

Original

No.37015-8-II

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

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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DIVISION II
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DEPUTY

BRIEF OF RESPONDENT

PACIFIC HARBORS COUNCIL, BOY SCOUTS OF AMERICA

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I. INTRODUCTION

In 1934, William Kilworth and his first wife, Augusta, made a gift of a twenty-five acre parcel in what is now Federal Way, Washington, to the Tacoma Area Council, Boy Scouts of America (now the Pacific Harbors Council, Boy Scouts of America, hereinafter the "Scout Council"). The Kilworths conveyed what is now known as "Camp Kilworth" to the Scout Council in perpetuity, subject to two conditions stated in the deed (the "1934 Deed"). First, the 1934 Deed specified that the Scout Council "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." Second, the 1934 Deed stipulated that the Scout Council "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." In the event the Boy Scouts were to abandon the property, violate either of the two conditions imposed in the 1934 Deed, be dissolved or fail to exist, the 1934 Deed provides that the property "shall revert to and vest in the Grantors, their heirs, executors, administrators or assigns, as fully as though this conveyance had never been made."

For nearly seventy five years, the Scout Council has used Camp Kilworth in the manner prescribed in the 1934 Deed. During that time, however, the forces of time and tide, together with encroaching urban development, have changed the shape and character of Camp Kilworth, diminishing its value for the purpose of teaching scout craft and for the promotion of the principles and purposes for which the Boys Scouts were organized.

Several years ago, the Scout Council conducted an assessment of its physical assets and determined that if the reversion clause were removed from the 1934 Deed, the Scout Council would be able much better to further William Kilworths' original purpose for the gift by selling Camp Kilworth and investing the proceeds from that sale in major capital improvements at two other larger camps owned by the Scout Council, Camp Hahobas on the Olympic Peninsula and Camp Thunderbird west of Olympia.

William Weyerhaeuser, then President of the Board of the Scout Council, and Douglas Dillow, the Scout Executive, presented the Scout Council's plan to Florence E. ("Babbie") Morris, niece of Florence B. Kilworth and co-trustee of the Florence B. Kilworth trust. Ms. Morris responded to this proposal with enthusiasm, indicating that she felt her step-father's intent would be enhanced by such a transaction and that he

would be delighted that the increased value of Camp Kilworth could be used to benefit Scouts now and in the future.

Encouraged by her response, the Scout Council proceeded and eventually entered into a conditional purchase and sale agreement with the City of Federal Way, which was willing to buy Camp Kilworth, maintain the land as a public park, and allow the Boy Scouts to continue to use the Camp without charge in the same manner as they had previously. The purchase and sale agreement was conditioned upon the removal of the reversionary provision in the 1934 Deed. The Scout Council petitioned the Pierce County Superior Court seeking removal of the reversionary clause and approval of the sale to the City of Federal Way. Unfortunately, Key Bank and Union Bank of California, the institutional trustees of the William W. Kilworth and Florence B. Kilworth trusts, ultimately opposed the sale.

Citing circumstances not contemplated by the Kilworths in 1934, the Scout Council asked the Court to reform the 1934 Deed and permit the sale by deleting the right of reversion so that the primary intent of the Kilworths – supporting the Boy Scouts – might continue to be fully realized through the sale of Camp Kilworth and the reinvestment of the proceeds of that sale in major capital improvements to Camp Hahobas and

Camp Thunderbird and in an endowment that would serve to maintain those improvements.

After reviewing the facts and the applicable law, considering the arguments of the parties and visiting Camp Kilworth with counsel for the two parties, the trial court concluded that the Kilworths' primary purpose in deeding Camp Kilworth to the Scout Council was to support the Boy Scouts with property that can be used for their benefit. The court then ruled that, because of changed circumstances unanticipated by the Kilworths, and to effectuate and further the primary purpose expressed by the Kilworths when they deeded Camp Kilworth to the Scout Council, it was necessary for the court to use its equitable authority to remove the reversionary language in the 1934 Deed and allow the sale of Camp Kilworth to proceed. The trial court found that the intention of the Kilworths would be best realized by using the proceeds from the sale of Camp Kilworth to make major capital improvements to other, larger camps owned by the Scout Council – camps that were now providing Scouts with the broad range of wilderness camping and robust waterfront and other outdoor experiences once provided by Camp Kilworth.

The Scout Council respectfully asks this Court to uphold the decision of the trial court. Such a decision will honor the donative intent of the Kilworths as expressed in the 1934 Deed. Perhaps more

importantly, by affirming the trial court and permitting the sale of Camp Kilworth to proceed, this Court will afford generations of Scouts yet unborn the opportunity to learn scout craft, cooperation, patriotism, courage, self reliance and kindred virtues through the promotion and furtherance of the principles and purposes for which the Boys Scouts were organized, just as the Kilworths envisioned.

II. ISSUES PRESENTED FOR REVIEW

1. Does RCW 11.96A.010, the Trust and Estate Dispute Resolution Act (“TEDRA”), vest the trial court with the authority to fully effectuate the donative intent of the Kilworths by removing the reversion clause from the 1934 Deed to Camp Kilworth, thereby allowing the Scout Council to sell the property and use the proceeds to strengthen Scouting through capital investments in two other camps serving Tacoma and Southwest Washington, while at the same time allowing the Scouts to continue their current level of use of the Camp Kilworth property?

2. Did the trial court properly construe the 1934 Deed to Camp Kilworth when it determined that the Kilworths’ primary donative intent, as expressed in that Deed, was to support the Boy Scouts?

3. Was the trial court’s finding of the existence of changed, unanticipated circumstances – material to the Kilworths’ primary purpose as evidence in the 1934 Deed – supported by substantial evidence?

4. Did the trial court properly exercise its discretion when it fashioned an equitable remedy that excised the reversionary clause in the 1934 Deed and authorized the sale of the Camp Kilworth property so that the proceeds could be invested in capital investments that effectuated the Kilworths' primary purpose as evidence in the 1934 Deed?

5. Does the reversion clause in the 1934 Deed constitute an unreasonable restraint on alienation where, because of changed circumstances unanticipated by the Grantor, it functions to frustrate the primary intention of the Grantor as expressed in the 1934 Deed?

III. STATEMENT OF THE CASE

A. Factual Background.

On February 28, 1934, William and Augusta Kilworth conveyed Camp Kilworth, then a relatively remote, twenty-five acre parcel in what is now the City of Federal Way, Washington, to the Tacoma Area Council, Boy Scouts of America. (CP 18-21). The Kilworths made this gift "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 Boy Scouts were organized. (CP 19). Camp Kilworth is now owned and operated by Respondent Pacific Harbors Council, Boy Scouts of America, a Washington nonprofit corporation and the successor to the Tacoma Area Council, Boy Scouts of America. (CP 5).

The Deed by which the Kilworths conveyed Camp Kilworth (the “1934 Deed”) contained a reversionary clause that would cause ownership of Camp Kilworth to revert to the Kilworths’ heirs, successors or assigns if it were sold or encumbered, or if scout craft were no longer to be taught there. (CP 19). The 1934 Deed provided, in pertinent part:

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.

Provided further, that if said Grantee shall abandon said premises, or violate any of the provisions above specified, or should itself be dissolved or fail to exist, 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 created by the 1934 Deed is now held equally by the William W. Kilworth Trust and the Florence B. Kilworth Trust, testamentary charitable trusts established by William and Florence Kilworth. (CP 5-6).

The Scout Council accepted the grant of Camp Kilworth and, with the help of the Tacoma Rotary and others, built a lodge and constructed a

stairway down the high bank to the Puget Sound waterfront. (CP 8). Over the years other improvements were made to the Camp, including the construction of a Ranger's house and buildings that provide shelter for overnight camping and small meetings. (CP 8).

More than seventy years later, the forces of time and tide, together with encroaching urban development, have changed both the shape and character of Camp Kilworth, limiting the types of activities available to Scouts at the Camp and resulting in a reduction in its use by Scouts and the Scout Council. (CP 86-87, 98). The area around Camp Kilworth has become increasingly urbanized and the Camp is now surrounded by residences. (CP 86, 98). Access to the Puget Sound waterfront was washed away years ago, and development of the waterfront is limited because of continuing erosion. (CP 86). This, together with the increasing urbanization of the area, has resulted in limiting the Scouts from engaging in many Scout outdoor activities, such as swimming, camping, survival training, marksmanship, archery and hiking at Camp Kilworth. (CP 86). These changed circumstances have left the Camp unsuitable for week-long scout camps, and therefore the use of the Camp for Scouting activities has fallen off in recent years and become stagnant. (CP 86).

After conducting an assessment of all of its physical assets in late 2004, the Scout Council determined that the value represented by Camp Kilworth would be best realized by selling the Camp and investing the proceeds of the sale in major capital improvements to two other properties owned by the Scout Council and dedicated to promoting the same purposes identified by the Kilworths in their 1934 Deed: Camp Hahobas (a 600 acre Boy Scout Summer camping facility abutting Hood Canal on the Olympic Peninsula) and Camp Thunderbird (a well-developed, 200 acre facility for year-round Cub Scout and Scout activities and leader training located some 10 miles west of Olympia, Washington). (CP 85-89, 98-99).

In order to accomplish this task, the Scout Council sought approval from the Kilworth family (and later the trusts that hold the possibility of reverter under the 1934 Deed) for the Scout Council to be allowed to sell Camp Kilworth – free from the reversion clause – and invest the proceeds of the sale in major capital improvements at Camp Hahobas and Camp Thunderbird. (CP 89-90). When William Weyerhaeuser, then President of the Board of the Scout Council, and Douglas Dillow, the Scout Executive, presented this proposal to Florence (Babbie) Morris, the daughter of Florence Kilworth, William Kilworth's second wife, Ms. Morris was enthusiastic, indicating that she felt her stepfather's intent would be enhanced by such a transaction and that he would be delighted that the

substantial increase in the value of Camp Kilworth would fund these needed improvements to benefit Scouts now and in the future. (CP 89).

Encouraged by Ms. Morris' response, the Scout Council sought out prospective purchasers that might be willing and able to use and maintain Camp Kilworth in its natural state and also allow the Scout Council the right to continue to use the Camp. (CP 91.) In mid-2005, the City of Federal Way, Washington (the "City"), offered to buy Camp Kilworth from the Scout Council for \$3 million. (CP 91). As part of its proposal, the City agreed to make Camp Kilworth a public park and to limit use of the Camp to low impact, passive-use recreation as long as the City operates the property. (CP 82, 97). The City also agreed to allow the Scout Council to continue its current use of Camp Kilworth without surcharge. (CP 82, 97). The City's offer was contingent, however, requiring that the Scout Council provide clear title to Camp Kilworth – title free from the reversionary rights incorporated in the 1934 Deed. (CP 80). The reverter will not be triggered by the present purchase and sale agreement.

In the fall of 2005, the Scout Council and the city of Federal Way entered into a Purchase and Sale Agreement conditioned expressly upon the removal of the reversionary clause or other modification to the two Kilworth Trusts, so that the Scout Council could sell Camp Kilworth

without losing the benefit of its sustained value to Scouting. (CP 65-70, 91). Shortly thereafter, a joint Petition was prepared with the request that the Trustees of the two Kilworth Trusts and the City join the Scout Council in petitioning the Court to exercise its jurisdiction in trust matters to remove the reversionary clause and allow the sale to proceed. (CP 91). The Two Trusts did not respond to the Scout Council's request that they join in the Petition, however, and after several months the Scout Council revised, filed and served the Petition as that of the Scout Council, joined by the City of Federal Way. (CP 91).

B. Procedural Status of the Case.

The Petition by the Scout Council was filed on March 28, 2006. (CP 3). On July 31, 2007, following agreement as to a briefing schedule, Union Bank of California, Trustee of the Florence B. Kilworth Residual Charitable Testamentary Trust, filed its Response in opposition to the Petition. (CP 3). The Assistant Attorney General with oversight for public charities in the state of Washington, Jeffrey Even, filed a Response on August 2, 2007, stating that, because this is essentially a contest between two charitable trusts and a community charity, the Attorney General will take no position. (CP 74-79). KeyBank, as Trustee for the William W. Kilworth Trust, filed its Response opposing the Petition on August 22, 2007.

The facts in this case were established by the testimony of Douglas Dillow, the Scout Executive, as set out in Sections 1 and 4 of the verified Petition, and by testimony in the form of Declarations from Joe Williams and Jimmy Collins, both Scouting volunteers who had served on the Scout Council's Board and Executive Committee and were familiar with the history and status of Camp Kilworth. (CP 5, 7-13, 84-93, 94-137). The trial court also considered a Declaration from Donna Hanson, the Director of Parks for the City of Federal Way, addressing the terms of the Purchase and Sale Agreement between the Scout Council and the City of Federal Way regarding the open space grant funding obtained by the City for the purchase and the manner in which the City intends to use Camp Kilworth should that purchase be allowed to be consummated. (CP 80-83). The Two Trusts submitted no objections to the evidence presented in favor of the Petition and no Declarations or other evidence of their own in opposition to the Petition.

As there was no disagreement concerning the facts involved in this case, the parties submitted memoranda supporting their legal positions and a hearing was held on September 6, 2007, before the Honorable Thomas P. Larkin. (CP 138-143, 144-149, 150-151, Verbatim Transcript of Proceedings, 9-06-07). Several days after that hearing, Judge Larkin conducted a site visit to Camp Kilworth accompanied by G. Perrin Walker, counsel for the Scout Council, Doug Dillow, the Scout Executive,

and Robert G. Casey, counsel for the Florence B. Kilworth Trust. (Verbatim Transcript of Proceedings, 9-10-07).

Judge Larkin issued a letter opinion on September 24, 2007, in which he granted the Scout Council's request in its Petition to modify the 1934 Deed to delete the reversion clause and to proceed to close the sale to the City of Federal Way free of the reversionary clause in the 1934 Deed. (CP 152-153). On October 23, 2007, Judge Larkin entered an Order, Judgment and Decree Deleting the Reversionary Right in the 1934 Deed to Camp Kilworth and approving the Scout Council's sale of Camp Kilworth to the City of Federal Way with certain restrictions on the Scout Council's use of the proceeds of such sale. (CP 154-163). Co-Appellants KeyBank and Union Bank of California, the institutional trustees of the William W. Kilworth and Florence B. Kilworth Trusts, timely filed their appeal to this Court. (CP 170-187).

IV. SUMMARY OF THE ARGUMENT

Under TEDRA, a trial court is vested with full and ample power and authority to administer and settle any issue, question, or dispute involving the determination of any question arising with respect to any asset or property interest passing at death, including questions relating to the construction of deeds. In the case below, the trial court properly exercised this authority when, in response to the Scout Council's Petition,

it determined that, in order to effectuate the Kilworths' primary intention as expressed in the 1934 Deed, it was reasonably necessary to excise the reversionary clause in that Deed to permit the Scout Council to proceed with a sale of the Camp Kilworth property to the City of Federal Way.

In making this determination, the trial court found that circumstances at Camp Kilworth had changed since the Camp Kilworth property had been given to the Scout Council by the Kilworths, and that these changes had not been anticipated by the Kilworths at the time they conveyed the property. The trial court determined that the primary donative intent of the Kilworths, as expressed in the 1934 Deed, was to benefit the Scouts with property that could be used to promote Scouting and the teaching of Scout craft. Based in these findings, the trial court concluded that the unanticipated change in circumstances warranted the removal of the reversionary clause in the 1934 Deed. This remedy would allow the Scout Council to complete a sale of the Camp Kilworth property to the City of Federal Way, which had agreed to purchase the Camp Kilworth property and allow the Scouts to continue to use it at their present level of use with no charge, but only if the reversionary clause were to be removed from the 1934 Deed.

The trial court ordered the Scout Council to proceed with the sale and to reinvest the sale proceeds in major capital improvements at two

larger camps owned by the Scout Council and in an endowment fund that would be used to maintain those improvements. The trial court further ordered the Scout Council to establish appropriate, permanent memorials to the Kilworths at the Scout camps where the funds would be employed, and requested that the City of Federal Way consider renaming the property after the Kilworths to continue their legacy once the purchase had been consummated.

Whether analyzed under trust law or under real property law, the trial court properly exercised its discretion when fashioning this remedy. If the 1934 conveyance created a charitable trust, the remedy crafted by the trial court was a proper application of the doctrine of equitable deviation sanctioned by the Washington Supreme Court in *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 113 P.3d 463 (2005). Conversely, if the presence of the reversionary clause in the 1934 Deed created a fee simple determinable, the trial courts' remedy was permissible and appropriate because the reversionary clause is no longer fulfilling its original purpose, which was to ensure that the Camp Kilworth property would be used to support the Boy Scouts.

V. ARGUMENT

A. Standard of Review.

The question of whether equitable relief is appropriate is a question of law. *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005) (citing *Puget Sound National Bank of Tacoma v. Easterday*, 56 Wn.2d 937, 943, 350 P.2d 444 (1960); *Townsend v. Charles Schalkenbach Home for Boys, Inc.*, 33 Wn.2d 255, 205 P.2d 345 (1949) Questions of law are reviewed *de novo*. *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007).

Where the matter before the Court involves construction of a deed, however, the dispute between the parties can best be described as a mixed question of fact and law. *Niemann*, 154 Wn.2d at 374. While construction of deeds is a matter of law for the court, the primary objective of deed interpretation is to discern the parties' intent. *Id.* (citing 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 7.9 (2d ed.2004)). "In other words, '[i]t is a factual question to determine the intent of the parties' with the court then 'apply[ing] the rules of law to determine the legal consequences of that intent.'" *Id.*, at 374-75 (quoting *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979)).

An appellate court will uphold challenged findings of fact and treat those findings as verities on appeal if the findings are supported by substantial evidence. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. *Id.* If this standard is satisfied, an appellate court will not substitute its judgment for that of the trial court even though it may resolve a factual dispute differently. *In re Riddell*, 138 Wn. App. 485, 492, 157 P.3d 888 (2007) (citing *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 314 P.2d 622 (1957)).

Finally, while the question of whether equitable relief is appropriate is a question of law, the fashioning of the remedy is reviewed for abuse of discretion. *Niemann*, 154 Wn.2d at 374, 385. “Trial courts have broad discretionary power in *fashioning* equitable remedies.” *Id.* at 385 (emphasis in original).

A discretionary decision or order of the trial court “will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Angelo v. Angelo*, 142 Wn. App. 622, 175 P.3d 1096 (2008) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

B. The Trial Court Properly Exercised Its Equitable Authority by Reforming the 1934 Deed and Ordering That the Sale of Camp Kilworth Should Proceed.

In the proceedings below, the trial court considered evidence presented in the form of the 1934 Deed and the testimony of Douglas Dillow, the Scout Executive, as set out in Sections 1 and 4 of the verified Petition. (CP 5, 7-13). The trial court also reviewed the declarations of Joe Williams and Jimmy Collins, both of whom had served on the Scout Council's Board and Executive Committee and were familiar with the history and status of Camp Kilworth, as well as the declaration of Donna Hanson, Director of Parks for the City of Federal Way, Washington. (CP 84-93, 94-137, 80-83). Based on that evidence, the trial court found that the Kilworth's primary purpose in establishing the trust that resulted from their conveyance under the 1934 Deed was "to support the Boy Scouts with property that can be used for their benefit." (CP 153). Further, the trial court found that there have been unanticipated changes in the circumstances affecting Camp Kilworth – changes that have resulted in diminished use of the Camp by the Scouts and, to that extent, frustrated the Kilworths' intent that the property be used for promoting Scouting. (CP 153, 156).

In light of these findings, the trial court concluded that equitable relief was necessary to advance the Kilworths' primary purpose. (CP

153). Accordingly, the trial court granted the Scout Council's Petition and ordered that the reversionary clause of the 1934 Deed be deleted in its entirety. (CP 157). The trial court approved the sale of Camp Kilworth to the City of Federal Way according to the terms of the Purchase and Sale Agreement, subject to the net proceeds of the sale being impressed with an express trust requiring the Scout Council to use those proceeds for the construction of the improvements set forth in the Petition, *i.e.*, a dining hall at Camp Hahobas and a swimming pool at Camp Thunderbird. (CP 157). The trial court also ordered that that Scout Council establish permanent memorials to the Kilworths at both of those camps. (CP 158).

The trial court's award of the equitable relief described above was undertaken pursuant to the authority granted under RCW 11.96A, the Trust and Estate Dispute Resolution Act ("TEDRA"). While the trial court based its equitable remedy on the assumption that the Kilworth's conveyance of the property had effectively imposed a charitable trust, the trial court's intention in granting such relief was to effectuate and further the Kilworths' primary purpose in making such conveyance. (CP 153). As noted in his Letter Opinion, the trial judge fashioned a remedy that accomplishes this purpose in several ways: (1) the Boy Scouts can continue to use Camp Kilworth – at no charge – in the same manner in which they are currently using it; (2) the Boy Scouts can use the proceeds

from the sale of Camp Kilworth to improve other Scout properties that are now much better fulfilling the purposes William Kilworth sought to promote when the Kilworths' conveyed the Camp to the Scout Council in 1934; and (3) by establishing appropriate memorials to the Kilworths' name, the Kilworths' legacy for Scouting will continue forward. (CP 153). Equitable relief was appropriate to fully realize the primary intent of the Kilworths in conveying Camp Kilworth to the Scout Council. The trial court properly exercised its discretion when it excised the reversionary clause of the 1934 Deed and approved the sale of Camp Kilworth.

1. The Trial Court Had Authority Under the Trust and Estate Dispute Resolution Act to Modify the 1934 Deed and Approve the Sale of Camp Kilworth.

In 1999, the Legislature enacted the Trust and Estate Dispute Resolution Act ("TEDRA"), now codified as RCW Chapter 11.96A. TEDRA, which was adopted to provide nonjudicial means of resolving disputes involving trusts and estates, "also provides for judicial resolution of disputes if other methods [such as mediation, arbitration or agreement] are unsuccessful." (RCW 11.96A.010). Under TEDRA, a trial court is vested with "full and ample power and authority" to administer and settle "[a]ll matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and

powers of attorney” and “[a]ll trusts and trust matters.” RCW 11.96A.020(1).

The term “matter” is defined under TEDRA to include “any issue, question, or dispute involving . . . [t]he determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts, community property agreements, and *other writings*; . . .” RCW 11.96A.030(1)(c)(i) (emphasis added). To be certain that there remained no misunderstanding as to the full reach of the Court’s authority with respect to such matters, the Legislature provided that if TEDRA was in “any case or under any circumstance” seen as “inapplicable, insufficient, or doubtful with reference to . . . the settlement of the matters listed in [11.96A.020(1)], the Court nevertheless has full power and authority to proceed with such . . . settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously . . . settled by the court.” RCW 11.96A.020.

TEDRA thus has expressly granted broad discretion to trial courts to resolve matters such as that before this Court. The remedy fashioned by the trial court resulted in the termination of the possibility of reverter in the 1934 Kilworth Deed. A possibility of reverter is a future interest in

land, retained by the grantor that follows a fee simple determinable interest. *Washington State Grange v. Brandt*, 136 Wn. App. 138, 148 P.3d 1069 (2006). In this case, both William and Augusta Kilworth held an undivided interest in the possibility of reverter in Camp Kilworth until their deaths. This property interest has devolved to the Two Trusts by passing at death to the Two Trusts through the residuary clauses of William and Augusta Kilworths' Wills and through that of Florence Kilworth, William's second wife. (CP 10). This dispute involves the determination of a question with respect to an asset or property interest passing at death, and therefore falls within the purview of TEDRA. Accordingly, the trial court "has full power and authority to proceed with such administration . . . in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court." RCW 11.96A.020(2).

2. The Trial Court's Finding That Changed Circumstances Warranted Modification of the 1934 Deed Was Supported by Substantial Evidence.

The trial court reviewed testimonial evidence in this case from Douglas Dillow, the Scout Executive, and Joe Williams and Jimmy Collins, both of whom had served as President of the Scout Council's Executive Board. (CP 5, 7-13, 84-93, 94-137). Each of these witnesses spoke about the declining use by Scouts of Camp Kilworth resulting from

limitations imposed by changed circumstances affecting both the property itself and the urbanization of the area surrounding Camp Kilworth. No evidence was presented contradicting their testimony.

After reviewing this testimony, the trial court found that Camp Kilworth was no longer the rural and remote camping area that it once had been and that the loss of access to the waterfront, coupled with the encroachment of urban and residential development, constituted unanticipated changes that justified the exercise of the court's equitable authority to modify the 1934 Deed. (CP 153, 156). While the Appellants argue at page 24 of their Brief that it is reasonable that the Kilworths anticipated such changes, neither trust presented any evidence to support such a conclusion. Where the trial court's findings that unanticipated changes in circumstances have impaired the Scouts' use of Camp Kilworth are supported by substantial evidence and no evidence was presented to the contrary, those findings should be upheld and treated as verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

3. The 1934 Deed, When Read in its Entirety, Supports the Trial Court's Determination That the Kilworths' Primary Intent Was to Support the Boy Scouts With Property That Could Be Used for Their Benefit.

Generally, when construing a deed, the intent of the parties is of paramount importance and courts must ascertain and enforce such intent.

Washington State Grange v. Brandt, 136 Wn. App. 138, 145, 148 P.3d 1069 (2006). It is elementary that a deed, like any other written instrument, will be read as an entirety for the purpose of determining its true meaning. *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 P. 645 (1911); *see also* Restatement (Third) of Property (Wills & Don. Trans.) § 10.2, cmt. b (2003).¹

In this case, the trial court reviewed the language of the 1934 Deed and determined that the primary intention of the Kilworths when conveying Camp Kilworth to the Scout Council was to “support the Boy Scouts with property that can be used for their benefit.” (CP 153). This conclusion was based on the trial court’s review of the affirmative requirement in the 1934 Deed that the Scout Council “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” as well as the 1934 Deed’s prohibition

¹ **Permissible Evidence For Determining Donor’s Intention.**

b. Reading donative document as an entirety. The text of a donative document must be read in its entirety. Each portion, whether it be a word, phrase, clause, sentence, paragraph, article, or some other portion, is connected to a whole. The donor is presumed to intend that the various portions complement or modify each other. The case may arise, for instance, in which two portions, read in isolation, appear contradictory. But, when construction of the document as a consistent whole would be facilitated by reading one portion as modifying the other or reading both as mutually modifying each other, that construction prevails.

against conveying, leasing, or encumbering the property. While it also took notice of the proviso in the 1934 Deed's reversion clause that stated "if said Grantee shall abandon said premises, or violate any of the provisions above specified, or should itself be dissolved or fail to exist, 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 . . .," the trial court nonetheless found that the overriding intent of the Kilworths in making the grant was to "support the Boy Scouts with property that can be used for their benefit." (CP 153).

4. The Remedy Fashioned by the Trial Court Was an Appropriate Exercise of Discretion That Will Preserve the Kilworths' Legacy and Promote the Kilworths' Primary Intention as Expressed in the 1934 Deed.

In making its ruling below, the trial court relied on the principles set forth in the Washington State Supreme Court's holding in *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 113 P.3d 463 (2005), in which the Court held that trial courts may use "equitable deviation" to make changes in the manner in which a charitable land trust is carried out. *Niemann* involved the question of whether an alleged restrictive covenant in a deed transferring property from one church to another prevented the receiving church from selling that property in order to relocate to a larger,

nearby property. *Id.* 154 Wn.2d at 369. The *Niemann* Court held that the trial court correctly permitted equitable deviation from the administrative trust provision, based on a finding of changed circumstances unanticipated by the settlor, and that the requested deviation furthered the charitable trust's primary purpose. *Id.*

Inherent in the decision in the *Niemann* case was the trial court's determination that the conveyance by deed had created a charitable trust. *Niemann*, 154 Wn.2d at 372. In a footnote, the Supreme Court questioned whether the deed at issue in that case actually presented any restriction on the alienation of the property and whether a charitable trust had, in fact, been created, stating:

Whether the 1956 deed in fact restricts the alienation of the property at all is questionable. First, a stipulation that the property be used for the stated purpose does not, unambiguously at least, prohibit the sale of the property and application of the funds to the stated purpose. This is exactly what VCC proposes doing with the property. VCC does not propose using the funds generated by the sale of the property for any unrelated objective. In its pretrial motions, VCC asserted that the deed did not create a charitable trust but rather simply a restrictive covenant. CP at 485-86. But VCC did not appeal the trial court's ruling to the contrary.

In addition, the deed itself may, in fact, merely convey a fee simple absolute outright, with no restrictions. Washington courts do not favor estates upon condition and if the creating language is unclear that a conditional estate was intended, courts will generally construe a fee simple absolute. *See* 17 WILLIAM B. STOEBUCK & JOHN W.

WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 1.8 (2d ed.2004) (citing *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 208 P.2d 113 (1949)). However, neither party has raised nor briefed these issues before this court or the Court of Appeals. RAP 13.7(b) suggests avoiding reaching an issue the parties do not present. While we have departed from this rule on rare occasions, *see, e.g., Mader v. Health Care Authority*, 149 Wn.2d 458, 467-68, 70 P.3d 931 (2003), we have done so only when necessary to “serve the ends of justice” and “secure [a] fair and orderly review.” RAP 1.2(c), 7.3. While there is certain doubt as to whether the trial court properly interpreted the deed and its subsequent finding of a charitable trust, we refrain from reviewing these unappealed orders here.

Niemann, 154 Wn.2d at 373, fn. 6.

The trial court in the instant case did not make an express finding that the conveyance of Camp Kilworth created a charitable trust, but that conclusion is implicit in its decision. The trial court found that circumstances unanticipated by the Kilworths existed and that equitable deviation was reasonably necessary to advance the primary purpose of the Kilworths’ gift of the Camp Kilworth property, which was to support the Boy Scouts. (CP 153). In its Letter Ruling, the trial court referred to the Kilworths’ gift as a trust and noted that “[t]he only difference between this case and the *Niemann* case is that, in addition to the provision forbidding the sale of the trust property[,] the deed also contains a reversion clause.” (CP 153). As noted by the Supreme Court in the *Niemann* footnote quoted above, however, there may be some significance to this difference, but the

mere presence of the reversion clause in the 1934 Deed does not dictate an outcome in this case that is different from that in *Niemann*.

There can be no question that the Kilworths' conveyance of Camp Kilworth to the Scout Council had a charitable purpose, but the 1934 Deed obviously did not convey Camp Kilworth to the Scout Council in fee simple absolute. The issue to be decided by this Court, therefore, is whether the remedy fashioned by the trial court is appropriate whether the Kilworths' conveyance of the Camp Kilworth property to the Scout Council created a charitable trust or whether that conveyance simply created a fee simple subject to a condition.

a. If the Kilworths' Gift of Camp Kilworth to the Scout Council Constituted A Charitable Trust, the Trial Court Properly Employed Equitable Deviation to Modify the Deed.

“A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.” (RESTATEMENT (SECOND) OF TRUSTS § 348, p. 210). “A charitable trust may be created by . . . a transfer inter vivos by the owner of property to another person to hold it upon a charitable trust.” (RESTATEMENT (SECOND) OF TRUSTS § 349, p. 213).

The creation and administration of a charitable trust lies with the settlor's intent. *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 375, 113 P.3d 463 (2005). Generally, the requirements for the creation of a charitable trust are: the intention to create a trust; a definite subject matter or trust property; a charitable purpose; and delivery of the trust property to another person as a trustee. *Eychaner v. Gross*, 202 Ill.2d 228, 253, 269 Ill.Dec. 80, 779 N.E.2d 1115, 1131 (2002). All of these requirements are present in the instant case, justifying the trial court's conclusion that the Kilworths had created a charitable trust.

In *Niemann*, the deed lacked the typical trust language and detail, so the trial court resorted to extrinsic evidence to construe the intent of the grantor and reach its conclusion that a charitable trust had been created. In this case, however, the Kilworths' intention to create a trust was clearly expressed in the conditional language of the 1934 Deed, which stated that "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." This language evinced an intention to create a trust by imposing upon the Scout Council a fiduciary duty to hold the property for the benefit of current and

future Boy Scouts, supporting a conclusion that a charitable trust had been created.²

If the trial court was correct in concluding that the Kilworths had created a charitable trust by their conveyance of the Camp Kilworth property to the Scout Council, then it was also correct when it concluded that it could modify an administrative or distributive provision of the trust, or direct or permit the trustee to deviate from an administrative or distributive provision if, because of circumstances not anticipated by the Kilworths, the modification or deviation would further the Kilworths' primary purposes. (CP 152, citing the *Niemann* case). This is precisely what the trial court did, holding that equitable deviation was reasonably necessary to effectuate the primary purpose of the trust.³ (CP 153).

² "If . . . the transferor manifested an intention to restrict the transferee in the use of the property transferred, the transferee does not take the property for his own benefit. A charitable trust is created if the transferee was restricted in the use of the property to charitable purposes." Restatement (Second) Of Trusts § 351, cmt. d, p. 216).

³ In reaching its holding, the trial court expressly relied on the RESTATEMENT (SECOND) OF TRUSTS § 381, which provides:

The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

The *Niemann* Court noted that the Restatement's most recent rendition of the rule grants courts broader discretion to permit deviation, providing:

The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.

In its Letter Ruling, the trial court found that when the Kilworths gave the Camp Kilworth property to the Scout Council in 1934, the area where the property was located was rural and remote – suitable for use by the Boy Scouts to support their goals in an outdoor, wilderness setting. (CP 153). The trial court also found that the property is now surrounded by the City of Federal Way and that it lacks any access to the waterfront it abuts. (CP 153). Based on these findings, the trial court concluded that unanticipated circumstances were present and that equitable deviation was necessary to free the 1934 Deed from the reversionary clause in order to advance the Kilworths' primary purpose in deeding Camp Kilworth to the Scout Council, which was to support the Boy Scouts. (CP 153).

The trial court's analysis, as expressed in its Letter Opinion, was founded upon the conclusion that the Kilworths' conveyance had created a charitable trust. This conclusion was supported by the restrictive language in the 1934 Deed and the intention expressed by that language that the Scout Council – a charitable organization – should hold the Camp Kilworth property for the benefit of current and future Boy Scouts. This conclusion also supported the trial court's determination that, because of changed circumstances, unanticipated by the Kilworths, the use of Equitable Deviation to excise the reversionary clause from the 1934 Deed

RESTATEMENT (THIRD) OF TRUSTS § 66(1))

was reasonably necessary to effectuate the Kilworths' primary intent. Even if one takes exception with the trial courts' conclusion that the conveyance created a charitable trust, the remedy crafted by the trial court was nonetheless appropriate because it gave precedence to the Kilworths' primary intention.

b. If the Kilworths' Gift of Camp Kilworth to the Scout Council Constituted a Transfer of Real Property Subject to a Condition Subsequent Rather Than a Charitable Trust, the Trial Court's Remedy Was Proper Where the Reversionary Clause in the 1934 Deed Constitutes an Unreasonable Restraint on Alienation.

Appellants have argued that the Kilworths' conveyance of the 1934 Deed did not necessarily constitute a charitable trust, even where the 1934 Deed provided that the Scout Council must keep and maintain Camp Kilworth subject to an equitable duty to serve the Scouts' charitable purpose. Assuming, *arguendo*, that such is the case, the remedy fashioned by the trial court was nonetheless appropriate and the trial court's ruling should be upheld because the reversionary clause – the mechanism imposed to effectuate the Kilworths' primary purpose – has become an unreasonable restraint on alienation that works not to effectuate the Kilworth's primary purpose but to frustrate it.

Rather than create a trust, an owner of property may transfer it to another on the condition that, if the latter should fail to perform a specified act, the transferee's interest will be forfeited. *See* RESTATEMENT (SECOND) OF TRUSTS § 11, cmt. a, p. 32. "In such a case the interest of the transferee is subject to a condition subsequent and is not held in trust." *Id.* Under Washington law, an estate in fee simple subject to a condition subsequent is created where a deed conveys an estate in fee simple but provides for a forfeiture or reversion upon the happening of some event or condition. *Halvorsen v. Pacific County*, 22 Wn.2d 532, 537, 156 P.2d 907 (1945) (citing *Mouat v. Seattle, Lake Shore & Eastern Railway Co.*, 16 Wash. 84, 47 P. 233 (1896)). Title to an estate in fee simple subject to a condition subsequent is not divested automatically upon the happening of the event or condition, but some affirmative action by the grantor or his successor is necessary to bring about a forfeiture or reversion of the estate. *Id.*

A similar estate – fee simple determinable – is an estate that automatically terminates on the happening of a stated event and reverts to the grantor by operation of law. *Washington State Grange v. Brandt*, 136 Wn. App. 138, 148 P.3d 1069 (2006) (citing *Alby v. Banc One Financial*, 156 Wn.2d 367, 372, 128 P.3d 81 (2006)). In this case, it appears that the Kilworths conveyed a fee simple determinable interest to the Scout Council because the property interest conveyed to the Scout Council

would automatically end and revert to the Kilworths, their heirs or assigns, if the Scout Council were to fail to keep and maintain Camp Kilworth for the purpose of teaching scout craft or if the Scout Council were to abandon, convey, lease or encumber the property. The distinction between the two fees – fee simple subject to a condition subsequent and fee simple determinable – is not germane to this case, however, as no condition has been breached by the Scout Council and the possibility of reverter remains just that, a possibility. The reverter is in effect the enforcement tool for a restraint on alienation.

As noted by the *Alby* Court, the analysis of whether a reversion clause is a valid restraint on alienation does not end with a determination of the type of estate involved; fee simple determinable estates are subject to the rule against restraints on alienation, which prohibits undue or unreasonable restraints on alienation. *Alby*, 156 Wn. 2d at 373. As the Supreme Court stated in *Alby*:

Washington follows the reasonableness approach to restraints on alienation. Unreasonable restraints on alienation of real property are . . . invalid; reasonable restraints on alienation . . . are valid if justified by the *legitimate interests of the parties*. **In determining whether a restraint is reasonable, we balance the utility of the purpose served by the restraint against the injurious consequences that are likely to flow from its enforcement. Whether a restraint is limited in scope or time is often highly significant.** In addition to the scope and duration of the restraint, we look at the purpose of the

restraint and whether the restraint is supported by consideration.

Alby v. Banc One, 156 Wn.2d 367, 373-74, 128 P.2d 81 (2006) (italics in original; bold added; internal citations omitted). An analysis of the factors noted in the *Alby* case leads to the conclusion in this case that the trial court correctly determined that the restraint imposed by the 1934 Deed is not reasonable under the circumstances and that its removal is appropriate in light of the legitimate interests of the parties.

The putative purpose of the restraint on alienation imposed by the 1934 Deed is expressed in the Deed itself: it is to ensure that the Scout Council continues to use the property conveyed “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 for which the Grantee is organized.” The purpose of the reversion clause is not unreasonable on its face – it is simply the mechanism the Kilworths fashioned to ensure that Camp Kilworth would be used to effectuate their primary purpose, which was to promote Scouting and its associated values. The negative consequences that will occur if this restraint on alienation remains in place include a reduction in the capability of the Scout Council to fully accomplish its mission with this

property – the promotion of which was the primary purpose behind the grant of the 1934 Deed itself.

As noted by the *Alby* Court, whether a restraint is limited in scope or time is often highly significant. In this case, the restraint imposed by the right of reversion has no limit in either scope or time. As long as the Scout Council is in possession of Camp Kilworth, it will be constrained from leasing, encumbering, or conveying the property. Further, the restraint imposed by the 1934 Deed was not negotiated by the parties, as arguably occurred in the *Alby* case.⁴ In this case, the Scout Council engaged in no negotiations with regard to the property or the terms of its possession of the property but simply accepted it subject to the restraints imposed by the grantors.

Further, the Scout Council’s interest in “free alienation” is limited to a transaction that will honor the intention expressed by the Kilworths when they conveyed the Camp to the Scouts. The Scout Council sought reformation of the 1934 Deed because of changed conditions affecting Camp Kilworth and the Scouts’ use of that Camp, conditions that have the effect of frustrating the Kilworths’ primary intent. Further, the Scout Council is not selling the property to just anyone; instead, it has crafted a

⁴ “[T]he Brashlers’ interest in free alienation is limited by the fact that they agreed to the restraint in consideration for the substantially reduced price.” *Alby*, 156 Wn.2d at 374.

sale that has been thoughtfully structured so that the Kilworths' intent when conveying Camp Kilworth to the Scout Council – promoting and furthering the principles for which the Boy Scouts were organized – will continue to be realized, both at Camp Kilworth and at other camps where scout craft is now much better able to be advanced.

While no Washington cases have directly addressed the issue, courts in other jurisdictions have considered the question as to whether a gift of property to a charitable corporation or for charitable uses may validly be subjected to an express restraint against the alienation of the property. 100 A.L.R.2d 1208, which reviews cases dealing with the question of the validity and effect of a provision or condition against alienation in a gift to a charitable trust or to a charitable corporation states:

While there appears to be little authority directly passing on the question, the majority of the apposite cases generally indicate that an express provision or condition against alienation in a gift to a charitable trust or to a charitable corporation is an exception to the operation of the rule against restraints on alienation and constitutes a valid restraint. The reasoning on which this result is arrived at would seem to be that since a donor may make a gift for charitable purposes perpetual in duration, he may, as a corollary of this right, and *in order to effectuate his primary purpose*, impose a condition that the gift property shall not be alienated, but shall continue in the hands of the donee in perpetuum. *In some cases the limitation is imposed on this rule, that a court of equity may in the exercise of its inherent power order a sale of the property, notwithstanding the restraint on alienation, where to do so would be desirable and necessary to carry out the basic purpose of the gift, or where conditions have so changed that a sale of the property is reasonably required.*

100 A.L.R.2d 1208 (emphasis added).

Under this approach, which is consistent with the rule on trust deviation principles sanctioned by the *Niemann* Court and expressed in the RESTATEMENT (SECOND) OF TRUSTS § 381 and the RESTATEMENT (THIRD) OF TRUSTS § 66(1), a prohibition against alienation of property donated for a charitable purpose should not prevent the court, in the case of necessity arising from an unforeseen change of circumstances, from reforming a deed and authorizing the charity to sell the property and apply the proceeds to further the purposes of the original gift, even where the conveyance has created a fee simple determinable estate or a fee simple subject to a condition subsequent rather than a charitable trust.

The Scout Council is seeking to maximize the Kilworths' generous gift of Camp Kilworth by extracting its monetary value through a sale and investing the proceeds in capital improvements to other Scout camps that – due to the vastly changed circumstances – are now much better fulfilling the role that Camp Kilworth did before those changes limited the types of scouting activities that could be conducted at the Camp. By excising the reversion from the 1934 Deed and ordering that the sale to the City of Federal Way be allowed to close, the court below left the Scouts in a position to continue to use the Camp – without charge – at the same level they are now using it. In addition, the trial court's ruling permits the Scout

Council to more fully and effectively pursue its mission by making major capital improvements at its other, larger and better situated camps.

The two Kilworth trusts will receive no benefit from a reversal of the decision below. If the reversion clause is allowed to remain in place, no sale will take place because the purchase and sale agreement between the Scout Council and the City of Federal is contingent upon the removal of that clause. Further, if the sale to the City is not permitted, no reversion will occur. The Scout Council will continue to comply with the conditions of the 1934 Deed and thereby retain title to Camp Kilworth. Sadly, however, the quantity and quality of the Scouts' use of Camp Kilworth will remain constrained by the limitations imposed by the changes in circumstances that have occurred since the Kilworths' gift of over seventy years ago.

At the September 6, 2007, hearing on this matter, and in response to arguments by counsel for the Two Trusts, the trial court recognized and gave voice to the dilemma created where a change in circumstances works to impede the realization of a grantor's intention because of the presence of a restraint on alienation such as the reversion clause in the 1934 Deed, stating:

. . . [Y]ou're going to argue, it is pretty clear what the Deed says. That is the strength of your arguments. But are there any circumstances in which a Court can say, "There

have been such substantial changes of circumstance that it makes no sense to continue with what is going on?" I will give an example: Unfortunately, toxic waste gets dumped on this piece of property. It is no longer able to be used for a substantial period of time by human beings until there's some substantial clean-up, yet someone is interested in spending the money to clean up it up and do something else and make another use. Is that a good enough reason to move them out, abandon the property and move elsewhere? I mean, where is the level – when do we get to the ability to do something? In reading the cases and reading your response to it, you know, you want the Court to stand on the clear language in the reversion clause that is incorporated within this Deed, and there has to be some point along the way when, you know, common sense takes over and the courts come in and do what is fair, right, and honors the original intention of the grantors.

Verbatim Transcript of Proceedings, page 25-26.

With this statement, the trial court was suggesting that the Appellants are advocating for the application of form over substance in the resolution of this case. The Appellants argue that the 1934 Deed “clearly and unambiguously provides that the ‘Grantee shall never lease, convey or encumber said premises . . . and shall never allow the same to come into the possession of any other party.’” (Appellants’ Brief, page 13). While this is true, the Appellants implicitly argue that the Kilworths’ intention to impose a restraint on alienation *is the primary intention* of the conveyance, not merely a means of ensuring that the Grantee will use the property in furtherance of the Kilworths’ primary purpose – the promotion of Scouting. Appellants’ argument subverts the Kilworths’ primary intention

by subordinating it to the enforcement mechanism that was incorporated into the 1934 Deed. The trial rejected this argument, however, and concluded that the Kilworths' primary objective was not to ensure that the property was never alienated but to ensure that Scouting and its associated principles would be supported in perpetuity.

In this case, the trial court found that the Kilworths imposed a restraint on alienation – a condition that the gift property shall not be alienated or else it will revert to the Kilworths or their heirs – in order to effectuate their primary purpose, supporting Scouting. The trial court concluded that the unforeseen change of circumstances had the effect of interfering with the realization of that primary purpose, and therefore it was reasonably necessary to reform the 1934 Deed to remove the enforcement mechanism, the restraint on alienation, and allow the Scout Council to sell Camp Kilworth in order to advance the Kilworths' primary purpose. The reversion clause now constitutes an unreasonable restraint on alienation precisely because it is not working as originally intended but is instead working to frustrate the Kilworths' primary donative intention. The remedy crafted by the trial court is reasonably necessary to effectuate the *primary* purpose of the Kilworths, which was to support the Boy Scouts and promote Scouting.

The Appellants seek to distinguish the decisions in *Niemann* and *In re Riddell*, 138 Wn. App. 485, 157 P.3d 888 (2007), because “they were cases involving trusts with restraints on alienation,” not cases involving deeds with reversionary clauses. This case does not involve a situation where the grantor’s heirs are claiming title to real property after the possibility of reverter has been triggered because the grantee failed to comply with conditions imposed by the grantor. The possibility of reverter in this case remains, however, as the ultimate doomsday restraint on alienation – the threat of forfeiture should the Scout Council ever convey, lease or encumber Camp Kilworth or allow it to come into the possession of any other party. When the reversion clause is viewed as operating as it does in this case – as a mere restraint on alienation – it is not distinguishable from *Niemann* or *Riddell*.

In *Niemann*, the Court found that the donor’s purpose was to promote the growth of the little Church to whom the donor had given the land in perpetuity. *Niemann*, 154 Wn.2d at 384-85. However, the Court also found that forbidding a sale of the land under the restrictions imposed by the deed would frustrate the donor’s primary intention of promoting the growth of what was no longer a little Church. *Id.* The Court therefore found the donor’s purpose of promoting the growth of the little Church would be enhanced by removing the restraint on alienation and allowing

the land to be sold, so long as the proceeds went into the new land for the new, larger church. *Id.* The trial court in *Niemann* correctly applied the principles of Equitable Deviation and removed the restraint on alienation, and the Supreme Court affirmed that action. *Id.*, 154 Wn.2d at 386.

The same analysis applies to the facts as they now exist in this case. Here, the primary purpose of William and Augusta Kilworth was not to get their land back – it was to promote the advancement of Scouting in the service of the Youth of the area. Changes through time have reduced the efficacy of that gift, as the various unanticipated changes in circumstances set out in the Petition and in the Declarations have taken place. Since the Scout Council will not cease to use Camp Kilworth, a reversion will not occur, and we are left with the restraint on alienation created by the possibility of reverter – a restraint that is unreasonable because it now acts in an unexpected manner to thwart the primary intention of the Grantor. The Deed requires the Scout Council to hold the property for the use and benefit of the Scouts – that is a trust. The situation in this case is subject to the same analysis as was applied in *Niemann*.

Even if the trial court had been in error in concluding that the Kilworths' conveyance of the Camp Kilworth property created a charitable trust rather than a fee simple determinable, the remedy fashioned by the trial court is still appropriate, and this Court should

affirm the trial court's ruling. See *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002) (an appellate court "may affirm the [lower] court on any grounds established by the pleadings and supported by the record.").

VI. CONCLUSION

True to their guiding principles, and in compliance with the terms of the 1934 Deed, the Boy Scouts have faithfully maintained Camp Kilworth and used it for the purpose of teaching scout craft, cooperation, patriotism, courage, self reliance and kindred virtues amount boys for nearly seventy five years. Despite changes in Scouting in Tacoma and Southwest Washington and despite changes in the now urban environment surrounding Camp Kilworth (changes over which the Scouts have had no control), the Scouts have continued to use Camp Kilworth even though its value in pursuing that Scouting's valued mission has significantly declined.

When the Scout Council sought to extend the reach of its mission by proposing a use of Camp Kilworth that would allow it to access the Camp's monetary to value fund major capital improvements in Scout camps that are now fulfilling the role that Camp Kilworth once did, they were encouraged by the response of Florence (Babbie) Morris, daughter of Florence Kilworth, who expressed enthusiastic support for the Scout Council's proposal. While Ms. Morris believed the plan proposed by the

Scouts would enhance her stepfather's intent, the institutional trustees of the Two Trusts have not agreed with the Scout Council's plan, and the Scout Council has turned to the court for relief.

The trial court approved the Scout Council's plan to sell Camp Kilworth and use the proceeds to invest in improvements to other Scout camps that are now fulfilling the role that Camp Kilworth once did before access to its waterfront was washed away and before the encroachment of urbanization limited the scouting activities that could be conducted at the Camp. If the trial court's ruling is affirmed, the reversion will be removed from the 1934 Deed and the sale to the City of Federal Way will proceed. The Scouts will still be able to use Camp Kilworth – without charge – at the same level they are now using it, and the Scout Council will be able to more fully pursue its mission by making major capital improvements at its other camps. Camp Kilworth will remain as open space and many more people will also be able to enjoy the Kilworths' legacy.

If the reversion is left in place, no sale will take place and the Scout Council will continue to maintain and operate the Camp despite the limitations imposed by the changed circumstances at the Camp. While this result will fulfill, to some extent, the original intent of the Kilworths, the opportunity to expand the benefit of the Kilworths' gift will be lost. Jeffrey Even, the Assistant Attorney General charged with statutory

oversight of public charities who appeared in this action, noted the irony of this situation in this Response, observing that the enforcement of the restraint on alienation in the 1934 Deed “may have the ironic effect of reducing the resources devoted to the original purpose of providing a scout camp” because if the Scout Council “is unable to avail itself of the proceeds of a sale, it is left with neither the ability to marshal resources to fulfill its charitable mission nor any incentive to sell the property so as to ultimately benefit charity through the works of the Respondent trusts.” (CP 76).

TEDRA provides the statutory authority for the trial court to review and resolve the issues presented in the Scout Council’s Petition. The trial court’s finding that there were changed circumstances unanticipated by the Kilworths is supported by substantial evidence and should be upheld by this Court. The remedy fashioned by the trial court was a proper exercise of discretion, one that will work to give greater effect and duration to the primary donative intent expressed by the

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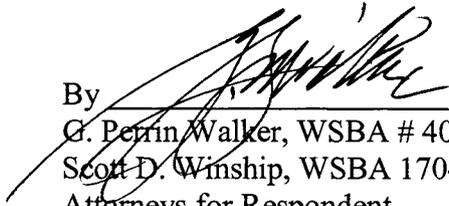
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Kilworths in the 1934 Deed. For these reasons, the Respondents respectfully request that this Court affirm the trial court's ruling.

DATED this 16th of April, 2008.

Respectfully submitted,

VANDEBERG JOHNSON & GANDARA, LLP

By 

G. Perrin Walker, WSBA # 4013

Scott D. Winship, WSBA 17047

Attorneys for Respondent

Pacific Harbors Council,

Boy Scouts of America

FILED
COURT OF APPEALS
DIVISION II

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No.37015-8-II

STATE OF WASHINGTON
BY 
DEPUTY

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

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.,

DECLARATION OF
SCOTT D. WINSHIP

VANDEBERG JOHNSON & GANDARA, LLP
By: G. Perrin Walker, WSBA # 4013
Scott D. Winship, WSBA #17047
Attorneys for Respondent
Pacific Harbors Council,
Boy Scouts of America

VANDEBERG JOHNSON & GANDARA, LLP
1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
(253) 383-3791

The undersigned, under penalty of perjury under the laws of the state of Washington, solemnly declares as follows:

That I am now and at all times herein mentioned was a citizen of the United States and a resident of the state of Washington, over the age of eighteen years, not a party to the above-entitled action and competent to be a witness therein.

That on April 16, 2008, this affiant delivered to Robert G. Casey, Eisenhower & Carlson, PLLC, 1201 Pacific Avenue, Suite 1200, Tacoma, WA 98402, by then and there personally delivering and leaving with his receptionist a true and correct copy of the

BRIEF OF RESPONDENT

PACIFIC HARBORS COUNCIL, BOY SCOUTS OF AMERICA.

DATED this 17th of April, 2008.


SCOTT D. WINSHIP