

NO. 73209-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re: The Richard C. Sweezey Trust of 1990,

RAE ANN ENGDAHL, Personal Representative of the Estate of Richard
H. Sweezey

Appellant,

v.

DAVID SWEEZEY and PAUL SWEEZEY as Trustees of the Richard C.
Sweezey Trust of 1990, and

MICHAEL VRANIZAN, Trustee of Gary Sweezey Trust

Respondents.

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REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The Estate seeks nothing more than enforcement of the unambiguous terms of the TEDRA Agreement at the heart of this dispute. This TEDRA Agreement was necessitated because two of the Respondents, in their capacities as co-trustees, wrongfully distributed hundreds of thousands of dollars of Trust assets to themselves. All of the Trust beneficiaries, including the two trustees who took Unlawful Distributions, resolved the matter through the TEDRA Agreement. The TEDRA Agreement did not require the breaching trustees/beneficiaries to reimburse the Trust, but instead allowed them to keep their Unlawful Distributions and granted to the other remainder beneficiaries the right to receive distributions of an equal amount upon the death of the lifetime income beneficiary. The parties included an inurement clause that expressly renders the TEDRA Agreement binding on all the parties and their estates. The Estate now requests the Court to enforce the clear terms of the TEDRA Agreement.

Respondents instead ask the Court to look outside the plain language of the TEDRA Agreement and incorporate a contrary term of the Trust in order to avoid the obligation to pay the Unlawful Distribution Payment. To accept the Respondents' interpretation would be to rewrite the contract, which the Court cannot do. The Court can neither imply the

terms Respondents seek to insert into the TEDRA Agreement, nor ignore its clear language as Respondents' interpretation requires. The Court should reverse the trial court and grant summary judgment for the Estate.

II. ARGUMENT

A. Plain Terms of the TEDRA Agreement Create an Enforceable Right for Rick and his Estate

Respondents' analysis of the TEDRA Agreement mistakenly begins with an analysis of the trustor's intent and trust language. The correct place to begin the analysis is with the language of the TEDRA Agreement itself. The words used in the TEDRA Agreement clearly manifest the intent to make the payment obligation under the Unlawful Distribution Payment Provision irrevocable, and to make the TEDRA Agreement survive the death of a party.

1. Context Rule Supports the Estate's Interpretation

a. Context rule only allows extrinsic evidence to define or explain undefined terms

Generally, the context rule of contract interpretation allows a court to ascertain the intent of the parties by viewing the contract as a whole, the objective of the contract, the contracting parties' conduct, and the reasonableness of the parties' respective interpretations. While extrinsic evidence is allowed, it may not be used to "modify or contradict a written contract." *King v. Rice*, 146 Wn. App. 662, 670-671, 191 P.3d 946

(2008). Additionally, when there is a merger clause, extrinsic evidence is only used to “explain undefined contract terms, not to modify, vary, or contradict terms of the written contract.” *Id.* at 671. Moreover the context rule is used to “determine the meaning of *specific words and terms used*” and not to show “an intention independent of the instrument.” *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (emphasis in original). For example, in *Berg*, the context rule was used to determine the meaning of “gross rents,” a term that had been undefined in the original contract. *Berg v. Hudesman*, 115 Wn.2d 657, 671-72, 801 P.2d 222 (1990).

In *Hearst*, the Washington Supreme Court found that when the contractual terms were clear, extrinsic evidence was unnecessary. Specifically, the court had to determine the applicability of one clause to another. Both parties had offered substantial extrinsic evidence in support of their interpretations. However, the court found that the terms of each of the clauses were clear, and there were no undefined terms. Therefore, extrinsic evidence was not relevant to determine the meaning of the disputed provisions. *Hearst*, 154 Wn.2d at 512. The court further remarked that using extrinsic evidence to interpret the clear terms of the contract would amount to a prohibited judicial rewriting of the contract. *Id.* at 510. Thus, under the context rule, a court can use extrinsic evidence

to determine *specific* undefined terms in a contract; but where the terms are unambiguous, extrinsic evidence is ignored.

Respondents do not identify a term that needs to be defined through reference to extrinsic evidence. In fact, Respondents agree that the terms are unambiguous (Br. of Respondents at 12). Nevertheless, without pointing to any “specific words or terms” in need of definition, Respondents refer to the Trust for the proposition that an equalizing payment pursuant to the terms of the TEDRA Agreement is dependent on surviving June. This is a contradiction of the express terms of the TEDRA Agreement, which unequivocally states that the Unlawful Distributions “shall be equalized,” and that the agreement binds and benefits the parties and their estates. Hence, by failing to identify a specific term that needs definition via extrinsic evidence, Respondents are improperly using the context rule to vary the plain and unqualified terms of the contract. Put another way, Respondents are using extrinsic evidence to try to show “an intention independent of the instrument,” which is prohibited under the context rule.

b. Context shows intent of parties to contradict the terms of the Trust

Respondents argue that the parties to the TEDRA Agreement intended what Dick intended, and therefore distributions pursuant to the

TEDRA Agreement can only be made to those sons who survive June. This contention is disproved in the document itself. The Trust, by its express terms, allowed only for distributions to June during her life, yet the TEDRA Agreement, signed during June's life, allowed David and Paul to keep their improper Trust distributions, which is a clear contravention of Dick's intent. The equalizing payments incorporated Dick's stated intent in his Trust that his sons be treated equally. Since David and Paul were allowed to keep their early distributions, the requirements for equalizing payments under the TEDRA Agreement were consistent with Dick's intention that his sons be treated equally and all had a right to the early distribution amounts. Had the parties intended to do what Dick intended as to the survivorship requirement instead of equal treatment as to the early distribution to each son, they could have simply said so. The parties had previously executed a TEDRA Agreement where they explicitly stated that their intent was to act consistently with what Dick would have wanted. CP 422. In contrast, in this TEDRA Agreement, there is no reference to Dick's intent. In sum, the parties unequivocally repudiated Dick's intent in the TEDRA Agreement.

Respondents imply that the Estate argues that the terms of TEDRA agreements, as a rule, must be read and enforced entirely apart from the disputed trust or will — essentially an interpretation in a vacuum. (Br. of

Respondents at 11). This misstates the Estate's position, which is simply that it is the intent of the *parties* to the TEDRA Agreement that must be considered independent of the disputed Trust. It has never been the Estate's position that terms in a TEDRA agreement cannot reference or apply to other documents, and indeed the Estate stated in its opening brief that this TEDRA Agreement does in fact amend specific sections of the Trust. (Br. of Appellant at 10).

c. June sought recovery for Rick and the Gary Trust

What the parties provided for in the TEDRA was not disgorgement, but rather an assignment of June's recovery to those brothers who had not taken Unlawful Distributions.¹ No particular words are required for a valid assignment. *Amende v. Town of Morton*, 40

¹ A distinction must be made between new claims on appeal, which are not allowed, and new arguments or new authority, which are allowed. Claims, not arguments in support of claims, are waived if not made at trial. *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1185 n.18 (9th Cir. 2007). Arguments may be framed more clearly on appeal, but as long as the issue was advanced below it is properly before the court. *Bennett v. Hardy*, 113 Wn.2d. 912, 917-18, 784 P.2d 1285 (1990). Complaint alleging indemnity and/or contribution sufficient to raise issue of equitable subrogation on appeal; and it was sufficient that argument was expanded and refined on appeal. *Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P. 2d 1122 (1986). Parties did not argue *Sullivan*, but they did argue the basic reasoning so that the issue could be reviewed by the appellate court. *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872 n.1, 751 P. 2d 329 (1988). There is no rule preventing an appellate court from considering case law not presented at the trial level when it is in support of contention made at trial. *Walla Walla County Fire Protection Dist. No. 5 v. Washington Auto Carriage Inc.*, 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1988).

Wn.2d 104, 106, 241 P.2d 445 (1952). In order to make an equitable assignment, the assignor must have intended to transfer a present interest in the debt or fund or subject matter, and pursuant to such intention, must have made an absolute appropriation of the thing assigned, relinquishing all power or control over it and to the use of the assignee. *Id.* at 106-107. Thus a valid assignment requires no particular language, and need only show that the transfer was intended and that control has been given to the assignee.

The context for this TEDRA Agreement is that David and Paul made unauthorized distributions of Trust assets to themselves. These distributions came at the expense of the only permissible income or principal beneficiary, their mother June. June sued all three trustees for breach of fiduciary duty, but, as shown by the Arbitration Award, only two of the three had taken unauthorized distributions. The TEDRA Agreement, rather than providing for a disgorgement and reimbursement, instead provides that an amount equal to the Unlawful Distributions (*i.e.* the amount owed June) should instead be distributed to those sons who had not taken the Unlawful Distributions (*i.e.* Rick and the Gary Trust). The TEDRA Agreement also contains a release of June's claims against the trustees. The effect of these provisions is an assignment of June's remedy against David and Paul for Unlawful Distributions to Rick and the

Gary Trust (the payment to Rick and Gary shows intent to assign, and the release is the relinquishment).² In sum, the TEDRA Agreement essentially functions as an assignment of June's remedy to Rick and the Gary Trust, and is enforceable as such.

2. Distributions Pursuant to the TEDRA Are Absolute and Not Contingent

Words in a contract are given their ordinary, usual and popular meaning unless the entirety of the document clearly demonstrates a contrary intent. *Hearst*, 154 Wn.2d at 504. The relevant part of the Unlawful Distribution Payment Provision, reads: "To the extent the distributions are unequal, they shall be equalized by the New Corporate Trustee upon June's death." There can be no doubt as to what this means. The ordinary and usual meaning of "shall be" is a mandatory action, and here the mandatory action is the equalization of the distributions taken from the Trust during June's life. It cannot be seriously argued that this means anything else.

The absence of certain language also shows the intended irrevocable nature of the TEDRA distributions. First, there is no language

² The fact that Rick and the other parties reserved claims does not change the irrevocable nature of the Unlawful Distribution Payment Provision. Whether payments are required under the Unlawful Distribution Payment Provision is governed by the terms of that provision, and not by the release of claims.

in the TEDRA Agreement requiring survivorship or qualifying in any way the distribution under the Unlawful Distribution Payment Provision. Second, there is no reference to Trust Article 3.4 (where the survivorship requirement is found). The *Hearst* court, in discussing the applicability of one clause to another, found it unreasonable to suggest that, where clauses failed to specifically state that they were applicable to another, meant that they were intended to apply to each other. *Id.* at 509. While the TEDRA Agreement contains no reference to survivorship or Trust Article 3.4, it does contain a Merger and Inurement Clause, both of which indicate an intention to not incorporate Trust terms and to make the agreement enforceable by a party's estate.

The absolute nature of these distributions is also seen in the lack of any reimbursement provision. To explain, under the Respondents' interpretation, if David or Paul had predeceased June without descendants, then their estates would have been obligated to repay their distributions to the Trust (as required by the survivorship provisions in the Trust). In the event of David's predeceasing June without descendants, then his estate would have been obligated to repay the Trust \$829,490.94. This is an unreasonable interpretation of the Unlawful Distribution Payment Provision. Moreover, David and Paul thought the distributions were irrevocable since they reported them as income on their W-2s.

Finally, Respondents point to the use of “would” as support for their position that the distributions pursuant to the TEDRA Agreement are contingent. However, the choice of the word “would” supports the Estate’s interpretation. “Shall” and “would” are modal auxiliary verbs used to express whether something is certain, probable or possible (and occasionally polite requests). “Shall” expresses an obligation; while “would” expresses something conditional or possible. The Unlawful Distribution Payment Provision states that the Unlawful Distributions “shall be equalized,” using “shall” to express the mandatory nature of the distribution. Later in that section, when discussing the Trust remainder distributions, the parties selected “would,” the modal verb to express something conditional or possible. This is in line with the Estate’s interpretation that the distributions pursuant to the TEDRA Agreement are an absolute obligation, thus the use of “shall,” while the ultimate Trust remainder distributions remain contingent, thus the use of “would.”

In sum, the TEDRA Agreement plainly requires that the distributions “shall be equalized,” contains no language qualifying those distributions nor any reference to Trust Article 3.4, and fails to provide any reimbursement mechanism for distributions to those who predecease June. Thus, that the parties to the TEDRA Agreement manifested their

intent that the equalizing distributions be absolute and irrevocable, and not contingent.

3. The TEDRA Agreement Rendered the Unlawful Distribution Payment Provision Irrevocably Vested

The basic premise of the trial court ruling was that Rick only had an “expectancy” interest in the Trust and so could not receive a distribution pursuant to the TEDRA Agreement. Respondents still claim that at the time the TEDRA Agreement was signed Rick, David, and Paul could all predecease June, and so there was no assignment of the remainder. These positions are incorrect applications of Washington law. Moreover, Rick’s Estate has argued from its initial TEDRA petition that Rick, David, Paul, and the Gary Trust, had the right to reallocate their interests in the remainder by means of a contract.

a. Common law upholds contracts reallocating contingent trust remainders and expectancy interests

It is settled in Washington that a contingent remainder beneficiary can assign that interest via a contract, and that a court will enforce that assignment. *Seattle First Nat. Bank v. Crosby*, 42 Wn.2d 234, 247-49, 254 P.2d 732 (1953). It is further settled that some or all of the contingent remainder beneficiaries of a trust may execute a contract that reallocates their shares of the trust remainder, and so eliminate the survival contingency. *Old Nat. Bank v. Campbell*, 1 Wn. App. 773, 779,

463 P.2d 656 (1970). More generally, it settled that parties interested in an estate can provide for an estate distribution different than that of the testator via contract between the interested parties. *Collins v. Collins*, 151 Wn.2d 201, 215-17, 275 P.2d 571 (1959). Thus, a contingent or expectancy interest is no bar to making a valid contract reallocating, assigning, transferring, selling or otherwise disposing of that interest.³ Furthermore, these contracts can eliminate contingencies or create rights where none existed previously. The rule is the same in other jurisdictions.⁴ Thus, an expectancy interest in a trust or estate is an assignable interest that can be transferred, sold, reallocated, or disposed of through a contract between one or more of the beneficiaries.

Rick, David, Paul, and the Gary Trust all had vested remainder interests subject to complete divestment. The Trust contained no spendthrift provision. These are remainder interests that can be transferred via contract. In such agreements, the parties are free to transfer

³ The Estate recognizes that had Rick alone made an assignment of his contingent remainder interest and predeceased June, the assigned interest would have disappeared upon Rick's death

⁴ *E.g.*, *Rector v. Tatham*, 287 Kan. 230, 233-36, 196 P.3d 364 (2008) (interest in estate is assignable, even when the contract is among the estate beneficiaries); *Krick v. Klockenbrink*, 144 Ind. App. 55, 60-63, 242 N.E.2d 848 (1968) (contingent remainder in land or personal property can be sold); *Lena v. Yannelli*, 78 N.J. Super 257, 260, 188 A.2d 310 (1963) (valid assignment by son of expectancy interest in his mother's estate while she was living, despite the fact that the son might predecease, the estate could shrink in value, or the mother might leave nothing to the son).

the interest to third parties (*Seattle First Nat. Bank*) or they can reallocate interests among themselves, including effectively eliminating contingencies (*Old Nat. Bank*), resulting in a distribution plan different than that of the testator (*Collins*). Therefore, the intent of the testator is irrelevant in interpreting the terms of a contract among the parties. Here, the parties agreed to a distribution different than that of the trustor; they specifically designated a portion of the Trust remainder in an amount equal to the Unlawful Distributions to the brothers who had not taken unauthorized early distributions. This reallocation was unqualified in the TEDRA Agreement, and was rendered expressly binding on the parties and their estates by the Inurement Clause. Thus, through the TEDRA Agreement, the parties reallocated a portion of the Trust remainder and eliminated its contingent nature.

b. *Butts* illustrates the appropriate analysis of contractual right created by agreement

The analysis of the contractual rights created in a family settlement agreement in the *Butts* case should guide the Court here. In *Butts*, the will of Raymond Sr. contained an option to purchase real estate that was personal to his son. Certain adjustments to the estate required under the will could not be made, so the beneficiaries entered into a settlement agreement to resolve the matter. The agreement gave the son an option to

purchase additional real property, and it included an inurement clause. The son died and his personal representative attempted to exercise the option. Extrinsic evidence was introduced that at least some of the parties intended the option to be personal. The court determined that the settlement agreement was not ambiguous and found that the option created in the settlement agreement was a *contractual* right, and therefore was not governed by the terms of the will. *Butts v. Lawrence*, 22 Kan. App. 2d 468, 470-71, 919 P.2d 363 (1996). The court further found that the inurement clause expressly made the option enforceable by the estate of a party. *Id.* at 473. Thus, the *Butts* court found that the option under the will was personal, but the settlement agreement granting the option created a contractual right that was governed by the terms of the contract, and those terms (*i.e.* the inurement clause) expressly rendered the option a right that inured to a party's estate.

As in *Butts*, the right to a distribution of a remainder of the Swezey Trust was created in the Trust. The parties interested in the Trust had various disputes which were resolved through a settlement agreement. Like *Butts*, the settlement agreement created contractual rights for the parties, one of which was the right to an equalizing distribution. The equalizing distribution provision, by its plain terms, gave a party an unqualified right to that distribution. Again, as in *Butts*, the parties

included an inurement clause that expressly makes the agreement applicable to heirs and assigns. Thus, the unqualified language of both the Unlawful Distribution Payment Provision and the Inurement Clause make the TEDRA Agreement enforceable by a party's estate, and the Court should follow the analysis in Butts and enforce this unambiguous language.

4. Courts Enforce Inurement Clauses

In order to avoid the Inurement Clause, Respondents ask the Court to ignore it as boilerplate, or to limit its meaning with language contained in the Trust. There is no basis for either action. Here, as set forth in Br. of Appellants at 26, the expansive language of the Inurement Clause allows for heirs, successors, executors, and assignees of the parties to the TEDRA Agreement to receive rights in the Trust (whether through the Unlawful Distribution Payment Provision or other provisions). Because the Inurement Clause is unambiguous and materially affects the parties' rights and duties, it must be enforced.

a. Inurement clauses are not unenforceable because they are common

First, Respondents assert that the Inurement Clause is "generic" language (Br. of Respondents at 16) and "pure boiler plate," that the parties did not ascribe any "particular meaning" to it, and that it was not intended to actually apply to the terms of the Unlawful Distribution

Payment Provision (Br. of Respondents at 18). But no particular meaning needs to be ascribed to it because its terms are plain (it binds and inures to the benefit of the parties and their heirs, successors, assigns and executors). Also, by its plain terms, the Inurement Clause applies to the entire agreement, including the Unlawful Distribution Payment Provision.

Furthermore, courts have often looked to an inurement clause to decide disputes, and although the Estate failed to find significant discussion of the application of inurement clauses in Washington cases, other jurisdictions have closely analyzed and enforced them.⁵ Respondents, however, cite to no authority for the proposition that an inurement clause can be ignored as “boilerplate.” To the contrary, courts generally read inurement clauses as expressing the intent of the parties and give force to their language. This Court may not simply dismiss the Inurement Clause as “boilerplate.”

b. Respondents cannot give a logically consistent interpretation of the Inurement Clause

Respondents try to give the Inurement Clause meaning by applying it to every provision of the TEDRA Agreement except for the Unlawful

⁵ *E.g., Pino v. Spanish Broad. Sys. of Florida, Inc.*, 564 So. 2d 186, 189 (Fla. Dist. Ct. App. 1990) (covenant not to compete enforced through application of inurement clause, in making its decision court noted the policy goal of providing uniformity in contract enforcement); *Am. Mfg. Co. of Tex. v. Witter*, 343 S.W.2d 943, 945-46 (Tex. Civ. App. 1961) (effect of inurement clause on contracts granting patent sublicenses, court found that the inclusion of the inurement clause rendered the rights assignable).

Distribution Payment Provision. As Respondents note, the TEDRA Agreement contains many other provisions that also alter the Trust (Br. of Respondents at 19), and Respondents ask the Court to interpret the Inurement Clause as applying to these other provisions, but just not the Unlawful Distribution Payment Provision. Critically, the Respondents quote no language showing this awkward result was intended. In short, Respondents ask the Court to either ignore the Inurement Clause entirely, or to interpret it as applying to everything but the Unlawful Distribution Payment Provision, but cannot point to any specific language to support these interpretations. In contrast, the Estate offers a straightforward interpretation that the Inurement Clause means what it says and applies to all clauses in the TEDRA Agreement.

5. Public Policy Requires that the Court Enforce the Contract as Written

When the Washington Supreme Court decided *Hearst*, it took time to note the importance of predictability in contract interpretation. *Hearst*, 154 Wn.2d at 503. The court also stated that even if the parties intended a different interpretation, that intention was not reduced to writing, and to enforce that intention would be to rewrite the contract, which the court was not at liberty to do. *Id.* at 510. Likewise, “the whole panoply of contract law rests on the principle that one is bound by the contract which

he voluntarily and knowingly signs.” *Nat'l Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973). Furthermore, the prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what their rights and liabilities will be under the contract. *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 700, 167 P.3d 1112 (2007). There is a strong public policy interest in preserving the sanctity of a contract and providing uniformity and certainty in contractual transactions.

Here, for the Court to find that certain provisions of the TEDRA Agreement are subject to the conflicting terms of the Trust, despite no express reference to the conflicting Trust provision and a Merger Clause, would be to rewrite the contract. Likewise, to find that certain provisions of the TEDRA Agreement do not survive the death of a party, despite the inclusion of the Inurement Clause, would be to rewrite the contract for the parties. This is the opposite of furthering the policy of predictability and sanctity of contracts. This policy is critical when interpreting TEDRA agreements because they will almost always contain terms different than the underlying trust or will. Moreover, to eliminate the Inurement Clause, or to selectively apply it to provisions, would call the effectiveness of such provisions into doubt, lead to uncertainty, and make it impossible for

parties to innumerable existing and future contracts to foretell what their rights and liabilities will be.

B. A Party Who Enjoys the Benefits of a Contract is Estopped from Denying Their Obligations

Equity estops Respondents from asserting that the terms of the Trust prohibit distribution to Rick's Estate. Equitable estoppel applies when "acts, statements, or admissions" are inconsistent with the later claim. *Witzel v. Tena*, 48 Wn.2d 628, 632, 295 P.2d 1115 (1956). Moreover, equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens the contract imposes. *See Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012) (applying equitable estoppel to an arbitration clause).

David and Paul have enjoyed the benefits of the TEDRA Agreement, which allowed them to retain the Unlawful Distributions. The burden imposed by the agreement is that Rick and the Gary Trust are entitled to equal distributions. Similarly, Respondents now assert that Dick's intent must be respected, and TEDRA distributions can only be in accordance with the Trust terms, yet previously they ignored Dick's intent by making distributions to themselves contrary to both the terms of the

Trust and Dick's intent.⁶ Coming from David and Paul, this about-face on respecting Dick's intent is not surprising since a denial of their obligations under the TEDRA Agreement increases their share of the Trust remainder. Equity demands that trustees who have breached their fiduciary duty not profit from so doing, and that the TEDRA Agreement be enforced.⁷

C. This Court Should Reverse the Award of Attorney Fees

1. Attorney Fee Equitable Standard Requires Reversal

Attorney fees under TEDRA are equitably awarded, and an award from a party individually typically requires a breach of fiduciary duty, bad faith or some violation of a statute or rule.⁸ The cases cited by Respondents do not show otherwise. In fact, the cases cited by Respondents show that courts almost always require a showing of misconduct or statute violation. *See In re Estate of Fitzgerald*, 172 Wn. App. 437, 453-54, 294 P.3d 720 (2012) (awarding attorney fees from the plaintiff who had brought plainly time-barred claims);

⁶ It should also be noted that while pointing out that Rick could have no personal recovery in June's lawsuit because it would have violated the terms of the Trust (Br. of Respondents at 28), Respondents conveniently ignore the distributions that were taken by David and Paul and in direct violation of the terms of the Trust.

⁷ The Estate assigned error to the trial court's denial of its motion for summary judgment, which includes the Estate's estoppel argument. (Br. Of Appellant at 1).

⁸ The Estate never claimed that a breach of fiduciary duty was the only reason for an award of fees personally (Br. of Respondents at 33), but rather that the general basis for an award of fees from a party personally appears to be some sort of misconduct, and not merely bringing a losing claim.

Kwiatkowski v. Drews, 142 Wn. App. 463, 499, 176 P.3d 510 (2008) (awarding attorney fees to the party seeking to enforce the settlement agreement and from the party who had violated it); *Villegas v. McBride*, 112 Wn. App. 689, 695-97, 50 P.3d 678 (2002) (awarding attorney fees to the estate because there was a total failure to provide the required information for a creditor claim).

Respondents also cite to *In re Estate of Kerr*, for the proposition that fees are properly awarded without a showing of misconduct. *In re Estate of Kerr*, 134 Wn.2d 328, 949 P.2d 810 (1998). *Kerr*, decided under RCW 11.68.070 and prior RCW 11.96.140, was a case where a beneficiary sought the removal of the personal representative. Had the beneficiary succeeded in removing the personal representative, the beneficiary would have been awarded fees pursuant to RCW 11.68.070; however that statute made no provision for fees for the personal representative who mounted a successful defense. *Id.* at 336. Essentially, the attorney fees awarded under RCW 11.68.070 used a prevailing party standard when the beneficiary won and removed the personal representative; but the statute made no provision for when the beneficiary lost and the personal representative was the prevailing party. The court had to determine whether it could award fees when the personal representative successfully defended a removal action, the court ultimately

decided that it had the equitable authority to do so under former RCW 11.96.140. *Id.* at 343-44. Thus, *Kerr* involved two statutes, one of which was a prevailing party standard. This is not the case here.

Although Respondents cite *Sloans v. Berry* for the proposition novelty of an issue does not warrant an award of the fees to the Estate, this case actually supports the Estate's contention that an award of fees against Rick's Estate was inappropriate. *Sloans v. Berry*, ---P.3d---, 2015 WL 4726882 (Aug. 10, 2015). In *Berry*, an aunt left most of her estate to her niece, however her house was left to her niece for life, and thereafter to Betty Jean Berry. The niece and Berry reached an agreement to let Berry use the house for a time. After Berry died, the niece filed a creditor's claim against Berry's estate. The court dismissed the niece's claim because it was improperly filed under TEDRA, rather than the creditor claim statutes, and awarded attorney fees from the niece. The niece appealed, arguing that a court could not award fees when the issue was novel. The court clarified that novelty was only one factor to be considered, confirmed the equitable standard for an award of fees, and reversed the award of fees from the niece to the estate. *Id.* at *2.

Here, of the three trustees, Rick alone took no unauthorized distributions. He participated in the mediation and signed the TEDRA Agreement (along with David, Paul and the Gary Trust) that was intended

to resolve all disputes related to the Trust. The TEDRA Agreement makes an unqualified provision for equal distributions to the brothers who had not received the Unlawful Distributions, then clearly states that it binds and benefits the parties and their executors and heirs. This is a valid claim brought in good faith by the estate of the sole trustee who did not breach his fiduciary duty. To award attorney fees from the Estate to the very trustees whose breaches of fiduciary duty necessitated the TEDRA Agreement is the opposite of equity.⁹

2. TEDRA is Not Supposed to be a Punitive Award of Fees for Parties that Bring Valid, but Ultimately Losing Claims

Public policy concerns also support the reversal of the attorney fee award. The chilling effect of such awards was of concern in the recent case of *Estate of Burton v. Didricksen*. *Estate of Burton v. Didricksen*, --- P.3d---, 2015 WL 4920961 (Aug. 18, 2015), where the court found that although the appeal was unsuccessful, it was not frivolous and so declined to award fees. The court stressed the public policy considerations, and held that because the claim raised a novel issue, and such claims should not be discouraged, that fees would be inappropriate. *Id.* at *5.

⁹ The Estate in its initial TEDRA Petition correctly made a request for fees from the Trust that was not dependent on winning or losing. CP 15.

Access to courts is expensive. In cases such as this, where an individual beneficiary is seeking to enforce a right against well-funded trustees who can afford some of the highest priced attorneys in the area, an award of fees against the beneficiary can be crushing. This is especially true when multiple parties are involved, and a bad day in court could result in paying the fees of all the parties. Allowing this fee award to stand would have a chilling effect on any beneficiary or interested party attempting to enforce a right that may in many cases be a right or perceived right to share in an inheritance from a deceased loved one.

Fees should only be awarded in a TEDRA case where a bad actor has abused the court system or prosecuted a frivolous claim. Under the facts presented here, the Estate should be awarded its fees from the Trust, not be forced to pay Respondents' fees.

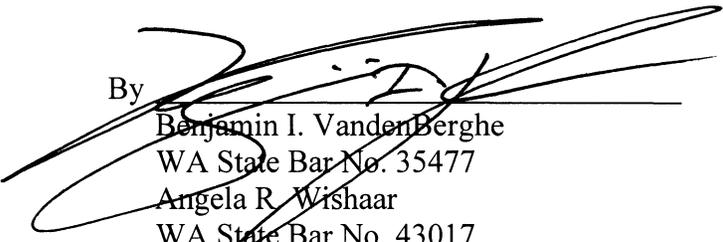
III. CONCLUSION

The Estate respectfully requests that this Court reverse the trial court, enforce the plain terms of the TEDRA Agreement, estop the Respondents from denying their obligation under the TEDRA Agreement, and reverse the trial court's award of attorney fees.

RESPECTFULLY SUBMITTED this 2nd day of November, 2015.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 2, 2015, I hand delivered an envelope containing a true and correct copy of REPLY BRIEF OF APPELLANT addressed to:

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DATED this 2nd day of November, 2015, at Seattle, Washington.



Verna Garton

CHIEF CLERK
NOV 11 2015
10:00 AM
CLERK