

Original

NO. 37015-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF:

The 1934 Deed to Camp Kilworth;
The Estate of William W. Kilworth, deceased;
The Estate of Augusta L. Kilworth, deceased;
The Estate of Florence B. Kilworth, deceased;
The William W. Kilworth Trust; and
The Florence B. Kilworth Trust.

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APPELLANTS' OPENING BRIEF

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I. ASSIGNMENT OF ERRORS

A. Assignment of Error

1. The trial court erred when it granted the Scout Council's Petition and deleted the reversionary clause in the 1934 Deed allowing the sale of Camp Kilworth to the City of Federal Way with certain conditions.

(a) *Court's Letter Decision*: Findings of Fact/Conclusions of Law: ¶ 2 (Deed's purpose); ¶ 5 (administrative nature of reversionary clause); ¶ 6 (unanticipated circumstances found & deviation advances trusts' purpose); ¶ 7 (nature of trust's primary purpose); ¶ 8 (grantor's specific intent & equitable relief honors intent).

(b) *Court's Order, Judgment and Decree*: Findings of Facts/Conclusions of Law: 2(g); 2(h); 2(i); 2(j)).

B. Issues Relating to Assignment of Error

1. Whether the trial court erred in ignoring the Kilworths' unequivocal donative intent as expressed in the 1934 Deed when it deleted the reversionary clause thereby allowing the sale of Camp Kilworth to the City of Federal Way with certain conditions.

2. Whether the trial court erred in applying the legal theory of equitable deviation where the reversionary clause at issue is the subject of a deed and not a trust?

3. Whether the trial court erred in determining that the reversionary clause in the 1934 Deed was administrative and subject to the trial court's power of equitable deviation.

4. Whether the trial court erred in finding, under the doctrine of equitable deviation, that there have been unanticipated changes in circumstances surrounding the Scouts' use of Camp Kilworth.

5. Whether the trial court erred in finding, under the doctrine of equitable deviation, that the primary intent of the 1934 Deed and of the Two Trusts was to support the Boy Scouts with property that could be used to their benefit.

6. Whether the trial court erred in applying the doctrine of equitable deviation based upon its determination that the primary intent of the 1934 Deed and the Two Trusts would best be served by deleting the reversionary clause and approving the sale of Camp Kilworth to the City of Federal Way with certain conditions.

7. Whether the trial court abused its discretion in fashioning an equitable remedy including ordering the distribution of sale proceeds from Camp Kilworth to the Scout Council to fund capital improvement projects and establish an endowment for maintenance of said improvements.

II. STATEMENT OF THE CASE

A. The Parties.

Co-Appellant KeyBank.

KeyBank National Association, (“KeyBank”) is the current successor trustee to the William W. Kilworth Trust (“W. Kilworth Trust”). KeyBank, as trustee, holds one-half reversionary right to Camp Kilworth, the property that is the subject of this appeal, and which is the subject of a reversionary clause in the 1934 Deed conveying the Property from the Kilworths to the Scout Council.

Co-Appellant Union Bank of California.

Union Bank of California, National Association, (“Union Bank”) is a co-trustee of the Florence B. Kilworth Trust (“F. Kilworth Trust”) along with Florence E. Morris, the daughter of Florence B. Kilworth, who was named as co-trustee in the Last Will and Testament of Florence B. Kilworth. Union Bank and Mrs. Morris, as co-trustees, hold one-half reversionary right to Camp Kilworth.

The term “Two Trusts” shall hereinafter refer to the W. Kilworth Trust and the F. Kilworth Trust. Union Bank and Mrs. Morris, and KeyBank are hereinafter referred to as “The Two Successor Trustees”. The Two Trusts are testamentary charitable trusts.

Respondent Scout Council.

The Respondent, the Pacific Harbors Council, Boy Scouts of America (“Scout Council”) is a Washington non-profit corporation chartered by the National Council of the Boy Scouts of America. The

Scout Council is the successor to the Tacoma Area Council Boy Scouts of America. The Scout Council is the successor-grantee of Camp Kilworth. (CP 5; 15).

Other Interested Parties.

The Attorney General of the State of Washington (“Attorney General”), as empowered by RCW 11.110 to provide supervision of public charitable trusts, also appeared in the litigation before the trial court. (CP 74-77). Additionally, the City of Federal Way, a municipality organized under the laws of the State of Washington (“City”), appeared before the trial court because the Scout Council seeks to sell Camp Kilworth to the City free of the reversionary interest held by the Two Trusts. (CP 65-70; 179).

B. Relevant Factual History

William W. Kilworth and Augusta L. Kilworth, husband and wife, were generous with their means, making many monetary lifetime and testamentary gifts to a variety of charities including youth and religious organizations as well as medical causes and educational institutions. (CP 22-46; 47-53).

The 1934 Deed

On February 28, 1934, William Kilworth and Augusta Kilworth granted to the Tacoma Area Council Boy Scouts of America, by deed,

(“1934 Deed”) twenty-five (25) acres of real property described in the 1934 Deed which is commonly known as “Camp Kilworth” in Federal Way, King County, Washington (“Camp Kilworth” or “Property”). (CP 18-20). The 1934 Deed was recorded under King County Auditor’s Fee No. 2789026. (CP 18-20).

The conveyance from the Kilworths to the Scout Council included the following unambiguous language:

Said grantee shall use, keep and maintain said premises for the purpose of teaching scout craft, cooperation, patriotism, courage, self reliance and kindred virtues among boys and for the promotion and furtherance of the principles and purposes for which the Grantee is organized.

Provided further, and this conveyance is made upon the express conditions that said Grantee shall never convey, lease or encumber said premises, or any part thereof, and shall never allow the same to come into the possession of any other party.

...

[T]hat if said Grantee shall . . . violate any of the provisions above specified, . . . then and in that event the said premises hereby conveyed shall revert to and vest in the Grantors, their heirs, executors, administrators or assigns, as fully as though this conveyance had never been made . . .

(CP 19).

The reversionary interest in the 1934 Deed became part of the residue of the estates of William W. Kilworth and Augusta L. Kilworth at their respective deaths. (CP 37-39). Augusta L. Kilworth died on July 31, 1943, leaving her husband, William W. Kilworth as her survivor. At

Augusta's death, her interest in the reversion passed with the residue of her Estate to her surviving husband, co-Grantor, William W. Kilworth under the Order of the Pierce County Superior Court dated April 23, 1946 in Cause No. 38723. (CP 47-53). William Kilworth subsequently married Florence B. Kilworth. (CP 22). William died on January 4, 1964, leaving Florence as his surviving spouse.

William W. Kilworth's Will

Article XXIII of the Last Will and Testament of William W. Kilworth dated October 5, 1962 ("William's Will") established the W. Kilworth Trust. (CP 22-46). William's Will provided that the residue of his Estate was left one-half to his surviving wife, Florence B. Kilworth, and one-half to the W. Kilworth Trust. (CP 22-46). The W. Kilworth Trust was, in relevant part, to hold, manage and distribute one-half of the residue of his estate. (CP 37). The W. Kilworth Trust further provided that only the Trust's net income was to be distributed and that the Trustee had discretion to determine to what use or purpose the net income would be used. (CP 37).

William's Will directs net income of the residual charitable trust be used for charitable, education or civic purposes. (CP 37). William's Will, Article XXIII, subsection (b), provides that income be distributed to

certain charitable organizations. (CP 37-39). Specifically, William's Will provides, in relevant part:

By way of illustration, and not by way of limitation, I suggest such uses as aid to the BOY SCOUTS or the GIRL SCOUTS who maintain offices in Tacoma; the Y.M.C.A., the Y.W.C.A., and Orthopedic Guild or Hospital; a scholarship in Stadium or Lincoln High School; a scholarship in the University of Puget Sound; the Tacoma Park Board, for public playgrounds and parks in the City of Tacoma, or any other charitable use . . .

(CP 38). William's Will and First Codicil of January 18, 1963 were admitted to probate in Pierce County Superior Court in Cause No. 72067.

Florence B. Kilworth's Will

Florence died on February 13, 1977. Article XII of the Last Will and Testament of Florence B. Kilworth dated January 18, 1972 ("Florence's Will"), established the F. Kilworth Trust. (CP 57). In Florence's Will, the residue of her Estate, including the residue of the Estate of William W. Kilworth, was left to the F. Kilworth Trust. (CP 57). Florence's Will provided that the F. Kilworth Trust was to hold, manage, and distribute the residue of her Estate. (CP 57). Florence's Will directs that all of the income of her residual charitable trust be distributed for medical, religious, educational, recreational and cultural uses. CP (57-58).

Like William's Will, Florence's Will also suggests numerous uses for Trust income including but not limited to "Boy and Girl Scouts, and

Boys Clubs” as well as for “research and study in the fields such as . . . arthritis and cancer . . .”, “missionary work of churches such as . . . Immanuel Presbyterian Church. . .”, and scholarships for deserving and underprivileged young people . . .” (CP 58).

Florence’s Will further provided that the Trustee of the F. Kilworth Trust hold full and complete power to determine the allocation of income earned by the Trust Estate. (CP 57-58). Florence’s Will was admitted to probate in Pierce County Superior Court under Cause No. 875312.

Camp Kilworth

Camp Kilworth, the 25-acre parcel of real property deeded from the Kilworths to the Scout Council, is located in Federal Way, Washington. (CP 18-19). Through the years, many improvements were made to Camp Kilworth including the construction of a lodge, a Ranger’s house and buildings providing a roof for campers to take refuge in inclement weather and to use for overnight camping. (CP 86). In the early 1990’s, local donations allowed a significant renovation and modernization of Camp Kilworth’s lodge. (CP 86). Today, Camp Kilworth is utilized as a Cub Scout Day Camp and a place for training Scouting volunteers. (CP 87).

The Scout Council and other Scout Camps

In the early 1990's, two other scout councils in Southwest Washington, Twin Harbors and Tumwater, merged into the Mt. Rainier Council (formerly the "Tacoma Area Scout Council") and the Scout Council, is now known as the Pacific Harbors Council Boy Scouts of America.¹ (CP 8, 15).

In addition to Camp Kilworth, the Scout Council operates (1) a 600-acre Boy Scout Summer camp abutting Hood Canal on the Olympic Peninsula known as Camp Hahobas; (2) a 200-acre camp for year-round Cub and Scout activities and leader training near Olympia, Washington known as Camp Thunderbird; and (3) a smaller and less developed camping facility west of Camp Thunderbird known as Camp Delezenne. (CP 8, 15, 87).

In 2004, the Scout Council appointed an Asset Review Committee to study all of its major assets and recommend to the Board the best use of those assets. (CP 84-93). The Board determined that, in their opinion, the best use of Camp Kilworth was to sell it and place the proceeds from the sale into major capital improvements in Camp Thunderbird and Camp

¹ As set forth previously in this Appellants' Opening Brief, the Pacific Harbors Council Boy Scouts of America is herein referred to as "Scout Council".

Hahobas and to establish an endowment for maintenance of those improvements. (CP 84-93).

As the concept of a potential sale of Camp Kilworth became known in the wider community, the City of Federal Way expressed an interest in acquiring it. (CP 90). The City's proposal included the City's purchase of Camp Kilworth with a reservation of the right to the Scout Council to continue to use Camp Kilworth on an occasional basis. (CP 65; 90).

On November 4, 2005, the Scout Council and the City entered into a Real Estate Purchase and Sale Agreement containing, in relevant part, a condition precedent. (CP 65-70). The condition required that the reversion clause in the 1934 Deed be removed by Court Order so to allow the sale without the property reverting to the Kilworths' successors, as Grantors, pursuant to the 1934 Deed. (CP 66). The Two Successor Trustees oppose the sale because it is contrary to the Kilworths' donative intent as evidenced in the unambiguous 1934 Deed.

C. Procedural History

On March 28, 2006, the Scout Council filed a Petition in Pierce County Superior Court seeking, in relevant part, deletion of the reversionary clause in the 1934 Deed to Camp Kilworth. (CP 3-17). More specifically, the Petition sought modification of the 1934 Deed

deleting the reversionary clause to allow the sale of Camp Kilworth to the City of Federal Way. (CP 12-13). Under the Scout Council's Petition, the proceeds of such sale would be subject to reinvestment in the capital improvements of two other Boy Scout camps, namely Camp Hahobas and Camp Thunderbird, with an endowment established for the maintenance of the improvements. (CP 13).

The Scout Council argued that the trial court had the authority to delete the reversionary clause in the 1934 Deed allowing the sale of Camp Kilworth to the City under the doctrine of equitable deviation because of unanticipated, changed circumstances since the time of the conveyance and the fact that the modification would further the Two Trusts' purposes. (CP 141-143). This is a legal theory without precedent. The Two Trusts opposed the Petition. (CP 71-73; 144-149).

On September 24, 2007, the Pierce County Superior Court, the Honorable Thomas P. Larkin, issued the Court's Letter Opinion granting the Scout Council's Petition. (CP 152-153). Thereafter, on October 23, 2007, the Pierce County Superior Court entered an Order, Judgment, and Decree Deleting the Reversionary Right in the 1934 Deed to Camp Kilworth and approving the sale of Camp Kilworth to the City of Federal Way, with certain conditions. (CP 154-163). These conditions include, in relevant part, that the net proceeds from the sale of Camp Kilworth be

used for capital improvements including a dining hall at Camp Hahobas and a swimming facility at Camp Thunderbird, with the balance held in a restricted endowment fund to maintain such capital improvements. (CP 157). The trial court's October 23, 2007 Order, Judgment, and Decree refers to and attaches to it the court's September 24th Letter Opinion. (CP 157).

This appeal follows. (CP 170-187). The Appellants respectfully request reversal of the Superior Court's Order, Judgment and Decree because the trial court erred in applying the doctrine of equitable deviation in this case.

III. ARGUMENT

A. Standard of Review.

The question of whether equitable relief is appropriate to deviate from the terms of a charitable trust is a question of law. *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). Questions of law are reviewed de novo. *Id.* at 375.

Factual findings made in support of the trial court's determination are reviewed for substantial evidence, that is, whether there is a sufficient quantum of evidence to persuade a fair minded person of the truth of the declared premise. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 638 P.2d 1231 (1982) (internal citations omitted). If the court finds substantial

evidence supports the findings, the court next determines whether those findings support the trial court's conclusions of law and judgment. *Id.*

The question of whether the trial court properly fashions a remedy is reviewed for abuse of discretion. *Niemann*, 154 Wn.2d at 374 (internal citations omitted). A court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *Beckman v. Wilcox*, 96 Wn. App. 355, 367, 979 P.2d 890, 896-97 (1999).

B. The Trial Court Erred When It Granted the Scout Council's Petition and Deleted the Reversionary Clause in the 1934 Deed Allowing the Sale of the Property to the City of Federal Way with Certain Conditions.

i. *The Trial Court Ignored the Plain and Unambiguous Language of the 1934 Deed and the Kilworths' Donative Intent When it Deleted the Reversionary Clause.*

The 1934 Deed clearly and unambiguously provides that the "Grantee shall never convey, lease or encumber said premises . . . and shall never allow the same to come into the possession of any other party." (CP 19). If the Grantee violates any of these provisions, the Property reverts to and vests in the Grantors, as if the conveyance had never been made. (CP 19).

Washington law recognizes reversions, reversionary interests, and possibilities of a reverter. *See King County v. Hanson Inv. Co.*, 34 Wn.2d

112, 118, 208 P.2d 113 (1949); and, *Hodgins v. State*, 9 Wn. App. 486, 494, 513 P.2d 304 (1973) (recognizing the validity of conveyances containing a possibility of reverter triggered upon failure to use or allocate the property according to expressed terms of conveyance). A reversion, which is a restraint on alienation, as in the present case, can serve the legitimate function of conserving land devoted to charitable purposes. *Alby v. Banc One Financial*, 156 Wn.2d 367, 373, fn.4, 128 P.3d 81 (2006) (internal citations omitted).

In all matters relating to trusts, courts must adhere to the “consistent aim of giving effect to the settlor’s intent.” *Niemann*, 154 Wn.2d at 382 (internal citations omitted). Given such, courts should be reluctant to deviate from the testator’s plan and can only do so upon determining that “it is reasonably necessary in effectuating the *primary* purpose of the trust.” *Id.* (emphasis in original) (internal quotation omitted). When determining a settlor’s intent courts derive such from the entire instrument and, *if ambiguity exists*, the situation and circumstances of the parties at the time of the grant are to be considered. *Niemann*, 154 Wn.2d at 375 (emphasis added).

Real estate authority William Stoebuck, discussing in detail “reversions” and “possibility of reverter,” describes a “typical example” of a possibility of reverter as “to the Three R’s School District for so long as

a school is so maintained and operated on the premises [and when a school is no longer so maintained and operated, the land shall revert to grantor and his heirs].” Professor Stobeck notes that the bracketed text is not strictly necessary but is a wise drafting precaution. 17 William B. Stoebeck & John W. Weaver, *Washington Practice: Real Estate: Property Law*, §§ 1.15-1.16, pp. 19-24 (2d ed. 2004).

Here, the Scout Council represents the “Three R’s School District” and the use of the property for a Scout Council activity is the equivalent to the restriction of maintaining and operating a school. When the property in this case is sold or no longer used for Scout Council or similar activity, it reverts to the Grantor, or in this case the Two Trusts, as successors-in-interest to the Grantors.

In this case, the 1934 Deed is unequivocal and unambiguous in expressing the Kilworths’ donative intent that the Grantee never convey, lease or encumber Camp Kilworth. In fact, the 1934 Deed goes so far as to express that Camp Kilworth “shall never allow the same to come into the possession of any other party. . .” (CP 19).

Consistent with Professor Stobeck’s “drafting precaution,” the Kilworths were exceedingly careful in drafting the language of the 1934 Deed to address any future circumstance with respect to the Property (i.e. use, ownership) that would differ in any manner from their specific intent.

These circumstances include any conveyance or any other action that the Scout Council may employ to fashion a result differing from such intent.

The first phrase of the 1934 Deed restriction, “Grantee shall never convey, lease or encumber said premises,” addresses a sale, gift, lease or encumbrance of the property, while the second phrase, “to come into the possession of any other party,” provides a “catch all” addressing any other situation not contemplated in the first provision.

In this case, there can be no doubt as to the Kilworths’ donative intent; that the Scout Council hold and use Camp Kilworth, in perpetuity, for boy scouting. Where any of the restrictions of the 1934 Deed are violated, the 1934 Deed expressly and unambiguously states that Camp Kilworth “shall revert to and vest in the Grantors . . . as fully as though this conveyance had never been made. . .” (CP 19).

The Scout Council relies upon the Trust and Estate Dispute Resolution Act (“TEDRA”), RCW Chapter 11.96A, and *Niemann v. Vaughn Community Church, supra*, to support its Petition and argument that the trial court has the authority to modify the 1934 Deed by invoking its equitable powers.

However, while TEDRA gives parties a forum for resolving disputes involving trusts and estates, nothing in TEDRA gives the trial court authority to ignore common law in applying reversionary clauses in

deeds, like the one in this case. Further, *Niemann*, which applies the doctrine of equitable deviation to modify a trust, does not apply to this case. *Niemann* is inapplicable because the deed in *Niemann*, which created the trust and placed a restriction on the property's use, is ambiguous. *Id.* at 375. In fact, the *Niemann* court found that it was questionable whether the deed even restricted the alienation of property. *Id.* at 373, fn. 6. Where the intent of the grantor in *Niemann* could not be derived from the entire deed instrument and, ambiguity existed, the court could consider extrinsic evidence to determine the grantor's intent and could modify the deed if certain circumstances were met.

In this case, where the 1934 Deed is unambiguous and Kilworths' intent can be derived from that instrument, there is no need to resort to extrinsic evidence or a balancing of the interests of various parties to modifying the 1934 Deed. *See Id.* at 374-75. Clearly, the trial court erred in failing to honor the Kilworths' donative intent as provided in the unambiguous 1934 Deed when it deleted the Two Trusts' reversionary interests.

As misguided as the trial court's decision in this matter, is the legal theory it adopted to achieve its result. If the reversion is enforced per its explicit terms, various charities, including the Boy Scouts, will benefit from the proceeds of the sale of Camp Kilworth. If the decision of the

trial court is affirmed, only the Boy Scouts will benefit from the sale. Therefore, critically, the enforcement or elimination of the reversion determines which charities will benefit from the proceeds of the sale. It is an understatement to say that generally “who” benefits from a charitable trust is solely within the control of the grantor. But there is one, and only one, exception – *Cy Pres*.

Courts apply equitable deviation to make *administrative* changes in the manner in which a charitable trust is carried out while courts apply *Cy Pres* in situations where trustees seek to modify or redefine the settlor's specific charitable purpose. The Court in *Niemann*, in differentiating situations where the application of equitable deviation or *Cy Pres* is appropriate said that

The question of the extent to which the court will permit or direct the trustee to apply the trust property to charitable purposes *other than the particular charitable purpose designated by the settlor* where it is or becomes impossible or illegal or impracticable to carry out the particular purpose involves the doctrine of *cy pres*. . . .

Niemann at 378, quoting RESTATEMENT (SECOND) OF TRUSTS § 381 cmt. a (1959) (*Emphasis Added*).

Even though the Boy Scouts are permissive beneficiaries of the Two Trusts, they are not the exclusive beneficiary of those trusts. Therefore, the effect of eliminating the reversion clause is to “apply the trust property

to charitable purposes other than the particular charitable purpose(s) designated by the settlor.” This would require the Boy Scouts to prove a critical element of a *Cy Pres* action – general charitable intent. However, a reversionary clause is the quintessential negative of general charitable intent!

Because, under *Niemann*, *Cy Pres* is the exclusive remedy when a plaintiff attempts to “apply the trust property to charitable purposes other than the particular charitable purpose(s) designated by the settlor” the trial courts application of equitable deviation must be reversed.

Further, sanctioning the trial court’s modification in light of the careful drafting of the unambiguous reversionary language discourages donors from making charitable dispositions if their intentions will not be honored but, instead, second-guessed and modified at some future time. For these reasons, the trial court’s Order, Judgment, and Decree must be reversed.

ii. The Trial Court Erred when it Applied An Incorrect Legal Theory in Granting the Scout Council’s Petition and Modifying the 1934 Deed.

The trial court applied the legal theory of equitable deviation to justify modification of the 1934 Deed, relying upon the *Niemann* case. (CP 152-153). This was an application of the doctrine without legal precedent.

In *Niemann*, our State Supreme Court recognized that the doctrine of equitable deviation may be invoked to make changes in the manner in which a charitable trust is carried out. *Id.* at 378. In clarifying the doctrine, the *Niemann* court stated “. . . [equitable deviation] has to do with the powers and duties of the trustees of charitable trusts with respect to the administration of the trust; it has to do with the methods of accomplishing the purposes of the trust.” *Id.* at 378, quoting RESTATEMENT (SECOND) OF TRUSTS § 381 cmt. a (1959).

In *Niemann*, the deed conveying the property at issue created a trust. *Id.* at 369. The petitioner sought equitable relief from the terms of a trust, namely removal of the alienation restriction from the trust. *Id.* In that case, because the instrument at issue was a trust and because the facts of the case met the elements of the doctrine of equitable deviation, the trial court permitted deviation from the trust provision. *Id.*

In this case, the reversionary clause at issue is contained in the 1934 Deed. The 1934 Deed did not create a trust and the Scout Council does not contend otherwise. The Two Trusts were created decades after the conveyance of Camp Kilworth by the 1934 Deed. (CP 22-46; 54-64). In this case, the trial court did not modify the Two Trusts but only modified the 1934 Deed. (CP 154-163). Where the instrument modified by the trial court was a deed as opposed to a trust, the trial court erred in

applying equitable deviation. *See also In re Riddell*, 138 Wn. App. 485, 493, 157 P.3d 888 (Div. II 2007) (applying equitable deviation to modify terms of consolidated trusts).

Given such, the trial court's Order, Judgment, and Decree Deleting the Reversionary Right in the 1934 Deed to Camp Kilworth and approving the sale of Camp Kilworth to the City of Federal Way with certain conditions must be reversed.

Assuming arguendo, that this Court determines the trial court did not err in applying the legal theory of equitable deviation, Appellants address the substance and elements of the doctrine, demonstrating that the trial court erred in modifying the 1934 Deed.

iii. The Trial Court Erred in Determining that the Reversionary Clause in the 1934 Deed was Administrative and subject to the Doctrine of Equitable Deviation.

Equitable deviation relates to the powers and duties of trustee of a charitable trust regarding the administration of the trust and is applied to make changes in the manner in which a charitable trust is carried out. *Niemann*, 154 Wn.2d at 378. The threshold question for a court in determining whether equitable deviation is appropriate is whether the action concerns an administrative provision. *Id.* at 379. While the *Niemann* court does not define the term "administrative", its common dictionary definition is "connected with administration; executive."

Further, the term “administration” is defined as “the act of administering; management”. WEBSTER’S NEW WORLD DICTIONARY 17 (3d ed. 1988).

In *Niemann*, the court applied the doctrine of equitable deviation after determining that the trust provision at issue related to the administration of the trust. *Id.* at 369. In *Niemann*, the Vaughn Community Church sought to sell the property at issue and use the proceeds of the sale to relocate its church. *Id.* at 371. However, the deed transferring the property in *Niemann* contained a restrictive covenant providing that “the property shall forever remain for the perpetual use of Protestant Evangelical Churches of the Community of Vaughn, Washington.” *Id.* at 371. Significantly, the grantor of the deed was a church which later merged into the donee of the land. *Id.* 370.

Conversely, in this case, the provision the Scout Council sought to modify is a reverter as opposed to a restriction on use. Unlike the restriction on use, the reverter involves a dispositive action relating to the transfer of the Camp Kilworth’s ownership in the event of a sale. This action involves more than either the management of a trust or ministerial actions relating to a trust and thus, is not administrative.

Where the clause at issue relates to the disposition of real property including the divestment of the property’s interest from a grantee in the

event of a sale, the clause is not administrative and is not subject to equitable deviation. The trial court erred in determining that the reversionary clause was an administrative provision.

iv. The Trial Court Erred in Applying the Doctrine of Equitable Deviation to Delete the Reversionary Clause in the 1934 Deed and Authorize the Sale of Camp Kilworth with Certain Conditions

Assuming arguendo, that the reversionary clause at issue in this case is administrative, the trial court erred in determining that the case meets the *Niemann* two-prong test.

The doctrine of equitable deviation allows a court to order a trustee of a trust to deviate from the terms of the trust if the court determines that because of circumstances not known to or anticipated by the settlor, compliance would defeat or substantially impair accomplishing the trust's purpose. *Niemann*, 154 Wn.2d at 381. Courts apply a two-prong test to determine whether the doctrine should be applied. First, there must be changed, unanticipated circumstances. *Id.* at 383 *citing* Restatement (Third) of Trusts § 66. Secondly, deviation must further the trust's purposes. *Id.* at 384.

- (a) The trial court erred in finding unanticipated changes in the circumstances surrounding the Scouts' use of Camp Kilworth.

With regard to changed, unanticipated circumstances, the petitioner must demonstrate that changed or relevant circumstances were unknown to the testator to allow deviation from the trust's terms. *Id.* at 383, *citing* RESTATEMENT (THIRD) OF TRUSTS § 66.

In this case, the trial court found that there had been “unanticipated changes in the circumstances surrounding the Scouts’ use of Camp Kilworth.” (CP 153; 156 ¶2(h)). In support of its determination, the trial court cited to the growth of the City of Federal Way now surrounding the once rural and remote area as well as the lack of access to the waterfront that abuts the property. (CP 153).²

In this case, the Scout Council did not present sufficient evidence to demonstrate that the Kilworths did not anticipate growth in the population of the surrounding area or changes to the physical property including erosion of the land resulting in unavailability of beach access. It is reasonable that the Kilworths, sophisticated in their business affairs, anticipated that the population in the area surrounding Camp Kilworth would grow and its topography would change over time. Just as it is

² Before the trial court, the Scout Council also argued that the gradual dilapidation of Camp Kilworth activity facilities due to storms and erosion and the increased use of other available Scout camps were facts supporting a finding of changed, unanticipated circumstances. The trial court did not articulate in its September 24, 2007 letter that it based its determination of unanticipated, changed circumstances upon the foregoing circumstances. (CP 152-153).

reasonable to anticipate that the population will grow and related development will occur in the next seventy years, so was it reasonable to expect that the Kilworths anticipated such growth when they deeded the Property to the Scout Council in 1934. The Scout Council presented no evidence that the Kilworths did not anticipate such growth and change.

Likewise, with respect to the unavailability of beach access due to the erosion of the high bank on the north end of the camp, it is also reasonable to find that the Kilworths anticipated this change. It would not be unusual for an individual to anticipate that a variety of outdoor conditions such as water, wind and other external factors would impact the physical qualities of real property and have some impact on such property. Again, the Scout Council presented no evidence including any testimony demonstrating that the Kilworths did not anticipate the environment altering Camp Kilworth in some manner including that portion of the Camp abutting the water.

In *Niemann*, the court found unanticipated, changed circumstances but, unlike this case, made its findings based upon testimony from individuals who were involved in the property's conveyance which included the deed restriction. Those individuals' testimony included unanticipated circumstances such as the church's growth, limitations on building and the property as well as changes in the current attitudes,

expectations and need of parishioners compared with those of the 1950's. *Id.* at 383.

The fact of the changes in population and topography as well as erosion and lack of beach access do not alone support the finding that the Kilworths did not anticipate such changes and do not support the trial court's finding that there have been "*unanticipated* changes in the circumstances surrounding the Scouts' use of Camp Kilworth", (CP 153; 156 ¶2(h)) (emphasis added), to meet the first prong of the equitable deviation test.

More importantly, the grantors of the 1934 deed anticipated the most significant change in circumstances involved in this litigation, the Boy Scouts wish to discontinue the use of Camp Kilworth exclusively for scouting purposes. The Kilworths anticipated this potential change through the inclusion of the reversionary clause.

Where the trial court's finding of unanticipated changes in circumstances is not supported by substantial evidence, that is, evidence sufficient to persuade a fair minded person of the truth or correctness of the declared premise, the application of the doctrine of equitable deviation is erroneous. *See Ridgeview Properties v. Starbuck, supra.*

- (b) The trial court erred in finding that the purpose of the 1934 Deed and the Two Trusts was “to support the Boy Scouts with property that can be used for their benefit” and that modification of the 1934 Deed furthers this purpose.

Assuming arguendo, that the trial court correctly found that there were unanticipated changes in the circumstances surrounding the Scouts’ use of Camp Kilworth, the court next considers the second prong of the equitable deviation test requiring that a modification furthers the purposes of the trust. *Niemann*, at 384. In this inquiry, courts are likely to engage in “a subjective process of attempting to infer the relevant purpose of a trust from the general tenor of its provisions.” *In re Riddell*, 138 Wn.App. at 493, *citing* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. b (2001).

The trial court’s September 24, 2007 letter decision, ¶ 7, includes a finding that the Trusts’ primary purpose is to support the Boy Scouts with property that can be used for their benefit. (CP 165). The trial court’s October 23, 2007 Order, Judgment and Decree, ¶2(g), includes a finding that the primary intent of the Grantors under the 1934 Deed was to support the Boy Scouts with property that could be used to their benefit. (CP 156). The court further determined that the modification of the 1934 Deed furthers the purpose of the 1934 Deed and Two Trusts. (CP 156; 165). A careful analysis of both the 1934 Deed and the Trusts demonstrate that this

finding of the “primary purpose” of the 1934 Deed and Two Trusts as well as modification to further the “primary purpose” is erroneous.

The 1934 Deed

Once again, the trial court erred in applying the *Niemann* case as it is distinguishable from this case. In *Niemann*, the trial court found that the instrument creating the charitable trust, namely the deed containing a use restriction, lacked the typical trust language and detail to determine the grantor’s intent in the grant of property. *Id.* at 375. The court, recognizing numerous possible interpretations of the deed language, which restricted the property’s use, found ambiguity as to the intent of the restriction. *Id.*

Therefore, the trial court considered extensive extrinsic evidence regarding the subject deed to determine the true intent of the settlors in forming the trust and in granting the property. *Id.* at 376-77. The *Niemann* court ultimately determined that the settlor’s primary intent was furthered by removing the alienation restriction from the trust prohibiting sale of the property because the intent was to facilitate and benefit worship of the church. *Id.* at 385. Such worship could be accomplished at any location in the community. *Id.*

Unlike the instrument in *Niemann*, in this case, there is no ambiguity and no doubt as to the Kilworths’ intent as evidenced in the

1934 Deed. As previously demonstrated, the inclusion of the reverter and the plain and unambiguous language of the 1934 Deed evidences a clear intent that the Scout Council use the Property for boy scouting in perpetuity without conveying, leasing, encumbering it or otherwise placing it into the hands of another entity. (CP 8-20). This Court need look no further in determining the Kilworths' donative intent. Given the unambiguous language of the 1934 Deed evidencing donative intent, the trial court erred in finding that the primary purpose of the 1934 Deed was simply "to support the Boy Scouts with property that can be used to their benefit" without any regard to time, purpose or ownership of the Property.

The Two Trusts

With regard to the primary purpose of the Trusts, the trial court also found that their primary purpose was to support the Boy Scouts with property that can be used for their benefit. (CP 165). As demonstrated above, the trial court erred in looking to the Two Trusts to determine the Kilworths' primary intent in granting Camp Kilworth given the unambiguous language of the 1934 Deed.

In any event, a review of the language of the Two Trusts demonstrates that the Two Trusts' primary purpose was not to "support the Boy Scouts with property that can be used for their benefit," but to support many charitable organizations including schools, churches, parks,

medical research, the Girl Scouts, and the Boy Scouts, equally, with no single charitable organization more important or more worthy of the Two Trusts' income than another. (CP 37-39; 57-58).

Even if Camp Kilworth is no longer optimal for use as a camp, as the Scout Council has apparently determined, the Kilworths addressed this circumstance when they included the reversionary clause in the 1934 Deed. They further included in the Two Trusts, provisions as to their respective Trustees' powers. For example, the F. Kilworth Trust gives the trustee "full and complete power to determine this allocation of income earned by this Trust Estate to those principal charitable purposes set forth above as they in their judgment and discretion feel most worthy and beneficial at the particular time." (CP 58). This includes directing Trust income to many worthy charitable organizations in addition to the Boy Scouts. If the reversionary clause in the 1934 Deed returns the Property to the Two Trusts, the Two Successor Trustees will determine how to manage the Property in accordance with the Kilworths' intent with respect to all of the Trusts' charitable purposes under present-day circumstances.

Given such, the trial court erred in finding that the primary purpose of the trusts was "to support Boy scouts with property that can be used for their benefit." (CP 165).

Further, the trial court erred in determining that modification including deleting the reversionary clause in the 1934 Deed, approving the sale and directing sale proceeds to be utilized by the Scout Council for capital improvements and maintenance of those improvements furthered the “primary purpose” of the Deed and/or the Two Trusts.

The modification fails to give effect to both William and Florence Kilworth’s clear directive that only Trust income be distributed to various beneficiaries. (CP 37-38; 57-58). Florence’s Will unambiguously provides that “any gain made upon the sale of any security or property belonging to the Trust shall be added to capital and held and retained as such.” (CP 57).³

It is well established that profits on the sale of any part of the principal are ordinary principal as opposed to income. IVA Austin Wakeman Scott & William Franklin Fratcher, THE LAW OF TRUSTS § 20.2.1 (5th ed. 2007). Income includes a return on capital that does not impair the asset, but represents an accretion to the capital such as rents, interest and cash dividends. *Id.* at 1473. Principal, on the other hand, includes profits on the sale or exchange of the principal. *Id.*

³ Curiously, the Scout Council acknowledges that “[n]either William’s Will nor Florence’s Will authorizes the distribution of principal out of the respective residual charitable trust, and Petitioners do not ask that the Trust be modified to allow such a distribution.” (CP 12).

In this case, the proceeds of any sale of Camp Kilworth are properly classified as principal. See RCW 11.104A.130(2). Any modification of the 1934 Deed removing the reversionary clause, approving the sale and directing sale proceeds to the Scout Council for use at other camps contravenes the intent of both the W. Kilworth Trust and the F. Kilworth Trust.

In sum, the foregoing provisions make evident the Kilworths' intent that the Scout Council hold and use Camp Kilworth for boy scouting in perpetuity. In the event that such does not occur, the Kilworths intended that Camp Kilworth revert to the Two Trusts, with income from the Trust asset being disposed of as the trustees best see fit under the circumstances at the time. The trial court erred in finding that the purpose of the 1934 Deed and the Two Trusts was to support the Boy Scouts with property that can be used for their benefit and erred in determining that the deletion of the reversionary clause and approval of the sale of the Property with conditions furthered the Kilworths' true intent.

C. The Trial Court Abused its Discretion in Ordering that Proceeds from the Sale of Camp Kilworth be used to Fund Capital Projects for other Scout Camps and in placing other Conditions upon the Sale.

A trial court has discretion in fashioning a remedy involving equitable relief. *Niemann*, 154 Wn.2d at 374. If this Court determines

that the trial court did not err in concluding that the doctrine of equitable deviation applies in this case, the Appellants respectfully request that this Court reverse the trial court's Order, Judgment and Decree as it relates to the trial court's relief.

In this case, the trial court abused its discretion when it ordered the proceeds from the sale of Camp Kilworth to be disbursed to the Scout Council and to be used for capital improvements at two Scout camps, with an endowment for maintenance of such improvements. As set forth above, by creating charitable trusts with the residues of their Estates, the Kilworths' intended to distribute income only to various charitable organizations. The distribution of principal from a sale of Camp Kilworth to the Scout Council to fund two capital projects which will not last in perpetuity directly contradicts the Kilworths' intended gift which is in perpetuity. Given such, the trial court erred in fashioning this remedy.

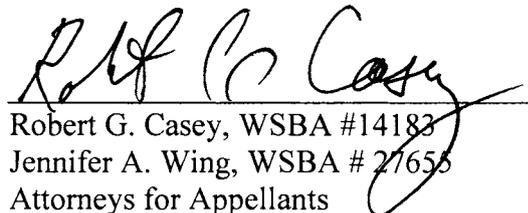
Thus, if this Court affirms the trial court's determination regarding equitable deviation, it should find that the trial court abused its discretion in fashioning its remedy and this Court should remand the matter back to the trial court. This Court's order should direct the trial court to fashion a remedy consistent with the Kilworths' express intent including that all proceeds from any sale of Camp Kilworth revert to the Two Trusts and appropriate income be distributed to the Scouts pursuant to the terms of the Two Trusts.

IV. CONCLUSION

For the reasons set forth above, Appellants, the Florence B. Kilworth Trust and the William W. Kilworth Trust, respectfully request that this court reverse the Trial Court's Order, Judgment, and Decree Deleting the Reversionary Right in the 1934 Deed to Camp Kilworth filed on October 23, 2007.

RESPECTFULLY SUBMITTED this 17 day of March, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2008, I served Respondent with a copy of the foregoing document by depositing a true and correct copy of the foregoing Appellants' Opening Brief, with ABC Legal Messengers to be delivered on March 17th, 2008 to the below-listed counsel:

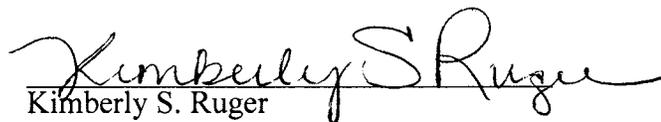
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DATED this 17th day of March, 2008.


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