

NO: 40930-II<sup>(5)</sup>

FILED  
COURT OF APPEALS  
DIVISION II

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

11 APR 12 AM 11:38  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

---

**Estate of ROSE P. SOWDER**

---

DIANE THOMPSON and SANDRA MITCHELL,

**APPELLANTS**

v.

Estate of ROSE P. SOWDER, CYNTHIA PICHA, PERSONAL REPRESENTATIVE,

**RESPONDENTS**

---

**REPLY BRIEF OF APPELLANTS**

---

Patrick H. Vane  
Attorney at Law  
Joan Roth  
Attorney at Law  
1530 Westlake Avenue North  
Suite # 1  
Seattle, WA  
98109  
(206) 612 8175  
Attorneys for Appellants

FILED

## TABLE OF CONTENTS

I. Introduction .....	1
II. Amended Assignments of Error .....	1
III. Statement of the Case .....	2
IV. Argument .....	4
A. Appellants Properly Appealed From The Final Order Granting Summary Judgment.....	4
B. Summary Judgment Should Be Reversed Because There Are Issues Of Fact Regarding Whether Diane’s Distributive Share Of Rose’s Estate Should Be Reduced By \$50,000. ....	9
1. There Is A Dispute Of Material Fact Concerning The Testator’s Intent. ....	9
2. There Are Issues Of Material Fact Whether There Were Any Items Of Personal Property Owned By Rose, Held By Diane, Requested By Rose, And Not Returned To Rose’s Estate. ....	12
C. Summary Judgment Should Be Reversed Because There Are Issues of Fact Regarding Whether Cynthia Has Breached Her Fiduciary Duty Of Loyalty As Trustee and Personal Representative. ....	17
D. Appellants Are Entitled To An Award Of Attorney Fees Both On Appeal And For Defending The Motion For Summary Judgment In The Trial Court. ....	19
V. Conclusion .....	20

## TABLE OF AUTHORITIES

### Table of Cases

<i>Esmieu v. Schrag</i> , 88 Wn.2d 490,563 P.2d 203 (1977) .....	17
<i>Griffen v. Allstate Insurance Co.</i> , 36 P.3d 552 (Wash.App. 2001).....	9
<i>In re Estate of Bergau</i> , 103 Wn.2d 431, 693 P.2d 703 (1985) .....	9
<i>In re Estate of Ehlers</i> , 80 Wn. App. 751, 911 P.2d 1017 (1996) .....	17
<i>Kinnan v. Jordan</i> , 131 Wn. App. 738, 753, 129 P.3d 807 (2006) .....	8
<i>Knox v. Microsoft Corp</i> , 92 Wn. App. 204, 213, 962 P.2d 839 (1998).....	9
<i>Maynard v. Sisters of Providence</i> , 72 Wn. App. 878, 881, 866 P.2d 1272 (1994).....	9
<i>Old Nat'l Bank &amp; Trust Co. of Spokane v. Hughes</i> , 16 Wn.2d 584, 587, 134 P.2d 63 (1943).....	10, 13
<i>Peoples Nat'l Bank of Washington v. Jarvis</i> , 58 Wn.2d 627, 632, 364 P.2d 436 (1961).....	18
<i>Pomerantz v. Pomerantz</i> , 179 Md. 436, 439-440, 19 A.2d 713, 715 (1941).....	14
<i>Rogers v Rogers</i> , 271 Md. 603, 608, 319 A.2d 119 (1974).....	14
<i>Ron &amp; E Enterprises, Inc. v. Carrara, LLC</i> , 137 Wn. App. 822, 155 P.3d 161(2007) .....	7

<i>Seattle First Nat'l Bank v. Crosby</i> , 42 Wn.2d 234, 246, 254 P.2d 732 (1953).....	10,13
<i>Snyder v. Stouffer</i> , 270 Md. 647, 650-51, 313 A.2d 497 (1974).....	14
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	8, 9
<i>Waits v. Hamlin</i> , 55 Wn. App. 193, 200, 776 P.2d 1003 (1989) .....	10
<i>West v. Thurston County</i> , 144 Wn. App. 573, 577-78, 183 P.3d 346 (2008) .....	7

**Statutes**

RCW 5.60.030 .....	16
--------------------	----

**Other Authorities**

CR 52(b) .....	1, 6, 8
CR 54(a)(1) .....	5, 7
CR 56(h) .....	5, 6
RAP 1.2(a) .....	9
RAP 2.4(f) .....	8

## **I. INTRODUCTION**

This case is an appeal from the granting of Respondent's Motion for Summary Judgment by Kitsap County Superior Court Judge Leila Mills on June 8, 2010.<sup>1</sup> Appellants timely appealed from the Order granting summary judgment, but did not clarify in their opening brief that they were also requesting reversal of the subsequent Order of Dismissal, entered to amend and add findings to the original summary judgment Order. Appellants respectfully request to amend their opening brief to clarify that they are seeking reversal of both the Order on Respondent's Motion for Summary Judgment and the amending Order of Dismissal subsequently entered. That order did not grant further relief, but was requested by Respondent's trial counsel to add additional findings, as allowed by CR 52(b). It is included within the scope of review pursuant to RAP 2.4(f).

## **II. AMENDED ASSIGNMENTS OF ERROR**

1. The trial court erred in entering the Order on Respondent's Motion for Summary Judgment on June 8, 2010, and the amending Order of Dismissal dated June 18, 2010, determining that Diane Thompson's distributive share of Rose Sowder's estate should be reduced by \$50,000.

---

<sup>1</sup> The Order was signed and dated by Judge Mills on June 8, 2010, but the file stamp on the top of the Order is dated June 9, 2010.

2. The trial court erred in entering the Order on Respondent's Motion for Summary Judgment on June 8, 2010, and the amending Order of Dismissal dated June 18, 2010, dismissing appellants' claims that Trustee and Personal Representative Cynthia Picha breached her fiduciary duties and should be removed.

3. The trial court erred in failing to award attorney's fees to claimants Diane Thompson and Sandra Mitchell.

### **III. STATEMENT OF THE CASE**

#### **Clarification to Respondent's Facts**

The Statement of the Case in Respondent's brief contains some inaccuracies or misleading statements and also asserts that disputed facts are undisputed. The following paragraphs clarify some of these inaccuracies and assertions.

As stated in Appellants' opening brief, testator Rose Sowder gave away many of her possessions before she moved to Washington state. She did this through notarized gift lists and asking her daughter Diane to accept and hold items for the donees in safekeeping. (CP 122-138, 127-135). Diane agreed to do so, and also allowed Rose to borrow some of the jewelry items she had gifted when she desired to wear them. When Rose moved to Washington, she took with her all her jewelry that she had not given away. (CP 30). Respondent now describes the gift lists as "bequeath lists" and

claims that Rose left some of her ungifted jewelry with Diane, although there is no evidence of that. (CP 218 & CP 284).

Respondent asserts that Rose asked Diane to return items, but cites no evidence that she did, other than the words of the 2002 trust amendment to be interpreted and Respondent's own testimony that she overheard Rose talking about unspecified items.<sup>2</sup> There is a dispute of fact whether Rose actually asked Diane to return any items after Rose moved to Washington, taking all of her ungifted items with her, and no evidence indicating what items Rose was referring to in the trust amendment. (CP 284).

While Diane did send a letter to attorney Sherrard, she did not enclose any jewelry belonging to Rose. Rather, she enclosed jewelry that had been gifted to Cynthia. (CP 293). When Diane had attempted to give this jewelry directly to Cynthia, Cynthia asked her to send the jewelry to attorney Sherrard and Diane did so. After receiving the jewelry, Cynthia signed a receipt acknowledging that the jewelry had been given to her in 1982. (CP 298).

Attorney Sherrard never received a letter confirming that there were no items belonging to Rose that were not returned, because Cynthia, as trustee, refused to write that letter in breach of her fiduciary duties to the

---

<sup>2</sup> Cynthia also testified at her deposition about a time before Rose moved to Washington, when she asked Diane to retrieve unidentified items from the safe, but it was too cold to do so. This was before Rose moved to Washington taking all her ungifted jewelry and personal property with her.

trust beneficiaries. She reduced Diane's share without ever telling her what items Diane had allegedly failed to return. (CP 386-388). The only items Cynthia now claims were not returned were the items of jewelry Cynthia acknowledged had been gifted to her in 1982. (CP 298). Diane only sent these items to the attorney because Cynthia had requested her to do so. Cynthia has explained that she made this request "to *prevent* the reduction in the distributive share of MS. THOMPSON." (CP 59, emphasis added). Now Cynthia is using Diane's compliance with her request to justify *applying* the trust amendment reduction, in breach of the fiduciary duty of loyalty she owed to Diane.

#### IV. ARGUMENT

##### **A. Appellants Properly Appealed From The Final Order Granting Summary Judgment.**

Appellants Diane Thompson and Sandra Mitchell properly and timely filed this appeal of the Court's Order on Respondent's Motion for Summary Judgment, entered on June 8, 2010. In this Order, the judge granted Cynthia's Motion for Summary Judgment and ruled on all issues presented. (CP 424-25).

This matter was commenced by a Petition filed by Cynthia, seeking a judicial declaration of rights—not a dismissal. (CP 1-4). In an Order dated June 2, 2009, the Court set for judicial determination the issues of the

proposed reduction of Diane’s share of the estate and of breach of fiduciary duty and removal of Cynthia as trustee and personal representative. (CP 45-46). Cynthia’s Motion for Summary Judgment sought resolution of all issues before the court. (CP 241). Although part of Cynthia’s request was for a dismissal of “all claims made against her with prejudice” (CP 241), the Court properly interpreted this as seeking a judicial determination on all matters set forth in the June 2, 2009 order.<sup>3</sup> In her June 8, 2010 Order on Respondent’s Motion for Summary Judgment, the Court resolved all issues, specifically granting summary judgment, determining that Diane’s share of the estate should be reduced, and determining there were insufficient facts to support finding that Cynthia had breached her fiduciary duties or should be removed. The Order further denied Cynthia’s request for attorneys’ fees. (CP 424-25).

The Order on Respondent’s Motion for Summary Judgment was a “judgment” under CR 54(a)(1) as it was “a final determination of the rights of the parties in the action.” CR 54(a)(1) specifically contemplates that such a determination may be by an order and CR 56(h) contemplates that a motion for summary judgment may be granted by an order. However, the judge’s Order failed to comply with the requirement of CR 56(h) that an order granting summary judgment “designate the documents and other

---

<sup>3</sup> There were technically no “claims” against Cynthia, only issues for judicial determination pursuant to her Petition.

evidence called to the attention of the court before the order on summary judgment was entered.” CR 56(h). To remedy this, Cynthia’s trial attorney timely sought to enter an amendatory Order listing the evidence that was before the court, as is allowed by CR 52(b). Wishing not to offend the judge, he labeled the amendatory order “Order of Dismissal,” but represented to the undersigned that the sole purpose of entering the order was to amend the judge’s Order to add the requisite list of evidence considered. Based on this representation, the undersigned agreed to the order (my signature is entered by telephone authorization) and also agreed not to raise on appeal that the judge’s Order on Respondent’s Motion for Summary Judgment failed to comply with CR 56(h).

In line with this agreement, the Order of Dismissal contains a listing of the evidence considered by the court at the hearing on the Motion for Summary Judgment, and then recites that the Court entered the order on June 8, 2010 granting summary judgment and that all issues in the matter have been decided. While it says the “matter” is dismissed, this simply confirms the effect of the June 8 Order granting summary judgment.<sup>4</sup>

---

<sup>4</sup> The “cause” was not dismissed, as the probate is still pending. Cynthia certainly doesn’t contend that her Petition was dismissed, as the Court granted her the relief she sought. All that could have been “dismissed” was the special setting for judicial determination of issues, which was already concluded by the Court’s Order on Respondent’s Motion for Summary Judgment.

Respondent's brief contends that an order resolving all issues on a petition for judicial declaration of rights in a probate proceeding is not final unless it also states it is dismissing the matter. No authority is cited for this odd contention. The question of finality depends on whether all issues are resolved, not on whether superfluous language dismissing a resolved matter is included. CR 54(a)(1). Notably, the amendatory Order of Dismissal did not resolve any issues in the matter, but only sought to clarify the requisite evidentiary references upon which the already entered final order was based. Had the judge's order contained the necessary evidentiary references, no further order would have been needed. Indeed, in *Ron & E Enterprises, Inc. v. Carrara, LLC*, 137 Wn. App. 822, 155 P.3d 161(2007), cited by Respondent, the Court held that an "Order Granting ... Motion for Summary Judgment..." was a final judgment. As here, that Order specifically stated that the motion for summary judgment was granted. It further stated that certain claims were dismissed, as that was the relief requested. It did not state that the "matter" was dismissed—that would have been superfluous. Here, the requested relief was a judicial determination of rights and the Order on Respondent's Motion for Summary Judgment ruled on all issues to be determined. It was a final order.

Although appellants could have amended their Notice of Appeal to include the amendatory Order of Dismissal, this was not required. *West v.*

*Thurston County*, 144 Wn. App. 573, 577-78, 183 P.3d 346 (2008); *Kinnan*

*v. Jordan*, 131 Wn. App. 738, 753, 129 P.3d 807 (2006). RAP 2.4(f)

provides:

An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b)..., (2) CR 52(b) (amendment of findings), (3) CR 59..., (4) CrR 7.4 ..., or (5) CrR 7.6 ....

The Order of Dismissal, entered in accord with CR 52(b) to amend the findings in the original Order granting summary judgment, can be reviewed by this Court pursuant to RAP 2.4.

Appellants did, however, commit a technical error in not clearly specifying in their opening brief that, in seeking reversal of the trial court's granting of Cynthia's Motion for Summary Judgment, they were seeking reversal of both the Order on Respondent's Motion for Summary Judgment and the amending Order of Dismissal. Appellants hereby move for permission to amend their opening brief to so clarify, and to reflect the Amended Assignments of Error stated above. Such a motion to correct a technical error was approved in *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). The issues raised, and the argument and citations in support thereof, remain the same and there is no prejudice to Respondent.

In *State v Olson*, the Washington Supreme court overruled the *State v. Fortun* case relied on by Respondent, and relying on the policy set forth in RAP 1.2(a), explained:

It is clear from the language of RAP 1.2(a), and the cases decided by this Court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

126 Wn.2d at 323. *Accord, Knox v. Microsoft Corp*, 92 Wn. App. 204, 213, 962 P.2d 839 (1998); *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 881, 866 P.2d 1272 (1994); *Griffen v. Allstate Insurance Co.*, 36 P.3d 552 (Wash.App. 2001). This Court should allow the technical amendment to Appellants' opening brief and consider this appeal on its merits.

**B. Summary Judgment Should Be Reversed Because There Are Issues Of Fact Regarding Whether Diane's Distributive Share Of Rose's Estate Should Be Reduced By \$50,000.**

1. There Is A Dispute Of Material Fact Concerning The Testator's Intent.

As set forth in the opening Brief of Appellants, there is a dispute of fact concerning what the testator, Rose Sowder, intended when she added the 2002 amendment to the trust. The paramount duty of a court in construing a will is to give effect to the testator's intent. *In re Estate of Bergau*, 103

Wn.2d 431, 435, 693 P.2d 703 (1985); RCW 11.12.230. Similarly, the objective in interpreting a trust is to determine the intent of the trustor. *Old Nat'l Bank & Trust Co. of Spokane v. Hughes*, 16 Wn.2d 584, 587, 134 P.2d 63 (1943); *Seattle First Nat'l Bank v. Crosby*, 42 Wn.2d 234, 246, 254 P.2d 732 (1953).

Respondent Cynthia Picha now argues that the language of the amendment is unambiguous and susceptible of only one reasonable interpretation. *See Waits v. Hamlin*, 55 Wn. App. 193, 200, 776 P.2d 1003 (1989) (“A trust is ambiguous if it is susceptible of more than one meaning.”) However, Cynthia herself has given conflicting interpretations of the amendment. In her trial brief, she argued that return of the referenced items to the estate, after Rose’s death, would comply with the trust amendment and prevent the reduction in Diane’s share, “in keeping with the intent of Ms. Sowder.” (CP 59). Now she argues that the words “returned to me” in the trust amendment have a different meaning: that the referenced items must be returned before Rose’s death. This conflicts not only with Cynthia’s own earlier interpretation, but with Rose’s specifically stating that the trustee could confirm receipt, indicating that she was most concerned that the whatever items she was referring to be accounted for in her estate.<sup>5</sup>

---

<sup>5</sup> Cynthia counters this by arguing that the trustee was only to write the letter if Rose was incapacitated, but that limitation is not set forth in what Cynthia characterizes as unambiguous language.

Respondent's brief on page 12 states that the trial court found the 2002 trust amendment unambiguous. However, the judge's Order granting summary judgment does not contain this finding, nor is it in the amended findings added by the Order of Dismissal. (CP 424, 428). The judge at oral argument presented an interpretation of the 2002 trust amendment that conflicts not only with appellants' interpretation, but also with Cynthia's. The judge suggested that Rose intended to reduce Diane's share regardless of whether requested items were returned, simply by not writing the letter. (RP 12). Although this alternate interpretation should be rejected because it conflicts with the language of the amendment, as discussed in appellants' opening brief, it highlights the fact that the language of the trust amendment is capable of differing interpretations.

Further, Cynthia's current interpretation--that the jewelry Rose was referring to in the trust amendment was the jewelry Rose had previously gifted to Cynthia--ignores the only descriptive language offered in the amendment. Rose described the items which she was referring to in the amendment as "jewelry, sterling silver and other personal property," that she believed she owned, and that she had requested to be returned. Since Rose gave this jewelry to Cynthia in her 1982 gift lists on which she wrote "gift today" (CP 321), Rose would not have thought she still owned this jewelry, and there is no evidence Rose ever requested that Cynthia's jewelry be

returned to her. Surely Rose would have told Cynthia she wanted it back, if this was the jewelry she was referring to. The 2002 trust amendment does not unambiguously refer to Cynthia's jewelry. There are issues of fact to be resolved with regard to what Rose's intent was in adding the 2002 trust amendment and how it should be interpreted in light of that intent.

2. There Are Issues Of Material Fact Whether There Were Any Items Of Personal Property Owned By Rose, Held By Diane, Requested By Rose, And Not Returned To Rose's Estate.

As set forth in appellants' opening brief, this Court should reverse the trial court's order granting summary judgment, because there are material issues of fact concerning 1) whether any items of Rose's personal property that she thought she still owned were being held by Diane, 2) whether Rose requested the return of any of those items, and 3) whether Diane failed to return the items to Rose or her estate. All three criteria must be met before the penalty provision would apply. If there is no property meeting all three criteria, Cynthia has a fiduciary duty as trustee to write the required confirming letter. As the trial judge stated at oral argument (RP 12), the evidence presented, viewed in the light most favorable to appellants, shows there are disputed issues of material fact.

Respondent's argument concerning the validity of Rose's gifts under Maryland law does not address the real issue in this matter, which is determining what property Rose was referring to in the 2002 trust

amendment. The objective in interpreting a trust is to determine the intent of the trustor. *Old Nat'l Bank & Trust Co. of Spokane v. Hughes*, 16 Wn.2d 584, 587, 134 P.2d 63 (1943); *Seattle First Nat'l Bank v. Crosby*, 42 Wn.2d 234, 246, 254 P.2d 732 (1953). If Cynthia is contending that Rose was referring to the property listed in her gift lists, there is substantial evidence against this interpretation. First, had Rose been referring to the items on the lists, she could easily have said so. Surely attorney Sherrard would have referenced the lists by title and date. Second, there is no evidence Rose ever asked for items on those lists to be returned to her. To the contrary, when granddaughters Christine and Mariamni visited her in Washington, Rose gave them each additional gifts and did not ask that items gifted to her granddaughters on the gift lists be returned to her. (CP 395). Third, even Cynthia admitted in her deposition that the “silver” mentioned in the amendment could not be referring to Rose’s silver service, because she had already given that away. (CP 61). Cynthia understood that items on the lists were gifts, even if, like the silver service set, they were being held for the donees by Diane in her safe. (CP 227-28). Other family members, including Cynthia’s sister Sandra and her three nieces Christine Thompson, Lynn Thompson and Mariamni Okrzesil, also understood that the items on the lists were gifts. (CP 400, 231, 227-28, 397-98). It is reasonable to conclude that Rose, who wrote in her own handwriting “gift today” on the lists, also

considered those items as having been given away. (CP 375-83). The items Rose specifically described in the trust amendment as things “that I own” would not include items she thought she had previously gifted.

Even if Maryland gift law controlled the determination of the testator’s intent, Respondent is incorrect in her interpretation of that law. A valid gift under Maryland law only requires “acceptance by the donee, *or by some competent person for him*” and delivery may “be actual or constructive.” *Snyder v. Stouffer*, 270 Md. 647, 650-51, 313 A.2d 497 (1974), quoting *Pomerantz v. Pomerantz*, 179 Md. 436, 439-440, 19 A.2d 713, 715 (1941) (emphasis added). The 1982 gift lists, which contain the jewelry in question, clearly evidence Rose’s intent to make gifts. She wrote in her own handwriting, “gift today.” She asked Diane to accept and hold the items in her safe for the donees, which Diane agreed to do. The fact that Diane allowed Rose to borrow back some of the gifted jewelry to wear does not impair the validity of the gift. *See Rogers v Rogers*, 271 Md. 603, 608, 319 A.2d 119 (1974) (“a delivery back to the donor, where the donor is acting as the donee's agent for a limited purpose, does not impair the validity of the gift”). Further, there is no evidence that Rose ever borrowed back the items of jewelry gifted to Cynthia, or any items on the 1982 jewelry gift lists after she moved to Washington.

Additionally, if determining the legal validity of the gifts depends on resolution of factual issues, it cannot be decided on summary judgment. Cynthia's argument at page 20 of her brief that "Rose's and Diane's actions indicate they viewed the lists as testamentary" appears to be asking the court to decide factual issues. As noted above, substantial evidence indicates that family members, including Cynthia and Rose herself, viewed the items on the lists as gifts. If this were the basis for the court's granting of summary judgment, the order should be reversed and remanded for resolution of these disputed issues of fact.

Not only are there issues of fact concerning whether there were any items owned by Rose and held by Diane at the time of Rose's death, the parties also dispute whether Rose ever asked Diane to return any items. In support of her motion, all Cynthia submitted was her deposition testimony that she had heard Rose complain about Diane not returning some unidentified things. (CP 276). Cynthia's actions, in not telling anyone in the family about Rose's complaints, call into question the credibility of this self-serving hearsay testimony and it conflicts with the statements of other family members that Rose never asked for the return of any gifted property. It also conflicts with Rose's actions in continuing to give gifts to Diane's family.

In the trial court, Cynthia objected to any testimony by Diane concerning conversations with Rose as barred by the deadman's statute,

RCW 5.60.030. This statute would not apply, however, to statements by disinterested parties such as Christine and Lynn about what Rose said and did. Now, Cynthia contends she raised the deadman's statute as a "red herring." However, Cynthia as trustee has the burden of showing that there were specific items that Rose asked Diane to return that were not returned, triggering the reduction to Diane's share. Cynthia has not met that burden, or very least there is a dispute of fact, when viewing the evidence and all inferences therefrom in the light most favorable to appellants.

Cynthia also appears to argue that, because she did not write the required letter to attorney Sherrard, Diane's share should be reduced. However, Cynthia cannot breach her fiduciary duties by refusing to write the required letter and then use that breach to award herself an additional \$25,000 from the trust estate. Although the trust allows Cynthia to serve as personal representative and trustee despite her conflict of interest, it does not waive her fiduciary duties of loyalty and honesty to all the beneficiaries. If there are no ungifted items that Rose owned that were not returned to her or the estate, then Cynthia has a fiduciary duty as trustee to write the confirming letter. As discussed below, if Cynthia refuses to write the letter in breach of her fiduciary duty, then she should be removed as trustee.

Because there are issues of material fact whether there were any items of personal property that Rose believed she owned that were held by

Diane, requested by Rose, and not returned to Rose's estate, entry of summary judgment was not proper and this Court should reverse the trial court's Order on Respondent's Motion for Summary Judgment and the amendatory Order of Dismissal.

**C. Summary Judgment Should Be Reversed Because There Are Issues of Fact Regarding Whether Cynthia Has Breached Her Fiduciary Duty Of Loyalty As Trustee and Personal Representative.**

This Court should reverse the trial court's order granting summary judgment because there are issues of fact whether Cynthia breached her fiduciary duties as trustee and personal representative and whether she therefore should be removed.

As Respondent's brief notes, conflicts of interest and bad will generated by litigation constitute reasonable cause to remove a trustee. *In re Estate of Ehlers*, 80 Wn. App. 751, 761, 911 P.2d 1017 (1996). Here Cynthia is using and depleting the trust assets to fund this litigation, after objecting to mediation under TEDRA, for the sole purpose of gaining an extra \$25,000 of trust assets for herself. She admits her self-dealing on page 26 of her brief, where she states she is acting out of loyalty to "the other beneficiaries." The only "other beneficiaries" under the trust beside appellants is Cynthia herself.

A trustee has the duty to inform beneficiaries fully of all facts that would aid them in protecting their interests. *Esmieu v. Schrag*, 88 Wn.2d

490, 498, 563 P.2d 203 (1977). Cynthia admits she never told Diane what specific items she, as trustee, had determined were requested by Rose and not returned by Diane. Her brief repeatedly misquotes Diane's letter to Sherrard, saying it admits Diane held jewelry belonging to Rose, when in fact the letter only refers to jewelry that Diane had "held in safekeeping for any family member." (CP 360). The jewelry sent with the letter was jewelry that Cynthia acknowledged had been given to her in 1982. (CP 297-298). When Diane attempted to give this jewelry to Cynthia when the family met at Hayden Lake in the Summer of 2006, Cynthia asked Diane to send it to attorney Sherrard. (CP 360). In her trial brief, Cynthia explained that she did this so it would be properly accounted for and prevent the reduction of Diane's share, in accordance with Rose's intent. (CP 59).

For Cynthia now to claim this jewelry is what Rose was referring to in the 2002 trust amendment is a breach of her fiduciary duty of loyalty to Diane. She did not inform Diane at Hayden Lake that she believed the jewelry really still belonged to Rose or that she was planning to reduce Diane's share even if it were returned to the estate as she requested. Even at the time of her deposition, Cynthia had not decided that this was the property she was going to use to justify awarding herself an extra \$25,000. She testified that she had no proof Diane had any property of Rose's. (CP 284). She confirmed that she had no idea if the items on the gift lists were what

Rose was referring to in the trust amendment. (CP 286). Cynthia did not investigate and has no evidence Rose was referring in the 2002 trust amendment to the jewelry she had gifted to Cynthia, nor does she have evidence that Rose ever asked Diane to return Cynthia's jewelry to her.<sup>6</sup>

This Court should either hold that Cynthia Picha has breached her fiduciary duties as Trustee and Personal Representative and should be removed, or that there is a dispute of material fact whether she has breached those duties and should be removed. The Order on Respondent's Motion for Summary Judgment, finding that insufficient facts were presented to sustain removal or find a breach of fiduciary duties, and the amendatory Order of Dismissal, should be reversed and remanded with appropriate instruction.

**D. Appellants Are Entitled To An Award Of Attorney Fees Both On Appeal And For Defending The Motion For Summary Judgment In The Trial Court.**

For the reasons set forth in their opening brief, appellants respectfully request an award of attorney's fees and costs associated with having to bring this appeal and with the defense of the summary judgment motion brought by respondents. Additionally, as noted in Respondent's brief, an award of attorneys' fees is appropriate where litigation is brought to resolve the meaning of ambiguous trust language and to further proper

---

<sup>6</sup> Cynthia's assertion on page 31 of her brief that "the undisputed evidence demonstrates that Rose asked Diane to return the property and that she did not do so" is not supported by any evidence on the pages cited.

administration of the trust. *Peoples Nat'l Bank of Washington v. Jarvis*, 58 Wn.2d 627, 632, 364 P.2d 436 (1961). Diane and Sandra sought TEDRA mediation to resolve the interpretation of the ambiguous language of the 2002 trust amendment and further proper administration of the trust. Their costs in so doing should equitably be borne by the estate, especially since Sandra is acting against her pecuniary interest and only to ensure proper administration of the trust. For the same reasons, Cynthia's request for the appellants to pay attorneys' fees to the estate should be denied.

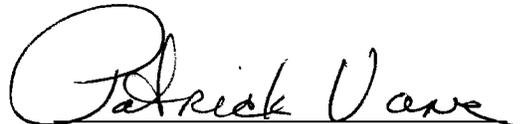
## V. CONCLUSION

When viewing the evidence and all references therefrom in the light most favorable to appellants Diane Thompson and Sandra Mitchell, there are issues of material fact and respondent is not entitled to judgment as matter of law. Appellants therefore respectfully request that this Court reverse the trial court's Order on Respondent's Motion for Summary Judgment entered on June 8, 2010, determining that Diane Thompson's distributive share of the Rose Sowder's estate should be reduced by \$50,000 and that there is insufficient evidence that Cynthia breached her fiduciary duties and should be removed as Trustee and Personal Representative. Appellants also request that the Court reverse the amendatory Order of Dismissal that was subsequently entered under CR 52(b) to add the findings required by CR 56(h). This matter should be remanded for trial and appellants Diane

Thompson and Sandra Mitchell should be awarded their attorney's fees on appeal and also for defending the summary judgment motion in the trial court.

Dated this 11<sup>th</sup> day of April, 2011.

Respectfully submitted,

  
Patrick Vane, WSBA # 9006

  
Joan L. Roth, WSBA # 8979

Attorneys for Appellants  
Diane Thompson & Sandra Mitchell

COURT OF APPEALS  
DIVISION II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

11 APR 12 AM 11:38

DECLARATION OF SERVICE

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

ESTATE OF ROSE P SOWDER )  
Cynthia Picha, Personal representative )  
Respondent, )

No. 40930-5-II

v. )

DECLARATION, OF MAILING AND PROOF  
OF

DIANE THOMPSON & SANDRA )  
MITCHELL )

SERVICE OF REPLY BRIEF

Appellants. )

Pursuant to RAP 18.5, I, Megan Randall being over the age of 18 and a competent adult, hereby declare, under penalty of perjury, the following:

1. **Service** - On April 11,, 2011, I placed an original copy of the Appellants reply brief in the US mail, with adequate postage addressed to Respondents counsel, Kenneth Masters at the law offices of Masters Law Group located at 241 Madison Avenue North, Bainbridge Island WA 98110 at approximately 10:45 AM.
2. An original <sup>of the</sup> Appellants Reply brief was placed in the US mails with adequate postage on the same date addressed to the Clerk, Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma Washington 98402.
3. The cover page bearing Mr. Masters original "received" stamp is attached hereto and incorporated by reference herein.

I declare the above statements to be true under penalty of perjury.

Date: April 11, 2011

Signature: [Signature]

[December 24, 2002]