unascertained remaindermen in the Trust, and whether the remainder interest must be separately represented by a GAL, were still unresolved issues, the Commissioner concluded:

> A separate remainder interest exists in the Trust, as held by Judge Ramsayer. Mr. Graham may not virtually represent that interest in TEDRA litigation or Non Judicial Biding

> Agreement, which could negatively impact the remainder interest.

CP 90.

Thus, the Commissioner concluded that the mere existence of a remainder interest in the Trust creates an inherent, unexplained conflict between the remainder interest and Mr. Graham's interest, which categorically bars virtual representation. This ignores the plain language of RCW 11.96A.120(9), which expressly permits the holder of a testamentary power of appointment to represent and bind the appointees or takers in default so long as there is no conflict of interest,

Mr. Graham appealed the denial of his TEDRA Petition to Division I of the Washington Court of Appeals.[1] On December 30, 2019, the Court of Appeals affirmed the lower court's ruling, concluding the estate of Mr. Graham and/or the expectant appointees possess a cognizable interest in the Trust that conflicts with the interest held by Mr. Graham, barring virtual representation under RCW 11.96A.120.[2]

IV. ISSUES PRESENTED FOR REVIEW

1. Pursuant to RAP 13.4(b)(4), does the Court of Appeals' ruling that the term "estate" includes heirs and distributees of the estate present an issue

[1] *Frederick A. Graham v. Bank of America, N.A.*, Division I, Washington Court of Appeals, Case No. 19261-0-I.
[2] *See* App. A.

of substantial public interest where, for probate and tax purposes, under both state and federal law, a transfer to an estate is treated differently than a transfer directly to the heirs and distributees of the estate?

2. Pursuant to RAP 13.4(b)(4), does the Court of Appeals' ruling that a conflict of interest exists and a guardian ad litem must represent the interests of the unascertained expectant appointees of Mr. Graham present an issue of substantial public interest where, by making Mr. Graham's general power of appointment subject to the consent an adverse party (the GAL), the Court has (a) converted Mr. Graham's general power of appointment into a non-general power, and (b) effectively invalidated all general powers of appointment in Washington?

3. Pursuant to RAP 13.4 (b)(2), does the Court of Appeals' ruling that the expectant appointees currently possess a cognizable property interest in the Trust corpus conflict with the prior Court of Appeals' holding that "no rights accrue under a will until the death of the deceased"? *In re Buhakka's Estate*, 4 Wn. App. 601, 603, 484 P.2d 463 (1971).

4. Pursuant to RAP 13.4(b)(1), does the Court of Appeals ruling that the expectant heirs of the Estate of Mr. Graham currently possess a cognizable property interest in the Trust corpus conflict with this Court's prior ruling that "[a]n heir's interest in his ancestor's estate does not vest until that ancestor's death….[and] [p]rior to that event there is no 'heir'

because no one can be the heir of a living person"? *In re Estate of Wiltermood*, 78 Wn.2d 238, 240, 472 P.2d 536 (1970).

5. Pursuant to RAP 13.4(b)(4), does the Court of Appeals ruling that a GAL must represent the expectant appointees' purported interest in the Trust corpus present an issue of substantial public interest because the GAL now faces the unworkable task of representing a limitless, undefined class of remaindermen that includes every person in the world but, presumably, excluding the estate of Mr. Graham?[3]

6. Pursuant to RAP 13.4(b)(5), does the Court of Appeals arbitrary award of attorneys' fees present an issue of substantial public interest where the Court awarded fees against Mr. Graham for seeking a declaration of rights, on an admittedly unanswered issue, with no finding of fault, and awarded fees in favor of the Trustee who breached the duties of loyalty and impartiality it owes to Mr. Graham by litigating against Mr. Graham and in favor of the purported unascertained remainder interest, which is already represented by a GAL?

[3] Absent a finding that Mr. Graham is incompetent, due process prevents the GAL from interfering with Mr. Graham's right to represent and bind his own estate. The due process basis for State interference with the property rights of Mr. Graham in this private, non-public matter requires a finding that Mr. Graham is incompetent by clear, cogent, and convincing evidence in a guardianship proceeding. RCW 11.88.045(3).

V. ARGUMENT

A. The Court of Appeals Ignored the Plain Language of the Will and Conflated the Estate of Mr. Graham With the Expectant Heirs and Distributees That May Take From the Estate of Mr. Graham.

It is the paramount duty of the court to give effect to the testator's intent when construing a will. *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985). "Such intention must, if possible, be ascertained from the language of the will itself…." *Id*. Courts must construe the language of a will according to the legal effect of the words used. *In re Estate of Riemcke*, 80 Wn.2d 722, 729, 497 P.2d 1319. Only when an uncertainty arises in reading a will may extrinsic facts or circumstances be admitted to explain the language of the will. *In re Estate of Bergau*, 103 Wn.2d at 436.

Here, Felicia Graham's Will is clear that when Mr. Graham dies, any Trust property that Mr. Graham does not appoint away from his estate pursuant to his testamentary general power of appointment "***shall be distributed****…****to his estate***." (Emphasis added). Ignoring the language of the Will and the intent of the testatrix, the Court of Appeals concluded that RCW 11.96A.120(7) "shows that the unascertained remaindermen have a cognizable and separate interest in the trust property…[and] that a conflict of interest arises between a beneficiary, like Frederick, and unascertained

remaindermen, that prevents the living person from virtually representing the unascertained remaindermen."[4]

However, RCW 11.96A.120(7) only applies where "an interest that has been given to a living person…is to pass to…the heirs…or the distibutees of the estate of that living person…." By its plain language, RCW 11.96A.120(7) is inapplicable here because, in default of Mr. Graham's power of appointment, Mr. Graham's interest in the trust passes to his estate. It does not pass to his heirs or distributees, as contemplated by RCW 11.96A.120(7).[5]

In applying RCW 11.96A.120(7) to this action, the Court of Appeals skipped a step in the transfer of title of the Trust corpus and conflates the estate (which has its own obligations) with the takers from the estate. This is the crux of the problem created by the opinion of the Court of Appeals: On the death of Mr. Graham, who gets the Trust corpus that is not disposed of pursuant to Mr. Graham's power of appointment? The Will

[4] App. A, at pp. 7-8.

[5] At first glance, RCW 11.96A.120(7) could be interpreted to control the right of virtual representation where a life beneficiary possesses a testamentary general power of appointment, as the life beneficiary could exercise the power of appointment in favor of his/her heirs and/or distributees. However, viewing 11.96A.120 as a whole, it is clear that RCW 11.96A.120(7) is not applicable in this situation because 11.96A.120(9), discussed *infra* pp. 11-12, expressly controls when the holder of a power of appointment can "virtually represent and bind persons who are permissible appointees or takers in default…." In applying RCW 11.96A.120(7) to this action, the Court of Appeals both applied the wrong TEDRA provision on virtual representation and conflated the estate of a decedent with the heirs and distributees of the decedent's estate.

unequivocally states that any Trust property that is not disposed of pursuant to Mr. Graham's power of appointment passes to his estate, that is, to the personal representative of the estate. The Court of Appeals, on the other hand, ruled that the Trust corpus skips the estate and passes directly to the heirs and distributees of the estate.

When a will or trust document provides that the trust corpus passes to the beneficiary's estate at death, the trustee has a legal obligation, on the death of the beneficiary, to transfer the trust corpus to the personal representative of the beneficiary's estate. Likewise, the personal representative of the estate of the decedent has a legal obligation to take control of the trust corpus to satisfy creditors' claims against the estate, pay the estate tax, and then distribute what is left pursuant to the decedent's public or private will. The Court of Appeals ruling all but guarantees substantial future litigation between trustees and personal representatives because, according to the Court of Appeals, both have a right to possess trust property that is to pass to the "estate" of a decedent.

i. <u>Tax and Estate Planning Implications Flowing From the Court of Appeals' Ruling That "Estate" Also Means "Heirs and Devisees of the Estate"</u>.

In addition to changing the intent of the testatrix and plain meaning of the words in her Will, the Court's ruling directly contradicts both federal and state tax law, which clearly differentiate between a transfer to the estate

of a decedent, and a transfer directly to the heirs and distributees of the decedent.

With respect to state law, a transfer directly to heirs and devisees avoids probate administration (Title 11 RCW), and estate taxation (ch. 83.100 RCW). In contrast, a transfer to the estate of the decedent does not. Restatement (Third) of Prop.: Wills and Other Donative Transfers § 1.1, and Illus. 15 (1999); RCW 83.100.010 and .020.

With respect to federal law,[6] § 2503(c)(2) provides an exemption to the tax applied to gifts in trust to minors where the trust property will "(A) pass to the donee on his attaining the age of 21 years, and (B) in the event the donee dies before attaining the age of 21 years, be payable ***to the estate of the donee*** or as he may appoint under a general power of appointment as defined in section 2514(c)." 26 U.S.C. § 2503(c)(2) (emphasis added).

The exemption does not apply if, in default of the power of appointment, the trust property passes to the decedent's "heirs as law" instead of the decedent's estate. *Ross v. Comm'r of Internal Revenue*, 71 T.C. 897, 900 (1979). This is because "***'estate' and 'heirs at law' are not equivalent concepts***." *Ross v. C. I. R.*, 652 F.2d 1365, 1368 (9th Cir. 1981)

[6] Also significant, but omitted due to page constraints of this Petition, is the impact of the Court of Appeals' decision in the application of IRC § 2033 (stating "[t]he value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death"), and §§ 2601 (imposing tax on generation-skipping transfers) et seq.

(emphasis added). "Property passing through an estate would be subject to federal estate taxes…However, property which passes to heirs at law is deemed transferred directly from the settlor to the donee's heirs at law and therefore not subject to taxation in the donee's estate." *Ross*, 652 F.2d at 1368 (citing 26 U.S.C. §§ 2033, 2041).

Here, the Court of Appeals contrary ruling that the estate of a Washington decedent and his heirs/distributees are one and the same renders it unclear how the gift tax exemption for transfers for minors in trust will be applied to Washington residents going forward, as the exemption only applies if, in default of the decedent's power of appointment, the trust corpus passes to the decedent's estate where it is subject to the estate tax.

The Court's ruling also creates problems for the marital deduction provided by 26 U.S.C. § 2056, which allows a deduction from the adjusted gross estate of a first-dying spouse for property that passes to the surviving spouse. "The purpose, however, is only to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. ***Thus the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate***." *United States v. Stapf,*

375 U.S. 118, 128–29, 84 S. Ct. 248, 255–56, 11 L. Ed. 2d 195 (1963) (emphasis added).

"The nature, extent, and character of the surviving spouse's interest in property must be determined by state law." *Estate of Heim v. C.I.R.*, 914 F.2d 1322, 1327 (9th Cir. 1990). If, under Washington law, the term "estate" encompasses the heirs and distributees of the estate, as held by the Court of Appeals, marital trusts that require the trust corpus to pass to the surviving spouse's "estate" on his or her death would nonetheless be ineffective because the trust corpus would, presumably, still be able to pass directly to the surviving spouse's heirs and distributees, avoiding the surviving spouse's gross estate.

In addition to ignoring the plain language of the Will and the intent of the testatrix, the Court of Appeals' erroneous ruling that the term "estate" includes the heirs and distributees of the estate will have far-reaching consequences in the tax and estate planning context, which presents an issue of substantial public interest that must be addressed by this Court.

B. The Court of Appeals Ruling Impairs Mr. Graham's General Power of Appointment and Effectively Invalidates All Testamentary General Powers of Appointment in Washington.

The Court of Appeals' erroneously determined that a life beneficiary with a testamentary general power of appointment has an inherent conflict of interest with the expectant appointees, which requires appointment of a

GAL. This ruling effectively converts Mr. Graham's power of appointment and, by extension, all general powers of appointment in Washington, into a non-general power because it gives the GAL, acting on behalf of the expectant appointees, a right to participate in any decision concerning the disposition of the Trust corpus.

Section 205 of the Uniform Powers of Appointment Act[7] explains why a GAL's representation of unknown and unascertained appointees of a testamentary general power of appointment effectively renders the power non-general. Section 205(b) provides "[i]f a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral."[8][9] *Accord* Restatement (Third) of Prop.: Wills and Other Donative Transfers §17.3, com. e. (2011) ("[i]f the power can only be exercised with the joinder of an adverse party, however, the power is not a general power.").

RCW 11.96A.120(9) allows the holder of a testamentary power of appointment, such as Mr. Graham, to "virtually represent and bind permissible appointees or takers in default…under the power" so long as

[7] The Uniform Powers of Appointment Act has not been adopted in Washington, but is included herein for its instructive explanation of non-general powers of appointment.
[8] Section 205 of the Uniform Power of Appointment Act is attached hereto as App. C. The comments to this section explain that "[a]n adverse party is an individual who has a substantial beneficial interest in the trust..that would be adversely affected by the exercise or nonexercise of the power in favor of the powerholder, the powerholder's estate, or the creditors of either."
[9] *Id.*

there is not a conflict of interest. A conflict is only present under RCW 11.96A.120 if the representative and party to be represented have "significantly different economic interests in the matter in issue[.]" Comments to S.B. 5196, § 305 (Ch. 42, Laws of 1999).[10]

Thus, the Court of Appeals ruling that a GAL must represent the expectant appointees' interest effectively requires the consent of an adverse party (the GAL) to Mr. Graham's exercise of his testamentary general power of appointment. This converts the unrestricted testamentary general power of appointment granted to Mr. Graham in the Will of Felicia Graham into a non-general power. As a published decision, the ruling that a GAL must represent and protect the expectant appointees' undefined interest against the holder of the general power of appointment effectively destroys general powers of appointment in Washington

Converting general powers of appointment into non-general powers in Washington will also have significant unintended tax consequences. Property subject to a general power appointment is included in the gross estate of the holder of the power, while property subject to a non-general power is not. 26 CFR §§ 20.2041-3(a)(1); (c)(2).

[10] Comments to S.B. 5196, § 305 (Ch. 42, Laws of 1999) is attached hereto as App. B.

In short, the Court of Appeals erroneous ruling impacts more than just the parties to this action. It effectively destroys general powers of appointment in Washington and will impede trust property subject to a purported general power of appointment from entering the power holder's taxable estate on his death.

C. The Future Heirs and Expectant Appointees of Mr. Graham Hold Mere Expectancy Interests That Cannot be Represented by a GAL.

The Court of Appeals ruling that "the unascertained remaindermen do have a legally recognized interest, and a special representative may separately represent them"[11] ignores decades of decisional law from the Washington Supreme Court and Court of Appeals, which holds that expectant heirs and appointees hold mere expectancy interests, which are incapable of representation by a GAL.

"The holder of a testamentary power may exercise the power only by the powerholder's last will[.]" RCW 11.95.060(2). A will only takes effect upon the death of the testator. *In re Hall's Estate*, 159 Wash. 236, 241, 292 P. 401 (1930). Accordingly, "[e]xpectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person." *Irving Tr. Co. v. Day*, 314 U.S. 556, 562, 62 S. Ct. 398, 401, 86 L. Ed. 452 (1942). The Washington Court

[11] App. A, at p. 8.

of Appeals reiterated this rule in *In re Buhakka's Estate*, 4 Wn. App. 601, 603, 484 P.2d 463 (1971), holding that "no rights accrue under a will until the death of the deceased." Here, the Court of Appeals' ruling that the expectant appointees currently possess a cognizable property interest in the Trust corpus cannot be reconciled with this long-standing precedent.

Such expectations or hopes of succession are not legally recognized interests. *See Matter of Estate of Baird*, 131 Wn.2d 514, 933 P.2d 1031 (1997). Rather, "the prospective appointee has a mere expectancy, like that of an heir apparent or presumptive…until the appointment is made, the prospective appointee has nothing which can be properly called an interest." Simes and Smith the Law of Future Interests § 58 (2d ed. 1966).

In holding that the expectant appointees' hope of one day receiving property is a present interest in the property subject to appointment, the Court of Appeals effectively held that "all persons in the world, since they are objects of an unexercised general power, would have an interest in all property subject to such general powers." Simes and Smith the Law of Future Interests § 423 (3d ed. 2002). Thus, the GAL is now tasked with representing, and may be liable to, a limitless and undefined class that includes every person on the planet, born or unborn.

For obvious reasons, this is not the law and a GAL is not required to represent this undefined expectancy interest. "[A] potential appointee has

no [vested] interest in the property, and is therefore not a necessary party prior to the time the power is exercised. ***Thus, the need for representation does not exist***." Simes and Smith the Law of Future Interests § 1812 (3d ed. 2002) (emphasis added).[12]

Mr. Graham's future heirs who may one day be entitled to a share of his estate under the laws of intestate succession also presently possess nothing more than a mere expectancy interest that is incapable of being represented under RCW 11.96A.120. It is well-settled black letter law that a potential heir does not have any interest in another person's estate until that person's death.[13] This rule is reflected in *In re Estate of Wiltermood*, 78 Wn.2d 238, 240, 472 P.2d 536 (1970), where the Washington Supreme Court found that the capacity to become an heir is a mere expectancy because "[a]n heir's interest in his ancestor's estate does not vest until that ancestor's death. Prior to that event there is no 'heir' because no one can

[12] *See also McFall v. Kirkpatrick*, 236 Ill. 281, 86 N.E. 139 (1908) (holding potential appointee of holder of general power of appointment was not a necessary party to a proceeding to determine the validity of the instrument creating the power of appointment); *Shamel v. Shamel*, 3 Ill. 2d 425, 434, 121 N.E.2d 819 (1954) (holding "the possible appointees under the power of appointment contained in the trust instrument…had no contingent future interest or title in the trust estate[.]"); *Brown v. Fid. Union Tr. Co*., 126 N.J. Eq. 406, 442, 9 A.2d 311, 330 (N.J. Ch. 1939) (citing rule that "possible appointees have no title or interest in the corpus of the trust" and holding that appointees lacked standing to sue trustee for acts performed prior to appointment).

[13] *See e.g.*, Restatement (Third) of Trusts, § 41 (2003) com. a ("A person who expects to receive property in the future by the will of a living person or by intestate succession has no presently existing interest…such an expectancy is not a contingent future interest but a mere hope or expectation, however well founded or likely to materialize").

be the heir of a living person." *See also* RCW 11.04.250 (providing an heir's legal interest vests only upon the death of decedent).

Moreover, Mr. Graham's future heirs possess an expectancy interest in the estate of Mr. Graham, not the Trust, as the Will provides that any Trust property that is not disposed of pursuant to Mr. Graham's testamentary power of appointment passes to his estate. Thus, Mr. Graham's heirs who may one day take from his estate pursuant to the laws of intestate succession do not even possess an expectancy interest in the Trust property.

Further, under RCW 11.96A.120, a "conflict" requires "significantly different economic interests in the matter in issue[.]" Comments to S.B. 5196, § 305 (Ch. 42, Laws of 1999). Mr. Graham cannot have a conflict with his own estate because it is not a distinct legal entity and does not possess any economic interests apart from those held by Mr. Graham. Rather, it is simply "the property belonging to [Mr. Graham on his death]…and which is being administered in the courts." *Hansen v. Stanton*, 177 Wash. 257, 260 (1934).

This Court should accept review to correct the Court of Appeals ruling that overrules, *sub silentio*, decades of well-settled Washington law.

D. The Court of Appeals Arbitrarily Awarded Attorneys' Fees Against Mr. Graham for Seeking a Declaration of Rights on An Admittedly Undecided Issue.

RCW 11.96A.150 gives appellate courts discretion to award costs on appeal to any party, from any party to the proceedings, and/or from the assets of the estate or trust involved in the proceedings. Generally, where all beneficiaries are before the court on the issue of their respective rights in a fund, an award of all fees from the fund is appropriate. *In re Estate of Black*, 116 Wn. App. 476, 491, 66 P.3d 670 (2003).

Despite acknowledging that Mr. Graham sought a declaration of rights on a novel issue,[14] and without identifying any wrongdoing by Mr. Graham,[15] the Court of Appeals awarded the Trustee attorneys' fees and costs to be paid by Mr. Graham and ignored Mr. Graham's request for his own fees and costs.

The Trustee should not have been awarded fees because its conduct in this action plainly breached the duties of loyalty and impartiality it owes to Mr. Graham, as "trustees acting in their representative capacities cannot…litigate the conflicting claims of beneficiaries." *In re Estate of Bernard*, 182 Wn. App. 692, 729, 332 P.3d 480 (2014).[16] The duty of

[14] App. D (Excerpt from Transcript of Court of Appeals' Hearing), at 19:16-20 (emphasis added).
[15] *See In re Guardianship of McKean*, 136 Wn. App. 906, 920, 151 P.3d 223 (2007) ("equity requires some finding of fault that in fairness requires a party to pay.").
[16] *See also* RCW 11.98.078(8).

impartiality is breached the moment a trustee advocates for the interests of one beneficiary over another in litigation regardless of the outcome of the litigation is irrelevant.[17] Here, there was a GAL but the Trustee substituted itself into the role of that GAL against and contrary to the interests of Mr. Graham.

It is inequitable to award fees against Frederick Graham and in favor of the party committing breaches of trust against him that he is trying to overcome in establishing the nature and extent of his own interest in the Trust corpus. *See Bernard*, 182 Wn. App. at 729. This Court should grant review and reverse the Court of Appeals' fee award to clarify that RAP 18.1(a) and RCW 11.96A.150 cannot be utilized to arbitrarily penalize TEDRA petitioners who invoke their statutory right to seek a declaration of rights under RCW 11.96A.080.

VI. CONCLUSION

For the foregoing reasons, the Petition for Review should be granted.

[17] *See, e.g., N. Tr. Co. v. Heuer*, 202 Ill. App. 3d 1066, 1070-71, 560 N.E.2d 961, 963 (Ill. App. Ct. 1990) (trustee's litigation against one beneficiary in favor of another was a breach of its duty of impartiality, even though trustee prevailed on its argument at trial court).

RESPECTFULLY SUBMITTED this 13th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 13th day of March, 2020, I caused a true and correct copy of the forgoing document, **PETITIONER FREDERICK A. GRAHAM'S Corrected Petition for Review** to be served via Appellate Court Web Portal to:

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Dated this 13th day of March, 2020, at Seattle, Washington.

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APPENDIX A

FILED
12/30/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the MARITAL TRUST B CREATED UNDER THE LAST WILL AND TESTAMENT OF FELECIA A. GRAHAM DATED OCTOBER 26, 1998, F/B/O FREDERICK A. GRAHAM. FREDERICK A. GRAHAM, Appellant, v. BANK OF AMERICA, N.A., Respondent.	No. 79261-0-I DIVISION ONE PUBLISHED OPINION FILED: December 30, 2019

LEACH, J. — Frederick A. Graham appeals a trial court order denying his request for a declaration of his rights in a trust created by Felecia Graham's will. This trust creates a life interest in Frederick. On his death, the trust distributes its net assets as Frederick appoints or provides in his will. If he does neither, the assets are distributed to his estate. Frederick asked the court to declare that he owns the remainder interest in the trust assets and can bind that interest without

it being separately represented. We disagree, affirm, and award the trustee attorney fees and costs against Frederick.

FACTS

Felecia Graham died in 2001. In her will, she established a trust benefitting her husband, Donald Graham Jr., for his life and giving a remainder interest to her two sons, Frederick Graham and Donald Graham III. In 2012, these three individuals signed a binding agreement[1] that ended Donald Jr.'s lifetime interest in the trust and divided it into two subtrusts, one for the benefit of each son. This appeal concerns the subtrust (hereinafter "the trust") for Frederick Graham.

The trust directs the trustee to pay the trust income to Frederick annually for the rest of his life. It also permits the trustee to make distributions from the principal in 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 . . . , the Trustee may distribute or expend for the benefit of such beneficiary such portion of the principal of [the trust] as the Trustee shall deem necessary for such purpose under the circumstances.

[1] See RCW 11.96A.220.

The trust provides that when Frederick dies, his "share of the net assets of the trust estate shall be distributed as he shall appoint or provide by his will or, in the absence of such appointment or provision, to his estate."

After Bank of America N.A. (the Bank) became the trustee, Frederick disagreed with the amount that the Bank distributed to him annually. He received an initial increase but asked the Bank for more.

Frederick did not agree with the new amount that the bank suggested. The parties' efforts to negotiate an agreement under the Trust and Estate Dispute Resolution Act[2] (TEDRA) failed. The Bank then asked the trial court for guidance.

The trial court affirmed the Bank's actions and agreed with it that there is "a separate remainder interest" in the trust. Frederick appealed this decision. He asked this court to determine as a matter of law that no separate remainder interest exists. We affirmed but did not decide the issue of whether the trust includes "a separate remainder interest" held by "unascertained remaindermen." We reasoned that the determination of a separate remainder interest was not necessary to the trial court's summary judgment decision.[3]

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[2] Ch. 11.96A RCW.

[3] In re Marital Tr. B, No. 74201-9-I, slip op. at 9 (Wash. Ct. App. Nov. 28, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/742019.pdf, review denied, 188 Wn.2d 1004 (2017).

Frederick then filed a second lawsuit, requesting a declaration of his rights over the remainder interest in the trust. The trial court denied Frederick's request, concluding, "A separate remainder interest exists in the Trust, as held by Judge Ramseyer. Mr. Graham may not virtually represent that interest in TEDRA litigation or Non Judicial Binding Agreement, which could negatively impact the remainder interest."

Frederick appeals the trial court's order.

STANDARD OF REVIEW

An appellate court generally reviews de novo decisions based on declarations, affidavits, and written documents.[4] So we review the trial court's decision to deny Frederick's request for a declaration of rights de novo. When we conduct a de novo review, we substitute our judgment for that of the trial court.[5]

ANALYSIS

Frederick contends that he is the only party with a present and future interest in the trust property and any interest in his future estate is incapable of being represented under RCW 11.96A.120. Frederick claims that he effectively

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[4] In re Estate of Bowers, 132 Wn. App. 334, 339, 131 P.3d 916 (2006).

[5] Skamania County v. Columbia River Gorge Comm'n, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

owns the property held by the trust because he controls the distribution of the remainder, either as he directs or as part of his intestate estate.

"[T]he paramount duty of a court in construing and interpreting the language of a will is to determine and implement the intent of the testator or testatrix."[6] We determine the testatrix's intent based on the provisions of the will itself.[7] We consider the entire will and give effect to every part.[8]

Felecia's will notably states that "the income of [the trust] shall be . . . paid quarterly, monthly or at such convenient intervals . . . as the Trustee [deems]." It also gives the trustee the "same authority with respect to the distribution of principal to the beneficiary." This portion of the will gave Frederick a life interest.[9] The will further states that upon Frederick's death, his share of the net assets of the trust estate "shall be distributed as he shall appoint or provide by his will or, in the absence of such appointment or provision, to his estate."

A testatrix's gift of a life interest in property to a beneficiary and the remainder to that beneficiary's estate or appointees creates a separate future

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[6] In re Estate of Newbert, 16 Wn. App. 327, 330, 555 P.2d 1189 (1976) (citing RCW 11.12.230; In re Estate of Griffen, 86 Wn.2d 223, 543 P.2d 245 (1975)).

[7] In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985).

[8] In re Estate of Price, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994).

[9] Kjosness v. Lende, 63 Wn.2d 803, 813, 389 P.2d 280 (1964).

interest for the unascertained remaindermen.[10] When this occurs, legal title to the remainder never vests in the beneficiary.[11]

Frederick claims that he effectively owns the trust property because any remainder is to be distributed as he directs in his will. We disagree. Frederick fails to appreciate the difference between a living person's and a dead person's estate. While Frederick can decide who receives the remainder interest, he does not own the trust property because legal title to it will never vest in him.[12] Frederick's TEDRA petition illustrates the flaw in his analysis. There, he alleges, "The future interest in the Marital Estate is vested in Mr. Graham because the Will gives that future interest to him at his death." But once Frederick dies, nothing can vest in him. Frederick cites no authority supporting the faulty concept implicit in his position—that a dead person can acquire property. And the trust does not give the future interest to him while alive. It allows him, while alive, only to identify other persons to receive it.

And Frederick's position would effectively give him the power to revoke the trustee's discretion over the trust property during Frederick's life, contrary to

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[10] Bruce P. Flynn et al., Nonjudicial Dispute Resolution Agreements in Trusts and Estates—The Washington Experience and a Proposed Act, 20 ACTEC NOTES 138, 140 (1994).

[11] State ex rel. Beardsley v. London & Lancashire Indem. Co., 124 Conn. 416, 423, 200 A. 567 (1938) (holding where the testator gave the beneficiary a life interest with remainder to that beneficiary's appointees, legal title to trust property never vested in the life beneficiary).

[12] Beardsley, 124 Conn. at 423.

Felecia's intent as reflected by the provisions of her will. His position also conflicts with his agreement that he has no authority to terminate the trust. Felecia's will makes clear that she did not intend for Frederick to have an interest in the remainder or own the trust property. Her will directs the trustee to distribute income to Frederick for his lifetime. Only if this income, together with other income and resources available to Frederick, is "insufficient to provide for the proper support in his . . . accustomed manner of living" can the trustee distribute principal to Frederick.

Frederick also asserts that even if unascertained remaindermen have an interest in the trust property, under RCW 11.96A.120, the appointees Frederick may designate do not have a cognizable interest in the trust property that is capable of being represented. However, RCW 11.96A.120 does not indicate this. RCW 11.96A.120 specifically states,

> Where an interest has been given to a living person, and the same interest, or a share in it, is to pass to . . . distributees of the estate of that living person . . . , that living person may virtually represent . . . the distributees of the estate . . . , but only to the extent that there is no conflict of interest between the representative and the person(s) represented with regard to the particular question or dispute.[13]

This language shows that the unascertained remaindermen have a cognizable and separate interest in the trust property. It also states that a conflict

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[13] RCW 11.96A.120(7).

of interest arises between a beneficiary, like Frederick, and unascertained remaindermen, that prevents the living person from virtually representing the unascertained remaindermen. For instance,

> An example could involve an issue relating to principal distributions to a life beneficiary. If the life beneficiary does not have a vested interest in the entire trust corpus (e.g., the right to receive an outright distribution of the entire trust corpus at a designated age), his or her interests conflict with those of his or her successors—the remainder beneficiaries of the trust.[14]

Because Frederick does not have a vested interest in the entire trust property, a conflict of interest arises between Frederick and the unascertained remaindermen if Frederick attempts to exhaust the trust's funds. Frederick cannot represent this interest. Also, "the interest of the unborn, incompetent, or unknown beneficiaries may still be represented by a 'special representative' in a nonjudicial procedure," such as a guardian ad litem.[15]

So, contrary to Frederick's claim, the unascertained remaindermen do have a legally recognized interest, and a special representative may separately represent such interest.

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[14] Flynn et al., 20 ACTEC NOTES at 141.
[15] Flynn et al., 20 ACTEC NOTES at 141.

Attorney Fees

The Bank asks that this court award it fees and costs incurred both at the superior court level and on appeal as authorized by RCW 11.96A.150 and RAP 18.1(a). RCW 11.96A.150 states,

> [A]ny 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. 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.[16]

This lawsuit does not benefit Felecia's estate or the trust, and Frederick does not prevail. So we award attorney fees to the Bank as requested.

CONCLUSION

We affirm. Because Felecia gave Frederick only a life interest and specifically gave any remainder to whomever Frederick appoints or as provided in his will, a separate remainder interest exists. And a special representative

[16] RCW 11.96A.150(1).

may represent that separate remainder interest. We award the Bank attorney fees and costs to be paid by Frederick.

Leach, J.

WE CONCUR:

Schindler, J.

Cox, C.J.

APPENDIX B

COMMENTS TO SB 5196
(Ch. 42, Laws of 1999)

COMMENTS TO THE TRUST AND ESTATE DISPUTE RESOLUTION ACT

January 28, 1999

TEDRA § 103 (RCW 11.96A.020) - Powers of the Court.

This was formerly part of RCW 11.96.020 and is intended to have full effect with respect to all procedures provided under this Title. Under this provision, it is intended that the court have all necessary and sufficient powers to cause the administration and final settlement of matters involving the estates, trusts, and nonprobate assets, so that the court can dispose of such matters expeditiously and efficiently.

TEDRA § 104(1) (RCW 11.96A.030) - Matter.

The term "matter" establishes the issues, questions and disputes involving trusts and estates that can be resolved by judicial or nonjudicial action under the Act. This term is meant to apply broadly and is intended to encompass matters traditionally within the exclusive province of the courts. This is consistent with the overall purpose of the Act, which is to foster nonjudicial resolution of issues confronting estates and trusts. Subsections (d) and (e) have been changed from the prior provisions of RCW 11.96.070 by removing the requirement that there be a determination that the requested action not be inconsistent with the purposes of the will or trust. By making this change Washington formally accepts recent practice and adopts a rule that allows all interested parties to agree to the resolution of an issue or modification of the applicable document.

TEDRA § 104(4) (RCW 11.96A.030) - Parties.

The definition of “parties” is intended to mean and clarify that only those persons having an actual interest in the subject matter of the dispute are required to be participants in the resolution of the dispute. Persons defined in TEDRA § 104(4) (RCW 11.96A.030) are <u>not</u> necessary parties to the resolution of a dispute unless they have an actual interest in the subject matter of the dispute. Any party may be represented by a virtual representative.

The amendments to this section are also intended to clarify that the grantor of a trust or the owner (as defined in RCW 11.18.040) of a nonprobate asset are necessary parties only if they are living at the time of the judicial or nonjudicial proceeding under this section and if they have an interest in the subject matter of the dispute. All other parties with an interest in the dispute (or their special representative, guardian ad litem, or virtual representative under TEDRA § 305 (RCW 11.96A.120)) must participate in the resolution of the dispute.

Thus this term establishes which of the "persons interested in the estate or trust" must participate in a nonjudicial dispute resolution agreement under TEDRA § 402 (RCW 11.96A.220). A

person who is interested in the estate, trust or nonprobate asset, but whose interest is not affected by the matter in issue, is not a required party to the agreement.

TEDRA § 104(8) (RCW 11.96A.030) - Situs.

Former RCW 11.96.040 has been incorporated into the general definitional provisions. Language was changed to improve the readability, but the intent remains the same.

TEDRA § 201 (RCW 11.96A.040) - Original jurisdiction in probate and trust matters - Powers of court.

This section was previously found at RCW 11.96.001. It clarifies that the superior court has original subject-matter jurisdiction over all matters relating to trusts and estates, regardless of the amount in controversy. (*See also* RCW 2.08.010-.020: The superior courts are courts of general subject-matter jurisdiction and have original, as compared to appellate, jurisdiction over most but not all matters.) TEDRA § 201 (RCW 11.96A.040) deals with subject-matter jurisdiction and is not intended to address any issues relating to personal jurisdiction (e.g. the sufficiency of a party's contacts with the State of Washington and the effects of *Shaffer v. Heitner*, 433 U.S. 186 (1977) and its progeny).

The term "probate" is used at various places in title 11 RCW to refer only to the procedures for proving a particular will, while it is also used at other places in title 11 RCW to refer to the larger process of administering and settling estates. Using "estates" together with the references to the estates of "incapacitated, missing or deceased persons" clarifies that the superior court has original subject-matter jurisdiction over all matters arising in connection with or under title 11 RCW (including without limitation all matters that relate to the administration and settlement of nonprobate assets that arise under RCW 11.18 or 11.42).

TEDRA § 202 (RCW 11.96A.050) - Venue.

TEDRA § 202 (RCW 11.96A.050) confirms the intent of the statutory amendments under the Trust Act of 1985 that venue is not jurisdictional. TEDRA § 202 (RCW 11.96A.050) specifies clear rules for determining the situs of a hearing or proceeding if a party does object to the venue where a matter is pending. If venue is moved for any reason, the statute confirms the validity of actions taken by the court before the move.

TEDRA § 203 (RCW 11.96A.060) - Exercise of powers - Orders, writs, process, etc..

This section was previously found at RCW 11.96.030. While the order of certain phrases in the statute has been changed from RCW 11.96.030, the purposes remain the same.

TEDRA § 204 (RCW 11.96A.070) - Statutes of limitation.

RCW 11.96.060 (the current law establishing statutes of limitation relating to trusts and estates) does not provide a statute of limitations for actions involving express trusts created before

January 1, 1959. The new statute will apply to those trusts three years after the effective date of the statute.

TEDRA § 204(3)(a) (RCW 11.96A.070) revises the statute of limitations for claims against special representatives acting on behalf of minor or after-born children under a nonjudicial dispute resolution agreement. An action by a represented party must be brought against the special representative before the earlier of (i) three years after the discharge of the special representative as provided in section 404 or (ii) the entry of an order approving the nonjudicial dispute resolution agreement under sections 402 and 403. TEDRA § 204(3)(b) (RCW 11.96A.070) provides indemnification protection in the event an action is brought against the special representative after the statute of limitations has run.

The time for bringing any action concerning either the agreement or the acts of a special representative shall not be subject to or extended by any other statute of limitations provision. No case law or statute extending any otherwise applicable statute of limitation shall apply to the agreement or to any action against a special representative for alleged breach of fiduciary duty.

The purpose of this section is twofold: first, to provide a specific period of limitations for actions against a special representative for alleged breach of fiduciary duty, and second, to preclude the application of any other statute of limitations provision, including any tolling provision that would otherwise hold open the period of limitations. This in turn will provide for an expeditious and complete resolution of matters involving trusts and estates, fulfilling the public policy of providing finality in those proceedings.

The statute provides safeguards against malfeasance by a special representative by (i) requiring that the special representative be a lawyer licensed to practice before the courts of this state or an individual with special skill or training in the administration of estates or trusts, (ii) requiring that the special representative not have any financial or familial interest in the estate, (iii) giving responsibilities for the appointment of the special representative to the duly appointed fiduciaries of the trust or estate involved, and (iv) requiring that the court make the actual appointment.

TEDRA § 301 (RCW 11.96A.080) - Persons entitled to judicial proceedings for declaration of rights or legal relations.

This section is substantially the same as current RCW 11.96.070 and identifies both those persons who have standing to seek a judicial determination and the subject-matter of such a proceeding.

This section allows judicial proceedings for disputes involving probate estates, trusts, and nonprobate assets.

Subsection (2) clarifies the relationship between various procedures established under title 11 RCW.

It is intended that any interested party may seek judicial review of all matters relating to trusts, estates and nonprobate assets under the special proceedings described in title 11 RCW, and not

just of those matters that have historically been within the limited jurisdiction of American probate courts or other similar courts of equity or limited jurisdiction. In other words, the amendments are intended to provide that all matters that fall within the scope of TEDRA § 301 (RCW 11.96A.080) are "special proceedings" for purposes of CR 81(a) and are therefore subject to the statutory rules of procedure provided in TEDRA.

TEDRA § 302 (RCW 11.96A.090) - Judicial proceedings.

Subsection (1) clarifies that any action controlled by the provisions of title 11 RCW is a "special proceeding" as contemplated by Civil Rule 81. Because of this, the procedural and administrative provisions of title 11 RCW are intended to control over any inconsistent provision of the civil rules.

Subsections (2) and (3) were previously part of RCW 11.96.130.

Subsection (4) is new. It is designed to clarify when the procedural rules of title 11 RCW govern and when the court rules will govern the procedures of an action involving trust, estate, or nonprobate asset.

General discussion regarding court rules and special proceedings.
In *Petrarca v. Halligan*, 83 Wn. 773, 776, 522 P.2d 827 (1974), the Supreme Court of the State of Washington confirmed the rule that "[w]here rule of court is inconsistent with the procedural statute, the power of this court to establish the procedural rules for the courts of this state is supreme." *See also* CR 81(b). However, CR 1 and CR 81(a) provide that the civil rules do not apply to special proceedings to the extent that the civil rules are inconsistent with rules or statutes applicable to the special proceedings. *See also Thompson v. Butler*, 4 Wn. App. 452, 453-54, 482 P.2d 791 (1971); *Snyder v. Cox*, 1 Wn. App. at p. 460-61. Rule 98.12W of the Special Proceedings Rules expressly pertains to probate matters and proceedings. TEDRA § 302 (RCW 11.96A.090) confirms that these are special proceedings. Thus a party commencing an action relating to a matter that is described in RCW 11.96.070 can elect to commence such action either as a "special proceeding" under chapter 11.96 RCW or as a regular civil action. A party can also move that the court consolidate the separate action with an existing special proceeding or vice versa.

The introductory phase of this statute is intended to re-affirm that a court has the flexibility to establish appropriate and reasonable procedures; to overrule *Estate of Stockman*, 59 Wn. App. 711, 800 P.2d 1141 (1990) to the extent that the decision mandates a single procedure for all circumstances; and to notify those reading this statute that the rules of court are supreme. *Petrarca v. Halligan*, 83 Wn. 773, 776, 522 P.2d 827 (1974) . "Rules of court" has been used in the plural, rather than the singular, to indicate that noncompliance with any single rule of court is acceptable so long as another, more general rule (such as CR 81[a]) provides a total exemption for special proceedings.

TEDRA § 303 (RCW 11.96A.100) - Procedural rules.

The method for commencing an action under chapter 11.96 RCW has frequently been ignored, probably in large part because the rules for commencing proceedings in probate are so different from the normal rules for commencing a civil action. Some of these differences were believed to be necessary to give the court the flexibility needed to promote expediency. Nevertheless, the statutes provide a middle ground by modernizing the procedures in probate and conforming them to the full extent possible without sacrificing all hopes for flexibility and expediency.

While the section refers to a petition, references to "citations" (a terms borrowed from courts of equity) have been deleted and those references are now to "summons." Furthermore, the form of a summons is provided, and the section also specifies certain default provisions so that the pleadings can be simplified. For example, witnesses may testify through affidavits, and no discovery is permitted unless a statute or court states otherwise.

General discussion on procedural rules for probate proceedings.
As part of the Trust Act of 1984/5 (and RCW 11.96.130), the legislature added a new statute which provides that "[a]ll issues of fact joined in probate or trust proceedings shall be tried in conformity with the requirements of the rules of practice in civil actions." Considerable confusion followed, the most significant manifestation of that confusion being *Estate of Stockman*, 59 Wn. App. 711, 800 P.2d 1141 (1990). In that case, the court suggested that the procedure outlined in chapter 11.96 RCW is that the initial hearing on the petition under RCW 11.96.080 is merely a show cause hearing in which, if the defendant is able to show "cause . . . , the issues of fact would be framed, and after pleadings were filed, the matter could then be noted and set for trial pursuant to [applicable local court rule]." *Id*. at p. 714, fn. 2.
The conclusion reached by the Court of Appeals in *Estate of Stockman* was not intended. The purpose of the reference to the civil rules in RCW 11.96.130 was to fill in the gaps in (and to provide a guide for) the flexible procedures traditionally followed in probate proceedings, in essentially the same manner as the court used the civil rules in *Snyder v. Cox*, 1 Wn. App. 457, 461, 462 P.2d 791 (1969). The purpose was not to eliminate the flexibility that a court previously had. The provisions of Part II of the statute are intended to overrule the decision in *Estate of Stockman* to the extent that the decision mandates multiple hearings. The statutes are intended to clarify that a court may resolve a matter promptly and efficiently at the initial hearing while also providing the court as much discretion and flexibility as possible to establish an appropriate procedure to be followed in any particular proceeding under chapter 11.96 RCW. The statutes also confirm that the court can establish other procedures in more complicated matters (such as a mechanism for requiring a formal answer where a matter is subject to mandatory arbitration or where the issues in dispute need to be identified and framed).

The statutes are not intended to alter or affect the holding in *In re Estate of Palucci*, 61 Wn. App. 412, 810 P.2d 970 (1991) that notice pleading does not require particular nomenclature for pleadings so long as the substance of the statutes and rules are satisfied.

TEDRA § 304 (RCW 11.96A.110) - Notice in judicial proceedings under title 11 RCW requiring notice.

This statute is modeled substantially on RCW 11.96.100. The definition of "party to the dispute" has been moved to the general definitional section for the new chapter.

TEDRA § 305 (RCW 11.96A.120) - Virtual representation - Notice constituting compliance with notice requirements of title 11 RCW.

This section was enacted originally as part of the Trust Act of 1984/5 to codify the Doctrine of Virtual Representation. This enactment is meant to be supplemental to the common law doctrine. This enactment is not intended to prevent the application of the common law doctrine.

This section and the Doctrine of Virtual Representation provide rules that simplify the requirements for notifying the possible beneficiaries of future interests, particularly unborn and uncertain beneficiaries. *See* Restatement of the Law of Property, sections 180-186 (1936).

The codification of this doctrine is intended to eliminate the expense associated with requiring the appointment of guardians ad litem or special representatives to represent the interests of minor, unborn, or unascertained beneficiaries under certain limited circumstances. A party may virtually represent his or her successors in interest or similar class members only if the virtual representative's interest in the estate or trust is not in conflict with the parties being virtually represented. For purposes of this provision, a "conflict" exists only if the party who would be the virtual representative has significantly different economic interests in the matter in issue from those of the parties being virtually represented. If the matter in issue is purely administrative in character (e.g., a change, addition, or replacement of Trustee), no conflict exists for purposes of this provision.

TEDRA § 306 (RCW 11.96A.130) - Special notice.

This statute was previously found at RCW 11.96.120.

TEDRA § 307 (RCW 11.96A.140) - Waiver of notice.

This statute was previously found at RCW 11.16.083.

TEDRA § 308 (RCW 11.96A.150) - Costs - Attorneys' fees.

This statute was previously found at RCW 11.96.140. Language was added to make clear that the application of this statute is not to be limited by any other specific statute that provides for the payment of costs. It is intended that a court may award costs in any matter subject to title 11 RCW if the court determines that such an award would be equitable.

TEDRA § 309 (RCW 11.96A.160) - Appointment of guardian ad litem.

This statute was previously found at RCW 11.96.180.

TEDRA § 310 (RCW 11.96A.170) - Trial by jury.

This statute was previously found in RCW 11.96.130.

TEDRA § 311 (RCW 11.96A.180) - Execution on judgments.

This statute was previously found in RCW 11.96.130.

TEDRA § 312 (RCW 11.96A.190) - Execution upon trust income or vested remainder - Permitted, when.

This statute was previously found at RCW 11.96.150.

TEDRA § 313 (RCW 11.96A.200) -Appellate review.

This statute was previously found at RCW 11.96.160.

TEDRA § 401 (RCW 11.96A.210) - Purpose. The purpose of part III is to permit interested parties to enter into a binding settlement of an issue, question or dispute involving a trust or estate. This innovation allows parties to settle estate and trust disputes out of court, just as parties can settle disputes involving contracts or torts out of court.

The traditional due process resolution of issues, questions or disputes involving future interests required judicial proceedings, and the judicial appointment of a guardian ad litem to represent the future interests. This part III [sic – refers to sections 401 to 405] allows a judicially appointed "special representative" to represent the future interests without further direct court supervision. This provides an alternative to the appointment of a guardian ad litem and formal court proceedings to bind future interests.

Under the statute, a "special representative" may be appointed by the court if the executor or trustee requests that one be named for any incompetent, unborn, unascertained or unknown beneficiary. The special representative once appointed has authority to enter into a binding agreement on behalf of those for whom he or she is appointed. The special representative must be either a lawyer or an individual having special skill or training in trust administration. In many cases a special representative may not be needed as the agreement can also be approved by an individual who represents others under the doctrine of virtual representation. TEDRA § 305 (RCW 11.96A.120) codifies that doctrine.

The agreement or a memorandum of its terms may be filed with the court if any interested party elects to do so. Once filed, the agreement will be equivalent to a final court order binding on all parties to the agreement.

At any time before the execution of the agreement any party can put the resolution of the matter back into the procedures set out in TEDRA. While the statute allows parties the flexibility of modern nonjudicial dispute resolution, it does not eliminate the option of judicial procedures.

TEDRA § 402 (RCW 11.96A.220) - Binding Agreement.

This is a re-enactment of RCW 11.96.170. This statute provides that a written agreement will be final and binding on all interested parties in furtherance of the policy of resolving disputes by agreement. When signed by all appropriate parties, or their representatives, the agreement is binding and conclusive on all persons interested in the estate or trust. There is no specific required form for an agreement.

TEDRA § 403 (RCW 11.96A.230) - Entry of Agreement with the Court.

The agreement or memorandum of its terms may be filed with the court if any interested party elects to do so. Filing the agreement or memorandum creates the same rights and obligations among the parties that a court order would create. The same result occurs immediately on filing the agreement or memorandum if all parties waive the notice provided in this section.

TEDRA § 404 (RCW 11.96A.240) – Judicial Approval of Agreement

The special representative has the right to present the agreement to the court for review and approval. If the agreement is approved by the court the special representative is granted protections similar to those provided to guardians ad litem under section 204(3)(a). If the agreement is not presented to the court, or if the court does not approve the agreement, actions may be brought against the special representative for a period of three years under section 204(3)(a).

TEDRA § 405 (RCW 11.96A.250) - Special Representative

This section provides a method for a "special representative" to be appointed to represent any "person interested in the estate or trust" who is a minor, incompetent, or disabled, or who is yet unborn or unascertained. This may include the representation of a trustor, if applicable. Once appointed, the special representative has authority to enter into the binding agreement contemplated by this statute on behalf of the parties he or she represents.

The special representative shall be either a lawyer or an individual with special skill or training in the administration of estates or trusts. This is to ensure proper representation by a party knowledgeable in trust and estate matters.

The trustee or executor may request that a specific individual having the required skills be appointed. The court appointment of this individual is the only time a judge is required to be involved. The court is involved to ensure that an impartial and qualified person will serve as special representative.

In lieu of appointing a special representative, it is possible to represent the interests of minor, incompetent, disabled or yet unborn or unascertained beneficiaries through the doctrine of virtual representation, which is codified in TEDRA § 305 (RCW 11.96A.120). If the elements needed to make that section applicable are present, a special representative would not be needed.

The special representative has no continuing duty of representation and is discharged on the execution of the agreement by all parties. If an agreement is not signed within six months of the special representative's appointment, this statute provides for an automatic discharge at that time to protect the special representative. If the agreement is not signed within the six month period, the special representative can be reappointed by the court at such time as the agreement is ready to be signed.

The statute of limitations provision applicable to special representatives has also been modified. The special representative can now be discharged by obtaining formal court approval of a nonjudicial dispute resolution agreement under new TEDRA § 404 (RCW 11.96A.240). If court approval is obtained, an action must be brought against the special representative before the date on which the court enters an order approving the agreement. The intent is to provide a discharge mechanism that is similar to the process applicable to guardians ad litem. It also tracks procedures that are applicable to personal representatives. If court approval is not obtained, an action may be brought within three years of the special representative's discharge (which normally occurs on execution of the agreement). See TEDRA §§ 204(3)(a) (RCW 11.96A.070) and 405(3) (RCW 11.96A.250).

TEDRA § 504 (RCW 11.96A.290) - Superior Court - Venue.

Prior to the commencement of a judicial proceeding, the superior court authorized by TEDRA § 201 (RCW 11.96A.040) will govern the mediation and arbitration procedures to the extent court intervention is required. For example, upon resolution of the dispute, the parties may wish to file a binding agreement authorized by TEDRA § 402 (RCW 11.96A.220) in superior court. If a judicial proceeding is already underway when a party uses the mediation and arbitration provisions, the superior court with jurisdiction of the existing proceeding will oversee application of the mediation and arbitration procedures.

TEDRA § 505 (RCW 11.96A.300) - Mediation Procedure.

This provision allows any interested person to use the mediation and arbitration process and directs the court to order the use of mediation unless the court finds "for good cause shown" that mediation will not serve the best interests of the affected parties. If the court finds that mediation is not appropriate, the court may decide the matter at the hearing, may require arbitration, or may direct other judicial proceedings. It is not intended that one party's unwillingness to participate alone will constitute "good cause shown."

Once mediation is invoked, the statute provides that the parties will select a mediator. If the parties fail to do so, a party may petition the appropriate court to appoint a mediator. The court-appointed mediator must be either an attorney licensed to practice before Washington courts or a person with special skill or training in the administration of trusts and estates.

The statute further provides for a minimum half-day mediation in order to assure the parties a reasonable opportunity to present their positions and thus to encourage good faith by all parties and their representatives to seek to achieve an acceptable resolution of the dispute.

The statute also provides for the mediator to be paid in accordance with the terms of a Mediation Agreement with the expenses to be borne equally by the parties.

TEDRA § 506 (RCW 11.96A.310) - Arbitration Procedure.

This section provides that arbitration will be available only if (a) a party has first sought mediation, (b) the court has ordered arbitration, or (c) all the parties involved agree to proceed directly to the arbitration process.

Arbitration can be commenced by any party to a dispute if all the parties have agreed not to use the mediation procedures or other methods to resolve the dispute. A party can invoke the procedure for arbitration without obtaining authority from any court unless there has already been a judicial hearing on the matter.

Any person involved in a trust or estate dispute has the right to object to the use of arbitration by filing a petition with the court. Arbitration will be ordered by the court unless the court finds "for good cause shown" that it will not serve the best interests of the affected parties. If the court denies arbitration, the court can then decide the issues at the hearing on the petition (if the petition requesting that arbitration be denied has requested such relief) or the court can order further judicial proceedings.

The statute allows for the parties to select the arbitrators, who must follow the mandatory arbitration of civil action rules found at RCW Chapter 7.06 (but without reference to any dollar limits).

Costs of arbitration are to be borne equally by the parties to the dispute who participate in the arbitration, and all other arrangements pertaining to the conduct of the proceedings are to be pursuant to an Arbitration Agreement among all parties to the dispute participating in the arbitration.

The rules of evidence and discovery applicable to civil actions apply unless the parties agree otherwise. Once the arbitrator reaches a decision, he or she must issue a memorandum of the decision to be filed with the Superior Court. The decision can be appealed by filing a notice of appeal with the Superior Court within 30 days after the memorandum is filed with the court. The decision is binding on the parties if it is not so appealed. Appeal of the arbitrator's decision to the Superior Court will be a review de novo.

In any de novo review, the statute directs the court to award costs, including expert witness fees and reasonable attorney's fees, to the prevailing party. The policy behind the award of fees and costs is to encourage the use of the arbitration procedures for final resolution of disputes. The policy is also intended to recognize and support appeals based on reasonable grounds by

awarding fees and costs to the prevailing party, and to likewise discourage frivolous appeals by assessing fees and costs against the non-prevailing party.

TEDRA § 507 (RCW 11.96A.320) - Petition for Order Compelling Compliance.

If a party fails to comply with the mediation and arbitration procedures, any other party can seek a court order compelling that party's participation in mediation or arbitration as provided in the statutes. Fees and costs of the moving party shall be awarded in such a case unless the court determines that an award should not be made "for good cause shown." The policy for awarding fees and costs to the moving party is to promote cooperation and participation in the required mediation and arbitration process. The legislature intends to provide full and clear authority for a party to pursue mediation or arbitration in solving disputes in trust and estate matters, thus giving specific rights to the parties to petition the court to enforce utilization of these procedures, including the right to be reimbursed for fees and costs incurred.

TEDRA § 601 (RCW 11.40.020) - Creditors Claims - Notice.

Language was added to 11.40.020 to ensure that if notice to creditors is given in the probate of a Washington resident's estate, that the notice will be published in the county of the decedent's residence. The reason the change is needed is that RCW 11.96A.060 will allow proceedings to be commenced in any county, irrespective of the decedent's residence. Publication in the county of residence is required since it is most likely that creditors of the decedent will be located in the decedent's county of residence, and creditors are likely to look for information about a debtor in the debtor's county of residence.

TEDRA §§ 602 to 636 (miscellaneous RCW sections – see codification table)

These changes were made to update cross references in existing statutes.

APPENDIX C

Donative Transfers Chapters 17 and 18, and the accompanying Commentary, containing many examples.

SECTION 204. EXCEPTION TO PRESUMPTION OF UNLIMITED AUTHORITY.

Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if:

(1) the power is exercisable only at the powerholder's death; and

(2) the permissible appointees of the power are a defined and limited class that does not include the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate.

Comment

This section is designed to remedy a recurring drafting mistake. A testamentary power of appointment created in a defined and limited class that happens to include the powerholder is usually intended to be a nongeneral power. For example, a testamentary power created in one of the donor's descendants (such as the donor's child or grandchild) to appoint among the donor's "descendants" or "issue" is typically intended to be a nongeneral power. See, for example, PLR 201229005 (stating the ruling of the Internal Revenue Service that a testamentary power of appointment in the donor's son, exercisable in favor of the donor's "issue," is a nongeneral power for purposes of 26 U.S.C. § 2041). Accordingly, the presumption of this Section is that such a power is nongeneral.

On the meaning of the well-accepted term of art "defined and limited," see the Comment to Section 205. See also Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment c.

SECTION 205. RULES OF CLASSIFICATION.

(a) In this section, "adverse party" means a person with a substantial beneficial interest in property which would be affected adversely by a powerholder's exercise or nonexercise of a power of appointment in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

(b) If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral.

(c) If the permissible appointees of a power of appointment are not defined and limited, the power is exclusionary.

Comment

Subsection (b) states a well-accepted and mandatory exception to the presumption of unlimited authority articulated in Section 203. If a power of appointment can be exercised only with the consent or joinder of an adverse party, the power is not a general power. An adverse party is an individual who has a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power in favor of the powerholder, the powerholder's estate, or the creditors of either. In this context, the word "substantial" is not subject to precise definition but must be determined in light of all the facts and circumstances. Consider the following examples.

Example 1. D transferred property in trust, directing the trustee "to pay the income to D's son S for life, remainder in corpus to such person or persons as S, with the joinder of X, shall appoint; in default of appointment, remainder to X." S's power is not a general power because X meets the definition of an adverse party.

Example 2. Same facts as Example 1, except that S's power is exercisable with the joinder of Y rather than with the joinder of X. Y has no property interest that could be adversely affected by the exercise of the power. Because Y is not an adverse party, S's power is general.

Whether the party whose consent or joinder is required is adverse or not is determined at the time in question. Consider the following example.

Example 3. Same facts as Example 2, except that, one month after D's creation of the trust, X transfers the remainder interest to Y. Before the transfer, Y is not an adverse party and S's power is general. After the transfer, Y is an adverse party and S's power is nongeneral.

Subsection (c) also states a longstanding mandatory rule. Only a power of appointment whose permissible appointees are defined and limited can be nonexclusionary. "Defined and limited" in this context is a well-accepted term of art. For elaboration and examples, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment c. In general, permissible appointees are "defined and limited" if they are defined and limited to a reasonable number. Typically, permissible appointees who are defined and limited are described in class-gift terms: a single-generation class such as "children," "grandchildren," "brothers and sisters," or "nieces and nephews," or a multiple-generation class such as "issue" or "descendants" or "heirs." Permissible appointees need not be described in class-gift terms to be defined and limited, however. The permissible appointees are also defined and limited if one or more permissible appointees are designated by name or otherwise individually identified.

If the permissible appointees are not defined and limited, the power is exclusionary irrespective of the donor's intent. A power exercisable, for example, in favor of "such person or persons other than the powerholder, the powerholder's estate, the creditors of the powerholder, and

the creditors of the powerholder's estate" is an exclusionary power. An attempt by the donor to require the powerholder to appoint at least $X to each permissible appointee of the power is ineffective, because the permissible appointees of the power are so numerous that it would be administratively impossible to carry out the donor's expressed intent. The donor's expressed restriction is disregarded, and the powerholder may exclude any one or more of the permissible appointees in exercising the power.

In contrast, a power to appoint only to the powerholder's creditors or to the creditors of the powerholder's estate is a power in favor of a defined and limited class. Such a power could be nonexclusionary if, for example, the terms of the instrument creating the power provide that the power is a power to appoint "to such of the powerholder's estate creditors as the powerholder shall by will appoint, but if the powerholder exercises the power, the powerholder must appoint $X to a designated estate creditor or must appoint in full satisfaction of the powerholder's debt to a designated estate creditor."

If a power is determined to be nonexclusionary, it is to be inferred that the donor intends to require an appointment to confer a reasonable benefit upon each mandatory appointee. An appointment under which a mandatory appointee receives nothing, or only a nominal sum, violates this requirement and is forbidden. This doctrine is known as the doctrine forbidding illusory appointments. For elaboration, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment j.

The terms of the instrument creating a power of appointment sometimes provide that no appointee shall receive any share in default of appointment unless the appointee consents to allow the amount of the appointment to be taken into account in calculating the fund to be distributed in default of appointment. This "hotchpot" language is used to minimize unintended inequalities of distribution among permissible appointees. Such a clause does not make the power nonexclusionary, because the terms do not prevent the powerholder from making an appointment that excludes a permissible appointee. See Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment k.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.3 to 17.5 and the accompanying Introductory Note and Commentary.

SECTION 206. POWER TO REVOKE OR AMEND. A donor may revoke or amend a power of appointment only to the extent that:

(1) the instrument creating the power is revocable by the donor; or

(2) the donor reserves a power of revocation or amendment in the instrument creating the power of appointment.

APPENDIX D

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION I

79261-0-I

FREDERICK A. GRAHAM,	)	
Appellant,	)	King County Cause
vs.	)	14-4-05427-8 SEA
BANK OF AMERICA, N.A.,	)	
Respondent.	)	

VERBATIM REPORT OF PROCEEDINGS

BEFORE THE

COURT OF APPEALS

SEPTEMBER 20, 2019

TRANSCRIBED FROM RECORDING BY:
CHERYL J. HAMMER, RPR, CCR 2512

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structure of the trust is that with the general power of appointment, Mr. Graham had the power to either designate an appointee, or, in default of that, it will go to his estate. At which point the -- his creditors could make creditors claims against the estate.

But, because that may never come to pass, because it was entirely proper and there was an election for the -- for Mr. Graham to designate someone else outside his estate, I would argue that the creditors don't have such a claim against the bank.

THE COURT: And if he did -- if he did exercise the power of appointment, the creditor would have of no claim against the funds received by the appointee.

MR. HARRINGTON: I think that's true, Your Honor. I believe that's so.

Now, the quote -- the Washington State Supreme Court has clearly held in the Erickson case that spendthrift clauses are enforceable. Mr. Graham makes a constitutional argument that we're encumbering his right to dispose of his property as he sees fit, but Erickson has already answered that question.

I think I want to talk for just a

moment about the res judicata argument here. Mr. Graham appeals whether there's a --

THE COURT: (Unintelligible.)

MR. HARRINGTON: Sorry.

THE COURT: I wouldn't spend a lot of time on that. We said we wouldn't consider the issue. We didn't decide the issue. So we're not going to say that he's precluded from raising it now.

MR. HARRINGTON: If I could spend 10 seconds on it, Your Honor.

THE COURT: You can if you want to spit into the wind.

MR. HARRINGTON: There is a trial court order here that was -- has not been overturned, and even when there's --

THE COURT: He sought review of it and we declined to review it. It seems patently unfair to say that he doesn't ever get to have an appellate court consider the issue because we declined to consider it.

MR. HARRINGTON: I'm not -- well, Your Honor.

THE COURT: That is an element of collateral estoppel.

MR. HARRINGTON: Well, I don't know

that anyone appealed that particular issue, but fair point and --

THE COURT: I sat through oral argument where that issue was argued, and I'm the author of an opinion which says that the parties raised it and argued it and then said we didn't need to decide it.

MR. HARRINGTON: Right. And I feel the wind, Your Honor. I'm going to stop spitting. I think our brief is clear on that point.

I think there's a question here about whether -- you know, since you raised the other opinion, Your Honor, I do want to address that we believe this issue is fully ripe. The legislature has granted this court the ability to make this decision, to decide it. It's been raised twice by the parties now, and it's not going to go away.

Moreover, there is a GAL who is appointed, and the effect of the petition below would have been to deprive the GAL of its power, and so I believe that makes it fully ripe and a real dispute as well, the question of whether that petition would deprive the GAL of his power and effectively remove him.

If the court has no further questions.

TRANSCRIPTION CERTIFICATE

I, CHERYL J. HAMMER, the undersigned Certified Court Reporter in and for the state of Washington, do hereby certify:

That the foregoing transcript was transcribed under my direction; that the transcript is true and accurate to the best of my knowledge and ability to hear the audio; that I am not a relative or employee of any attorney or counsel employed by the parties hereto; nor am I financially interested in the event of the cause.

WITNESS MY HAND this 14th day of October 2019.

CHERYL J. HAMMER
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Filing Petition for Review

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Comments:

This is a CORRECTED Petition for Review, to the one filed on 3/11/2020 - Reference No. PRV83389SC. The only difference is that we are now attaching the Appendices.

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