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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 31757-9-III

In Re The Estate of:

MARGARET WIMBERLEY,

Deceased.

RESPONDENT CARROLL WESLEY WIMBERLEY'S
ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF RESPONDENTS AND SUMMARY OF ARGUMENT.

Respondent, Carroll Wesley Wimberley is one of two surviving adult sons of C. W. and Margaret Wimberley, both deceased. The other Respondent is Stephen Trefts who is the successor trustee of the Wimberley Family Trust (herein the “Wimberley Trust”). Mr. Trefts was appointed the successor trustee when James Wimberley, the Petitioner herein, was removed as Trustee because he breached his fiduciary duties to his brother Wesley.¹

Wesley urges this court to deny review of the decision in *In the Matter of the Estate of Margaret Wimberley* No. 31757-9-III, (Slip Op., January 29, 2015, as modified by court order dated March 31, 2015).

The Petition for Review does not meet the considerations governing acceptance for review. The decision is not in conflict with any other Washington decision, does not involve an issue of substantial public interest or a significant issue of constitutional law. The decision affirms the trial court’s application of the plain language of the trust to the issues in dispute and follows long established case law.

¹ For clarity, Carroll Wesley Wimberley will be referred to as “Wesley” herein, James Wimberley will be referred to as “James” and Mr. Trefts will be referred to as “Successor Trustee.”

II. ISSUES FOR REVIEW.

- A. Whether a trial court may establish the start date of a trust accounting as the date the trustor died upon the recommendation of the successor trustee?
- B. Whether application of the plain language of the original trust and its subsequent amendments to an issue of interpretation of the trust distribution is consistent with existing case precedent?
- C. Whether the Supreme Court should deny review of a claim that the Court of Appeals decision conflicts with case law holding that community property ceases on death when this claim misconstrues the decision and was not raised to the trial court or to the Court of Appeals?
- D. Whether review should be denied because no issues of substantial public interest are raised by an opinion that determines the trustors' intent from the plain and unambiguous language of the trust and applies that intent to the issues in dispute?

III. STATEMENT OF THE CASE.

This appeal follows the trial court's order approving the Successor Trustee's preliminary accounting, which was submitted after James was removed as trustee of his deceased parents' trust for breach of fiduciary duties. On January 29, 2015 the Court of Appeals affirmed the trial court's decision that approved the Trustee's preliminary accounting. James's motion for reconsideration was denied on March 5, 2015.

C.W. and Margaret Wimberley, husband and wife, executed joint estate planning documents in 1999. Those documents included the

Wimberley Trust, Last Wills and Testaments, and revocation of all prior community property agreements. The couple also signed a Letter of Intent and Declaration of Gift that provided that all property placed into the Trust now or in the future would be both community and Trust property. CP 175.

The couple's wills mirrored each other and stated that all of their individual assets owned at the time of their deaths were distributed into the Trust (commonly called "pour over" wills). C. W. and Margaret² served as trustees of the Wimberley Trust. C.W. died in 2002. Margaret died in 2010, leaving their two sons James and Wesley as the beneficiaries of the Wimberley Trust. CP 112, 217, 160.

Upon C.W.'s death, the Wimberley Trust created an "A," "B," and "C" Trust. Trust A consists of Margaret's one-half share of the community assets and Trusts B and C consist of C.W.'s one-half share. As trustee, Margaret had a duty to fund the trusts but she did not do so. In fact the three separate trusts outlined in the Wimberley Trust were never properly funded. Trusts B and C were irrevocable and were supposed to be funded with C.W.'s share of the couple's community property. CP 139, 141.

After C. W.'s death, Margaret executed two Trust amendments. The 2007 Trust amendment stated that Margaret "elected" not to fund Trusts A,

² C.W. Wimberley is referred to as "C.W." and Margaret Wimberley is referred to as "Margaret." No disrespect is intended.

B and C, ignoring the mandatory funding language in the Trust. CP 178. The amendment also purported to change the distribution provisions of the Wimberley Trust. CP 179-80. The 2008 amendment removed Margaret as her own trustee, made her Survivor's Trust A irrevocable, and made James the trustee. CP 187. Margaret never, however, changed the language of her Last Will and Testament, executed at the same time as the Wimberley Trust.

James misstates the facts when he claims that all parties agree that in December 2009 Margaret was incapacitated. Pet. for Rev. p. 3. Throughout these proceedings, Wesley has vigorously disputed this characterization of his mother. Margaret's attorney Marcus Fry met with Margaret in April 2009. CP 322. Mr. Fry noted that Margaret had been involved in unusual estate planning that had not been clearly explained to her and that did not meet her wishes. *Id.* Mr. Fry also prepared and witnessed Margaret's signature on a revocation of the financial power of attorney she had previously granted to James which demonstrates Mr. Fry's confidence in Margaret's mental capacity. CP 330-331. After Mr. Fry sent James a letter and James learned that Margaret had been to see an independent attorney, Mr. Fry did become concerned that Margaret was being subjected to pressure or manipulation by James. CP 322.

While we do not know what occurred between James and Margaret during the time frame of April 10, 2010 and May 24, 2010, we do know that

by the latter date Kristyan Calhoun offered her lay opinion that Margaret was susceptible to undue influence.³ CP 206.

James further misstates the record when he claims that Margaret “misappropriated” funds from the “building fund account” which was the account that the 2007 Trust amendment distributed to James. Pet. for Rev. p. 11. Mr. Richard Greiner testified in a declaration that the building fund consisted of two accounts at Yakima Federal, “...a checking account No. 5734 and a savings account No. 5370.” CP 195. The \$280,000 that Margaret withdrew from Yakima Federal in 2009 was not from the building fund. Instead, the monies were withdrawn from account no. 1351 and deposited into an investment account upon the recommendation of Margaret’s investment advisor Suzanne Williams. CP 212. The funds remained invested in Margaret’s name until her death when they became part of the corpus of the Trust.

James was the trustee for the Wimberley Trust from 2008 until he was removed on March 2, 2012 because he breached his fiduciary duties to Wesley. The court specifically found that he breached his fiduciary duties for failing to pay rent to the Trust, and charging the Trust for his personal

³ Mr. Fry recommended Ms. Calhoun to Margaret. Ms. Calhoun provides geriatric care management services. While James continued to live with Margaret until her death and was alone with her many months, Wesley did not have private visits with his mother for the remainder of her life. In order to avoid conflict for his mother, Wesley arranged his visits with his mother when a caregiver was present and James was not home.

utility bills and incidentals of occupancy. The Order removing James as trustee was not appealed. An independent successor trustee, Stephen Trefts, was appointed by the court. CP 4-8.

Mr. Trefts provided a preliminary accounting of Margaret Wimberley's estate and the Wimberley Trust on February 1, 2013, after working diligently to account for all Trust assets despite James's refusal to timely cooperate with the accounting when questioned about assets. CP 39-51. The court approved the preliminary accounting and gave instruction to Mr. Trefts in its June 4, 2013 order and James appealed. The Court of Appeals affirmed the trial court's order on January 29, 2015 and James's motion for reconsideration of the appellate decision was denied on March 5, 2015. James filed his Petition for Review on April 30, 2015.

Except as supplemented herein, Wesley adopts by reference the Statement of the Case set forth in his brief filed in the Court of Appeals.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED.

- A. The Court of Appeals Correctly Affirmed the Trial Court's Selection of Margaret's Date of Death as The Start Date of the Accounting Due to James's Complete Failure to Deliver Any Analysis, Case Law or Statute to Show that the Trial Court Did Not Have Authority to Pick the Start Date.

James makes the specious argument that the Court of Appeals ruled that a trustee does not have to account for known misappropriations by a prior trustee. This is a gross mischaracterization of the Court's decision.

Margaret served as her own trustee from the inception of the Trust until she resigned in 2008. James then served as Trustee until he was removed by the trial court in 2012. Evidently, during Margaret's life, James did not take possession of the Trust assets and change the Trust accounts into his name as the trustee, which allowed Margaret to continue to access the Wimberley Trust's bank accounts. As the Successor Trustee noted, there were multiple transfers into and out of the Trust accounts including after Margaret resigned as trustee. CP 68.

In 2009, Margaret followed the advice of an investment advisor and transferred Trust funds from a credit union account which earned almost no interest into an investment account. CP 212. James argues that this transfer was a "misappropriation" of Trust assets even though these assets were part of the Trust at Margaret's death because Margaret's pour over will stated that any assets she owned on her death were distributed to the Trust. CP 359. To the extent this fact is not clear, the confusion is caused by James's failure to fully account for the Trust assets during the years he served as trustee. The trial court ordered James to fully account. Mr. Trefts gave James ample opportunity to do so and James refused to provide accounting records to Mr. Trefts. "James is complaining about a problem he helped to create." *Slip Op.* at p. 27. As Wesley has pointed out before, the

preliminary accounting is as accurate as James has allowed it to be. *Slip. Op.* at 37.

The Successor Trustee has a duty to settle the estate in a prompt and efficient manner. The Trust directs distribution “as soon as practicable.” CP 162. The trial court had authority to issue the order approving a start date for the accounting. RCW 11.96A.020, 11.96A.060. The \$280,000 that Margaret withdrew before she died was deposited into her other accounts (including the Franklin Templeton account) and these funds are a part of the Trust as of the date of Margaret’s death and part of the accounting. The preliminary accounting shows that the Franklin Templeton account had a balance of \$466,379.43 on Margaret’s date of death. CP 51.

The decision of the Court of Appeals is not in conflict with the case of *Tucker v. Brown*, 20 Wn 2d 740, 150 P.2d 604. The court in *Tucker* stated that as a general rule, a successor trustee must make an accounting of the trust. The court further stated that a personal representative of a deceased trustee must account for the period his decedent was in possession of the trust assets. *Id.* at 771.

In the case at bar, James is the prior trustee and he is not deceased. The *Tucker* case is not on point. James failed to provide accounting records to Mr. Trefts even though James could have done so. The funds James questions are accounted for by the Successor Trustee’s accounting of Trust

assets on the date of Margaret's death. In light of these facts, the trial court reasonably ruled that the accounting start date could be the date of Margaret's death. The accounting was both accurate and equitable.

B. The Opinion of the Court of Appeals is in Harmony With Prior Opinions Holding that the Intent of the Decedent Expressed in the Plain Language of the Estate Planning Documents Signed By the Decedent Must Be Followed.

James correctly states that the intent of a testator should be given effect "provided always that he has given them lawful expression." *In Re Elliot's Estate*, 72 Wn 2d 334, 351, 156 P.2d 427 (1945). There is no lawful expression of intent where Margaret's trust amendments attempted to revoke the distribution provisions of her husband's irrevocable trust shares. For that reason, her amendments are interpreted and applied in a lawful manner as a change to Margaret's Survivor's Trust share and not to C.W.'s irrevocable Decedent's Trust share.

In the Wimberley Trust, there are two people whose intent must be given expression: C. W. and his wife Margaret. As the trial court noted: "...the trust documents manifest Mr. and Mrs. Wimberley's intentions clearly ... and it is those intentions which govern this proceeding" CP 347. The Trust unambiguously states that during the joint lifetimes of C.W. and Margaret, the Trust was fully revocable and amendable. However, on the death of the first spouse, the Trust was to be divided into separate Trusts.

Margaret's undivided one-half share of the community property was to be distributed to the survivor's Trust and she could amend that trust. C.W.'s one-half share became irrevocable and Margaret had no authority to amend the Trust provisions that applied to C.W.'s share.

James argues that the Court of Appeals did not follow Margaret's intent to give all of the Fromherz real estate to her son James. This is untrue. The court did respect the lawful expression of Margaret's intent by distributing all of Margaret's one-half community ownership of the home to James. Because Margaret could not revoke the distribution provisions of C.W.'s irrevocable Decedent's Trusts B and C, the court respected C.W.'s intent by affirming the accounting that gave the value of C.W.'s one-half share in the home to both James and Wesley.

This decision is in harmony with prior case law which holds that the objective of interpreting a trust is to determine the intent of the settlor or grantor. *Old Nat'l Bank & Trust Co. of Spokane v. Hughes*, 16 Wash.2d 584, 587, 134 P.2d 63 (1943).

The court determines an individual's intent in a trust document by construing the document as a whole, giving effect to each part of the trust instrument. *In re Estate of Sherry*, 158 Wn.App. 69, 76, 240 P.3d 1182 (210); *Bartlett v. Betlach*, 136 Wn.App. 8, 19, 146 P.3d 1235 (2006).

The Wimberley Trust states that on the death of the surviving trustor, the balance of the Decedent's Trusts B and C are distributed in accordance with the provisions under the section titled "Allocation and Distribution of Trust Assets" as that section was "constituted and provided on the date of the death of the **first** of the Trustors to die." CP 150, 155 (emphasis added). The balance of the Survivor's Trust A is distributed in accordance with the provisions under the section titled "Allocation and Distribution of Trust Assets" as that section is "constituted and provided on the date of the **last** of the Trustors to die." CP 146 (emphasis added).

Margaret's 2007 trust amendment stated that she was electing to "...modify the distributive provisions of the trust beginning at page 50 of the trust agreement...." The amendment then went on to state that the Fromherz real estate would be distributed to James at the time of Margaret's death and that this "...distribution shall not be subject offset against his share the residual trust." CP 179.

In order to interpret the Wimberley Trust, the court must give effect to all of the Trust provisions. *Id.* The court did that by holding that Margaret's 2007 distribution amendment was effective as to her share of the Trust but that C.W.'s irrevocable Trusts would be distributed pursuant to the provisions of the Trust as it existed on the date of C.W.'s death.

James asks the court to twist the plain language of the Wimberley Trust and the 2007 amendments to find that the trust amendment was not a trust amendment at all, but instead Margaret's decision to fund the Survivor's Trust A with the Fromherz real estate. Pet. for Rev. at 14. The problem with this argument is that the 2007 amendment is not ambiguous. It explicitly states that it is an amendment to the Wimberley Trust and further states that Margaret was electing not to fund the trusts. CP 179. "Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation" *Templeton v. Peoples Nat'l Bank of Wash.* 106 Wn. 2d 304, 309, 722 P.2d 63 (1986) (quoting 90 *C.J.S. Trusts* § 161 at 18-19 (1955)). The trust amendment states it is an amendment and this language is unambiguous.

James claims the amendment should be interpreted as Margaret simply making a non-prorata distribution of Trust assets between her share and C.W.'s share. The problem with this argument is that no corresponding and equalizing distribution of Trust assets to C. W.'s Trust share is provided for in the amendment. It also is a complete mischaracterization of the amendment—it clearly was a Trust amendment not a division of the Trust into separate Trust shares. No evidence exists to show that Margaret distributed C.W.'s one-half share of the community estate into the irrevocable trust as required by the plain language of the Trusts.

Similarly, James's claim that Margaret "substantially" complied with the provisions of the Trust providing for distribution of assets to the separate Trust shares is not supported by the evidence. As the court of appeals noted, "...James presents no evidence Margaret divided the assets of the trust upon C.W. Wimberley's death, let alone that she assigned the entire value of the home to the Survivor's Trust. The evidence showed that Margaret violated the terms of the trust and considered all property to be under her full ownership." Slip op. at p. 34.

Williams v. Bank of California, N.A., 96 Wn. 2d 860, 639 P.2d. 1339 (1982), cited by James, does not support James's arguments. *Williams* held that if the procedure used in adopting an amendment to an employee profit sharing plan followed rather closely the method provided in the trust agreement then it substantially complied with the trust procedures for amendments. *Id.* 867. In the Wimberley Trust, there was nothing wrong with the *procedure or method* Margaret used in her amendments such as putting her amendments in a written signed document. The *content* of the amendment is the issue—the surviving spouse of the Wimberley Trust had no right to change the distribution provisions of the deceased spouse's trust.

The court determined the intent of both settlors from the language of the Wimberley Trust and respected the intent of both C.W. and Margaret.

Because the decision follows existing case law on settlor's intent, the Petition for Review should be denied.

C. The Court of Appeals Did Not Rule that Community Property is Created Following the Death of a Spouse and James Raises This Issue for The First Time On Appeal.

James asserts that the Court of Appeals decision converted the proceeds of asbestos litigation from separate property to community property. This is flatly wrong. The decision does not even apply to the asbestos litigation proceeds because those proceeds are distributed to the probate estate of C. W. and not to the Wimberley Trust. These proceeds are paid to the Estate of C. W. Wimberley and from there are directly distributed to C. W.'s heirs. CP 274.

At the time they signed the Wimberley Trust, C. W. and Margaret also signed a Letter of Intention which stated:

...If any questions should arise, it is the intent of each of the Trustors to gift, in consideration of their mutual love and affection, so much of any disputed property to the other as is necessary to create joint ownership in both Trustors."

CP 175. James argued below that 100% of the couple's community property became Margaret's separate estate upon the death of C. W. In ruling against this argument, the court noted that this argument was contrary to the couple's stated intent in the Letter of Intention. Slip Op. pp 30-31.

If prior to her death Margaret deposited any of the asbestos proceeds into the Trust, those funds would be part of the residue of the Survivor's

Trust A to be distributed in equal shares to James and Wesley. The funds do not have to be characterized as “separate property” or “community property” because both Margaret’s Trust amendment and the C. W.’s Trust provisions provide that the residue is distributed in equal shares to James and Wesley. C.P. 180.

Characterization of the asbestos proceeds was not an issue before the trial court nor an issue on appeal. Under RAP 2.5(a), an appellate court will not consider arguments or theories that are raised for the first time on appeal. See *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 289, 840 P.2d 860 (1992). Furthermore, resolution of this issue is not necessary to decide the issues in dispute. The Court of Appeals did not rule that assets Margaret acquired after death were converted into community property. Rather, the Court ruled that the Fromherz home was community property and this asset was owned by the Trust and by C. W. and Margaret prior to C W.’s death. This decision is in harmony with existing case law and statutes holding that spouses can gift property to each other.

D. Interpretation of a Single Unique Trust Document and Application of the Plain and Unambiguous Language of the Trust Does Not Invoke the Public Interest.

James argues that the court should grant review because many couples engage in estate planning that involves revocable living trusts. However, the mere fact that revocable trusts may be a common estate

planning technique does not invoke substantial public interest. The interpretation of each trust document is dependent upon the precise language of each particular trust. The interpretation of the Wimberley Trust is an issue that impacts only the parties to this unique trust document and does not invoke the public interest. Furthermore, the basic and general principle that a surviving spouse cannot revoke or amend her deceased spouse's irrevocable trust share was previously established by case law. This is not a case of first impression.

The court of appeals decision requires a trustee of a living trust to follow the explicit terms of the trust document. Our courts have consistently held that in construing a trust, the court looks to the language of the trust document itself and interpret the trust so that no sections of the trust are superfluous. See, e.g., *First Interstate Bank of Washington v. Lindberg*, 49 Wn.App. 788, 746 P.2d 333 (1987). In the *Lindberg* case, the court affirmed the trial court's decision that the surviving spouse could amend the distribution of her share of the assets in the trust when the trust became irrevocable due to her husband's death because the surviving spouse's amendment "did not attempt to revest the trust assets in herself or otherwise to destroy the trust by amending it...." *Id.* p. 794.

The language of the *Lindberg* trust was quite similar to the trust language at bar and allowed withdrawals of trust property, amendments and

revocation as “long as both of the Trustors are living....” *Id.* p.793. The Wimberley Trust provided that the trustors could amend the trust, withdraw trust property or revoke “... during the joint lives of the Trustors...except as to any share or Trust created herein which has become irrevocable” CP 122.

Lindberg held that the surviving spouse could amend the distribution provisions of her share because the trust in question stated that on the death of the surviving spouse, the “... remainder shall be distributed as he or she shall appoint by his or her Last Will or as he or she may herein designate....” However, the surviving spouse could not revoke the trust in its entirety or otherwise change the distribution of her husband’s share of the Trust which could only be amended while both trustors were alive. *Id.*

To the extent that trustees in the State of Washington are confused as to whether or not they need to follow the trust document, *Lindberg* already establishes this precedent, and the instant case is now a published opinion that provides further guidance.

James argues that trustors are often not informed of the duties and restrictions involved in the establishment of a trust. There is no evidence in the record that C. W. and Margaret did not understand their Trust when they signed the Trust in 1999. There is further no evidence in the record that

trustors commonly comingle trust assets and ignore restrictions created by the trust.

The Wimberley case involves facts unique to the Wimberley family and the Wimberley Trust. This is demonstrated by the fact that the slip opinion devotes 25 pages to the factual and procedural history of the case.

If review is not granted, then the Wimberley case will stand for the simple proposition that a trust that states that it can only be revoked by both trustors during their joint lives may only be revoked by both trustors during their joint lives. This proposition is already well established law.

E. James Should Pay Wesley Attorney's Fees In Responding to the Petition for Review.

As demonstrated throughout this brief, the court should deny the Petition for Review. James should pay the Trustee's fees and costs, and Wesley's fees and costs, whether incurred in the trial court or on appeal because the continued litigation is a direct result of James's failure to supply adequate timely information. If James had answered the Trustee's questions years ago, the accounting issues would not have had to be brought before the trial court and the appellate courts. The continued hearings are a direct result of James's failure to account for his actions as trustee and the expenses of litigation are unfairly diminishing Wesley's share of the Trust.

RAP 18.1 gives the court discretion to award reasonable attorney's fees and expenses. RCW 11.96A.150 (1) also gives the court discretion to award costs, including reasonable attorneys' fees to be paid "in such manner as the court determines to be equitable."

James was removed as trustee of the Trust for breach of fiduciary duties. He then violated the trial court's order and failed to cooperate with the Successor Trustee, causing an extended period of time to pass and hampered the Successor Trustee in completion of his accounting tasks. After repeated requests for information, and the Successor Trustees agreement to continuances of the hearing on the preliminary accounting, James finally responded three days before the hearing with over 200 pages of documents. CP 83-207.

Similarly, James requested continuances in the Court of Appeals and filed the Petition for Review on the last possible day but failed to pay the filing fee, which caused yet another delay. The Petition does not meet the standards for review and is yet another tactic by James to prevent Wesley from ever receiving a share of their parents' estates.

It is equitable to award fees against James because the litigation is a direct result of James's failure to follow his fiduciary duties and account.


V. CONCLUSION

The Court of Appeals decision follows existing case law in ruling that a trustee of a trust must follow the terms of the trust in division of the trust into shares and in distribution of the trust. The decision further follows existing case law in ruling that if the trustee is the surviving spouse of a deceased trustor, the trustee must still follow the terms of the trust. There is not any conflict in case law on these points.

The decisions of the trial court and the Court of Appeals further respected the intent of each trustor by enforcing each term of the Wimberley Trust and distributing C.W.'s share as provided in his irrevocable Trust shares and further distributing Margaret's share as provided in her Trust amendments.

Further review of the trial court's resolution of the dispute between the two Wimberley brothers does not serve the public interest and does a gross injustice to Wesley who has waited over five years for resolution of his mother's trust and estate. Review should be denied.

RESPECTFULLY SUBMITTED this 4th day of June, 2015.


LINDA A. SELLERS (WSBA #18369)
SARA L. WATKINS (WSBA #33656)

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

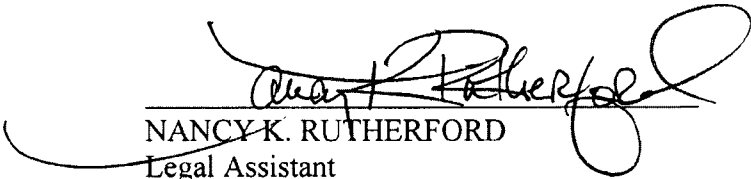
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Please find attached for filing with the Supreme Court Clerk Respondent Carroll Wesley Wimberley's Answer to Petition for Review.

Thank you for your attention to this matter.

Nancy

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