

74320-1

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No. 74320-1-I
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

GARY PETER WAY and KRISTIN KIRCHNER,

Appellants,

v.

MARJORY E. WAY, TRUSTEE OF THE PETER J. & MARJORY E.
WAY LIVING TRUST,

Respondent.

Appeal from the Superior Court of Washington for Snohomish County
(Cause No. 15-2-04284-8)

BRIEF OF APPELLANTS

Mark J. Wilson, WSBA #16675
500 Union Street, Suite 502
Seattle, WA 98101
(206) 567-9826
mjwilson@mjwilsonlawyer.com

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I. INTRODUCTION

On February 29, 2012, Peter J. Way signed his Will.¹ On the same day, he and Marjory E. Way, his surviving spouse, signed the Peter J. & Marjory E. Way Living Trust.² Peter died four months later on June 4, 2012.

On June 3, 2015, three years after Peter's death, Marjory filed a Summons and Petition under the Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A.090, requesting confirmation of the Trust's terms.³ CP 1562-1585, 1556-1561.

The Petition alleges "real confusion still exists concerning Schedule E and its effect on the administration of Trust A." CP 1567, 1585. Marjory contends that when Peter died she was supposed to get the condo and car and the remainder of Peter's estate was supposed to be transferred into Trust A to serve as a life estate for Marjory. CP 1585.

Gary Peter Way and Kristin Kirchner filed an opposition to the Petition denying any confusion has ever existed in anyone regarding the meaning and intent of Schedule E.⁴ CP 1499-1505, 1506-1514. They agree Schedule E provides that Marjory was to receive Peter's

¹ Appendix 1 is the Last Will and Testament of Peter J Way. CP 1558-1561.

² Appendix 2 is the Peter J. and Marjory E. Way Living Trust. CP 1570-1585.

³ Marjory Way is referred to herein by her first name. No disrespect is intended.

⁴ Gary and Kristin filed their own declarations in opposition to the petition, the declaration of their legal counsel, Mark Wilson, and a reply and counterclaim against Marjory. CP 1499-1505, 1506-1514, 1515-1550 and 1551-1555.

condominium and car as her sole and separate property upon Peter's death. However, they point out that Schedule E then provides that the remainder of Peter's estate, was to go to Gary and Kristin, 50-50 and not, as Marjory claims, into Trust A as a life estate for Marjory. CP 1500, 1506-1507, 1551-1554.

Schedule E does not indicate that upon Peter's death and after the gift of the condo and car to Marjory, the remainder of Peter's estate was to be transferred into Trust A as a life estate for Marjory. CP 1585. Nor does the language of Schedule E indicate that the specific bequests of the remainder to Gary and Kristin are to go to them in trust for the life benefit of Marjory. Rather, the language of Schedule E indicates that the specific bequest to them of the remainder was to them absolutely, free of trust.

Marjory, as surviving trustee of the Trust, had a mandatory duty under the Paragraph 6 and Schedule E to distribute the remainder of Peter's estate to Gary and Kristin upon Peter's death. CP 1573, 1585. If she had done her fiduciary duty when Peter died almost four years ago, there would have been no remainder to transfer into Trust A as her own self-proclaimed life estate.

II. ASSIGNMENTS OF ERROR

The Trial Court committed error on November 20, 2015 when it entered summary judgment in favor of Marjory and held that the language of the Trust resulted, upon the death of Peter Way, in the creation and funding of Trust A with the remainder of Peter's estate. CP 199-200.

The Trial Court committed error on November 20, 2015 when it denied Gary and Kristin's motion for summary judgment that upon the death of Peter Way, Gary and Kristin became entitled to receive the remainder of Peter's estate, 50-50, free of trust. CP 198-201.

The Trial Court committed error on November 20, 2015 when it granted Marjory's motion for summary judgment of dismissal of Gary and Kristin's counterclaim against Marjory for breach of fiduciary duty, breach of contract, fraud and specific performance. CP 200.

The Trial Court committed error when it decided the notes of a meeting between attorney William Zingarelli and his legal assistant, Kathleen Matzen is not admissible under ER 802 and is hearsay. 11/20/2015 Hearing, RP 33.

The Trial Court committed error on December 10, 2015 when it awarded attorney fees and costs to Marjory in the total amount of \$107,317.60. CP 87-91.

III. STATEMENT OF FACTS

1. Dispositive Provisions in Peter's Will.

In Article 3.1 of the Will, Peter gives his entire estate to the trustee of the Trust “to be distributed in accordance with the terms thereof.”⁵ CP 1559. The Will then directs Marjory, as personal representative, in the event the Trust shall have been revoked or declared invalid for any reason, to give the condominium and car to Marjory and the remainder of Peter’s estate to Gary and Kristin, 50-50. CP 1559.

2. The Dispositive Provisions in the Trust.

The Trust contains provisions protecting each settlor’s rights and interests in the separate property they each transfer into the Trust, including each settlor’s testamentary power over his or her separate property and his or her half of the shared property. CP 1570-1573.

Paragraph 6, Trust Beneficiaries, contains provisions whereby each Settlor may bequeath their portion of the trust estate to beneficiaries of their choosing, to be distributed upon their death. The first two subparagraphs, Wife’s Beneficiaries and Husband’s Beneficiaries confirm that upon the death of the Settlor, his or her portion of the trust estate “shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule [D or E], attached.” CP 1573 (emphasis added).

Paragraph 6, subparagraph, Remainder of Trust Estate, provides that upon the death of one spouse, any remaining property of the deceased

⁵ Appendix 1.

spouse, “which was not distributed to the aforementioned Beneficiaries...shall be transferred and administered as part of Trust A, as herein provided.” CP 1573 (emphasis added).

Paragraph 7, Creation of Trust A and Trust B, provides that “[U]pon the death of the first spouse, the surviving spouse, as Trustee, shall divide the entirety of the Trust Estate into two separate trusts, Trust A and Trust B, and shall continue to serve as Trustee for both Trusts.” CP 1573.

Paragraph 7, subparagraph, Contents of Trust A, provides that the contents of Trust A “does not include any portion of the Trust Estate given to a specific beneficiary under the terms of Paragraph 6 of this Declaration of Trust.” CP 1573 (emphasis in original).

3. Peter’s relationship with Marjory

Peter met Marjory a short time after his wife of 31 years, Carol Way (formerly Kirchner), died in June 2005. CP 1416-1417. Peter was 71 years old at the time and Marjory was 65 years old. They each had children from former marriages. CP 1546. Gary was Peter’s son from his first marriage to Kathleen. Peter also had a step-son, Greg Kirchner, who was Carol’s son from a former marriage. CP 1507.

Marjory had two daughters, Karen Martin and Tracey Cummings. CP 1584.

a. Peter and Marjory Enter into a Prenuptial Agreement in September 2006

Peter and Marjory married on September 24, 2006, but not before entering into a prenuptial agreement. CP 1547, 895-903, 858-861.

According to their prenuptial agreement, Peter's separate property totaled \$1,649,628 and his separate property monthly income totaled \$2,440. CP 902.

Marjory's separate property totaled \$64,000 and her separate property income totaled \$1,100. CP 903.

The prenuptial agreement recites that each party "has relatives who are the natural objects of [his]/[her] beneficence" and that each party's separate property is to remain their separate property "to enable each to dispose of his or her assets as he or she wishes at death." CP 897.

Again, Peter had his son, Gary, and his step-son, Greg. Marjory had her two daughters, Karen and Tracey.

b. Marjory Petitions for Divorce From Peter on August 16, 2011

After Marjory filed and served her TEDRA Petition, Gary and Kristin discovered she filed for divorce from Peter on August 16, 2011, to which Peter filed a Joinder. CP 949, 817, 821, 1439, 1511. The divorce petition was still pending at the time of Peter's death on June 4, 2012. CP 949, 823.

After Gary and Kristin pointed out to the Court the fact of Marjory's petition for divorce, Marjory filed a declaration stating the petition for divorce she had filed was only intended to be a "Medicaid Divorce," in order to protect Peter's assets against her own possible future medical expenses, but she and Peter intended to continue living happily together. CP 950-955, 826, 1417.

After Gary and Kristin propounded discovery requests to Marjory requesting the identity of the attorney who advised her regarding a Medicaid Divorce, Marjory filed a "Declaration Correcting Declaration," in which she declares her statements regarding a "Medicaid Divorce" were "inaccurate." She states she had been "too embarrassed" to admit in her earlier declaration that the real reason she filed for divorce was that she and Peter had been abusing alcohol and had been physically abusive to each other. CP 951, 1129-1131, 840-842. She stated that, after she filed for divorce, neither she nor Peter "had any desire to follow through with it" and that they overcame their abuse problems, and were able to restore their "happy marriage" CP 952, 841-842, 1130-1131. She indicated in her declaration that Peter still intended to leave her with a life estate, despite their marital difficulties. CP 842, 1131.

Marjory's claims that neither she nor Peter "had any desire to follow through" with the divorce after it was filed are contradicted by documentary evidence and by Marjory's own deposition testimony.

Peter and Marjory signed a Decree of Dissolution and Findings of Fact and Conclusions of Law on December 9, 2011, which were never filed in the divorce case. CP 867-874, 875-882. Marjory testified that when she signed these documents on December 9, 2011, she intended to go forward with the divorce. CP 864. She could not deny it, since she and Peter had both signed the Decree and the Findings of Fact.

The Findings of Fact approves the September 20, 2006 prenuptial agreement. CP 876, 902, 903. The Divorce Decree confirms an attached property settlement agreement and includes an “equalization award of \$15,000” to Marjory. CP 867-878. Marjory does not receive any spousal support or any of Peter’s separate property.

Peter signed the Will and Trust twelve weeks later. Under Schedule E of the Trust, Peter gives Marjory his separate property condominium and car, which was considerably more than Marjory would have received had she gone through with the divorce. After Peter died and before she filed the Petition in this case, Marjory sold the condominium and received proceeds of \$482,419.93. CP 1012.

4. Peter’s relationship with Gary

Gary is Peter’s son from his first marriage to Kathleen. CP 1501.

Soon after Peter and Kathleen were married, they moved to the United States. Peter and Kathleen divorced when Gary was still a toddler

and she and Gary returned to the United Kingdom, while Peter remained in the States and pursued a career in the aeronautical industry as an engineer. CP 1501.

Peter stayed in contact with Gary throughout his life. CP 1501.

Peter told Gary many times that he would take care of Gary and his children in his will. CP 1502. Peter called Gary in January 2012 and said he was not feeling well and was waiting on test results. He reiterated his intention to provide for Gary in his will and told Gary that “his estate would be divided equally with Greg’s family.” CP 1502.

After Peter’s death, Marjory told Gary that Peter had set up a trust and put her in charge of it. CP 1503. She told Gary he would only inherit upon her death. Gary thought this was unfair and did not tally with what Peter had told him about providing for Gary and Greg, Peter’s step-son from his marriage to Carol, in his will, but Gary took Marjory’s word for it, not knowing what his rights were or what action to take since he was based in Brussels at the time, never having met Greg and having no idea how to contact Greg’s family, since Gary knew Greg had died two years earlier. CP 1503.

Communications from Marjory to Gary after that were very sporadic. Marjory showed no real interest. When Gary received the summons and petition and read how Marjory was interpreting the Trust, Gary realized how wrong she was. CP 1503.

5. Peter's relationship with Kristin

Carol Way had been Peter's wife for thirty-one years when she died in June 2005 from cardiomyopathy. CP 1424, 1507.

When Peter married Carol in 1974, she had a son, Greg Kirchner, who was 13 years old at the time. Peter's son, Gary, was 14 years old at the time, living in the UK with his mother, Kathleen. CP 1507.

Kristin married Carol's son Greg in 1989. She has two daughters by that marriage: Summer, age 25; and Holly and, age 20. CP 1507.

During their lives together, Peter and Carol acquired a substantial estate. CP 1508.

In 1993, Peter told Greg and Kristin that he and Carol were making sure that they would have a substantial inheritance from their estate and that Greg and Gary would share equally.

In 2008, Kristin's husband Greg and their daughter, Summer both became gravely ill. CP 1508.

Greg was diagnosed as suffering from polymyositis, an uncommon, incurable, genetically inherited disease that weakens all the muscles. It was determined that Greg inherited this disease from Carol's lineage. CP 1508. In 2008 Greg developed a blood clot in his lung caused by tachycardia, requiring a pacemaker be installed. In 2009 Greg was hospitalized for polymyositis. CP 1509.

In December 2008, Summer required a heart transplant. In the meantime, a Left Ventricular Assist Device (LVAD) was implanted in her chest. CP 1509. Summer had to stay connected to the LVAD for 6 months. CP 1509. In May 2009, Summer received a donor heart and a successful heart transplant. CP 1509.

Greg died on May 3, 2010 due to heart failure, interstitial lung disease and polymyositis, one year after Summer received her heart transplant. CP 1509.

Greg had kept Peter informed of Summer and Greg's medical conditions. CP 1509.

After Greg's death and Summer's heart transplant Peter called Kristin often to check on Summer and Hollyanne. CP 1510. He frequently asked Kristin if she needed any monetary support. Peter told Kristin often that her daughters were in his Will and that he would take care of them. Peter often assured Kristin that she and her daughters were part of his family. One or two months before Peter's death, he again assured Kristin that they were in his Will. CP 1510.

Peter wrote to Richard Park, Carol's brother, on March 15, 2012, and stated,

I have lung cancer, non-curable. I will take care of Greg's wife and my son in Belgium. I miss Carol so much.

CP 1511, 1513.

6. Attorney William Zingarelli Drafted the Will and Trust.

Attorney William Zingarelli prepared the Will and Trust that Peter and Marjory signed. CP 263. Zingarelli prepared the Trust using a form he obtained from legalforms.ilrg.com, which he had used 10 or 20 times previously. CP 451, 261. Zingarelli drafted the Schedules himself, but could not recall drafting the Schedules used in the Way Trust. CP 263.

Kathleen Matzen, Zingarelli's legal assistant, took shorthand notes of a meeting she had with Zingarelli on February 8, 2012, at which time he advised her of Peter's wishes regarding the disposition of his estate and Zingarelli instructed her as to the preparation the Will and Trust.⁶ CP 886-887.

Matzen's notes indicate Peter wanted the "condo, contents and car" to go to Marjory "along with sufficient cash resources to cover the cost of the condo dues during Midge's lifetime." CP 891, 893.

Matzen's notes, plus Marjory's own declaration, indicate Peter had already designated Marjory as 100% primary beneficiary on his investment accounts, at least prior their entering into the Trust. CP 891, 893, 1131.

IV. ARGUMENT

⁶ The Trial Court stated during oral argument at the summary judgment hearing on November 20, 2015 that "the legal assistant's material is not admissible under ER 802. It is hearsay." 11/20/2015 Hearing, RP 33. Appellants have assigned error to this and have addressed it in the Argument section.

1. Standard of review.

This is an appeal from the Trial Court's Order granting Marjory's motion for summary judgment. CP 198-201 Summary judgment is reviewed de novo. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005).

Interpretation of a will or trust instrument is a question of law reviewed de novo. In re Estate of Curry, 98 Wn. App. 107, 112-13, 988 P.2d 505 (1999).

An individual's intent in a trust document is determined 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, 78, 240 P.3d 1182 (2010); Bartlett v. Betlach, 136 Wn. App. 8, 19, 146 P.3d 1235 (2006).

Although determining a settlor's intent is generally a question of fact, the interpretation of a trust provision is a question of law. Sherry, 158 Wn. App. at 76. "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)). "A trust is ambiguous if it is susceptible of more than one meaning; ambiguity is a question of law." Waits v. Hamlin, 55 Wn. App. 193, 200, 776 P.2d 1003 (1989). Furthermore, "if the intention may be gathered from [the trust] language without reference to rules of

construction, there is no occasion to use such rules, and the actual intent may not be changed by construction." Templeton, 106 Wn.2d at 309 (quoting 90 C.J.S. Trusts § 161 at 18-19 (1955)).

2. The Will and Trust are considered together and, if inconsistent, the Will controls.

Peter's Will incorporates the Trust, since the Will and Trust were signed the same day, the Will makes reference to the Trust by date and the Will directs that Peter's estate be distributed according to the Trust. CP 1559.

In this regard, RCW 11.12.255 provides as follows:

Incorporation by reference. A will may incorporate by reference any writing in existence when the will is executed if the will itself manifests the testator's intent to incorporate the writing and describes the writing sufficiently to permit its identification. In the case of any inconsistency between the writing and the will, the will controls.

RCW 11.97.020 provides as follows:

The rules of construction that apply in this state to the interpretation of a will and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

RCW 11.12.230 provides that all courts have regard to the direction of the will and true intent and meaning of the testator:

All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.

The intent of the Testator must be ascertained by considering the Will and Trust together, where both speak to a single purpose and were prepared at the same time. Fowler v. Lanpher, 193 Wash. 308, 75 P.2d 132 (1938).

Applying the foregoing rules, when construing a will and integrated trust, the court must ascertain the testator's intent from the four corners of both documents and, if inconsistent, the will controls. In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985).

There is no inconsistency between the dispositive provisions in the Will and Trust. Both unambiguously provide that upon Peter's death the remainder of his estate, except the condominium and car, are to be distributed to Gary and Kristin. CP 1559, 1573, 1585.

Marjory contends the Trust provides that the remainder of Peter's estate was to be transferred to Trust A upon Peter's death. CP 1565. However, this is clearly inconsistent with Article 3.1 of the Will. CP 1559. If the Court were to accept Marjory's interpretation of the Trust, which Gary and Kristin dispute, it would create an inconsistency between the Will and Trust. In such a circumstance, the dispositive provisions in the Will should control. RCW 11.12.255.

**3. Peter's dispositive intent in the Will is unambiguous:
No life estate for Marjory.**

The Will directs that if the Trust is revoked or declared invalid for any reason, Marjory, as Personal Representative, is to give the condo and car to Marjory and the “rest, residue and remainder of my estate I give, devise and bequeath 50% to my son, Gary Peter Way...and 50% to KRISTIN KIRCHNER, per stirpes.” CP 1559.

It is necessary to interpret the provisions of the Trust, since it was never revoked or declared invalid. However, the dispositive provisions in the will in the event the Trust is ever revoked are an indication of Peter’s dispositive intent.

Article 3.1 of the Will is intended to act as a safety net. It is reasonable to assume that Peter’s basic dispositive intent was the same in the Will as in the Trust. He wanted Marjory, Gary and Kristin to receive the same bequests under the Will as they did under the Trust, if the Trust were ever revoked.

If Peter wanted Marjory to have a life estate in the remainder of his estate, which Marjory claims he wanted her to have in the Trust, he would have provided a life estate for her in his Will if the Trust were ever revoked or declared invalid, which he clearly did not do.

**4. Peter’s dispositive intent in the Trust is unambiguous:
No remainder for Trust A, because no life estate for
Marjory was intended.**

Gary and Kristin concede that if Peter had not provided for the distribution , upon his death of his entire estate to specific beneficiaries

pursuant to Paragraph 6 and Schedule E, any remainder would and should have been transferred to Trust A and administered by Marjory as trustee of Trust A. However, according to the terms of Schedule E, Peter intended that upon his death his entire trust estate would be distributed between Marjory, Gary and Kristin, leaving no remainder to be transferred to Trust A to serve as a life estate for Marjory.

5. The language used in Schedule E does not indicate the gifts to Gary and Kristin were in trust or for the benefit of Marjory, so were absolute to them.

RCW 11.98.011, states among other provisions that, "A trust is created only if: . . . (b) the trustor indicates an intention to create the trust."

Before a trust will be found to exist, there must be a clear manifestation of intent to create a trust and not to do something else. In re Estate of Brooks, 20 Wn. App. 311, 313, 579 P.2d 1351 (1978), citing Hoffman v. Tieton View Community Methodist Episcopal Church, 33 Wn.2d 716, 207 P.2d 699 (1949). A testamentary trust will not be declared, unless such a trust is clearly intended by the testator. Id., citing In re Estate of King, 144 Wash. 281, 257 P. 848 (1927). It has generally been held that an imperative command to dispose of the property for the benefit of another is required to create a testamentary trust. Id., citing In re Estate of Morton, 188 Wash. 206, 61 P.2d 1309 (1936).

The dispositive language Peter used in Schedule E does not indicate that the gifts of the remainder to Gary and Kristin were in trust or

that they were to be transferred into Trust A or that they were for the benefit of Marjory.

The only reasonable interpretation that can be made of the language regarding the remainder in Schedule E is that the remainder was given to Gary and Kristin outright, free of trust, as their sole and separate property.

6. Peter's expressions of his dispositive intent in Matzen's notes do not indicate any intent to leave a life estate to Marjory.

William Zingarelli's legal assistant, Kathleen Matzen, made notes of Peter's expressions of intention that Marjory receive the condo, contents, car and enough cash resources to cover the condo dues for life. CP 891, 893.

The intention expressed by Peter does not rise to the level of intent to give Marjory a life estate in the entire remainder of Peter's estate. Marjory is 76 years old. CP 1546. Marjory's counsel reported that the income generated by the remainder of Peter's estate for the three year period following Peter's death was \$294,732.00. CP 965. That amount is far more than would be necessary to cover Marjory's condo dues for life.

In any event, Matzen's notes indicate Peter had already designated beneficiaries in his investment accounts. CP 891, 893. Marjory herself stated in a declaration that she was the 100% primary beneficiary on Peter's investment accounts before she and Peter signed the Trust. CP

1131. So, Peter did not need to give Marjory a life estate to cover her condo dues for life. He simply designated her as beneficiary on his investment accounts.

7. Matzen's shorthand notes are admissible under the statements of existing intent exception to the hearsay rule.

The Trial Court indicated during oral argument at the summary judgment hearing on November 20, 2015 that "the legal assistant's material is not admissible under ER 802. It is hearsay." 11/20/2015 Hearing, RP 33.

However, there is an applicable exception to the hearsay rule. Out-of-court statements which tend to prove a plan, design, or intention of the declarant are admissible under ER 803(a)(3). State v. Alvarez, 45 Wn. App. 407, 410, 726 P.2d 43 (1986).

ER 803 states in part as follows:

"(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

" . . .

"(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

ER 803(a)(3).

Matzen's notes contain out-of-court statements by Peter to Zingarelli and Matzen regarding the terms of Peter's Will, which fall within the exception of ER 803(a)(3).

To the extent Matzen's notes are out-of-court statements by Zingarelli to Matzen, they also come under the ER 803(a)(3) exception because they are statements of Zingarelli's intent to draft or have Matzen draft at his direction the Will and Trust for Peter.

Therefore, Matzen's notes are admissible as an exception to the hearsay rule under ER 803(a)(3).

8. The surrounding circumstances indicate Peter did not intend to leave Marjory a life estate.

Peter owned substantially more separate property than Marjory when he married her and when they signed the Trust. CP 902, 903, 965. He was careful to protect his separate property from her. He entered into a prenuptial agreement before he married her, which confirmed their separate property. CP 895-903.

Peter and Marjory each had their own children from former marriages to whom they wanted to give their estates upon their death. CP 1584, 1585. The prenuptial agreement recites that each party can "dispose of his or her assets as he or she wishes at death." CP 897.

The Trust served the same purpose as the prenuptial agreement.

Although the Trust provides at Paragraph 7 that upon the death of the first spouse Trust A would be created and funded to serve as a life estate for the surviving spouse, it also provides at Paragraph 6 that each spouse can provide that upon their death their portion of the trust estate shall be distributed to specific beneficiaries. CP 1573. In that sense, the Trust served the same purpose as the prenuptial agreement of protecting both their testamentary wishes and powers.

The petition for dissolution of their marriage was still pending as of February 29, 2012, when they signed the Trust. They had recently signed Findings of Fact and Conclusions of Law and a Divorce Decree, which either one could have presented to the divorce court and dissolve their marriage. CP 867-882.

Instead of going forward with the divorce, they decided to enter into the Trust and transfer their respective separate and shared property into the Trust. Instead of Marjory getting just \$15,000 as an equalization award from the pending decree of dissolution, Marjory received Peter's separate property condominium upon his death pursuant to Paragraph 6 and Schedule E (CP 1572, 1585), which she sold in April 2015 and received \$482,419.93. CP 1012.

Peter decided to go forward with the Trust instead of going through with the divorce. He had recently been diagnosed with terminal illness. He and Marjory had been separated since August 16, 2011. CP

876, 1417. He did not want to live alone with a terminal illness. He was willing to give Marjory his condominium and car when he died but he wanted the rest of his estate to go to Gary and Kristin, as he had promised them and his wife Carol. CP 1502, 1510. Gary was his only son. Kristin was the widow of the son of Peter's wife Carol of 31 years. It was because of Carol and his long marriage with her that Peter was able to acquire an estate worth \$1,649,628 in the first place. CP 876, 902, 903. Carol's son, Greg died prematurely due to a genetic disease that he had inherited from Carol. Not long after Carol's death, Peter witnessed Carol's granddaughter, Summer endure a heart transplant. Peter knew Kristin and her children would require substantial financial support for their future medical care and education. CP 1506-1514.

It was under these that Peter and Marjory designated the terms and specific beneficiaries to receive their respective portions of the trust estate upon their deaths, pursuant to Paragraph 6 and Schedule D and E. It is not surprising that both of them provided that upon their death their entire estate would go to specific beneficiaries under Paragraph 6 and their respective schedules D and E, leaving no remainder to be transferred into Trust A to serve as a life estate for the surviving spouse. CP 1573, 1584, 1585.

9. It was Marjory's fiduciary duty as trustee to distribute the remainder to Gary and Kristin upon Peter's death.

The termination date of the Trust was the date of Peter's death.
Restatement Third, Trusts §89, Comment *a*.

Following a trust's termination date, the trustee has a duty within a reasonable time to distribute the trust property to the persons who are entitled to it, and to make preliminary distributions as appropriate within the period for winding up administration. Ordinarily the trustee performs this duty by transferring the trust property to the distributees. Restatement Third, Trusts §89, Comment *e*.

Since Peter's death on June 4, 2012, Marjory has wrongfully and in breach of her fiduciary duties, been paying herself a life estate in the entire remainder of Peter's estate, as purported of trustee of "Trust A," knowing all the while from the unambiguous terms of the Will and trust, that Peter did not intend to fund "Trust A" upon his death or give Marjory a life estate. CP 1562-1585.

If this Court determines that Marjory owed a fiduciary duty to Gary and Kristin, upon Peter's death, to immediately distribute the remainder of Peter's estate to them, then they respectfully request that all causes of action in their counterclaim be reinstated and this case remanded to the Trial Court so they may resume prosecuting their counterclaim.

10. Attorney fees and costs.

Gary and Kristin appeal the award of attorney fees and costs to Marjory. CP 87-91. They request attorney fees and costs on appeal. In

addition they request the Court remand this case to the Trial Court so they may move the Trial Court for an award of attorney fees incurred in these proceedings, including but not limited to attorney fees and costs associated with opposing the petition and prosecuting their counterclaim in the Trial Court since the time these proceedings were initiated on June 3, 2015.

Under RCW 11.96A.150(1), either the Trial Court or this Court may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party.

The Trial Court's award of attorney fees and costs to Marjory on December 10, 2015 was based on the fact that the Trial Court ruled in her favor and determined that she was the prevailing party. CP 89. If the Trial Court's November 20, 2015 on summary judgment is reversed on this appeal, Marjory would not be the prevailing party.

An award of fees against Marjory in favor of Gary and Kristin under RCW 11.96A.150 is warranted. Gary and Kristin incurred costs opposing the Petition, prosecuting their counterclaim and appealing the Trial Court's decision. Marjory raises no meritorious issue on appeal, and the remaining trust assets should not be further depleted by the expense of appellate attorney fees.

V. CONCLUSION

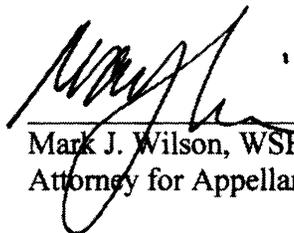
It is clear from the unambiguous terms of the Will and Trust and from the surrounding circumstances that existed at the time Peter signed

the Will and Trust that he intended that upon his death Marjory would receive his condominium and automobile and Gary and Kristin would receive the remainder of his estate, 50-50, as their sole and separate property, free of trust.

Marjory breached her fiduciary duties by failing, upon Peter's death, to distribute the remainder of Peter's estate to Gary and Kristin, as required under the provisions of the Trust.

Dated: April 27, 2016

Respectfully submitted,



Mark J. Wilson, WSBA No. 16675
Attorney for Appellants

CERTIFICATE OF SERVICE

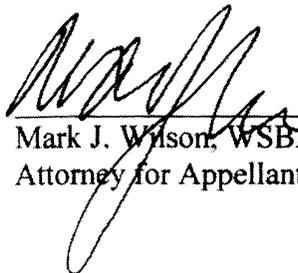
I, Mark J. Wilson, certify that on April 27, 2016, I caused a copy of this Brief of Appellants; and an unsigned copy of this Certificate of Service to be served by e-mail pursuant to mutual agreement of counsel for the parties on the following persons at the following e-mail addresses:

Beth A. McDaniel
beth@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Hillary D. Mace
Hillary@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Kimberly Staraitis
kstaraitis@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Dated: April 27, 2016 at Seattle, Washington.



Mark J. Wilson, WSBA No. 16675
Attorney for Appellants

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 APR 28 AM 10:39

APPENDIX 1

LAST WILL AND TESTAMENT OF

PETER J. WAY

CP 1558-1561

COPY
LAST WILL AND TESTAMENT

OF

PETER J. WAY

I, PETER J. WAY, of Mukilteo, Washington declare this to be my WILL and revoke all former Wills, Codicils and Trusts.

ARTICLE I
Family; Guardian

1.1 Family. I am married to MARJORY E. WAY. I have one child, GARY PETER WAY, an adult, and a former step-daughter-in-law, KRISTIN KIRCHNER.

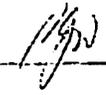
No other children have been born to or adopted by me.

ARTICLE II
Personal Representative

2.1 Designation. I appoint my spouse, MARJORY E. WAY as my Personal Representative to administer my Will. If she at any time declines, fails, or becomes unable to act as Personal Representative, I appoint my step-daughter, TRACEY CUMMINGS. If she at any time declines, fails, or becomes unable to act as Personal Representative, I appoint my step-daughter, KARIN MARTIN as Personal Representative.

2.2 Bond Waiver; Powers. No bond shall be required of my Personal Representative in any jurisdiction for any purpose. My Personal Representative shall have unrestricted non-intervention powers to settle my estate in the manner set forth in this WILL, and shall have full power, authority, and discretion to do all that my Personal Representative deems necessary or in the best interests of the practical

LAST WILL AND TESTAMENT - Page 1

Initials: 

WILLIAM M. ZINGARELLI, P.S.
9733 271st St. N.W., PO Box 356
Stanwood, WA 98292
(360) 629-2424

*Peter's Will
Original
Safe Deposit
Box*

administration of my estate, including all powers and authority vested in a Trustee under the provisions of the Washington Trust Act of 1985 as amended which I incorporate by reference herein.

2.3 Taxes from Residue. I direct that all estate, inheritance, and other taxes imposed by reason of my death, and interest or penalties on those taxes, shall be paid by my Personal Representative out of the residue of my estate. This direction shall apply to all such taxes attributable to all property of my estate even though some property may not pass under my WILL or is not part of the residue of my estate.

ARTICLE III
Disposition of Property

3.1 TRUST. I give all of my property and estate to the Trustee under trust dated February 29, 2012, to be distributed in accordance with the terms thereof. In the event the said trust shall have been revoked or declared invalid for any reason, then I direct my Personal Representative to give all of my property and estate as follows:

Condominium, Unit 113, Building 1 of View Point, Parcel No. 00699800111300, to my wife, MARJORY E. WAY, together with the vehicle, VIN # JTEEW41A092030311, to MARJORY E. WAY.

The rest, residue and remainder of my estate I give, devise and bequeath 50% to my son, Gary Peter Way. If he predeceases, then to his wife, Elena Way if they were still married at the time of his death and 50% to KRISTIN KIRCHNER, per stirpes.

ARTICLE IV

LAST WILL AND TESTAMENT - Page 2

Initials: *GW*

WILLIAM M. ZINGARELLI, P.S.
9733 271st St. N.W., PO Box 356
Stanwood, WA 98292
(360) 629-2424

Memorandum

I may leave in the same envelope with my WILL a written memorandum disposing of certain items of tangible personal property. I request that my Personal Representative effect distribution in accordance with the same as though it were set forth in full in this WILL.

I have initialed for identification purposes all pages of this WILL and have executed the entire instrument by signing this page on Feb 29th 2012 at Stanwood, Washington.



PETER J. WAY, Testator

This is to certify that on this 29 day of February, 2012, in Stanwood, Snohomish County, Washington, the foregoing instrument was, in our presence, published and declared by PETER J. WAY, the Testator herein named, to be his Last Will and testament. The Testator signed the same in our presence and, at the Testator's request, and in the presence of each other, we signed our names hereto as attesting witnesses.



Print Name: William Zingarelli
Residing at: Stanwood WA



Print Name: Kathleen A. Matson
Residing at: Menor Vernon WA

LAST WILL AND TESTAMENT - Page 3

Initials: _____

WILLIAM M. ZINGARELLI, P.S.
9733 271st St. N.W., PO Box 356
Stanwood, WA 98292
(360) 629-2424

DECLARATION OF SUBSCRIBING WITNESSES

THE UNDERSIGNED WITNESSES to the Last Will and Testament of PETER J. WAY, under penalty of perjury pursuant to the laws of the State of Washington, hereby declare as follows:

I am over the age of 18 years, and am fully competent to be a witness in this matter.

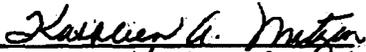
The foregoing last Will and Testament of PETER J. WAY was executed by him on the 29th day of February, 2012 at Stanwood, Snohomish County, Washington.

Immediately prior to the execution, PETER J. WAY declared the document to be his Last Will and Testament and requested the witnesses to subscribe their names to it. The Testator signed the document in the presence of all of the witnesses, and the witnesses attested the execution by all subscribing their names in the presence of the Testator and of each other.

The Testator appeared to be of sound and disposing mind and acted freely without duress or undue influence. Each of the witnesses is competent and appears competent to the other, and is of legal age.

SIGNED this 29 day of February, 2012.


Print Name: William Zingarelli
Residing at: Stanwood WA


Print Name: Kathleen A. Maten
Residing at: Maple Vernon WA

LAST WILL AND TESTAMENT - Page 4

Initials: _____

WILLIAM M. ZINGARELLI, P.S.
9733 271st St. N.W., PO Box 356
Stanwood, WA 98292
(360) 629-2424

APPENDIX 2

Declaration of Trust
The Peter J. & Marjory
E. Way Living Trust
CP 1570-1585

552581180

COPY

DECLARATION OF TRUST

THE PETER J. & MARJORY E. WAY LIVING TRUST

Date: February 29, 2012

This Declaration of Trust is made and executed this 29th day of February 2012, by PETER J. WAY and MARJORY E. WAY as the Settlers, and shall establish a revocable living trust in accordance with all of the terms and purposes herein detailed.

1. **Name of Trust.** The trust shall be called and known as The PETER J. & MARJORY E. WAY LIVING TRUST (hereinafter referred to as "the Trust").
2. **Trust Estate.** Settlers warrant and declare that they have transferred, set aside and hold separately any and all of their interest in the property described in the attached Schedules A, B, and C (hereinafter referred to as "the Trust Estate") in The Peter J. & Marjory E. Way Living Trust. Settlers agree to execute any and all additional instruments necessary to vest full title of all the aforementioned property in the Trustees in their capacity as Trustees of the Trust.

The Trustees shall use and manage the Trust Estate for the benefit of the Trust Beneficiaries, as herein described, and shall administer the Trust Estate in accordance with the terms and purposes herein stated.

Settlers may, from time to time, add additional and after-acquired property to the Trust Estate by executing such documents as are required to vest title in the Trustees and by amending Schedule A, B or C to reflect the addition of such property, and such property shall be fully incorporated into this Trust.

While both Settlers are alive, the property contained in the Trust Estate shall retain its original character. That property described as separate property shall remain separate property and that property described as shared property shall remain shared property in the same manner as it was shared before being placed in the Trust.

While both Settlers are alive, property described in Schedule A retains its character as the shared property of both Settlers. Property described in Schedule B retains its character as the separate property of MARJORY E. WAY. Property described in Schedule C retains its character as the separate property of PETER J. WAY. In the event of revocation of the Trust, property shall be distributed between the Settlers and ownership shall continue in accordance with the above provision as if this Trust had never been created.

3. **Reserved Powers of the Settlers.** *At all times while both Settlers are alive, Settlers shall retain the following powers:*

A. **Superior Interest.** *At all times during their lifetimes, Settlers' interest in the Trust Estate shall remain superior to the interest of any and all beneficiaries.*

B. **Amendment.** *Settlers reserve the right to amend or modify the Trust by adding or removing beneficiaries, adding or removing Trustees or Successor Trustees, or amending any other Trust provision only by a written agreement signed by both parties, but there will be no need to notify any beneficiary.*

C. **Revocation.** *Either Settlor reserves the right to revoke this Trust in its entirety by delivering a written notice of revocation to the other Settlor, without need to notify any beneficiary.*

D. **Trust Estate.** *Both Settlers reserve the shared right to all income, profits and control of the Trust Estate property described in Schedule A.*

(i) *At all times during her lifetime MARJORY E. WAY reserves the right to all income, profits and control of the Trust Estate property described as her separate property in Schedule B.*

(ii) *At all times during his lifetime PETER J. WAY reserves the right to all income, profits and control of the Trust Estate property described as his separate property in Schedule C.*

E. **Homestead.** *In the event that Settlers' primary residence is transferred to the Trust, Settlers retain all rights and eligibility for state homestead tax exemption that they would be entitled to had the property not been placed in trust. Settlers shall have the right to occupy, rent free, the residence for life.*

4. **Appointment of Trustees.** *Settlers appoint PETER J. WAY and MARJORY E. WAY as Trustees for The Peter J. & Marjory E. Way Living Trust and that those Trustees shall also serve as Trustee for any additional trusts or Child's Trusts herein created. Either Trustee has the equal right to act for and represent the Trust in any transaction.*

Death or Incapacitation of Trustee. *Upon the death or physician certified incapacitation of MARJORY E. WAY, then PETER J. WAY shall serve as sole Trustee of any and all trusts created by this Declaration of Trust. Upon the death or*

physician certified incapacitation of PETER J. WAY, then MARJORY E. WAY shall serve as sole Trustee of any and all trusts created by this Declaration of Trust.

Successor Trustees. Upon the death or incapacitation of the surviving spouse/Trustee, or in the event that both spouses become simultaneously incapacitated, as certified by a physician, then TRACY CUMANIAS shall become Successor Trustee of The Peter J. & Marjory E. Way Living Trust. If this named Successor Trustee is unable or unwilling to serve or predeceases the Initial Trustee, then KARIN MARTIN shall serve as Successor Trustee.

5. **Trustee Rights.** During the administration of the Trust, the Trustee shall have the following rights. For purposes of this Declaration of Trust, the term "Trustee" shall refer to the acting Trustee or Trustees, whether the Initial Trustee or a Successor Trustee.
 - A. **Trust Purposes.** Trustee shall administer and manage the Trust in a good faith manner for the benefit of Settlers and Beneficiaries and in accordance with the terms and purposes described in this Declaration of Trust.
 - B. **Trustee Resignation.** Any acting Trustee may resign at any time by providing written notice to the person specified to serve as next Trustee, as provided in the foregoing or following section.
 - C. **Appointment of Successor Trustees.** In the event all Trustees herein named are unwilling or unable to serve as Trustee, the acting Trustee may appoint an additional Successor Trustee by executing a signed and notarized appointment.
 - D. **Trustee Compensation.** No Trustee shall be entitled to any compensation for serving in the capacity of Trustee, except that Trustee shall be entitled to reasonable compensation, as determined by Trustee, in the event that he/she serves as Trustee of any Child's Trust herein created or in the event that Trustee serves during either or both Settlor's incapacitation.
 - E. **Trustee Liability.** Trustee shall not be liable for any discretionary act associated with the administration and management of the Trust, so long as Trustee is acting in good faith.
 - F. **Waiver of Bond and Accounting.** No bond shall be required of any Trustee, nor shall any Trustee be required to deliver accountings or reports.

6. Trust Beneficiaries.

Wife's Beneficiaries. Upon the death of MARJORY E. WAY, her portion of the Trust Estate, to include her share of the property listed in Schedule A, as well as any separate property listed in Schedule B shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule D, attached.

Husband's Beneficiaries. Upon the death of PETER J. WAY, his portion of the Trust Estate, to include his share of the property listed in Schedule A, as well as any separate property listed in Schedule C, shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule E, attached.

Remainder of Trust Estate. Upon the death of one spouse, any remaining property of the deceased spouse, including one half of the shared property in Schedule A and any separate property in the appropriate Schedule B or C, in the Trust Estate, which was not distributed to the aforementioned Beneficiaries, including remaining property which was not distributed as above due to the prior death of the Beneficiary, shall be transferred and administered as part of Trust A, as herein provided.

- 7. Creation of Trust A and Trust B.** Upon the death of the first spouse, the surviving spouse, as Trustee, shall divide the entirety of the Trust Estate of The Peter J. & Marjory E. Way Living Trust into two separate trusts, Trust A and Trust B, and shall continue to serve as Trustee for both Trusts. Determination of adequate documentation and records for the division of the Trust and creation of Trust A and Trust B shall be at the discretion of the Trustee.

Contents of Trust A. All of the property of The Peter J. & Marjory E. Way Living Trust owned by the deceased spouse, to include one half of the value of shared Property in Schedule A, as well as any separate property described in Schedule B or C, as applicable, shall be transferred to Trust A. This includes any earned and accumulated income or appreciation in value attributable to his/her ownership interest in the aforementioned property, but does *not* include any portion of the Trust Estate given to a specific Beneficiary under the terms of Paragraph 6 of this Declaration of Trust. No formality shall be required to transfer the aforementioned property into Trust A

(i) Irrevocability of Trust A. Trust A becomes irrevocable upon the death of the deceased spouse.

(ii) Life Beneficiary of Trust A. Upon the death of the deceased spouse and the creation of Trust A, the surviving spouse shall become the Life Beneficiary of Trust A. The surviving spouse's life estate interest in Trust A, entitles the surviving spouse receives all interest or other income from the trust property, to

use the property, and to spend the trust property in any amount for his or her health, education, support and maintenance, in his or her accustomed manner of living

Contents of Trust B. All of the property of The Peter J. & Marjory E. Way Living Trust owned by the surviving spouse, to include one half of the value of the shared Property in Schedule A, as well as any separate property described in Schedule B or C, as applicable, and any property given to the surviving spouse in accordance with Paragraph 6 shall be distributed to Trust B. This includes any earned and accumulated income or appreciation in value attributable to his/her ownership interest in the aforementioned property. No formality shall be required to transfer the aforementioned property into Trust B.

(i) ***Revocability of Trust B.*** Trust B remains revocable until the death of the surviving spouse. Surviving spouse retains the right to revoke or amend Trust B throughout his/her lifetime.

(ii) ***Rights Retained in Trust B.*** The surviving spouse retains the right to all income, profits and control of the property in Trust B.

8. Administration of Trust A.

Final Beneficiaries.

If MARJORY E. WAY is the first deceased spouse, then the Final Beneficiaries of Trust A shall be:

TRACEY CUMMINGS, per capita
KARIN MARTIN, per stirpes

If MARJORY E. WAY is the first deceased spouse, then the alternate Final Beneficiaries of Trust A shall be:

the then living children of Karin Martin

If PETER J. WAY is the first deceased spouse, then the Final Beneficiaries of Trust A shall be:

50% to GARY PETER WAY, per capita
50% to KRISTIN KIRCHNER, per stirpes

If PETER J. WAY is the first deceased spouse, then the alternate Final Beneficiaries of Trust A shall be:

- 50% to the children of Kristin Kirchner
- 50% to the wife of Gary Peter Way, if married.

Trustee Maintenance. The Trustee of Trust A shall spend for the benefit or pay to the surviving spouse all net income earned from the principal of Trust A on a quarterly basis, or with greater frequency, if necessary. The Trustee shall also spend for the benefit of or pay to the surviving spouse any amounts from the principal of Trust A which are necessary for the surviving spouse's health, support and maintenance according to his or her accustomed manner of living. Trustee shall be entitled to reasonable compensation from Trust A assets for his/her duties administering Trust A. No accounting shall be required of Trustee of Trust A, unless otherwise required by law, except that the Trustee shall be required to file federal income taxes on behalf of Trust A and the Final Beneficiaries shall be provided with copies of annual federal income tax returns.

Death of the Life Beneficiary. Upon the death of the Life Beneficiary, the Trustee shall distribute the property of Trust A to the appropriate Final Beneficiaries provided in this Paragraph 8.

9. Administration of Trust B. Upon the death of the first deceased spouse, Trust B shall become the surviving spouse's trust and shall remain revocable.

Distribution of Trust B Property. Trust B becomes irrevocable upon the death of the surviving spouse. The Trustee of Trust B shall distribute the property of Trust B, first in accordance with any specific gifts described under Paragraph 6 of this Declaration of Trust. All remaining Trust B property shall be distributed to the appropriate Final Beneficiaries named in Paragraph 8.

10. Children as Beneficiaries. *[choose one of the following three options:]*

No Beneficiary of the Trust is a minor or young adult at the time of the execution of this Declaration of Trust.

11. Simultaneous Death. In the event that both Settlers die simultaneously or under such circumstances as would render it doubtful which Settlor died first, then it shall be conclusively presumed, for the purposes of this Trust, that both Settlers died simultaneously and at the same moment. Neither spouse shall be deemed the

surviving spouse, and the Trustee shall distribute the Trust Estate according to Paragraph 6 and Paragraph 8 of this Declaration of Trust.

12. Settlers' Debts and Taxes.

Wife's Liabilities. Any and all debts of MARJORY E. WAY at the time of her death and all death taxes of the wife shall be promptly paid by the Trustee from the following property of the Trust Estate:

*[list account/accounts]

If the above referenced property is insufficient in value to satisfy liabilities at the time of her death, then the Trustee shall determine, at his/her discretion, from which property of the wife's portion of Trust property the debts shall be paid, subject to any IRS regulation controlling the property in Trust A.

Husband's Liabilities. Any and all debts of PETER J. WAY at the time of his death and all death taxes of the husband shall be promptly paid by the Trustee from the following property of the Trust Estate:

* [list account/accounts]

If the above referenced property is insufficient in value to satisfy liabilities at the time of his death, then the Trustee shall determine, at his/her discretion, from which property of the husband's portion of the Trust property the debts shall be paid, subject to any IRS regulation controlling the property in Trust A.

13. Incapacity.

Simultaneous Incapacity of Both Settlers. In the event that both Settlers of The Peter J. & Marjory E. Way Living Trust should become physician certified as incapacitated, physically or mentally, at the same time, then the Successor Trustee shall continue the administration and management of The Peter J. & Marjory E. Way Living Trust. The Trustee shall use, distribute and pay from the Trust Estate for the benefit of the Settlers, as he/she sees fit in their best interest, both from income from the Trust Estate as well as principal from the Trust Estate, as needed. This shall continue until either or both Settlers are certified no longer incapacitated by a competent physician.

Incapacity of Surviving Spouse. In the event that the surviving spouse should become physician certified as incapacitated after the death of the first spouse, then the Successor Trustee shall continue the administration and management of Trust B. The Trustee shall use, distribute and pay from the property of Trust B for the benefit of the surviving spouse, as he/she sees fit in the surviving spouse's best interest, both from income from Trust B property, as well as principal from Trust B property, as needed. This shall continue until either or both Settlers are certified no longer incapacitated by a competent physician. The Successor Trustee shall also manage Trust A, and any Child's Trust herein created, according to the provisions of this Declaration of Trust until the surviving spouse is no longer incapacitated or until the surviving spouse's death.

Amendment During Incapacity. In the event that one spouse is incapacitated and the other spouse is not incapacitated, the spouse who is not incapacitated shall have the authority to amend this AB Trust without the consent of the incapacitated spouse only in response to any change Congress may make to the Estate Tax laws. In the event that both spouses are simultaneously incapacitated and Congress makes changes to the Estate Tax law, the Successor Trustee may amend this Declaration of Trust to the extent necessary to best take advantage of changes to the Estate Tax laws.

14. **Trustee Powers.** The Trustee, in his management and administration of the Trust, shall have any and all powers allowed or conferred upon a Trustee under the laws of the State of Washington, specifically, but not limited to the following

the power to manage the Trust Estate, including real estate, as if Trustee were absolute owner;

the power to sell, encumber, borrow against the Trust Estate, including any real estate therein, by any method allowable by law;

the power to invest, sell or grant options for the sale of the Trust Estate in property of any kind whatsoever;

the power to receive additional property and add it to the Trust Estate as herein created;

the power to make and diversify investments, including determining whether any or all of the Trust Estate should produce income;

the power to deposit funds from the Trust Estate in bank accounts or other accounts, whether they be interest-bearing or non-interest-bearing accounts and whether the institution be FDIC insured or not;

the power to establish relationships with financial institutions involving safe deposit boxes, wire transfer and other transaction;

the power to employ competent professionals for advice and services regarding the management of the Trust Estate;

the power to commence or defend legal actions regarding the Settlor or the Trust;

the power to conduct and continue any business matter of the Settlor; and

the power to perform all acts necessary to administer any Child's Trust which may be created by this Declaration of Trust.

15. **Changing the Situs of Administration.** The Trustee may, at any time, remove all or any part of the property or the situs of administration from one jurisdiction to another. The Trustee may elect, by filing an instrument with the trust records, that the trust shall thereafter be construed, regulated, and governed as to administration by the laws of the new jurisdiction. The Trustee may take action under this paragraph for any purpose that the Trustee deems appropriate, including the minimization of any taxes in respect of the trust or any beneficiary of such trust. If necessary, the beneficiaries entitled to receive distributions of net income under the trust may, by majority consent, appoint a corporate fiduciary in the new situs. If a beneficiary is a minor or is incapacitated, the parent or legal representative of the beneficiary may act on behalf of the beneficiary.
16. **Amendment.** Any subsequently executed amendment to this Declaration of Trust made and signed by both the Settlers shall be deemed fully incorporated in this Declaration of Trust.
17. **Duplicate Originals.** This Declaration of Trust may be executed in any number of counterparts, each of which shall be deemed an original. Any person may rely upon a copy of this Declaration of Trust, provided that it is certified under oath by the Trustee as a true copy, to the same effect as if it were an original.
18. **Severability and Survival.** If any part of this Declaration of Trust is declared invalid, illegal, or inoperative for any reason, it is the intent that the remaining parts shall be effective and fully operative, and that any Court so interpreting this Declaration of Trust and any provision in it construe in favor of survival.
19. **Governing Law.** This Declaration of Trust and The Peter J. & Marjory E. Way Living Trust herein created shall be governed, construed and interpreted by, through and under the Laws of the State of Washington.

SETTLORS' CERTIFICATION OF DECLARATION OF TRUST

We, PETER J. WAY and MARJORY E. WAY, as Settlers, certify that this Declaration of Trust correctly states the manner in which and the terms and conditions upon which the Trust Estate is to be held, administered, managed and disposed of by our named Trustee(s). We have read and understand this Declaration of Trust and confirm that it reflects our wishes.



PETER J. WAY, Settlor



MARJORY E. WAY, Settlor

TRUSTEES' DECLARATION OF ACCEPTANCE OF TRUSTEE RESPONSIBILITY

We, PETER J. WAY and MARJORY E. WAY, as Trustees, certify that we have read the terms and conditions upon which the Trust Estate is to be held, administered, managed and disposed. We have read and understand this Declaration of Trust and confirm that we accept the responsibilities as Trustee that it confers and promise to act in accordance with its requirements.



PETER J. WAY, Trustee



MARJORY E. WAY, Trustee

STATEMENT OF WITNESSES

The foregoing instrument, consisting of 13 pages, including this page, was signed in our presence by PETER J. WAY and MARJORY E. WAY. We, at the request and in the presence of the Settlers and in the presence of each other, have subscribed our names

below as witnesses to this revocable Living Trust. We declare that we are of sound mind and of the proper age to witness a revocable trust, that to the best of our knowledge the Settlers are of the age of majority, or are otherwise legally competent to make a revocable trust, and appear of sound mind and under no undue influence or constraint. Under penalty of perjury, we declare these statements are true and correct on this 29th day of February, 2012 at Stanwood, Washington.

[Signature]
Witness Signature

William Zingarelli
Witness Printed Name

[Signature]
Witness Signature

Kathleen A. Matzen
Witness Printed Name

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

STATE OF WASHINGTON)
COUNTY OF SNOHOMISH)

On February 29, 2012 before me, STACEY MAIN,
NOTARY PUBLIC, personally appeared PETER J. WAY and MARJORY E. WAY,
who proved to me on the basis of satisfactory evidence to be the persons whose names
are subscribed to the within instrument and acknowledged to me that they executed the
same in their authorized capacities, and that by their signatures on the instrument the
persons, or the entity upon behalf of which the persons acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Washington that
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Signature]
Signature
NOTARY PUBLIC, State of Washington
My Commission Expires: 01-23-2016

(Seal)



SCHEDULE A
of
The Peter J. & Marjory E. Way Living Trust
Marital/Shared Property

Settlers place in Trust all their interest in the following property :

Chase Bank, checking Account (This account also includes incoming electronic deposits)

SCHEDULE B
of
The Peter J. & Marjory E. Way Living Trust
Wife's Separate Property

Settlor places in Trust all her interest in the following property :

Vehicles:

2004 Pontiac Vibe, VIN 5Y2SL62804Z467703

Investments:

Prologis Computershare Trust Company
NEA Valubuilder TSA Mutual fund

Jewelry

Bank Accounts:

Umpqua Bank CD
Washington Federal checking

Income:

U.S. Social Security
U.K. Social Security
Washington State Retirement

Liabilities:

(list)

SCHEDULE C
of
The Peter J. & Marjory E. Way Living Trust
Husband's Separate Property

Settlor places in Trust all his interest in the following property :

Real Property:

Unit 113, Building 1 of View Point, a Condominium, according to Declaration thereof recorded under Snohomish County Recording No. 8002060102 and any amendments thereto; said Unit is located on Survey Map and Plans filed in Volume 41 of Condominiums, at Pages 152 through 162, in Snohomish County, Washington.

Parcel No. 00699800111300

Vehicles: 2009 Toyota Highlander JTEEW41A092030311

Retirement (IRAs, 401Ks, etc.)

Boeing Voluntary Investment Plan
401K Stable Value Fund

Investments:

Vanguard Investments
Individual Account (Non-IRA)
Traditional IRA
Traditional IRA Brokerage Account
Roth IRA

Fidelity Investments
Variable Annuity

Bank Accounts:

Boeing Employees Credit Union
Savings Account
Variable IRA Savings Account
2 year Traditional IRA CD
3 year Traditional IRA CD
4 year non-IRA CD

Umpqua Bank
Traditional IRA CD

Bank of Washington
Traditional IRA CD

Income:

U.S. Social Security
U.K. Social Security
Boeing Retirement
Delta D&S Trust
Delta Retirement Trust
Delta/John Hancock Annuities

SCHEDULE D
of
The Peter J. & Marjory E. Way Living Trust

Pursuant to Paragraph 6 of the Declaration of Trust, dated Feb 29, 2012, the Trust Estate property of MARJORY E. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

Karin Martin
Ferndale, WA

Daughter

50% per stirpes

Tracey Cummings
Carnation, WA

Daughter

50%; if she predeceases, then to Karin Martin, per stirpes.

SCHEDULE E
of
The Peter J. & Marjory E. Way Living Trust

Pursuant to Paragraph 6 of the Declaration of Trust, dated February 29 2012 the Trust Estate property of PETER J. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

SPECIFIC BEQUESTS:

In the event Marjory Way survives Peter Way then she shall inherit the real property condominium, Parcel number . 00699800111300 and the vehicle, VIN JTEE W41A 092 030311 2009 Toyota Highlander

Gary Peter Way	son	50% of remainder; if he predeceases, then 50% to his wife, Elena Way, if they were still married at the time of his death
Kristin Kirchner	daughter-in-law	50% of remainder. If she predeceases, then 50% to her then living children in equal shares.