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No. 51992-5-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re Estate of

CAROL L. WOOD,

Deceased.

SUSAN M. GONZALES,  
Appellant,

v.

SECURITY STATE BANK, TRUST DEPARTMENT,  
Appellee.

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REPLY BRIEF OF APPELLANT

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## 1. FACTS RELEVANT TO REPLY

1.1. The day after executing her last Codicil to her Will, Ms. Wood signed a beneficiary form with Edward Jones that revoked all prior beneficiaries and did not name a new beneficiary:

**Edward Jones**

CUSTOMER NAME: WOOD, CAROL L.      DESTINATION: NEW ACCOUNTS  
ACCOUNT NUMBER: 877-98234      BRANCH #: 08768      DATE: 04/29/2016

**EDWARD JONES SELF-DIRECTED INDIVIDUAL RETIREMENT ACCOUNT BENEFICIARY FORM**

TYPE OF ACCOUNT (INDICATE ONE)     Traditional IRA     Roth IRA     SEP IRA     SIMPLE IRA

By signing below:

1. I designate as beneficiary(ies) of this account the individual(s) I have named on this Beneficiary Designation Form, which I have read and reviewed, and confirm the designation is complete and accurate.
2. I acknowledge that any prior beneficiary designation for this account is hereby revoked.
3. I acknowledge that I have the authority to designate, change or revoke the beneficiary(ies) for this account as the Account Holder or an authorized representative of the Account Holder acting on specific authority to designate, change or revoke the beneficiary(ies).

Carol L. Wood      CAROL L. WOOD      4/29/16  
Signature of Account Owner      Account Owner's Name      Date

NO BENEFICIARY DESIGNATION ON FILE, CUSTODIAL AGREEMENT DEFAULT APPLIES.

(CP at 46). With no beneficiary named, the custodial agreement between Ms. Wood and Edward Jones determined how the IRA was to be distributed after Ms. Wood's passing. (CP at 46-52). The custodial agreement between Ms. Wood and Edward Jones was "*incorporated into and [wa]s part of the Individual Retirement Account Authorization Form* (collectively "Agreement") signed by [Ms. Wood]. . . .":

*This Custodial Agreement is incorporated into and is part of the Individual Retirement Account Authorization Form (collectively "Agreement") signed by me (collectively "the Depositor," "the Client," "me," and "I"). . . .*

(CP at 47) (emphasis added). In other words, the custodial agreement

“constitute[d] a binding contract between Edward D. Jones & Co. L.P. (collectively “Edward Jones” and Custodian”) and [Ms. Wood]”:

*The Custodial Agreement . . . constitutes a binding contract between Edward D. Jones & Co. L.P. (collectively “Edward Jones” and Custodian”) and Me.*

(CP at 47) (emphasis added). Ms. Wood represented that she read and understood the custodial agreement: “I represent that I have read and understand the Agreement. . . .” (CP at 47). She specifically agreed to be bound by the custodial agreement’s terms as well as separate disclosures and notices referenced in the agreement:

*[Ms. Wood] agree[s] to be bound by its terms as well as the separate disclosures and notices referenced in and/or provided with this Agreement.*

(CP at 47) (emphasis added). Under federal law, an IRA cannot exist at all without such a custodial agreement. 26 U.S.C. § 408(a) (stating the creation of an IRA requires a “written governing instrument,” i.e., a contract, between the individual benefiting from the IRA and the institution creating the IRA). Once a custodial agreement is executed, “a valid IRA is created. . . .” *Michel v. Commissioner*, 1989 Tax Ct. Memo LEXIS 670, \*10, T.C. Memo 1989-670.

1.2. The plain language of the custodial agreement, mandated by federal law, provided that the IRA was to be distributed to Ms. Wood’s “descendants per stirpes” not to the Estate, which is a common IRA

contractual provision for easy administration and tax purposes:<sup>1</sup>

(b) Beneficiary Not Designated. If I have no designated beneficiaries, or no beneficiaries survive me, then my beneficiaries shall be deemed to be designated in the following order and priority: (1) my surviving spouse; or if none, then (2) *my descendants, per stirpes*, as defined by the laws of the State of Missouri; or if none, then (3) my estate.

(CP at 49) (emphasis added). Missouri law, R.S.Mo. § 474.010, provides that if there is no surviving spouse, a decedent's assets pass to surviving children.

1.3. The trial court framed the issue in this case succinctly:

THE COURT: This comes down to the very narrow question what happens when a beneficiary is not named in that [IRA] account.

(RP at 9). Counsel for the Estate did not object to the admission of the IRA custodial agreement at hearing. (RP at 1-20). He supplied and filed the custodial agreement, provided by Edward Jones to him, with the trial court. (CP at 45-52). Counsel for the Estate stated the custodial agreement would “benefit” and “aid” the Court. (CP at 45). At the contested “show cause” hearing, counsel for the Estate admitted that the IRA custodial agreement was what it purported to be; that is, an “IRA that says if no beneficiary

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<sup>1</sup> By distributing directly to heirs at law instead of the estate, it is a double bonus of lower taxes due after distribution and disposing of the need to probate the asset. *See e.g.*, IRS Publication 559, available at, <https://www.irs.gov/pub/irs-pdf/p559.pdf>; IRS Publication 590-B, available at, <https://www.irs.gov/publications/p590b>.

named then [the IRA is distributed] to the two children”:

We have a will that says residuary to Security State Bank in trust for my son and we have [an] IRA that says if no beneficiary named then to the two children.

(RP at 7). The trial court then decided “as a matter of law,” i.e., no material issues of law or fact need to be resolved at trial or evidentiary hearing, that the “overriding intent of the decedent . . . from the four corners of the will and codicil” defeated the “custodial agreement terms and her intent in not making a beneficiary.” (CP at 59). This was because, according to the trial court, the evidence at the “show cause” hearing was not “sufficient” nor “clear” enough to determine if the decedent knew of the custodial agreement terms:

The Court further finds that the overriding intent of the decedent to leave the residuary of her estate to the Trust created for her son is quite evident from the “four corners” of the will and codicil and that the evidence shown as to whether decedent knew of the custodial agreement terms and her intent in not making a beneficiary are neither clear enough nor sufficient to overcome the clear showing as to her intentions as to the residue of the estate.

(CP at 59).

1.4. Ms. Gonzales was denied a reconsideration motion, filed her notice of appeal, and then her Brief of Appellant. In response to Ms. Gonzales Brief of Appellant, the Estate argues the following in summation:

(1) “The scope of the show cause hearing is limited” and “[t]he

show cause hearing is in the nature of a summary proceeding wherein the trial court makes a threshold determination of whether there is evidence amounting to probable cause to hold a full hearing.” (Response Brief at 4).

(2) “In estate proceedings, the Appellate Court’s review is limited to determining whether findings are supported by substantial evidence in the record, and if so, whether the conclusions of law are supported by those findings.” (Response Brief at 7).

(3) “[T]he trial court properly examined Ms. Wood’s Will, the surrounding circumstances, the intentions of the parties, and the evidence in the record to determine that Ms. Wood’s intent was in direct conflict with the custodial agreement’s default provisions.” (Response Brief at 15).

(4) “The trial court properly construed Ms. Wood’s intent and held that Ms. Wood’s will and codicil reflected her final wishes” and “the trial court correctly held it was Ms. Wood’s intent to leave all of her Edward Jones accounts in trust for her son.” (Response Brief at 1, 15).

(5) Ms. Gonzales’ “argument rests on the broad, unsupported assertion . . . that the custodian agreement should control” and Ms. Gonzales “brought forth zero evidence, zero testimony, and zero proof” supporting her argument that she was entitled to the IRA proceeds, and “there was no evidence in the record showing the custodial agreement was attached or even presented to Ms. Wood, therefore she was unaware of the default

provision's implications." (Response Brief at 1, 5).

(6) A "change in beneficiary of nonprobate asset will not be honored if it is contrary to the decedent's intent or an overarching public policy directive" and the "courts impose constructive trusts" in such cases. (Response Brief at 7-8).

(7) The trial court did not err in finding Ms. Wood's Will and Codicil controlled the distribution of the IRA, not the custodial agreement, because the custodial agreement was a product of "procedural unconscionability" in which Ms. Wood was subject to an "unfair bargaining" process and in which the custodial agreement was not reasonably available to her. (Response Brief 13-15).

## **2. REPLY ARGUMENT**

### **2.1. The Trial Court Held a Summary Proceeding Requiring Any Material Issues of Law or Fact Be Decided in a Full Evidentiary Hearing.**

Court Rule 56(c) provides that if there is "no genuine issue as to any material fact and th[en] the moving party is entitled to a judgment as a matter of law." The burden is on the moving party to establish its right to judgment as a matter of law, and facts and reasonable inferences from the facts are considered in favor of the nonmoving party. *Goad v. Hambridge*, 85 Wn. App. 98, 931 P.2d 200, *review denied*, 132 Wn.2d 1010, 940 P.2d 654 (1997).

Under RCW 11.96A.100, a party may file a TEDRA action to resolve disputes in probate. But this requires a petition, a summons, and a new cause number. *Id.* After the petition is filed, any party may move for summary judgment. RCW 11.96A.100(9). The initial hearing must resolve all issues of fact and law, or the trial court schedules additional proceedings as necessary. *See* RCW 11.96A.100(10).

Bringing a probate matter before the trial court via other procedures is statutorily limited. *In re Estate of Ardell*, 96 Wn. App. 708, 980 P.2d 771, 776 (1999); *In re Estate of Rathbone*, 190 Wn.2d 332, 412 P.3d 1283, 1287 (2018). Other than a citation under TEDRA, or a show cause order under RCW 11.68.070 to remove a personal representative, show cause orders are not utilized in probate matters under Chapter 11, RCW.

Here, the Estate argues that “The scope of the show cause hearing is limited.” (Response Brief at 4). The Estate further argues that “The show cause hearing is in the nature of a summary proceeding wherein the trial court makes a threshold determination of whether there is evidence amounting to probable cause to hold a full hearing.” (Response Brief at 4). The Estate argues that the “burden” was on Ms. Gonzales to prove that Edward Jones should do what it refused to do; that is, tear up Ms. Wood’s IRA’s custodial agreement and distribute the IRA to the Estate contrary to its provisions. (Response Brief at 4). Finally, the Estate argues that Ms.

Gonzales “brought forth zero evidence, zero testimony, and zero proof” supporting her argument that she was entitled to the IRA proceeds. (Response Brief at 5). Therefore, the Estate further argued that Ms. Gonzales deserved to lose because she did not “press” and thereby “abandon[ed]” her claims and arguments. (Response Brief at 4).

Ms. Gonzales agrees with the Estate that if issues of law or fact remain after a contested show cause hearing, the trial court must “hold a full hearing” and that it cannot make a ruling “as a matter of law” in such circumstances. Notably, no applicable statute, and certainly no authority cited by the Estate in its Motion to Show Cause (CP at 26-27) or Response Brief, provides that a show cause hearing is the same as a full hearing or trial. The Estate cites *West v. Gregoire*, 184 Wn. App. 164, 336 P.3d 110 (2014) for the proposition that the trial court could rule as a matter of law for the Estate at a show cause hearing. But that case has to do with an explicit statutory show cause procedure, in an entirely different context, under RCW 42.56.550. Even then, *West* stated that the show cause hearing did, or at least may, “operate like a motion for summary judgment.” *Id.* at 172. Moreover, the Estate’s argument that Ms. Gonzales presented “zero evidence” at the show cause hearing (Response Brief at 4) is false. Ms. Gonzales filed an affidavit testifying to the fact that she was Ms. Wood’s daughter and rightful beneficiary to the IRA under the custodial agreement.

(CP at 41). Ms. Gonzales did not need to present more evidence than she did before the hearing because the Estate supplied Ms. Wood’s beneficiary designation and custodial agreement. (CP at 45-52).<sup>2</sup>

The contested hearing that occurred before the trial court was far more akin to a summary judgment hearing (lacking the procedural due process protections of 28 days of notice) than anything else. The Estate improperly tried to bootstrap Ms. Gonzales with a made-up-out-of-whole-cloth “show cause” procedure, when in fact the burden was on the Estate, as the moving party, to demonstrate why the contract between Edward Jones and Ms. Wood should be disregarded. Ms. Gonzales never abandoned any argument or claim and presented sufficient evidence to win her case. The Estate supplied the custodial agreement that was dispositive to resolving this matter. All reasonable inferences were to be drawn in favor of the non-moving party, Ms. Gonzales. If material issues of law or fact existed after argument and after reviewing the evidence supplied, then the issue presented could not be decided as a matter of law and the trial court was duty bound to set a full hearing.

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<sup>2</sup> In normal situations, where an Estate does not try to erroneously vacate a custodial agreement, Ms. Gonzales would not have been required to do anything other than wait for Edward Jones to ask her what she wanted to do with her share of the IRA. It was only in this odd case where the Estate erroneously believed a Will or Codicil could override an IRA custodial agreement—that this contested hearing and appeal ever even happened.

2.2. The Custodial Agreement was Properly Before the Court, Was Reviewed by the Court, and the Standard of Review in Cases Involving the Interpretation of a Contract at a Summary Proceeding is De Novo, Not “Substantial Evidence.”

“[A] Court of Appeals is not bound by a superior court’s findings of fact that are based on documentary, nontestimonial evidence.” *Danielson v. Seattle*, 45 Wn. App. 235, 240, 724 P.2d 1115, 1118 (1986). “In such a situation the Court of Appeals is as competent as the superior court to weigh and consider the evidence.” *Id.* (citing *In re Estate of Reilly*, 78 Wn.2d 623, 654, 479 P.2d 1 (1970)). “Absent disputed facts, the legal effect of a contract is a question of law that we review de novo.” *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 711-712, 334 P.3d 116, 119 (2014).

“Rule 901 lists ten acceptable methods of authentication . . . [but] the rule does not preclude the use of other methods of authentication . . . . [such as] stipulation or an admission by the opposing party.” *Courtroom Handbook on Washington Evidence*, Chapter 5, pg. 461, Karl B. Tegland (2007-08 ed.). “In the absence of timely objection, challenges to the sufficiency of the foundation requirements will normally be waived.” *State v. Roberts*, 73 Wn.App 141, 867 P.2d 697 (1994). Authentication is also satisfied when the party challenging the document originally provided it. *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wash. App. 736, 748, 87 P.3d 774, 782 (2004).

Here, counsel for the Estate did not object to the admission of the IRA custodial agreement at hearing. (RP at 1-20). He supplied and filed the custodial agreement, provided by Edward Jones to him, with the trial court. (CP at 45-52). Counsel for the Estate stated the custodial agreement would “benefit” and “aid” the Court. (CP at 45). At hearing, counsel for the Estate admitted that the IRA custodial agreement was what it purported to be; that is, an “IRA that says if no beneficiary named then [the IRA is distributed] to the two children”:

We have a will that says residuary to Security State Bank in trust for my son and we have [an] IRA that says if no beneficiary named then to the two children.

(RP at 7). The trial court then reviewed the matter and ruled, taking into consideration substance of the custodial agreement:

The Court . . . finds . . . the custodial agreement terms . . . neither clear enough nor sufficient to overcome the clear showing as to her intentions as to the residue of the estate.

(CP at 59). Consequently, while the trial court erred in its ruling, the custodial agreement was properly before the trial court and its substance was considered.

In fact, the Estate, now attempting to say the custodial agreement was not authenticated, or was not before the trial court to review, is impermissibly inviting an error on appeal. *See In re Estate of Muller*, 197 Wn. App. 477, 484, 389 P.3d 604, 609 (2016) (holding party cannot set up

an error on appeal). In other words, the Estate cannot present evidence that “aids” and “benefits” the trial court, invoke its substantive consideration by the trial court, argue about such substance, secure a ruling by the trial court regarding its substance, but then say on appeal that such evidence was inadmissible, not authenticated, and not before the trial court to review. *See id.*

Furthermore, it is plain that the standard of review of this matter is de novo. The matter on appeal has entirely to do with contractual interpretation, which requires de novo review. *See e.g., Viking Bank*, 183 Wn. App. at 711-712. This Court “is not bound by a superior court's findings of fact that are based on documentary . . . evidence” such as the custodial agreement, the Will, and the Codicil. *See Danielson*, 45 Wn. App. at 240. This Court can and should “weigh and consider the evidence.” *Id.* If material issues of law or fact remain after this analysis, then remand is the proper remedy.

The Estate argues otherwise, and that “[i]n estate proceedings, the Appellate Court’s review is limited to determining whether findings are supported by substantial evidence in the record, and if so, whether the conclusions of law are supported by those findings.” (Response Brief at 7). The Estate cites *In re Estate of Freeberg*, 130 Wn. App. 202, 122 P.3d 741 (2005) for the proposition that substantial evidence is the standard of review

in this case. However, *Estate of Freeberg* proceeded to trial because such case required the weighing of testimony and evidence and had material issues of fact and/or law that could not be resolved in summary proceedings as a matter of law. In fact, the Estate's other cited authority preceded to trial as well. *See e.g., Dwelley v. Chesterfield*, 88 Wn.2d 331, 560 P.2d 353 (1977) (stating "At trial, petitioner testified. . . ." and court limiting material issues at trial via the Deadman's Statute); *Rainier Nat'l Bank v. McCracken*, 26 Wn. App. 498, 503, 615 P.2d 469, 473 (1980) (stating "The case was tried to the court"); *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 378, 97 P.3d 11, 12 (2004) (court remanding back to trial court because material issues of law or fact remained); *Webster v. State Farm Mut. Auto. Ins. Co.*, 54 Wn. App. 492, 494, 774 P.2d 50, 51 (1989) (stating "At trial Mr. Webster testified . . ."); *Rice v. Life Ins. Co.*, 25 Wn. App. 479, 480, 609 P.2d 1387, 1388 (1980) (stating "At trial Ms. Chrabot testified, over objection . . ."); *Allen v. Abrahamson*, 12 Wn. App. 103, 104, 529 P.2d 469, 470 (1974) (stating "The case was tried to the court, sitting without a jury"). The Estate also cited *Zapel*, and while it is true that case did not go to trial, the summary judgment order was vacated and the matter was remanded because the plaintiff "may yet be able to prove his claim." *Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wn. App. 444, 452, 90 P.3d 703, 707 (2004).

Accordingly, the Estate has presented no effective argument that this

matter is to be reviewed for substantial evidence. Generally speaking, substantial evidence is the standard of review after matters proceed to trial because material issues of law or fact could not be decided as a matter of law in a summary proceeding. On the other hand, when contracts are being interpreted, and there is no live testimony, such matters are reviewed de novo, and that is proper standard of review for this case.

2.3. The Fact that the IRA Existed and the Fact Ms. Wood Signed the Beneficiary Designation Form without Naming a Beneficiary, Demonstrates Both that the Custodial Agreement was Binding on Ms. Wood and that Ms. Wood Read, or Had Opportunity to Read, It.

An IRA cannot exist without a contract between financial institution and its client, in this case the late Ms. Wood. 26 U.S.C. § 408(a) (stating the creation of an IRA requires a “written governing instrument,” i.e., a contract, between the individual benefiting from the IRA and the institution creating the IRA); *Michel*, T.C. Memo 1989-670 (holding “Once the section 408(a) requirements are met, a valid IRA is created. . .”).

Here, the trial court ruled “the evidence shown as to whether decedent knew of the custodial agreement terms and her intent in not making a beneficiary are neither clear enough nor sufficient to overcome the clear showing as to her intentions as to the residue of the estate.” (*See* CP at 58-60, 61; RP at 3-4, 9, 19). This was error.

Ms. Wood did not choose any beneficiary regarding the IRA. (CP at

46). Ms. Wood signed the beneficiary form that (1) “revoked” any “prior beneficiary,” and (2) stated that she understood that she could “designate, change or revoke beneficiaries for this account.” (CP at 46). Simply put, by her signature and understanding, as indicated on the form she signed, Ms. Wood clearly had the opportunity to designate a beneficiary but did not; therefore, the “custodial agreement . . . appli[ed].” (CP at 46).

The custodial agreement between Ms. Wood and Edward Jones provided the following:

This Custodial Agreement is incorporated into and is part of the Individual Retirement Account Authorization Form (collectively “Agreement”) signed by me (collectively “the Depositor,” “the Client,” “me,” and “I”) and constitutes a binding contract between Edward D. Jones & Co. L.P. (collectively “Edward Jones” and Custodian”) and Me. I represent that have read and understand the Agreement and agree to be bound by its terms as well as the separate disclosures and notices referenced in and/or provided with this Agreement.

(CP at 47). Breaking down this provision is helpful to this Court’s analysis on appeal. First, this provision objectively demonstrated that Ms. Wood set up an IRA with Edward Jones, by “sign[ing]” an “Individual Retirement Account Authorization Form”:

the *Individual Retirement Account Authorization Form* (collectively “Agreement”) *signed by me* (collectively “the Depositor,” “the Client,” “me,” and “I”). . . .

(CP at 47) (emphasis added). The Individual Retirement Account

Authorization Form, i.e., “written governing instrument” was required under federal law to create the IRA. *See* 26 U.S.C. § 408(a) (stating the creation of an IRA requires a “written governing instrument,” i.e., a contract, between the individual benefiting from the IRA and the institution creating the IRA). Once the form was executed, Edward Jones created the IRA. *See Michel*, T.C. Memo 1989-670 (holding once a custodial agreement is executed, “a valid IRA is created. . . .”). In sum, the fact that the IRA existed at all, combined with the above provision, objectively demonstrated that when Ms. Wood went to Edward Jones to set up her IRA account, she executed an Individualized Retirement Account Authorization Form.

Second, the Individual Retirement Account Authorization Form “incorporated” the “custodial agreement” into it:

This Custodial Agreement *is incorporated into and is part of* the Individual Retirement Account Authorization Form (collectively “Agreement”) signed by me. . . .

(CP at 47) (emphasis added). This provision objectively demonstrated that when Ms. Wood signed the Individual Retirement Account Authorization Form, she either reviewed, or had the opportunity to review, the custodial agreement.

Third, the plain language of the custodial agreement, which Ms. Wood reviewed or had the opportunity to review, stated she was entering

into a binding contract with Edward Jones:

The Custodial Agreement . . . *constitutes a binding contract* between Edward D. Jones & Co. L.P. (collectively “Edward Jones” and Custodian”) and Me.

(CP at 47) (emphasis added). Fourth, the plain language of the custodial agreement, which Ms. Wood reviewed or had the opportunity to review, stated she read and understood the custodial agreement: “*I represent that have read and understand the Agreement. . . .*” (CP at 47) (emphasis added).

Fifth, by the plain language of the custodial agreement, which Ms. Wood reviewed or had the opportunity to review, Ms. Wood agreed to be bound by the custodial agreement’s terms as well as separate disclosures and notices referenced in the agreement:

[Ms. Wood] agree[s] to be bound by its terms as well as the separate disclosures and notices referenced in and/or provided with this Agreement.

(CP at 47). Sixth, the plain language of the custodial agreement provided that the IRA was to be distributed to Ms. Wood’s “descendants per stirpes” not to the Estate, which is a common IRA contractual provision for easy administration and tax purposes:

(b) Beneficiary Not Designated. If I have no designated beneficiaries, or no beneficiaries survive me, then my beneficiaries shall be deemed to be designated in the following order and priority: (1) my surviving spouse; or if none, then (2) my descendants, per stirpes, as defined by the laws of the State of Missouri; or if none, then (3) my estate.

(CP at 49). Missouri law, R.S.Mo. § 474.010, provides that if there is no surviving spouse, a decedent's assets pass to surviving children.

Consequently, the trial court erred in ruling that—as a matter of law—the “custodial agreement terms and [Ms. Wood’s] intent in not making a beneficiary [designation]” were not “clear enough nor sufficient to overcome” Ms. Wood’s Will and Codicil. By her own signature, Ms. Wood read the beneficiary form and understood she could designate a beneficiary. The custodial agreement by operation of law and contract then applied. Ms. Wood read, or had the opportunity to read, the custodial agreement. Consequently, it is clear that the terms of the custodial agreement applied, and her daughter, Ms. Gonzales, was entitled to a distribution from the IRA. At the very least, material issues of law or fact remain, and the trial court erred ruling as matter of law.

#### 2.4. The Trial Court Improperly Examined Extrinsic Evidence When Interpreting the Custodial Agreement and Ruling as a Matter of Law in Favor of the Estate.

Recent Supreme Court precedent clearly holds, and affirms black letter contract law, that extrinsic evidence cannot be used to show intention independent of the contract. *Wilkinson v. Chiwawa Cmty. Ass'n*, 180 Wn.2d 241, 251-252, 327 P.3d 614, 620 (2014). Stated succinctly, “It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.” *Id.* at 251-252. In *Hearst Commc'ns, Inc. v.*

*Seattle Times*, the Supreme Court clarified the reach of the “context” and “parole” evidence rules regarding extrinsic evidence: “[S]urrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of specific words and terms used’ and *not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’*” *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 502-504, 115 P.3d 262, 266-267 (2005) (emphasis added).

In *Hearst Commc'ns, Inc. v. Seattle Times*, the Supreme Court interpreted a joint operating agreement between two newspapers. *Id.* Both parties offered extrinsic evidence to interpret the contract. *Id.* But the court found that the contract’s written words were not ambiguous. *Id.* at 510. And since “extrinsic evidence may be used only to determine the meaning of specific words in the agreement,” the parties’ extrinsic evidence was “irrelevant.” *Id.* at 509. Thus, the written words of the agreement governed as written. *Id.* at 512 (stating “We recognize this day is not a happy day” for those who wanted to resort to the use of extrinsic evidence to interpret the contract the way they wanted).

Here, the Estate argues that the “trial court . . . examined Ms. Wood’s Will, the surrounding circumstances . . . and the evidence in the record to determine that Ms. Wood’s intent was in direct conflict with the custodial agreement’s default provisions.” (Response Brief at 15).

Ms. Gonzales agrees that this is what the trial court did; however, she points out this was clear, reversible, error. *See Hearst Commc'ns, Inc.*, 154 Wn.2d at 502-504 (holding “We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts” and that surrounding circumstances and extrinsic evidence cannot be used to “vary, contradict or modify the written word” in the contract at issue).

The Estate further argues that Ms. Gonzales’ “argument rests on the broad, unsupported assertion . . . that the custodian agreement should control” and that the “trial court properly construed Ms. Wood’s intent and held that Ms. Wood’s will and codicil reflected her final wishes.” (Response Brief at 1, 5).

The Estate is mistaken all three times. First, because Ms. Wood’s Will was not a “super” Will, Ms. Wood’s Will and Codicil were irrelevant. (*see* Brief of Appellant). Second, because extrinsic evidence cannot be considered to contradict the words of a contract, the Will and Codicil are irrelevant for yet another reason. *See Hearst Commc'ns, Inc.*, 154 Wn.2d at 502-504. And third, because the custodial agreement unambiguously left the IRA to Ms. Wood’s children per stirpes (CP at 49), one of whom is Ms. Gonzales, the Estate’s claim that Ms. Gonzales’ appeal “rests on the broad, unsupported, assertion . . . that the custodian agreement should control” is

quite meritless; Ms. Gonzales' appeal is a matter of basic contract law and her claim is anything but unsupported.

Accordingly, this Court should reverse and remand. The trial court should order Edward Jones to distribute the IRA account to Ms. Wood's children per stirpes. Alternatively, if any issue of law or fact remain in this Court's mind, remanding for a full hearing is the appropriate remedy on appeal.

2.5. There is No Basis to Impose a Constructive Trust or Change the Distribution of the IRA to the Beneficiaries of Ms. Wood's Will.

“The general rule in this jurisdiction and elsewhere as to attempted changes of beneficiaries on an insurance policy is that courts of equity will give effect to the intention of the insured when the insured has substantially complied with the provisions of the policy regarding that change.” *Allen*, 12 Wn. App. at 105. However, “[s]ubstantial compliance with the terms of the policy means that the insured has not only manifested an intent to change beneficiaries, but has done everything which was reasonably possible to make that change.” *Id.*

In *Allen*, the court of appeals reversed the trial court for changing a beneficiary on an insurance policy because “the insured . . . never even attempted to comply with the policy requirement of written notification of a change of beneficiary[,]” and because the insured “was apparently aware

of this requirement. . . .” *Id.* at 108.

Here, the Estate—citing *Allen*—acknowledges that “the facts of this case do not precisely mirror those facts in substantial compliance cases. . . .” (Response Brief at 9). Nonetheless, the Estate argues that in equity this Court should ignore the fact that Ms. Wood chose not to designate a beneficiary to the IRA, should ignore the custodial agreement, and should award the IRA to the beneficiaries of Ms. Wood’s Will and Codicil (Response Brief at 9-10). The Estate further argues that Ms. Wood’s Will indicates that “if [she] had the opportunity to designate a beneficiary on her IRA, and knew of the consequences of not doing so, she would have named her estate as beneficiary of her IRA.” (Response Brief at 10).

The Estate is wrong on all accounts again. First, Ms. Wood executed her Will on May 7, 2014 (CP at 10), executed her Codicil on April 28, 2016 (CP at 15), and then, a day later on April 29, 2016, signed the beneficiary designation form for her IRA—revoking all prior beneficiaries and not naming any new beneficiaries. (CP at 46). The beneficiary form she signed clearly stated “I acknowledge that I have the authority to designate, change or revoke beneficiary(ies) for this account. . . .,” yet “NO BENEFICIARY DESIGNATION [WAS] ON FILE” and the “CUSTODIAL AGREEMENT DEFAULT” therefore “APPLI[ED].” (CP at 46). Consequently, the Estate’s argument that Ms. Wood did not know she could designate a

beneficiary is untenable. (CP at 46). Furthermore, as explained in Section 2.3, it is clear that Ms. Wood read, or had the opportunity to read, the custodial agreement when setting up the IRA. (*See* Section 2.3). Stated another way, under *Allen*, Ms. Wood not only did not intend to name a beneficiary to the IRA, but she took no steps to name one and actually did the opposite. (CP at 46).

Accordingly, the Estate's new argument to affirm the trial court is without merit, and this Court should reverse and remand with instructions for the trial court to order Edward Jones to follow the custodial agreement.

2.6. There is No Basis to Find “Blatant Unfairness in the Bargaining Process” with Edward Jones or that Ms. Wood “Lacked a Meaningful Choice.”

Procedural unconscionability involves “blatant unfairness in the bargaining process and a lack of meaningful choice.” *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 518, 210 P.3d 318, 322 (2009).

Here, the Estate cites *Torgerson* in making a new argument of procedural unconscionability. *Torgerson* noted that “It is black letter law of contracts that the parties to a contract shall be bound by its terms.” *Id.* at 517. *Torgerson* then went on to hold that the party's procedural unconscionability claim was “meritless” because the party was able to negotiate the contract and had choice in deciding whether to enter into it or not. *Id.* at 518-20.

In the case at hand, Ms. Wood was not subject to any “bargaining process” let alone an unfair one. Rather, she worked with her—duty bound to act in her best interest—fiduciary, i.e., Edward Jones, and revoked all prior beneficiaries to her IRA while at the same time she chose not to name new beneficiaries. (CP at 46). This situation can hardly be said to be “unconscionable,” let alone even remotely unfair or adversarial. *See Torgerson*, 166 Wn.2d at 518. In fact, this situation is common. Furthermore, the idea that Ms. Wood’s attorney during the drafting of the Will, or her fiduciaries at Edward Jones, did not inform her of the consequences of not naming a beneficiary on her retirement accounts strains credulity. The record belays this claim because Ms. Wood submitted the beneficiary form the day after the codicil; had she wanted to name her estate as her beneficiary she certainly could have done so.

As to the “lack of meaningful choice,” it is objectively clear that Ms. Wood reviewed, and had the opportunity to review, the terms of the custodial agreement with her fiduciaries when creating the IRA account. (*See* Section 2.3). Given the hundreds of thousands, if not millions, of persons who create IRA’s with Edward Jones and other well-reputed companies every year—it borders on the preposterous to claim such process or custodial agreements are “unconscionable.”

Accordingly, the Estate’s “unconscionability” claim lacks any merit

and cannot be a new basis of affirming the trial court as a matter of law. This Court should reverse and remand with instructions that the Edward Jones account be distributed under the custodial agreement.

### **3. ATTORNEY FEES ON APPEAL**

Ms. Gonzales is entitled to attorney fees on appeal. The Estate makes no meritorious arguments and fails to demonstrate how the trial court's reasoning and ruling as a matter of law is justified. In this circumstance where Ms. Gonzales' fees on appeal are substantially similar to her half-portion of the asset she is fighting for, it is equitable to award her attorney fees for prevailing. *See* RCW 11.96A.150; *Cook v. Brateng*, 180 Wn. App. 368, 321 P.3d 1255 (2014) (holding court may direct that any attorney fees awarded be paid in such amount and in such manner as the court determines to be equitable, including from the assets of the estate or trust involved in the proceedings).

Respectfully submitted this 8th day of February, 2019,



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Attorney for Appellant

## CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on February 8, 2019, I caused to be served:

1. Reply Brief of Appellant

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\_\_\_\_\_  
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**February 08, 2019 - 1:35 PM**

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