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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Estate of:

RAYMOND M. LARSON,

Deceased.

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**APPELLANTS' REPLY BRIEF**

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## I. STATEMENT OF THE CASE

### A. Brief Factual Reply.

On November 1, 1989, Raymond and Gene Larson (the “Larsons”), as Trustors, created the “Raymond M. and Gene M. Larson Trust”. CP at 269-96. It is undisputed that one of the purposes of this trust was “. . . to ensure the orderly and economical transition of the Trustors’ assets after their deaths to the distributees and beneficiaries identified in Schedule B. . .” CP at 272-73. Schedule B states that upon the passing of both Raymond and Gene Larson, the Larsons’ children and eight grandchildren will be the sole beneficiaries of the Raymond M. and Gene M. Larson Trust. CP at 291-92. Gene Larson never attempted or agreed to amend the Raymond M. and Gene M. Larson Trust.

The Larsons reserved the power to revoke or modify the terms of the Raymond M. and Gene M. Larson Trust. CP at 271-72 (¶2.1). They reserved this power to the “Trustors”, acting jointly, rather than to either “Trustor” alone. CP at 271 (¶2.1). The Raymond M. and Gene M. Larson Trust language plainly demonstrates their intent: “. . . nothing in this Trust and its Schedules shall be construed to give *either* Trustor the right, *acting alone*, to amend or revoke this Trust as to the other Trustor’s interest or to utilize assets in such a way that would be inconsistent

with the ownership interests of the other Trustor. . .” CP at 272 (emphasis added).

However, the Larsons created three narrow exceptions to the rule requiring joint action. First, they granted the survivor Trustor the power to amend Article IV in his or her sole discretion. *Id.* Second, in Paragraph 6.1, after granting the survivor Trustor a limited power to change the successor Trustee(s), the Larsons added language acknowledging the general requirement of joint action: “. . . and this right shall not be considered in conflict with Paragraph 2.1.” CP at 281. Third, the Larsons granted the survivor Trustor the power to amend the distribution scheme for the Marital Trust. See Paragraph B.2.3(b)(1), CP at 290.

In drafting the Raymond M. and Gene M. Larson Trust, the Larsons included a blueprint for two separate and distinct trusts. CP 296-96. These two trusts are evidenced throughout the original Raymond M. and Gene M. Larson Trust document.

For example, Article IV, Paragraph 4.3.20 authorizes the Trustee to “hold Trust assets in *two separate* brokerage Trust accounts to meet the requirement of the *division* of Trust assets into the Marital Trust *and* Family Trust if applicable (Ref. Schedule B).” CP at 279 (emphasis added).

Turning to Schedule B, Section II, Paragraph B.2.3, after providing that all of *Trustors’* assets pour into a Marital Trust upon the death of the first Trustor, Raymond and Gene Larson directed

that the Trustee “administer *this Trust* as follows. . .” CP at 289 (emphasis added). Likewise, at Paragraph B.2.3(b)(1), the Larsons stated that upon the death of the survivor Trustor, the Trustee was to distribute the principal of *this Marital Trust*. . .” CP at 290 (emphasis added).

The very next paragraph—B.3.1—erases any remaining doubt regarding the Larsons’ intent to create two separate trusts. The Larsons wrote that upon the death of the survivor Trustor, “. . . [a]ll taxes and expenses relative hereto shall be paid *first* out of the residue of the Marital Trust, *then* the residue of the Trust Estate. . .” CP at 290 (emphasis added). Obviously, there cannot be two residues to only one trust.

The Larson’ intent appears again in the general provisions of Schedule B, Section IV. In particular, Paragraph B.4.8 states that “[d]uring the administration of *any trust* created by this instrument, the undistributed net income shall be added to the principal at intervals . . .” CP at 294 (emphasis added).

Finally, Raymond Larson’s recognition of the two trusts is apparent in his attempted 2001 amendment. Raymond Larson attempted to rewrite Paragraph B.3.2 as follows: “Upon the death of Raymond M. Larson, the corpus and any undistributed income, from *either* the Marital *or* the Family Trust, shall be held in continuing trust by the Co-Successor Trustees for the benefit of RoseAnne D. Larson. . .” CP at 303 (emphasis added).

Interestingly, this same document stated that the Raymond M. and Gene M. Larson Trust “shall *also be known as* The Larson Family Living Trust Dated 11-1-89.” CP at 302 (emphasis added). The Raymond M. and Gene M. Larson Trust was the “Family Trust” referenced in the original Trust document.

In addition to requiring that the Larsons act together to amend or revoke terms of the Raymond M. and Gene M. Larson Trust, the original Raymond M. and Gene M. Larson Trust document required that any amendment to the Marital Trust be notarized. CP at 290. In 1989, the Raymond M. and Gene M. Larson Trust was notarized. CP at 296. In 1991 and 1995, Raymond Larson ensured that his attempted amendments were notarized. CP at 298 and 300. Obviously, Raymond Larson knew what it meant to have a document notarized. Strangely, however, Raymond Larson’s attempted 2001 amendment was not notarized. Rather, two notaries each completed an “affidavit of witness”, then notarized each other’s signature on the affidavits. No one certified that: (1) Raymond Larson was the person who signed the document; (2) Raymond Larson acknowledged that he signed the document; and (3) Raymond Larson acknowledged that it was his free and voluntary act. CP at 304-307.

## II. ARGUMENT IN REPLY

### A. Standard of Review.

The Respondent does not dispute Appellants' arguments regarding the applicable standard of review.

### B. Raymond Larson Lacked the Power to Unilaterally Amend the Distribution Provisions of the Raymond M. and Gene M. Larson Trust.

The parties disagree on two related issues regarding interpretation of the Raymond M. and Gene M. Larson Trust: (1) Whether the Raymond M. and Gene M. Larson Trust document called for the creation of a second separate "catch-all" trust, to be called the "Marital Trust" upon the death of the first Trustor; and (2) whether the power to amend the distribution scheme found in Schedule B, Section II, Paragraph B.2.3(b)(1), was limited to the Marital Trust or applied to the Raymond M. and Gene M. Larson Trust as a whole. Because the original Raymond M. and Gene M. Larson Trust document called for two distinct trusts, the power of to amend found in Paragraph B.2.3(b)(1) was necessarily limited to the Marital Trust. Consequently, Raymond Larson lacked the power to unilaterally amend the distribution provisions in 1991 and 2001. The original Raymond M. and Gene M. Larson Trust distribution provisions must control.

**1. There were Two Separate and Distinct Trusts.**

The parties agree that in interpreting written trust agreements, courts look first to the trustors' intent as manifested in the language of the trust document. *Cf. In re Estate of Preston*, 59 Wn.2d 11, 15, 365 P.2d 595 (1961); *In re Estate of Larson*, 58 Wn.2d 673, 678, 364 P.2d 494 (1961). In this case, the trial court erred in denying the Appellants' motion for summary judgment, and instead, holding that Raymond Larson had the power to unilaterally amend the distribution provisions of the Raymond M. and Gene M. Larson Trust. CP at 424 (Conclusion No. 5). The trial court erred by misinterpreting the Raymond M. and Gene M. Larson Trust. The trial court's ruling failed to recognize the Larsons' intent as demonstrated by the plain language of the Raymond M. and Gene M. Larson Trust. Indeed, the plain language of the document provides for two separate and distinct trusts: (1) The Raymond M. and Gene M. Larson Trust or "Family Trust"; and (2) the Marital Trust. Because there were two separate trusts, Raymond Larson's power of appointment was necessarily limited to the Marital Trust.

Evidence of the Larsons' intent to create two trusts abounds throughout the Raymond M. and Gene M. Larson Trust. For example, Article IV, Paragraph 4.3.20 contemplates the *division* of trust assets into the Marital Trust *and* Family Trust. CP at 279 (emphasis added). Similarly, in Schedule B at Paragraph B.2.3,

the Larsons referred to “*this* Trust” and “*this* Marital Trust.” CP at 289-90 (emphasis added). Notably, Paragraph B.2.3 calls for the Trustee to wind-up the Marital Trust upon the death of the survivor Trustor, distributing the principal and income. CP at 290. Conversely, Section III, Paragraph B.3.3 mandates that the Trust Estate continue after the survivor Trustor’s death, providing income to Randall Larson and paying for each of the grandchildren’s education expenses. CP at 291-92. These two different mandates make no sense unless the Larsons created two different trusts with two different distribution schemes for two different purposes.

Further evidence of the Larsons’ intent is found at Schedule B, Section III, entitled “Survivor Trustor Deceased”. The Larsons stated that upon the death of the survivor Trustor, the taxes and expenses to be *first* paid out of the residue of the Marital Trust, *then* out of the residue from the Trust Estate. CP at 290 (emphasis added). Obviously, such language denotes two separate and distinct trusts, each with separate assets.

Raymond Larson recognized the existence of two separate trusts by referring to “either the Marital or the Family Trust” in his attempted 2001 amendment. CP at 303. Also, he recognized that the two trusts had different distribution schemes. Therefore, Raymond Larson deleted the distribution provision for the Marital Trust and revised the distribution scheme for the so-called Family

Trust to make Respondent the sole beneficiary. *Id.* While Appellants concede that Raymond Larson may have had the power to amend the distribution provisions for the Marital Trust by executing a notarized amendment to Paragraph B.2.3, he did not have the power to unilaterally amend the distribution provisions set forth in Paragraph B.3.3 of the Raymond M. and Gene M. Larson Trust.

In addition to the plain language, a reading of the Raymond M. and Gene M. Larson Trust as a whole proves that there were two separate trusts. The purpose of the Raymond M. and Gene M. Larson Trust was to provide for the Larsons' care, then provide for their children and grandchildren. CP at 272 and 291-92. However, the Larsons were realistic. They realized that upon the death of the first Trustor, there would be non-Trust community property. In order to avoid probate for such property, the Larsons created the Family Trust and indicated that such property would automatically pour into the Family Trust. Also, the Larsons anticipated that after the first of them passed away, the survivor may remarry or develop other relationships that he or she would wish to remember upon his or her passing. The Marital Trust would allow the survivor to provide some property to such a person, while preserving the Raymond M. and Gene M. Larson Trust Estate for the Larsons' children and grandchildren. If no such relationship evolved, then the Marital Trust assets would be distributed in the same manner as

the assets belonging to the Trust Estate. Therefore, both the plain language of the document and a common sense analysis of the Raymond M. and Gene M. Larson Trust establish that the Larsons created two separate and distinct trusts.

**2. The Power to Unilaterally Amend the Distribution Scheme was Limited to the Marital Trust.**

“Where the power to modify a trust has been reserved to the joint settlors of the trust, both must join in executing an instrument to effectuate a change.” *Williams v. Springfield Marine Bank*, 475 N.E.2d 1122, 1124 (Ill. App. 1985). The *Williams* court focused on the fact that the settlors (trustors) had used the plural “Settlors” when explaining how the trust could be amended. *Id.* at 1125. Moreover, the court observed that when the settlors intended for the survivor settlor to have a power that he or she could exercise alone, they specifically stated so in the trust document. *Id.*

Likewise, the *Restatement* provides that unless the trustors provide otherwise in the trust, the trust may only be amended “by the joint action of the trustors during their lifetime.”

RESTATEMENT (THIRD) OF TRUSTS § 63, cmt. k.

In this case, the trial court erred in denying the Appellants’ motion for summary judgment and holding that Raymond Larson, acting alone, had the power to amend the distribution provisions of

the Raymond M. and Gene M. Larson Trust. CP at 424. Instead, like the settlors in *Williams*, the Larsons' language signaled their intent that amendment or revocation of the Trust document be done by joint action. The "Trustors" reserved the right to amend or revoke. See Paragraph 2.1, CP at 271-72 (emphasis added). Neither Raymond Larson nor Gene Larson, acting alone, had the power to amend or revoke the Trust as to the other's interest or to use Trust assets in a manner inconsistent with the other's interest. *Id.* Reading the Trust document as a whole, it is clear that Gene Larson's "interest" was to provide for herself and her husband, and then to provide for her children and grandchildren.<sup>1</sup>

Also like the settlors in *Williams*, the Larsons specified the situations in which the survivor Trustor could act alone to amend. The Larsons included only three such exceptions within the Raymond M. and Gene M. Larson Trust document. First, in Article II, entitled "Rights Reserved by the Trustors", at Paragraph 2.1, the Larsons granted the survivor Trustor the power to amend Article IV of the Trust document. CP at 272. Article IV is not at issue in this appeal. Second, in Paragraph 6.1, the Larsons provided the survivor Trustor with a limited power to amend the designation of trustees or successor trustees. CP at 281. And, third, in Schedule B, Section II, Paragraph B.2.3(b)(1), the Larsons

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<sup>1</sup> In particular, see Article III, Paragraph 3.1 and Schedule B, Section III, Paragraph B.3.3.

granted the survivor Trustor the power to amend the distribution scheme for “this Marital Trust.” CP at 290.

Respondent attempts to distinguish *Williams* by stating that in that case there was no general power of appointment granted to the survivor Trustor whereas in this case, Raymond Larson had such power. See *Br. of Respondent*, p. 8. Respondent is mistaken. A closer reading of *Williams* reveals that the trust at issue did include a power of appointment. *Williams*, 475 N.E.2d at 1125. However, the power of appointment was limited in that it was only exercisable by will. *Id.* Similarly, the power of appointment in the Raymond M. and Gene M. Larson Trust is limited in that it only applied to the Marital Trust. Respondent would have this Court read the language in Schedule B, Section II, Paragraph B.2.3 as granting Raymond Larson the power to unilaterally amend any provision of the Raymond M. and Gene M. Larson Trust. Respondent’s interpretation is overly-broad and does not make sense in light of the language of the Trust document as a whole.

Other than the three exceptions, the Larsons reserved to themselves, acting jointly, the right to amend or revoke any other term of the Raymond M. and Gene M. Larson Trust. In attempting to remove the children and grandchildren as beneficiaries of the Raymond M. and Gene M. Larson Trust, Raymond Larson acted against Gene Larson’ interests and, therefore, beyond his power. The Larsons’ children and grandchildren could not be removed

without Gene Larson's consent. Upon Gene Larson's death, her children and grandchildren became, in effect, irrevocable beneficiaries of the Raymond M. and Gene M. Larson Trust.

**3. The Marital Trust did not include the Assets of the Trust Estate.**

Schedule B, Section II, Paragraph B.2.3 states that upon the death of the first Trustor, all of the Trustors' assets pour into a Marital Trust. CP at 289. Respondent misinterprets this paragraph to mean that the Trust Estate becomes part of the Marital Trust. See *Br. of Respondent*, p. 13. Respondent's conclusion is flawed for two primary reasons.

First, by funding the Raymond M. and Gene M. Larson Trust with real property and investment accounts, the Larsons made such property assets of the Trust Estate. For instance, the Larsons quit claimed several parcels of real property to the Raymond M. and Gene M. Larson Trust. Similarly, they established investment accounts in the name of the Raymond M. and Gene M. Larson Trust. These assets cannot be called "assets of the Trustors." Rather, these were assets of the Trust Estate. Instead, the term "assets of the Trustors" refers to the Larsons' non-trust assets, which included certain investment accounts, bank accounts, gold ingots, and silver bars. These assets alone comprised the Marital Trust.

Second, the plain language of the Raymond M. and Gene M. Larson Trust contradicts Respondent's argument that all assets funded the Marital Trust. Remember that the Marital Trust was intended to catch the non-Trust community property at the time that the first Trustor died, and therefore, avoid probate.

The plain language of Article IV, Paragraph 4.3.20 authorizes the Trustee to divide the assets into the Marital Trust and the Family Trust if applicable. Such division would have been applicable only if the survivor Trustor designated beneficiaries of the Marital Trust other than his or her children and grandchildren. Otherwise, the two trusts would have been, for all practical purposes, one trust because the beneficiaries would be the same for both. However, as in this case, when the survivor Trustor designates a different beneficiary, then the Trustee was required to maintain two separate trusts. Moreover, Paragraph B.3.1 states that the taxes and expenses due upon the survivor Trustor's death are to be paid first out of the residue of the Marital Trust, then out of the residue of the Trust Estate. Respondent's suggestion that the Trust Estate became part of the Marital Trust makes no sense in light of this language. Clearly, there were two separate trusts, each funded by separate assets.

**4. Appellants and their Children are the Sole Beneficiaries of the Raymond M. and Gene M. Larson Trust.**

Because the Court must first look to the trustors' intent when interpreting a trust, this Court, upon determining that Raymond Larson lacked the power to unilaterally amend the distribution provision of the Raymond M. and Gene M. Larson Trust, must determine the appropriate distribution scheme under the Raymond M. and Gene M. Larson Trust. It is uncontested that Gene Larson never attempted to amend the Raymond M. and Gene M. Larson Trust. At the creation of the Raymond M. and Gene M. Larson Trust, the Larsons jointly intended that upon their deaths, the Trust Estate should be continued and distributed to their children and grandchildren in the manner set forth in Schedule B, Section III, Paragraph B.3.3. Therefore, Respondent is not entitled to any proceeds from the Raymond M. and Gene M. Larson Trust Estate.

**C. Raymond Larson's Attempted 2001 Amendment is Invalid Because it was Not Notarized.**

The Larsons provided that the survivor Trustor could make a "written and notarized amendment" to Paragraph B.2.3. In his attempted 2001 amendment, Raymond Larson failed to comply with this notarization requirement.

A "notarial act" must be evidenced by a certificate signed and dated by a notary public. RCW 42.44.090(1). A valid

notarization requires that the notary certify that the person who signs the document is indeed the person that he or she purports to be. RCW 42.44.080. The notary's certification must be based on personal knowledge or satisfactory evidence consisting of identification by a witness known to the notary or by identification documents. RCW 42.44.080(8). A notary's failure to comply with statutory and/or documentary requirements will render the underlying document invalid. *In re Jesse*, 286 F. 305, 306 (9<sup>th</sup> Cir. 1923) (interpreting Washington law).

In this case, the Raymond M. and Gene M. Larson Trust required that any amendment to B.2.3 must be notarized. In comparing Raymond Larson's signature on the attempted 2001 amendment to his signature on the attempted 1991 and 2005 amendments, there is a noticeable difference in the 2001 signature. See CP at 304, 300, and 298. Upon observing the 2001 signature, Appellants' reaction was "That's not our father's signature". The reason for Notarization is to assure that a document is actually signed by the person empowered to make and execute that document.

Raymond M. Larson's signature was notarized on the original Trust document. It was notarized on the attempted 1991 amendment, and it was notarized on the attempted 1995 amendment. This Court can see that Raymond Larson knew how to execute an amendment. The Court can see why the 2001

Amendment fails to convey the beneficial result that notarization provides.

The attempted 2001 amendment was not notarized. Rather, two notary publics each completed an “Affidavit of Witness”, then notarized each other’s affidavits. Contrary to Respondent’s strained attempt to say that the witnesses’ act was, in essence, “close enough”, neither notary certified that by personal knowledge or satisfactory evidence they determined that: (1) Raymond Larson was the person who signed the document; (2) Raymond Larson acknowledged that he signed the document; and (3) Raymond Larson acknowledged that it was his free and voluntary act. CP at 304-307. Without such certification based on knowledge or evidence, there is simply no way to ensure the validity of the document.

Respondent goes on to argue that “[t]here is no requirement that the signature of the signor of the amendment be notarized.” *Br. of Respondent*, p. 20. This begs the question, “if not the signature, then what?” Respondent has no answer. Of course it is the signature that is to be notarized, and the only signatures notarized here were those of the notaries.

Respondent’s argument is especially surprising given the fact that Raymond Larson had obtained proper notarization on the original Trust document in 1989, the attempted 1991 amendment, and the 1995 amendment. He knew what was required for an

amendment to be “notarized.” Because there was insufficient notarization, the underlying document is invalid.

### **III. CONCLUSION**

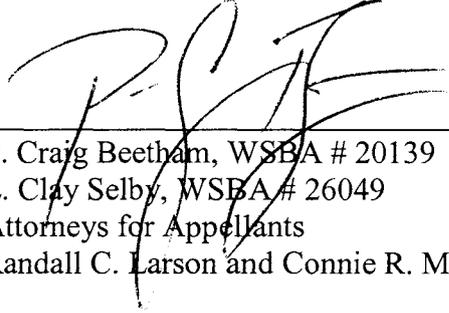
The trial court erred in holding that the Raymond M. and Gene M. Larson Trust document granted Raymond Larson the power to amend the distribution scheme for the Raymond M. and Gene M. Larson Trust. Rather, the plain language of the Trust document demonstrates that Raymond Larson’s power to amend was limited to the Marital Trust. Contrary to Respondent’s assertions, the Marital Trust was funded separately from the Raymond M. and Gene M. Larson Trust Estate. Upon Gene Larson’s death, Raymond Larson had no power to distribute the Trust Estate to anyone other than his children and grandchildren. Therefore, this Court should reverse the trial court’s denial of Appellant’s first motion for summary judgment, hold that the attempted 2001 amendment is invalid, and award Appellants their attorney’s fees incurred in this appeal.

In the alternative, even if this Court determines that Raymond Larson had the power to amend the distribution provisions of the Raymond M. and Gene M. Larson Trust, and that the Marital Trust consumed both the non-trust and Trust Estate assets, the attempted 2001 amendment is still invalid because it was not properly notarized. As such, this Court should reverse the trial court’s denial of Appellant’s second motion for summary

judgment, declare the attempted 2001 amendment invalid, and  
award Appellants their attorney's fees incurred in this appeal.

RESPECTFULLY SUBMITTED this 5th day of October, 2006.

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I certify that on the 7<sup>th</sup> day of October, 2006, I personally served  
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