

No. 74207-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CAROLE LAROCHE, f/k/a CAROLE HOFFMAN,

Appellant,

v.

ALAN LOWELL HOFFMAN,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY,

The Honorable Carol Schapira

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Mr. Hoffman appointed a \$10 million trust (the "Lillian Non-Exempt Trust," hereafter "SB 5177"), to his own estate three years before the parties' 2010 dissolution trial, then explicitly asserted throughout the proceedings and trial that SB 5177 was not part of his estate. SB 5177 was by far the largest asset discussed in the divorce, what the trial court termed "the giant gorilla throughout this case¹." Relying on this misrepresentation, Ms. LaRoche did not ask the trial court to dispose of SB 5177, based on her reasonable belief and her attorney's concession in closing argument that SB 5177 was not part of Mr. Hoffman's estate.

In 2015, Ms. LaRoche brought a CR 60(b)(4) motion to vacate alleging fraud, misrepresentation and misconduct of an adverse party, based in part on Mr. Hoffman's 2007 appointment of SB 5177 to his own estate, which document she provided to the court. The court denied the motion, stating "... I certainly don't see something by Dr. Hoffman, the respondent, or his attorney, Mr. Eagle, that was false, intended to mislead the court, intended to mislead you." RP 21.²

Ms. LaRoche asks this Court to reverse the superior court's denial

¹ Oral ruling at dissolution trial, CP 302.

² The Verbatim Report of Proceedings in this case consists of one volume, the October 9, 2015 hearing on Ms. LaRoche's CR 60(b)(4) motion. It shall be referred to as "RP" followed by a page designation. The final day of the 2010 dissolution trial has been designated as part of the Clerk's Papers and will be referred to by its CP designation.

of her CR 60(b)(4) motion and to hold that until the property is otherwise disposed of, the former spouses hold it as tenants in common.

B. ASSIGNMENTS OF ERROR

1. The superior court abused its discretion in denying Ms. LaRoche's CR 60(b)(4) motion to vacate based on misrepresentation.

2. The superior court abused its discretion in denying Ms. LaRoche's CR 60(b)(4) motion to vacate based on misconduct of an adverse party.

3. The superior court abused its discretion in denying Ms. LaRoche's CR 60(b)(4) motion to vacate based on fraud.

4. The superior court erred in failing to hold an evidentiary hearing to resolve the facts surrounding the misrepresentation and fraud.

5. The superior court erred in failing to find that the former spouses hold SB 5177 as tenants in common.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CR 60(b)(4) provides that the superior court may relieve a party from a final judgment for "misrepresentation." Here, Ms. LaRoche provided documentary evidence that a very large trust, SB 5177, that Mr.

Hoffman had insisted was not part of his estate had been appointed to his estate, by him, three years before trial. Was the superior court's denial of Ms. LaRoche's CR 60(b)(4) motion an abuse of discretion? (Assignment of Error 1.)

2. To obtain relief under CR 60(b)(4), the moving party must present clear and convincing evidence that they relied on or were misled by the misrepresentation. At trial in this case, Ms. Hoffman did not ask the court to dispose of SB 5177, and her attorney conceded in closing argument that SB 5177 was not part of Mr. Hoffman's estate. Did Ms. LaRoche rely upon and was she misled by Mr. Hoffman's misrepresentation? (Assignment of Error 1.)

3. To obtain relief under CR 60(b)(4), the moving party must present clear and convincing evidence that there is a connection between the misrepresentation and obtaining the judgment, such that it prevented a full and fair presentation of the moving party's case. Here, SB 5177 was the largest asset in the case, and because SB 5177 was represented to the court and Ms. LaRoche as not being part of Mr. Hoffman's estate, Ms. LaRoche was unable to present argument that SB 5177 should be considered when dividing up the parties' community and separate properties at dissolution. Did Ms. LaRoche show a connection between the misrepresentation and obtaining the decree? (Assignment of Error 1.)

4. CR 60(b)(4) provides that the superior court may relieve a party from a final judgment for fraud. Here, Ms. LaRoche provided documentary evidence that SB 5177, which Mr. Hoffman had insisted was not part of his estate had been appointed to his estate, by him, three years before trial. Was the superior court's denial of Ms. LaRoche's CR 60(b)(4) motion an abuse of discretion? (Assignment of Error 3.)

5. CR 60(b)(4) provides that the superior court may relieve a party from a final judgment for "misconduct of an adverse party." Where Ms. LaRoche provided documentary evidence that SB 5177, which Mr. Hoffman had insisted was not part of his estate had been appointed to his estate, by him, three years before trial, was the superior court's denial of Ms. LaRoche's CR 60(b)(4) motion an abuse of discretion? (Assignment of Error 2.)

6. To prevail on a CR 60(b)(4) motion, the moving party must show that the misconduct, fraud, or misrepresentation prevented the losing party from fully and fairly presenting their case or defense. Here, Ms. LaRoche was unable to present testimony or argument about the true status of SB 5177 at issue, or to propose a disposition that took into account the full extent of Mr. Hoffman's property, including SB 5177, because Mr. Hoffman did not disclose that SB 5177 was part of his estate. Did Mr. Hoffman's misconduct, fraud, or misrepresentation prevent Ms.

LaRoche from fully and fairly presenting her case? (Assignments of Error 1, 3.)

7. In In re the Marriage of Maddix,³ this court held that when a CR 60(b) motion raises an issue of fact which cannot be resolved purely by resort to the transcript and documents of the underlying trial, the superior court must take testimony to resolve the disputed factual issue. Here, Ms. LaRoche raised fraud and misrepresentation based upon a document that was not presented or discussed at trial. Did the superior court err in failing to take testimony on this issue? (Assignment of Error 4.)

8. Property undisposed of by a dissolution action becomes property held by the former spouses as tenants in common.⁴ Since SB 5177 was property in Mr. Hoffman's estate at the time of dissolution and, due to his nondisclosure of his appointment of SB 5177 to his estate, it was not disposed of in the dissolution, do the former spouses now hold SB 5177 as tenants in common? (Assignment of Error 5.)

D. STATEMENT OF THE CASE

³ 41 Wn.6App. 249, 251, 703 P.2d 1062 (1985).

⁴ Yeats v. Estate of Yeats, 90 Wn.2d 201, 580 P.2d 617 (1978); Olsen v. Roberts, 42 Wn.2d 862, 864, 259 P.2d 418 (1953).

1. Procedural History. The parties were married in 2000 and their dissolution trial was in 2010. CP 332, 342. Mr. Hoffman appealed on several issues and Ms. LaRoche cross-appealed on two issues; this Court affirmed in 2012. CP 332. A related federal malpractice suit concluded in February, 2015. CP 124. Ms. LaRoche filed a CR 60(b)(4) motion to vacate the dissolution in August, 2015, which the superior court denied on October 9, 2015. CP 125, 357. This appeal timely followed. CP 359.

2. Relevant Facts.

a. The dissolution trial. The parties were in their 50s when they married, and among several trusts created by his parents, Mr. Hoffman was the beneficiary of three trusts. Appendix A at 638-39.⁵ His father had created a trust for him that contained "a little over a million dollars." Appendix A at 639. His mother had created two trusts for him and his sister, an exempt trust and a non-exempt trust. Appendix A at 638-39. The exempt trust contained a little over two million dollars. *Id.* The Lillian Non-Exempt Trust, SB 5177, contained approximately \$10 million

⁵ Concurrently with this motion, Ms. LaRoche has filed a Motion To Transfer Transcripts from the original 2010 dissolution appeal, COA No. 66193-1-I (King Co. No. 09-3-02400-0 SEA) into this appeal. The transferred transcripts contain the trial testimony referenced in this brief. For this Court's convenience, Ms. LaRoche attaches the specific portions of the transcripts to which she is referring in this brief as Appendix A.

in assets at the time of trial. Id. Mr. Hoffman received \$156,000 per year from SB 5177. Appendix A at 900.

Ms. LaRoche had a more modest financial background. CP 276. The court found that total assets at trial were \$3,764,000. CP 276. The court valued Ms. LaRoche's separate assets at \$47,000 and Mr. Hoffman's separate assets at \$2,000,000. CP 276. Because SB 5177 was represented by Mr. Hoffman as not being part of his estate, that trust was not considered by the court to be part of his estate, nor in any way Mr. Hoffman's asset. The trial court did not dispose of SB 5177.

What the trial court did not learn during the dissolution trial was that three years before trial, Mr. Hoffman had appointed the entirety of the \$10 million SB 5177, the Lillian Non-Exempt Trust, to his own personal estate on August 4, 2007. CP 149 (Exhibit 7 to Declaration of Carole Hoffman, also attached herein as Appendix B). Not only did Mr. Hoffman not inform the trial court that he had appointed SB 5177 to his estate, he specifically testified at the dissolution trial that he did not possess SB 5177:

No my sister and I, we don't get the money ever. I have concerns that -- well, I don't even know what is legally allowed. I do not have the money to -- you know, I have about -- I think if I sold everything I'd have \$500,000. That's all I have. That's my sum total for working for 47 years of my savings, other than retirement and the house. That is it of mine.

Appendix A at 622. (Emphases added.) Mr. Hoffman also told the trial court that SB 5177 was not for him:

Q: So the terms of the nonexempt Trust that your mother set up, this Trust was -- although you've portrayed the Trust as for your children, the terms of the Trust are for you; aren't they?

A: No, I don't think so at all. I think the beneficiaries are my children. I'm entitled to take out a certain amount of money per month.

Appendix A at 624. Mr. Hoffman also specifically disclaimed that there was any other relevant document regarding SB 5177:

Q: Would you also agree that the terms of this Trust as written by your mother on July 6th of 1990 are still the terms of the Trust, the terms that control the nonexempt --

A: Yes, that's the only other document that's available.

Appendix A at 628. In closing argument at the dissolution trial, Mr. Hoffman's attorney argued that the SB 5177 trust assets were not available to Mr. Hoffman:

[H]e made it patently clear his interpretation, his understanding of the Trust accounts, and he indicated what he thinks [sic] the Trust account is for his children and his grandchildren.

CP 291. He reiterated the point:

Your Honor, my client has asked me -- and if I can find it -- to indicate to you that he does not believe and disagrees with Mr. Billbe and Ms. Hoffman that he's a rich man. He

does not accept that premise. The money that he has is owned in Trust for his issue.

CP 295. Mr. Hoffman's attorney specifically tied this alleged lack of access to the trust monies to his argument on why Ms. LaRoche should receive a smaller property distribution than she had requested:

If you do what Mr. Billbe wants to do, she essentially runs the table, she essentially cleans out all of my client's retirement assets whatsoever, and he is relegated essentially to doing what he does not believe he can do that's live from the Trust because she would get everything, essentially, I think I heard this morning 100 percent.

CP 296. Ms. LaRoche accepted that SB 5177 was not available to Mr. Hoffman, and relying upon this fact, conceded in closing that the total amount of property available for disposition before the trial court -- property not held in any trust -- was \$3,764,000. Supp.

CP 253. The trust assets, Ms. LaRoche's attorney conceded, "are structured in a very sophisticated way. They are technically and legally beyond his control because his -- other than the mandatory distributions, he has to have the consent of his sister as the special trustee to get any monies out of there." CP 253-54.

Ms. LaRoche's attorney argued that the trial court should consider that over the last four years Mr. Hoffman had taken

still in effect -- i.e., that no later documents significantly changed SB 5177. Appendix A at 628.

Mr. Hoffman's theme at trial was that SB 5177 did not belong to him and was not for him, but only for his children: "...[T]he beneficiaries [of the \$10 million Trust] are my children." Appendix A at 628.. In closing argument, Mr. Hoffman's attorney told the trial court that the SB 5177 account is for his children and his grandchildren, not for himself. CP 291. "The money that he has is owned in Trust for his issue." CP 295.

When Mr. Hoffman was testifying that SB 5177 was not part of his estate, he was sitting on the knowledge that he had in fact already appointed SB 5177 to his own estate three years ago. His conduct disserves Ms LaRoche and the court. See Suburban Janitorial Servs. v. Clarke Am., 72 Wn. App. 302, 863 P.2d 1377 (1993) (silence can equal misrepresentation). For this reason, CR 60(b)(4) permits the court to vacate this judgment based on "misrepresentation or other misconduct." In re Marriage of Maddix, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985).

Such conduct is particularly reprehensible in a marital dissolution, when the relationship between the parties is not an arm's length relationship, but one of trust and confidence, with each spouse bearing the other "the highest fiduciary duties," which continue until the marriage is terminated. Friedlander v. Friedlander, 80 Wn.2d 293, 494

P.2d 208 (1972); Peters v. Skalman, 27 Wn. App. 247, 251, 617 P.2d 448 (1980).

iii. Ms. LaRoche relied upon and was misled by Mr. Hoffman's misrepresentation. Where a party to a dissolution action, in clear and unambiguous terms asserts the nonexistence of a fact of which that party has or should have had knowledge, the opposing party may rely on such statements. Seals, 22 Wn.App. at 656. Here, the record clearly shows that Ms. LaRoche relied upon Mr. Hoffman's representation that the original terms of SB 5177 still held, that the \$10 million SB 5177 did not belong to him, was not part of his estate, and could not be disposed of by the dissolution court. Her attorney conceded in closing that the total amount of property available for disposition before the trial court -- property not held in any trust -- was \$3,764,000. CP 253. The trust assets, Ms. LaRoche's attorney conceded, "[A]re technically and legally beyond his control because his -- other than the mandatory distributions, he has to have the consent of his sister as the special trustee to get any monies out of there." CP 254-55.

Ms. LaRoche's attorney explicitly conceded that the trusts were not before the court for disposition:

But the existence of those Trusts, while not properly before you for a division of property, certainly are a factor that you can consider ...

CP 254. Ms. LaRoche's attorney made it clear that Ms. LaRoche accepted that the trial court could not dispose of SB 5177: "I'm not asking you to invade the Trusts." CP 286-87.

This record makes it obvious that Ms. LaRoche relied upon Mr. Hoffman's representation that SB 5177 was not part of his estate and could not be disposed of by the dissolution court. Had Ms. LaRoche known about the Appointment, it is beyond question that she would not have conceded it away in closing argument; rather, she would have argued that it was subject to disposition and potentially division by the dissolution court. Only her reliance upon Mr. Hoffman's misrepresentation caused her to concede that SB 5177 -- the "giant gorilla of the case" in the court's words -- was not available for disposition.

iv. Mr. Hoffman's wrongful conduct prevented a full and fair presentation of Ms. LaRoche's case, creating a connection between Mr. Hoffman's misrepresentation and the contents of the Decree. As noted in the context of granting a new trial for similar discovery violations, "[a] new trial based upon the prevailing party's misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial." Roberson v. Perez, 123 Wn. App. 320, 336, 96 P. 3d 420 (2004) (internal citations omitted).

Simply, " a litigant who has engaged in misconduct is not entitled to 'the benefit of this] calculation..." Id.

Here, Mr. Hoffman's wrongful conduct -- nondisclosure of the appointment of the \$10 million SB 5177 to his own estate - prevented Ms. LaRoche from presenting accurate proposed financial orders that took the \$10 million trust into account and arguing for a disposition that took the trust into account. Because the Appointment had not been disclosed, Ms. LaRoche was unable to effectively combat Mr. Hoffman's claim that "I think if I sold everything I'd have \$500,000. That's all I have. That's my sum total for working for 47 years of my savings, other than retirement and the house. That is it of mine." Appendix A at 622.

Instead, Ms. LaRoche had to concede that SB 5177 was not before the dissolution court for disposition, and could only potentially be vaguely somehow "considered." CP 254. Ms. LaRoche's attorney had to specifically concede that "I'm not asking you to invade the Trusts" because as far as anyone knew, none of the trusts were part of Mr. Hoffman's estate. CP 286-87. In these very specific ways, Mr. Hoffman's wrongful conduct prevented a full and fair presentation of Ms. LaRoche's case, creating a connection between Mr. Hoffman's misrepresentation and the contents of the Decree.

b. The superior court abused its discretion in denying Ms. LaRoche's CR 60(b)(4) motion based on misconduct of an adverse party. All of the above facts and argument showing misrepresentation apply equally to a finding of misconduct of an adverse party. Mr. Hoffman's nondisclosure of the Appointment and the true nature and extent of his estate at dissolution was misconduct of an adverse party.

The \$10 million SB 5177 was property held by a party that was undisposed of in the dissolution action. It therefore became property held by the former spouses as tenants in common. Yeats v. Estate of Yeats, 90 Wn.2d 201, 580 P.2d 617 91978); Olsen v. Roberts, 42 Wn.2d 862, 864, 259 P.2d 418 (1953). Accordingly, this Court should remand to the superior court with instructions to find that SB 5177 is held as tenants in common and as such is available for partition.

c. The superior court abused its discretion in denying Ms. LaRoche's CR 60(b)(4) motion based on fraud.

In order to base vacation of a judgment on fraud, the trial court must make findings of fact and conclusions of law regarding each of the nine elements of common law fraud. Maddix, 41 Wn.App. at 252. But because misrepresentation or other misconduct also are grounds for vacation of a judgment, the moving party may not be required to prove all the elements of fraud to obtain relief under CR 60(b)(4). Mitchell v. Wash.

State Inst. of Pub. Policy, 153 Wn.App. 803, 825, 225 P.3d 280 (2009).

Nonetheless, all the elements of fraud are present here and provide a basis for vacation under CR 60(b)(4). Staley v. Block, 130 Wn.2d 486, 505 (1996). They are as follows:

i. Representation of an existing fact. Mr. Hoffman represented the fact that the SB 5177 did not belong to him. Appendix A at 622, 624, 628.

ii. Materiality of the representation. The \$10 million SB 5177 was more than three times as large as the assets the dissolution court recognized as comprising the estate. The existence of SB 5177 was termed by the dissolution court "the gorilla in the case."

iii. Falsity of the representation. Mr. Hoffman's representation that SB 5177 did not belong to him was false; he knew that he had appointed it to his estate three years before the dissolution trial.

iv. The speaker's knowledge of its falsity. Mr. Hoffman signed the Appointment document. He therefore knew that he had appointed SB 5177 to his estate, as the document plainly stated that it was so appointed. Therefore, when he testified 3 years later that SB 5177 was not "his" and his total estate would be "\$500,000. That's all I have. That's my sum total for working for 47 years of my savings, other than retirement and the house. That is it of mine" Mr. Hoffman knew without question that

this statement was false. Appendix A at 622. Similarly, when he testified, "No my sister and I, we don't get the money ever" . Appendix A at 628. Mr. Hoffman knew that statement was false. He knew he was misleading the dissolution court to believe that SB 5177 assets were not part of his estate subject to disposition.

v. The speaker's intent that it be acted upon by the plaintiff. Mr. Hoffman clearly intended that the \$10 million SB 5177 not be included in the dissolution since that is what he argued in closing: "[Mr. Hoffman] indicated what he thinks [sic] the Trust account is for his children and his grandchildren." CP 291

vi. Plaintiff's ignorance of the falsity. Ms. LaRoche was obviously ignorant of the falsity since her attorney conceded at closing that SB 5177 was not susceptible of disposition by the dissolution court and that "I'm not asking you to invade the Trusts." CP 286.

vii. Plaintiff's reliance on the truth of the representation. Ms. LaRoche's attorney conceded in closing that the Trusts, including SB 5177, were not part of Mr. Hoffman's estate and that the dissolution court could not dispose of them. This concession unambiguously demonstrates Ms. LaRoche's reliance on the truth of Mr. Hoffman's representation that SB 5177 was not part of his estate.

viii. Plaintiff's right to rely upon it. Washington law clearly holds that where a party to a dissolution action, in clear and unambiguous terms asserts the nonexistence of a fact of which that party has or should have had knowledge, the opposing party may rely on such statements. Seals, 22 Wn.App. at 656. In a marital dissolution, when the relationship between the parties is not an arm's length relationship, but one of trust and confidence, with each spouse bearing the other "the highest fiduciary duties," which continue until the marriage is terminated. Friedlander, 80 Wn.2d 293; Peters, 27 Wn. App. at 251. Ms. LaRoche therefore had the right to rely upon Mr. Hoffman's representation regarding the nature of his estate.

ix. Resulting damage. Ms. LaRoche was damaged by being unable to argue for disposition of SB 5177, unable to propose financial orders that took SB 5177 into account, and unable to argue to the dissolution court that Mr. Hoffman had extensive separate property assets such that the disposition she had originally requested -- or one more favorable to her -- would be reasonable. Indeed, as Mr. Hoffman's true assets dwarfed the rest of the assets by over three times, Ms. LaRoche would certainly have requested a different disposition had she known the true nature and extent of Mr. Hoffman's assets. Because of Mr. Hoffman's misrepresentation, Ms. LaRoche was unable to propose or argue for an

appropriate disposition of her case based on the true extent of the parties' assets.

While Ms. LaRoche's *pro se* CR 60 (b)(4) motion did not individually set forth and analyze the elements of fraud, her CR 60(b)(4) presentation nonetheless established those elements. Particularly given the fact that the CR 60(b)(4) judge was the same judge that conducted the dissolution trial, and that the judge was drawing extensively on her memory of that trial, the facts of that trial were very much in the judge's mind at the CR 60(b)(4) argument, as evidenced by the judge's repeated references to the trial. The trial court should have reversed based on fraud as well as upon misconduct and misrepresentation.

2. THE SUPERIOR COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING TO RESOLVE THE FACTS SURROUNDING THE MISREPRESENTATION, MISCONDUCT, AND FRAUD

CR 60(e) sets forth the procedure for vacating judgments. CR 60(e)(1) provides that the party seeking such relief must file a motion with a supporting affidavit setting forth a concise statement of the facts or errors upon which the motion is based. The trial court then provides notice of the hearing on the motion by entering "an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why

the relief asked for should not be granted." CR 60(e)(2). This court has previously held that a show cause hearing on a CR 60 motion does not require live testimony; rather, "oral testimony is not the general rule and is discretionary." Roberson v. Perez, 123 Wn.App. 320, 331, 96 P.3d 420 (2004) (quoting In re Marriage of Irwin, 64 Wn.App. 38, 61, 822 P.2d 797 (1992)). The superior court in this case held an arguments-only hearing, taking no testimony.

This Court's holding in Maddix, 41 Wn.App. 248 supports the conclusion that if the affidavits and declarations in a motion to vacate based upon fraud, misrepresentation, or other misconduct, raise a factual issue, an evidentiary hearing with testimony is required. In Maddix, the wife moved for vacation of her decree of dissolution pursuant to CR 60(b)(4), alleging fraud, misrepresentation, or other misconduct by her former husband. Maddix, 41 Wn.App. at 249-50. Ms. Maddix specifically claimed that her former husband fraudulently withheld from her the value of his business. Id. at 249. The trial court granted the wife's motion, finding that the husband had failed to disclose the value of his business, but did not make reference to fraud. Id. at 250, 252. The husband appealed, arguing that the trial court failed to find nine elements of fraud by clear, cogent, and convincing evidence. Id. at 252. According to the Maddix court, the facts alleged by the wife were disputed by the husband;

however, no further testimony was taken by the trial court to resolve the controverted issues. Id. The court went on to hold that: "The affidavits raise an issue of fact which cannot be resolved without the taking of testimony. . . . The court erred in vacating the judgment without first hearing and weighing testimony regarding fraud, misrepresentation or other misconduct." Id.

Later, Division One of this court was able to distinguish Maddix in In re Marriage of Irwin. In Irwin, the husband/respondent moved the trial court for relief from judgment under CR 60 and the parties submitted sworn statements, affidavits, memoranda, and depositions. Irwin, 64 Wn.App. at 46. At the hearing on the motion, the court declined to take any live testimony and granted the husband's motion for relief. Id. The wife appealed, arguing that the trial court erred by refusing to hold an evidentiary hearing with live testimony under Maddix. Id. at 60. The Irwin court found no error, pointing out that while CR 60(e)(2) provides for a show cause hearing, nothing in that rule indicates that live testimony is required. Id. at 61.

According to the court's analysis, "none of the authorities cited by the Maddix court state any requirement for live testimony in determining a CR 60 motion." Id. The court reiterated that a trial court's decision to allow oral testimony is not the general rule and is discretionary. Id.

However, Irwin is distinguishable. Even though the trial judge who ruled on the motion to vacate was the same judge who presided over the dissolution trial, the Declaration and Exhibits submitted by Ms. LaRoche raised "an issue of fact which cannot be resolved without the taking of testimony." Maddix, 41 Wn. App. at 252. The issue of the Appointment, its authenticity and its significance, are issues which should have been clarified by an evidentiary hearing. Failure to hold such an evidentiary hearing was an abuse of discretion.

F. CONCLUSION

Ms. LaRoche respectfully requests this Court vacate the superior court's denial of her CR 60(b)(4) motion and instruct the trial court to have an evidentiary hearing to establish the nature and extent of the assets possessed by the parties at the time of dissolution, including SB 5177. Ms. LaRoche further requests that based upon Mr. Hoffman's misconduct in hiding the fact that he had assigned the \$10 million SB 5177 to his own estate, SB 5177 be found to be held as tenants in common by the former spouses, and available for partition. Finally, Ms. LaRoche requests that

this Court remand with instructions that the trial court fashion a
dissolution disposition in keeping with the true extent of the parties' assets.

DATED this 11th day of March, 2016.

Respectfully submitted:



Carole La Roche, *pro se*
f/k/a Carole Hoffman

APPENDIX A

1 through whatever those things are just so that it's
2 kind of in the same place in my notes.

3 MR. EAGLE: I will.

4 THE COURT: If you don't mind.

5 A. Should I answer that now or --

6 Q. Yeah --

7 THE COURT: No, let him ask you some questions. I'm
8 just saying I don't want to hear about that in an hour
9 when we're talking about it now, so.

10 Q. You heard the judge's inquiry, do you have an answer to
11 what she's inquiring about, Dr. Hoffman?

12 A. Yes, in my mother's will which set up these Trusts, she
13 wrote down sort of an odd thing is that I can take out
14 -- I'm supposed to take out -- let's see how she
15 phrased it -- it was \$12,000 a month. It's equal to
16 per month what the annual gift tax exclusion is. I
17 think she really meant, you know, that much per year,
18 but the way it's written down, my mother was getting
19 pretty senile by then, but it's written down as that I
20 am entitled to take out this 12,000 or it may be
21 \$13,000 a month.

22 Q. And do you in fact do that, Dr. Hoffman?

23 A. No, I don't do that. You know, I've worked 47 years to
24 provide for myself. I've saved up a little bit. I've
25 saved for my retirement. I regard these Trusts as

1 purely for my children.

2 Q. Well, I think it would be accurate, though, would it
3 not be that at the divorce was filed there was a larger
4 amount that you were taking?

5 A. Yes. After I bought the Sun Valley house and this is
6 something that Carole insisted if we -- you know, I
7 always wanted to buy a retirement house because my
8 father used to take vacations with my whole family and
9 my sister's family and I wanted to continue the
10 tradition, so when the Trust was established I was able
11 to buy the Sun Valley house, I was able to buy real
12 estate with my sister's permission because she has to
13 give permission for any of those things. And then
14 Carole really wanted to refurbish it and redo the
15 bathroom which I thought was going to cost \$30,000 and
16 she got finished and it cost \$70,000. So I was taking
17 out the full amount for, I don't know, maybe since I'm
18 not sure exactly when. So i was taking out \$12,000 a
19 month and using that money for -- you know, for
20 refurbishing, buying some furniture for the Sun Valley
21 house. This was actually brought up before Judge North
22 earlier, and, you know, he acknowledged that when --

23 Q. Okay. That's fine.

24 A. Okay.

25 Q. So why did it change contemporaneous with -- well, why

- 1 A. Yeah, that's changed a little bit. When --
- 2 Q. Well, Dr. Hoffman, the first one goes back a ways,
3 right, the date?
- 4 A. Yes, that's my paycheck, that was \$2,157 every two
5 weeks.
- 6 Q. And --
- 7 A. Or every half-month.
- 8 Q. And then it goes up to essentially 2010, correct?
- 9 A. Yes.
- 10 Q. Okay.
- 11 MR. EAGLE: Your Honor, I move to admit his
12 paychecks as an exhibit.
- 13 THE COURT: Exhibit 120?
- 14 MR. BILLBE: No objection.
- 15 THE COURT: Admitted. Thank you.
- 16 MR. EAGLE: Thank you, Judge.
- 17 Q. Do you anticipate needing the \$3,000 that you still
18 receive to continue post this divorce for the upkeep of
19 Sun Valley?
- 20 A. Yes, I have no other way of keeping up the Sun Valley
21 house. That belongs to the Trust, so I think that's
22 justified.
- 23 Q. Okay. Now, why did you want a prenuptial agreement,
24 Dr. Hoffman?
- 25 A. We had both been married twice before. I was 58 and a

1 \$34,000 that my father gave to my sister and I and my
2 sister has used it, I've never used it. I regarded
3 that purely as something to be passed down to my heirs.

4 Q. When you and Carole Hoffman were residing together as a
5 community, did the two of you consider your access to
6 Trust assets as a part of something that could fund
7 your life or lifestyle?

8 A. No, I had planned my lifestyle completely based on my
9 retirement earnings and that is why we had these
10 discussions with the financial person at the very
11 beginning of our marriage when I wanted to make sure
12 that we could live our life based on my retirement
13 savings alone. I have never expected to use anything
14 from the Trusts. I didn't know of the Trust early on,
15 what -- you know, there was no Trust early on, but I
16 never wanted to have any expectation of anything from
17 any Trusts. I had worked hard all my life as a
18 scientist. I lived always on what I earned. I
19 supported four kids on what I earned and my intention
20 always -- I had saved up enough to live the way I
21 wanted to live.

22 Q. And did you in fact provide in your will the Trust Fund
23 should go to your children?

24 A. Yes.

25 Q. Okay.

1 A. I didn't have any choice for that, but, yes, I did
2 provide that.

3 MR. EAGLE: I have no further questions, Judge.

4 MR. BILLBE: Nothing.

5 THE COURT: Nothing additional?

6 You may step down. Thank you.

7 MR. EAGLE: Your Honor, I don't have another witness
8 in the hallway. I apologize for that. We did the best
9 we could.

10 THE COURT: I guess that's not too bad.

11 (DISCUSSION RE SCHEDULING OFF THE RECORD.)

12 THE COURT: Okay. Anything additional?

13 MR. BILLBE: No, your Honor.

14 THE COURT: And you're likely to call your client in
15 rebuttal. Anybody else?

16 MR. BILLBE: I don't know, but if I did it wouldn't
17 be lengthy. I'll know tomorrow. I need to talk to her.

18 THE COURT: Okay. Thank you.

19 All right. So we'll hope for a fabulous day
20 tomorrow.

21 Now, we'll be off the record. Thank you.

22 (PROCEEDINGS ADJOURNED.)

23 --o0o--

24

25

HOFFMAN, A. - Direct

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1 take that money from?

2 A. The only Trust I -- well, I shouldn't say that. The
3 Trust I'm allowed to take money from is this 5 -- it's
4 the nonexempt Hoffman Family Trust. It's the one that
5 has the bulk of my mother's estate in it, and I'm
6 allowed to take without my sister's permission this
7 \$12,000 a year or 13,000 -- I mean, a month, 13,000 a
8 month.

9 Q. Okay. Now, you heard testimony from a financial
10 witness yesterday, Mr. Moss, regarding scenarios. Does
11 Scenario 1 represent, if you recall what Scenario 1 is
12 -- and we have it in evidence and you can look at it if
13 you need to, Dr. Hoffman -- represent what you think
14 most closely matches the terms of the prenuptial
15 agreement?

16 A. Yes, Scenario 1 -- well, even -- Scenario 1, as I
17 understand it, lets Carole have her share of the --
18 what I put into the TIAA CREF account since marriage.
19 It also lets her keep her spousal IRA I set up for her.
20 I don't know whether it included this Roth IRA that I
21 had agreed to let her have in case of divorce, and I
22 don't think it included all the separate accounts that
23 she has set up since marriage her -- I don't know,
24 they've been switched back and forth between Smith
25 Barney and Scottrade and stuff. I don't think it

1 included that, but, you know, I'm perfectly willing for
2 her to keep all of that. So that's the closest to it.
3 I think there would be more money than what Mr. Moss
4 was figuring because she has her own separate accounts,
5 but.

6 Q. Okay. And do you have any ability to fund on what the
7 marital community has accumulated on any of the
8 Scenarios 2, 3 and 4?

9 A. No, the marital community has accumulated only these
10 additions to the TIAA CREF Retirement Fund. I have no
11 ability to do anything else that would have to come out
12 of the Trusts, and I don't know, I think that would be
13 illegal. First of all, my sister would never allow it
14 and it would be unethical. That would be stealing from
15 my children and that's ...

16 Q. Well, we heard testimony now this morning that you have
17 to consult with your sister for purchases of real
18 estate. What other permission do you need to obtain
19 from her, if you know, for anything?

20 A. If I wanted to take out more than this
21 \$12,000-per-month allotment.

22 Q. Okay.

23 A. I'm entitled to do that without her permission.

24 Q. And you anticipate she would say no to that?

25 MR. BILLBE: I'm going to object. That calls for

1 speculation.

2 MR. EAGLE: That's all right. I'll withdraw the
3 question.

4 MR. BILLBE: Lacks foundation.

5 THE COURT: Go ahead.

6 Q. Well, to date, do you have any permission from your
7 sister for any withdrawals from any Trust account that
8 you and she are beneficiaries of?

9 A. No, I don't.

10 Q. Now, in your opinion, based upon what you saw from Dr.
11 Drakeley, did the marital community spend more in the
12 years that you were married than what you essentially
13 earn, the two of you?

14 A. Quite a bit more. As you can see, I have less money
15 than I had when we were married even though I had

16 earned other things and taken money out of stock
17 accounts. They all paid for us living sort of beyond
18 our means, and that even includes the trustee fees.

19 Q. Now, we heard testimony you anticipate retirement in
20 February of 2011. Where do you intend to retire to, if
21 you know?

22 A. I think I will live mostly in Redmond, my Redmond
23 house. All my children except my son are here.
24 Grandchildren are here. My friends are here. I will
25 probably use the Sun Valley house a little more than I

1 live in. My will, which I revised in Carole's favor in
2 2007 after the Trusts were formed because I didn't have
3 to worry then about leaving so much to my children or
4 anything, I made a provision that I would set up a Trust
5 which Carole would manage herself that the Trilogy home
6 would go into and a bunch of my other -- my savings
7 would also go into that Trust to provide her with an
8 income and I think there was a provision that was
9 specified there in that will that the Trilogy home,
10 although it was titled in both our names, was owned by
11 me, but that I was leaving it to this Carole Hoffman
12 Trust for -- you know, as long as she wanted to live
13 there. And then I think the provision was that after
14 she died, she could leave the stuff not just to my
15 children but to her children, too, or her child. I was
16 able to be generous because my children were taken care
17 of otherwise.

18 Q. Showing you what has been marked as Exhibit 140, 140.
19 Would you take a moment and look at that document,
20 please.

21 A. (Witness complies.)

22 Q. Is that the will that you just testified about?

23 A. Yeah, it obviously is because some of these
24 grandchildren weren't alive earlier, uh-huh.

25 Q. And it appears as though it was dated when, Dr.

Carole
Hoffman
attest

HOFFMAN, A. - Direct

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1 should have said 2 through 4 of the scenarios.
2 A: I'd like to tell you a little bit about my children,
3 but why don't you ask a direct question about that. My
4 children and grandchildren are the most precious thing
5 to me in the world. This is a family tradition. My
6 parents felt that way about my sister and I, and
7 they've provided, you know, for all their
8 grandchildren. And that's why these Trusts are set up
9 with my children and my sister's children as
10 beneficiaries. No my sister and I, we don't get the
11 money ever. I have concerns that -- well, I don't even
12 know what is legally allowed. I do not have the money
13 to -- you know, I have about -- I think if I sold
14 everything I'd have \$500,000. That's all I have.
15 That's my sum total for working for 47 years of my
16 savings, other than retirement and the house. That is
17 it of mine.
18 I married Carole at 37 (sic) and a half years old --
19 no, I mean, after I had worked for 37 years. I've
20 accumulated that money over 37 years and to think that
21 somehow after eight and a half years of what I call a
22 so-called marriage that I would have to give her that
23 money, especially when we had a prenuptial agreement is
24 [INAUDIBLE] to me. And I don't know where I could get
25 the money for paying any of those scenarios other than

LAR 000087

- 1 A. Yes, there is a woman living with me. We are sharing
2 expenses at Sun Valley.
- 3 Q. Is she working?
- 4 A. She does some piano-teaching.
- 5 Q. And how much does she contribute to the household
6 expenses each month?
- 7 A. Oh, I would guess about \$1500.
- 8 Q. So otherwise, other than that, you're paying all the
9 household expenses for yourself and this woman who's
10 living in Sun Valley with you?
- 11 A. The Trust pays all the household expenses. I pay for
12 -- Flora and I share paying for food.
- 13 Q. So the terms of the nonexempt Trust that your mother
14 set up, this Trust was -- although you've portrayed the
15 Trust as for your children, the terms of the Trust are
16 for you; aren't they?
- 17 A. No, I don't think so at all. I think the beneficiaries
18 are my children. I'm entitled to take out a certain
19 amount of money per month.
- 20 Q. You don't think you're a beneficiary of that Trust?
- 21 A. I've explained exactly what I am. I take out a certain
22 amount per month.
- 23 Q. But you recognize, don't you, that the trustee of the
24 nonexempt Trust, let's talk just about the nonexempt
25 Trust, has the authority to take out as much of the

1 income and the principal of the Trust as the trustee
2 wants to for you?

3 A. I am not that trustee. My sister can do that.

4 Q. So could you just answer the question. Your sister is
5 the special trustee --

6 A. My sister is the special trustee. She probably has --

7 Q. The terms of the Trust expressly authorize the special
8 trustee in her sole discretion to withdraw as much of
9 the income and the principal of the nonexempt Trust as
10 the special trustee wants to pay for your care and your
11 needs?

12 A. That's right.

13 Q. But yet you say you aren't a beneficiary of the Trust?

14 A. When the Trust is dissolved, all the money goes to my
15 children.

16 Q. The Trust dissolves in fact upon your death; doesn't
17 it?

18 A. That's right.

19 Q. It's not a legacy Trust that's intended to live beyond
20 your death; is it?

21 A. I'm not a trust attorney. If you read the provisions
22 of these things, you need a law degree and maybe beyond
23 to do that. I've always assumed that the money would
24 be divided up among my children.

25 Q. And the provision in the nonexempt Trust that requires

1 or that provides for annual distributions to you, you
2 agree, don't you, that the terms of the Trust say that
3 the trustee shall disburse those funds to you?

4 A. I'm not sure what it says, but it may say that.

5 Q. Okay. Well, let's look at it. I think it's sort of
6 important because we didn't look at it earlier in your
7 testimony.

8 A. Uh-huh.

9 Q. It's Exhibit 139. Let me hand it to you, okay.

10 MR. EAGLE: Your Honor, just for clarification. I
11 apologize for the interruption. Is Exhibit 139
12 admitted? It may have been. I just didn't keep track.
13 Yes?

14 THE COURT: It is?

15 THE CLERK: Yes.

16 THE COURT: Thank you.

17 MR. EAGLE: Thank you, Judge.

18 A. It says: The trustee shall transfer, convey and pay
19 over to the child of the settlor for whom the nonexempt
20 Trust has been established annually \$10,000 or a gift
21 tax exemption.

22 MR. EAGLE: Dr. Hoffman, you trailed off at the end.

23 A. I said it says that: The trustee shall distribute
24 \$10,000 or the greater -- or the gift tax exemption.
25 Sort of a weird provision, but that's the way my mother

1 did it.

2 Q. You know, I'm going to rehand you what's Exhibit 139
3 because I inadvertently handed you Mr. Eagle's copy.
4 I'd like you to read from the original -- from the
5 actual trial exhibit.

6 So Page 14 of Exhibit 139 --

7 A. Uh-huh.

8 Q. -- do you agree that this Page 13 is Page 13 of the
9 Trust document that your mother created to create the --

10 A. You mean Page 14?

11 Q. -- Page 14 of the actual Trust document that your
12 mother created under her will to create the nonexempt
13 Trust and the exempt Trust for you and your children?

14 A. Yes, this appears to be the document.

15 Q. Okay. I'm just trying to establish what the document
16 is we're looking at. Your mother created this Trust on
17 July 6th of 1990; didn't she?

18 A. I'm not sure what you're --

19 Q. Okay. You can look at Page 1 of the Trust Agreement
20 there. You're looking at Exhibit 57 -- or 139, I mean.
21 We were on Page 14. Just go to Page 1 of the
22 Declaration of Trust.

23 A. (Witness complies.)

24 Q. Under your attorney's inquiry, you established on your
25 direct that this document consists both of the will of

1 your mother and the Trust that she created under the
2 will?

3 A. Oh, yes.

4 Q. Good.

5 A. July 6, 1990, yeah.

6 Q. And would you agree -- and I'm working now that
7 document called Declaration of Trust.

8 A. Uh-huh.

9 Q. We were looking at Page 14 of that Trust, so we've now
10 established that your mother established this Trust.
11 Would you agree that she did it under her will?

12 A. Yes.

13 Q. And she established this Trust on July 6th of 1990?

14 A. Yes.

15 Q. Would you also agree that the terms of this Trust as
16 written by your mother on July 6th of 1990 are still
17 the terms of the Trust, the terms that control the
18 nonexempt --

19 A. Yes, that's the only other document that's available.

20 Q. -- control the nonexempt Trust and the exempt Trust
21 for you?

22 A. That's right.

23 Q. So let's go back to Page 14 then. I think you agree
24 that the Trust document that your mother prepared or
25 signed in 1990 in Exhibit -- on Page 14, this

1 Subsection J, requires that the trustee shall transfer,
2 convey or pay over to the child of a settlor, that's
3 you, right? You're the child of the settlor?

4 A. Uh-huh.

5 Q. You're the child of your mother?

6 A. No, I have never disagreed that that's what the Trust
7 says.

8 Q. So it has to be the greater of \$120,000 or 12 times the
9 amount of the annual gift taxes --

10 A. That's what it says.

11 Q. Do you have any understanding what the annual gift tax
12 exclusion is right now?

13 A. I think it's about 13,000 a year.

14 Q. So 12 times 13 is \$156,000?

15 A. Uh-huh.

16 Q. Who's the trustee of this Trust that shall transfer
17 over \$156,000?

18 A. My sister and I.

19 Q. Your sister is the special trustee, you're the trustee,
20 right?

21 MR. EAGLE: Objection, your Honor. If he doesn't
22 know the answer, he doesn't know the answer.

23 A. I don't know what that --

24 THE COURT: If you're able to answer, then you
25 should answer. Is there something that would assist

1 him in -- I don't personally know what you're talking
2 about, so.

3 Q. You are a trustee of this Trust?

4 A. I am a trustee, yes. My sister and I -- I've always
5 thought my sister and I are trustees, but my sister is
6 the special trustee.

7 Q. So pursuant to this document, the trustee, which
8 doesn't say the special trustee, but the trustee shall
9 transfer, convey and pay over to the child these
10 certain amounts and it's supposed to be paid over on
11 that child's respective birthday, true?

12 It says on his or her respective birthday.

13 A. I'm not going to argue about it. I don't see that,
14 but I don't --

15 Q. Oh, I mean, it's just under the first paragraph of J.
16 Shall pay over to the child of the settlor for whom the
17 nonexempt separate Trust has been established --

18 A. Oh, okay, yeah.

19 Q. So would you agree, though, that that sentence says the
20 trustee shall transfer, convey --

21 A. Counsel, I have no argument with any of that.

22 Q. -- to the child of the settlor for whom the nonexempt
23 separate Trust has been established?

24 A. Yes.

25 Q. Clearly, the nonexempt separate Trust that your mother

1 established was for the child of settlor just by those
2 terms?

3 A. Yes.

4 Q. But yet although the Trust says that the trustee, one
5 of whom you are, says that the monies shall be paid
6 over, you've voluntarily decided not to comply with
7 that provision but rather only to take \$3,000 a month
8 from the Trust?

9 A. That's right.

10 Q. So do you pretty much think that as the trustee you
11 don't have to comply with the provisions of the Trust?

12 A. Yes, I think that's true.

13 Q. Let's talk about the nonexempt Trust for a moment.
14 What does the nonexempt Trust hold in terms of
15 property? Let me strike that question.

16 Would you agree that when your mother set up the
17 Trust document in 1990, the structure of that Trust
18 document sets up two Trusts for you, nonexempt and
19 exempt, and two Trusts for your sister Carole Mawson
20 nonexempt and exempt?

21 A. Yes.

22 Q. So there are a total of four Trusts set up by your
23 mother, true?

24 A. That's right.

25 Q. Two of them are exempt, one exempt for you and one

1 exempt for your sister?

2 A. Uh-huh.

3 Q. And two of them are called nonexempt, one nonexempt for
4 you and one nonexempt for your sister, yes?

5 A. Yes.

6 Q. Do you have any understanding about what the difference
7 when your mother set up two Trusts for you under her
8 will in 1990 what the difference between the nonexempt
9 Trust is and what the exempt Trust is?

10 A. I have had to become cognizant of these things which I
11 knew very little about before, but, yes. The exempt
12 Trust is exempt from generation-skipping tax, so that
13 was done -- you know, my father was a lawyer and he
14 dealt with things like this, but that was done so that
15 this money could pass directly to my mother's
16 grandchildren without being subject to a second set of
17 gift taxes -- of estate taxes.

18 Q. That answer referred to the exempt Trust, right?

19 A. That's the exempt Trust.

20 Q. So the answer is the exempt Trust is exempt from
21 generation-skipping taxes?

22 A. That's right.

23 Q. Which are higher taxes than estate taxes; aren't they?
24 Or if you know.

25 A. It was my -- it is my belief that that nonexempt Trust

1 will go directly to my children without estate taxes at
2 all. But again I'm not a -- that's what I've always
3 thought.

4 Q. Okay. So now we've established that under your
5 mother's will, she established two Trusts for you, the
6 exempt and nonexempt. How much -- we've also
7 established, haven't we, that -- do you agree that the
8 provisions of your mother's Trust give beyond the
9 mandatory distributions that we've talked about of
10 \$120,000 a year or 156-, beyond that distribution on
11 Page 14, do you acknowledge that the Trust also allows
12 the nonexempt Trust, allows for distribution of so much
13 of the income and the principal as the trustee
14 determines possible --

15 A. That may be possible. I'd have to read it carefully to
16 understand that.

17 Q. I'll go back to that then. How much property does the
18 nonexempt Trust hold?

19 A. It holds just the Sun Valley house.

20 Q. It also has a -- okay. When I said property, how much
21 assets does the nonexempt Trust hold?

22 A. Today?

23 Q. Yes.

24 A. I think probably about seven and a half million
25 dollars.

1 Q. Does that include in that answer when I said assets,
2 does that include the Sun Valley home?

3 A. No.

4 Q. So it holds about seven and a half million dollars of
5 assets in a brokerage account --

6 A. A stock account, yeah.

7 Q. -- and the Sun Valley house which we've stipulated is
8 worth \$1.557 million?

9 A. Uh-huh, that's true.

10 Q. So the nonexempt Trust that your mother established for
11 you holds about seven and a half --

12 A. I don't agree with your words for me, it's for my
13 parents' issue.

14 Q. Well, I thought we've established that on Page 14 the
15 trustee shall transfer, convey and pay over to the
16 child of the settlor for whom the nonexempt separate
17 Trust has been established.

18 A. That says I can get the income, but it doesn't say the
19 Trust is for me. The Trust is for -- eventually goes
20 to my children.

21 Q. Where does it say that in this Trust document?

22 A. Well, you just mentioned that you thought when I died
23 it would go to my children.

24 Q. I'm not testifying. I'm just asking you, where does it
25 say in this Trust document --

1 A. Oh, I'd have to go through this. I mean, that's what
2 I've always assumed and that's what I've been told. I
3 went through this with a lawyer when I set up my will --

4 MR. BILLBE: I'm going to object to any hearsay
5 questions.

6 A. Okay.

7 Q. I'm just asking you if you can say --

8 A. I couldn't tell you right now.

9 Q. Okay. You've testified that your sister is the special
10 trustee of your Trusts, true, the two Trusts your
11 mother established for you?

12 A. Yeah. The answer to the other question would be
13 Section N on Page 16.

14 MR. EAGLE: Please speak up. I didn't hear you.

15 THE WITNESS: I was trying to find this provision
16 where it says where if I die where it goes. Okay, go
17 ahead.

18 Q. We've established -- I think you agreed -- that you're
19 a trustee of the nonexempt and the exempt Trusts?

20 A. That's right.

21 Q. And that gives you certain powers, for example. You
22 testified that you work with Jordan Walters to make
23 management decisions about how assets that are held in
24 the nonexempt and exempt Trusts are invested?

25 A. I approve his recommendations, yes.

- 1 Q. Your sister is also a trustee of both those Trusts, too?
- 2 A. Uh-huh.
- 3 Q. And she also is a special trustee of both those Trusts,
- 4 true?
- 5 A. That's right, uh-huh.
- 6 Q. Would you acknowledge that her role or her hat as a
- 7 trustee or her hat as a special trustee are two
- 8 different, distinct obligations under the Trust
- 9 Agreement that your mother made?
- 10 A. Yeah, I guess so.
- 11 Q. Okay. With respect to her hat as a special trustee,
- 12 you wear that hat for her under her Trust; don't you?
- 13 A. That's right.
- 14 Q. Would you turn to Page 11 of the Trust Agreement which
- 15 is Exhibit 139, please.
- 16 A. (Witness complies.) Okay.
- 17 Q. Would you agree that as the special trustee, your
- 18 sister has the power under the Trust Agreement to
- 19 distribute as much of the principal of the exempt and
- 20 the nonexempt Trust as she wants to for either you or
- 21 your children? And I'm looking at Section I,
- 22 Discretionary Distribution of Principal.
- 23 A. Yes, she is authorized to do that.
- 24 Q. And Section I on Page 11 reverts to the exempt Trust
- 25 and there's a similar provision in here for nonexempt

1 Trusts? I mean, I can show it to you.

2 A. Okay. I'm not going to argue with that.

3 Q. Okay. So you acknowledge that a special trustee, your
4 sister, can invade the principal of both the exempt
5 Trust and the nonexempt Trust if she wants to in her
6 discretion?

7 A. I have never looked at anything to do with the exempt
8 Trust, but I'm not arguing that that's not what it says.

9 Q. Okay. And on Page 9, Subsection E, did you acknowledge
10 that -- I'll let you read it.

11 A. (Witness complies.)

12 Uh-huh.

13 Q. Would you acknowledge that your sister as special
14 trustee also has the discretion and authority to direct
15 income from the exempt Trust to you or your children as
16 she determines appropriate for your proper health,
17 support, maintenance and/or education?

18 A. Yeah, uh-huh. That is probably standard trust
19 provision words.

20 Q. Do you have Exhibit 160 there?

21 A. Looks fine to me.

22 MR. HILTY: Is it there?

23 THE WITNESS: No.

24 MR. EAGLE: It's one of those exhibits that was in
25 the boxes because of its circumference. We couldn't

- 1 put it in the binder.
- 2 Q. Well, I'll come back to that. We've established that
- 3 the nonexempt Trust for you has cash and securities in
- 4 a brokerage account that off the top of your head you
- 5 say is worth about seven and a half million, true?
- 6 A. That's true.
- 7 Q. Okay. What about the exempt Trust that your mother
- 8 established. How much property does that hold in
- 9 assets in a brokerage account, if you know?
- 10 A. It holds I think between maybe a little over two
- 11 million dollars.
- 12 Q. So the nonexempt and the exempt Trust themselves
- 13 considering cash and securities and the Sun Valley home
- 14 hold property that right now is worth about \$12
- 15 million? I mean, I added up what you said. The
- 16 nonexempt Trust has --
- 17 A. Seven and a half plus one and a half makes nine plus
- 18 another two makes about eleven.
- 19 Q. You've talked about the needs of your four children.
- 20 Apart from the Trust we've talked about here, your
- 21 children also were given Trusts by your parents;
- 22 weren't they?
- 23 A. Yes, they were each given \$200,000 and they bought
- 24 houses with that.
- 25 Q. Okay. Now, apart from the two Trusts we've just talked

- 1 about that your mother set up for you, the exempt and
2 the nonexempt, you have a third Trust; don't you?
- 3 A. Yes.
- 4 Q. Okay. That Trust was set up by your father; wasn't it?
- 5 A. 1974, yes.
- 6 Q. Would you turn to Exhibit 141, please.
- 7 A. (Witness complies.) Uh-huh.
- 8 Q. Do you recognize what's been marked for identification
9 as Exhibit 141?
- 10 A. Yes, these Trusts set up by my father, one for me and
11 one for my sister in 1974.
- 12 Q. And the Trust that your father set up for you and for
13 your sister Carole in 1974, do you still own any assets
14 that were directed to the Trust by your father for you
15 under his 1974 document?
- 16 A. Yes, that's a brokerage account that has a little over
17 a million dollars in it.
- 18 Q. That million dollars is a different million dollars
19 than the 11 million that were in the nonexempt and the
20 exempt Trust, correct?
- 21 A. That's right.
- 22 Q. So as to that money, that million dollars, was in a
23 brokerage account. Is there any other document since
24 your father's agreement in 1974 that we've marked as
25 Exhibit 141, is there any Trust documents that you've

1 prepared that control or regulate that million dollars?

2 A. I have had almost nothing to do with any of these
3 things.

4 Q. But you agree, don't you, that your father's Trust that
5 now holds a million dollars for you, you're a
6 beneficiary under that Trust?

7 A. His issue was a beneficiary, yeah, and his issue.

8 Q. Do you want to read the Trust, I mean, the Trust says
9 it's a Trust for his son, Alan Hoffman, and his issue?

10 A. Yeah, okay, Alan Hoffman and his issue, that's just
11 what I said.

12 Q. Well, actually, you're just looking at the issue,
13 you're trying to disregard yourself; aren't you?

14 A. No, I said --

15 MR. EAGLE: Objection, your Honor. That wasn't his
16 answer.

17 A. It was in my interest that the Trust is for my
18 [INAUDIBLE] and my father's issue. I've learned a lot
19 about a Trust documents and the issue refers to my
20 children and grandchildren.

21 Q. And the Alan Hoffman refers to you?

22 A. Yeah.

23 Q. Who's the trustee of the Trust that your father set up
24 in 1974? Do you know?

25 A. Well, I had my mother, but she's dead now and it has

A

1 me, my sister and somebody named Bernie Brandis
2 (phonetic), so I assume he's probably dead also.

3 Q. So do you know who the trustee is of the million
4 dollars within the brokerage account?

5 A. Well, I just answered. It's myself, my sister and if
6 this Bernie Brandis is still alive and he's a trustee
7 also.

8 Q. And do you know what powers the trustee has under the
9 Trust that your father set up for the Trust to
10 distribute funds to you?

11 A. I've always assumed I could do pretty much what I
12 wanted with that Trust.

13 Q. So you sort of acknowledge that the terms of your
14 father's Trust give the trustee in fact sole and
15 absolute discretion to distribute as much of the income
16 or the principal of the Trust as --

17 A. I'm not saying I know that. I always have assumed that.

18 This Trust is also a Trust that is not subject to
19 estate taxes, so I have never wanted to touch that
20 Trust. It's grandfathered in.

21 Q. In your direct testimony, you said when you -- if I
22 understood you correctly -- when the funds were
23 withdrawn from the nonexempt Trust to purchase the
24 Trilogy home, that you borrowed the funds from the
25 Trust. Did you say "borrowed"?

1 A. I considered it that I was borrowing it until I paid
2 back the money from selling the Woodinville house.

3 Q. So you considered it -- I think by that answer you
4 would acknowledge, wouldn't you, that there's not a
5 single written document that reflects any borrowing by
6 you from the Trust?

7 A. No, if you wanted to say from that point of view, you
8 could say that the Trust completely owns the Trilogy
9 house. That's a little ridiculous, but that's what
10 you're trying to say, I guess. I don't know what the
11 point is.

12 Q. Well, actually, I'm not trying to say anything, I'm
13 just trying to get you to answer the question. The
14 question is, there's no --

15 A. There's no written document, yes.

16 Q. In fact, there was never any understanding even between
17 you and the special trustee of the Trust that you were
18 borrowing the money from the Trust?

19 A. Yes, there was an understanding. That's what I asked
20 her to do, so there was an understanding.

21 Q. So then the special trustee of your Trust distributes
22 \$1.3 million as an alleged loan but doesn't get any
23 written documentation of that loan; is that your
24 testimony?

25 A. This is my sister. My sister has concern for me and

1 for her nieces and nephews.

2 Q. In fact, your sister has never said no to you whenever
3 you asked her to do anything with respect to your
4 nonexempt Trust; has she?

5 A. I have never asked my sister to do anything except this
6 one time to borrow money and the second time to
7 purchase the Sun Valley house. She has written
8 permission which she sent to Jordan Walters for that
9 two times.

10 Q. So the answer is yes, your sister has never denied any
11 request you've made?

12 A. Yes, that's true.

13 Q. And there is no document from you to your sister saying
14 that you wanted to borrow funds from this exempt Trust;
15 is there?

16 A. My sister --

17 MR. EAGLE: Objection, your Honor. That's been
18 asked and answered now.

19 THE COURT: You asked if there's a document?

20 MR. BILLBE: From him.

21 THE COURT: Okay. So I think that question has been
22 asked and answered.

23 Q. There was no agreement, I mean, there's not even a
24 document from you saying: Dear Sister, I'd like to
25 borrow money from the Trust?

1 MR. EAGLE: Objection, your Honor; same objection.

2 It's been asked and answered.

3 MR. BILLBE: It's different. I asked if there was
4 an agreement. Now, I'm asking if there's a document --

5 A. There's a verbal agreement which I take completely
6 seriously as an honorable person. If you want to
7 question that about me, then show some other evidence
8 of that.

9 Q. I'm just asking if there's any --

10 A. There's no written document, no.

11 Q. That in any way, shape or form would lead to support
12 your testimony that you made an oral understanding that
13 you were going to borrow the money and repay it?

14 A. It's pretty obvious from what happened that that's what
15 happened, okay?

16 Q. But not a document that shows it's obvious?

17 MR. EAGLE: Objection, your Honor.

18 A. I've answered that already. No, no document.

19 THE COURT: We have been around on this one.

20 MR. BILLBE: Okay.

21 THE COURT: Thank you.

22 MR. BILLBE: Do you want me to keep going?

23 THE COURT: Yeah, you can, thank you.

24 Q. So we've --

25 MR. BILLBE: Oh, your Honor, I'd like to move to

APPENDIX B

EXERCISE OF GENERAL POWER OF APPOINTMENT

I, Alan Hoffman, pursuant to the provisions of Section L. Special Power of Appointment of the NON-EXEMPT TRUST FOR SETTLOR'S DECEDENTS (the "Lillian Non-Exempt Trust") established under the terms of the DECLARATION OF TRUST by LILLIAN F. HOFFMAN, dated July 6, 1990, as such Power of Appointment was modified and amended to be a General Power of Appointment pursuant to the provisions of the FIRST AMENDMENT TO THE LILLIAN F. HOFFMAN 1990 Trust, executed on April 22, 2005, hereby exercise such General Power of Appointment to appoint the entire Lillian Non-Exempt Trust to my Estate.

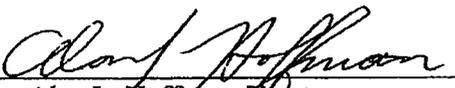
DATED: Aug 4, 2007


ALAN L. HOFFMAN

RECEIPT OF THIS DOCUMENT ACKNOWLEDGED BY
TRUSTEE OF THE ALAN L. HOFFMAN EXEMPT TRUST

DATED: Aug 6, 2007

ALAN L. HOFFMAN EXEMPT TRUST


by: Alan L. Hoffman, Trustee

EXERCISE OF
GENERAL POWER OF APPOINTMENT BY
ALAN L. HOFFMAN

EXERCISE OF SPECIAL POWER OF APPOINTMENT

I, Alan Hoffman, pursuant to the provisions of Section J. Special Power of Appointment of the EXEMPT TRUST FOR SETTLOR'S DECENDANTS (the "Lillian Exempt Trust") established under the terms of the DECLARATION OF TRUST by LILLIAN F. HOFFMAN, dated July 6, 1990, hereby exercise the Special Power of Appointment granted to me thereunder to appoint the Exempt Trust to the Trust For Children and Grandchildren established under ARTICLE 9 of my Will, to be allocated among the shares established in that trust as follows:

The Lillian Exempt Trust shall be equally divided among the Trust shares established for my three children, SARA J. KELSO, GWYNITH E. HOFFMAN-ROBINSON, and DAVID C. HOFFMAN, and for their issue in the event that are deceased and a share is set aside for such issue, and shall be further divided or allocated to the portions of such shares in order to maintain an inclusion ratio of either one or zero for such portions for generation-skipping transfer tax purposes. Further, if in the judgment of the Trustee it is best to do so, the portion of this Lillian Exempt Trust allocated to these children (or their issue, as the case may be) may be retained in an entirely separate share, as a separate trust, and held, administered, and distributed in accordance with the provisions of ARTICLE 9.

In exercising this Special Power of Appointment for the benefit of these three of my children, I am carrying out the intention of my mother that the Lillian Exempt Trust would go to those of my children who were living at the time she established that trust.

DATED: Aug 4, 2007


ALAN L. HOFFMAN

RECEIPT OF THIS DOCUMENT ACKNOWLEDGED BY
TRUSTEE OF THE ALAN L. HOFFMAN EXEMPT TRUST

DATED: Aug 6, 2007

ALAN L. HOFFMAN EXEMPT TRUST


by: Alan L. Hoffman, Trustee

EXERCISE OF
SPECIAL POWER OF APPOINTMENT BY
ALAN L. HOFFMAN

-1-

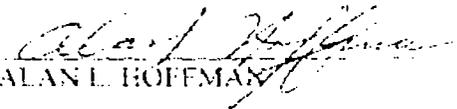
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Exhibit No. 7

EXERCISE OF GENERAL POWER OF APPOINTMENT

I, Alan Hoffman, pursuant to the provisions of Section L, Special Power of Appointment of the NON-EXEMPT TRUST FOR SETTLOR'S DECEDENTS (the "Lillian Non-Exempt Trust") established under the terms of the DECLARATION OF TRUST by LILLIAN F. HOFFMAN, dated July 6, 1990, as such Power of Appointment was modified and amended to be a General Power of Appointment pursuant to the provisions of the FIRST AMENDMENT TO THE LILLIAN F. HOFFMAN 1990 Trust, executed on April 22, 2005, hereby exercise such General Power of Appointment to appoint the entire Lillian Non-Exempt Trust to my Estate

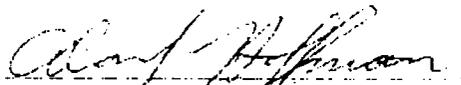
DATED: Aug 4, 2007


ALAN L. HOFFMAN

RECEIPT OF THIS DOCUMENT ACKNOWLEDGED BY
TRUSTEE OF THE ALAN L. HOFFMAN EXEMPT TRUST

DATED: Aug 6, 2007

ALAN L. HOFFMAN EXEMPT TRUST


by Alan L. Hoffman, Trustee

EXERCISE OF
GENERAL POWER OF APPOINTMENT BY
ALAN L. HOFFMAN

