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

IN RE THE MATTER OF: THE GILBERT MILLER TESTAMENTARY
CREDIT SHELTER TRUST

AND

THE ESTATE OF MARY EVELYN MILLER

RENE REMUND, Personal Representative of the ESTATE OF MARY
EVELYN MILLER,

Appellant,

v.

THE HEIRS OF THE GILBERT MILLER TESTAMENTARY CREDIT
SHELTER TRUST,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The facts of this case are relatively straightforward. Gilbert Miller (“Gib”) and Mary Evelyn Miller (“Evelyn”) were married. When Gib died in 1998, per the terms of his Will, a credit shelter trust (the “Trust”) was formed for Evelyn’s benefit to reduce the couple’s exposure to estate taxes. Evelyn was the Trust’s sole beneficiary during her lifetime. The couple intended that when Evelyn died, all Trust assets would pass to their only child, Leah.

Leah predeceased Evelyn, who died in 2012. After Leah’s death, Evelyn changed her Will (which would have distributed all her assets to Leah). Evelyn named some specific beneficiaries, and left the remainder of her assets in trust for the city of Winlock, Washington, where she was born and she and Gib had lived the majority of their lives. Evelyn did not have the power to change the terms of the Trust.

Gib and Evelyn owned commercial real estate as community property, and at Gib’s death his one-half interest in that property was transferred to the Trust. Evelyn’s half was never transferred. Whether Evelyn had a right to retain her own half of that property or was obligated to transfer it into the Trust at Gib’s death is the crux of this dispute.

After Evelyn’s death in 2012, there were no clear heirs of the Trust—Evelyn and Leah were the only named beneficiaries. Since both

were deceased and the order of their deaths unexpected, it was unclear who should inherit the Trust's estate, which was comprised of Gib's one-half of the commercial real estate, now worth approximately \$500,000. Through a court proceeding, it was determined that Gib and Evelyn's heirs at law should inherit the Trust property, and they did.

In 2017, the heirs at law sued Evelyn's estate, arguing that 20 years ago, at Gib's death, Evelyn *intended to transfer her own one-half of the commercial real estate to the Trust*, but neglected to do so. They argued that because the Trust *should have* been funded with the whole piece of commercial property at Gib's death, they—the intestate heirs entitled to Trust assets—should receive Evelyn's half of the property, which would otherwise pass to Evelyn's beneficiaries under the terms of her Will.

The intestate heirs' argument is based on supposition about Evelyn's *intent* at Gib's death in 1998, despite the fact that Gib's probate was closed in 2000, and the Trustees who funded the Trust died in 2011 and 2012.

On summary judgment, the trial court implored for additional guidance regarding the application of the statute of limitations in this case, but because of its interpretation of the broad powers granted to courts under RCW 11.96A, the trial court granted summary judgment to the

intestate heirs, ordering that Evelyn's half of the property pass to the
intestate heirs, rather than Evelyn's intended beneficiary under her Will.

Because the parties agree that Evelyn did not transfer her half of
the property to the Trust, and because all applicable statutes of limitation
have passed, barring the parties from now scrutinizing or complaining of
Evelyn's actions in funding the Trust, the trial court should be reversed.
Evelyn's half of the property should pass to the City of Winlock as she
intended. Regardless of what may have been *intended* 20 years ago,
Evelyn's half of the property was and remained her property, is therefore
controlled by her Will, and should pass to her intended beneficiary.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to grant summary judgment as a matter of law to Evelyn's Estate based on the undisputed facts of this case.
2. The trial court erred in granting summary judgment in favor of the non-moving party, the Heirs of the Gilbert Miller Testamentary Credit Shelter Trust dated May 18, 2018 (the "Order"). CP 320 – 323.
3. The trial court erred in imposing a constructive trust upon the one half interest in the commercial property held in the name of Mary Evelyn Miller as constructive trustee for the benefit of the Gilbert Miller Testamentary Credit Shelter Trust. CP 322.
4. The trial court erred in finding that the terms of the Credit Shelter Trust required the Credit Shelter Trust to be fully funded. CP 322.
5. The trial court erred in making findings regarding any party's intent at Gib's death in 1998, or in 1999 or 2000. CP 322.
6. The trial court erred in finding that "it was the intent that the Credit Shelter Trust would be funded with the entirety of the commercial real estate at issue that was co-owned by the parties." CP 322.
7. The trial court erred in finding that Evelyn Miller retained her one-half of the commercial real estate in question "through inadvertence or oversight." CP 322.
8. The trial court erred in making findings regarding the "beliefs" of Evelyn Miller and Leah Miller, when they died in 2012 and 2011, respectively, and neither left any statement regarding their "beliefs" with respect to the property in question. CP 322.
9. The trial court erred in declining to award fees to Evelyn Miller's Estate which were only incurred because the intestate heirs of the Credit Shelter Trust attempted to obtain assets which rightfully belong to the Estate. CP 323.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Whether the statute of limitations bars claims made regarding the funding of a testamentary trust made in 2017, when the probate of the Will creating that trust was closed in 2000 (CP 38). (Assignments of Error 1, 2, 4, 5, 6, 7, 8, 9.)
- B. Whether the statute of limitations bars claims made regarding the funding of an express testamentary trust made in 2017, when the trustees of that trust died in 2011 and 2012 (CP 67, 68). (Assignments of Error 1, 2, 5, 7.)
- C. Whether a constructive trust may be imposed based on Gib and Evelyn's alleged "intent" when all evidence of such is speculative, contradictory, and such "intent" occurred almost 20 years ago. (Assignments of Error 1, 2, 3, 6, 7, 8, 9.)
- D. Whether the existence of a constructive trust was proven by clear, cogent, and convincing evidence. (Assignments of Error 1, 2, 3.)
- E. Whether an Estate seeking to protect its interest in the testator's property as bequeathed under the testator's Will must pay its own attorneys' fees and costs when the action attempting to convert the testator's assets is barred by all applicable statutes of limitation. (Assignment of Error 9.)
- F. Whether the proper statute of limitations based on the facts alleged is RCW 11.96A.070 (which governs proceedings relating to express trusts) or RCW 4.16.080(4) (which governs relief upon the ground of fraud). (Assignments of Error 1, 2.)

IV. STATEMENT OF THE CASE

A. At Gib's Death in 1998, His Will Provided for the Creation of a Credit Shelter Trust for the Benefit of Evelyn.

This dispute concerns the funding of a trust created under the Will of Gilbert Miller ("Gib") after his death on November 30, 1998. Clerk's Papers ("CP") 1-6, 264. Gib's wife Mary Evelyn Miller ("Evelyn") and

their only daughter Leah served as co-trustees of the Trust. Leah died on October 8, 2011. CP 67. Evelyn died on October 18, 2012. CP 68.

Gib's Last Will and Testament was admitted to probate under Pierce County Cause No. 99-4-00335-0 on March 3, 1999. CP 38; 127-139. Evelyn served as non-intervention personal representative of Gib's estate. Gib's probate was closed on April 19, 2000. CP 38.

1. Gib's Will Gave His Executor Sole Discretion to Decide Which Assets Would Fund the Trust.

Article III of Gib's Will provided for the creation of a Credit Shelter Trust ("the Trust"). CP 128-129. Article III(A) provides that the Trust should be funded with a portion of Gib's estate "equal to the largest amount that can pass free of federal estate tax..." but also states:

I recognize that the sum established by this paragraph may be zero and may be affected by the actions of my Personal Representative in exercising certain tax elections.

CP 128.

Article III(A) of Gib's Will goes on to state:

Except as specifically provided for, it shall be at the *sole discretion of my Executor* which assets shall be transferred either to the Credit Shelter Trust or the Residual/Marital Deduction Trust.

CP 129. Emphasis added.

Article III(B) of Gib's Will directs that all income from the Trust be paid to Evelyn during her lifetime, and if the income was not adequate for her health, education, maintenance, and support,

...the trustee is authorized to distribute such portions of the principal of the trust estate as, in the discretion of the trustee, is reasonable for such purposes...

And that:

...I desire that the trustee resolve in [Evelyn's] favor any uncertainty concerning distributions from the principal.

CP 129.

Gib's Will provided that the Trustees and his Personal Representative acting thereunder could "[r]ely with acquittance on advice of counsel on questions of law." CP 134.

2. Evelyn Funded the Trust with Gib's One-Half of the Property.

Gib and Evelyn owned a piece of commercial property located in Lewis County, Washington (the "Property"). The parties agree that the Property was acquired jointly by Gib and Evelyn, as husband and wife, in 1953. CP 157. There is no dispute that Gib and Evelyn owned the Property as community property, and that during their marriage each had a one-half interest in the Property.

At Gib's death in 1998, the Property was valued at \$627,000. CP 267. Gib's one-half of the Property was valued at \$313,500. CP 267.

The federal exemption from estate taxes in the year of Gib's death was \$625,000, and his federal estate tax return notes that the Trust was to be funded in that amount. CP 265. The parties agree that the only property transferred into the Trust was Gib's one-half interest in the Property, worth \$313,500.

When Gib died in 1998 Evelyn was 86 years old. CP 68. She did not transfer \$625,000 worth of assets to the Trust at Gib's death. She did not transfer any liquid assets to the Trust, although plenty of liquid assets were available. She did not transfer her own one-half of the Property to the Trust. Gib's estate was closed on April 19, 2000. CP 38.

The Millers' estate planning attorney, Ralph Olson, "handled the probate [of Gib's estate] for Evelyn." CP 219, ¶ 6. Mr. Olson prepared the deed transferring Gib's half of the Property to the Trust, which Evelyn signed, and which was recorded on December 20, 1999. CP 220, ¶ 10; CP 59-62. Mr. Olson acknowledges that neither he nor any other person transferred Evelyn's one-half of the Property to the Trust, and stated in 2018 that he "honestly do[es] not know" why Evelyn retained her half of the Property. Ibid.

Evelyn was the Trust's sole beneficiary during her lifetime. Gib and Evelyn's estate plans dictate that following the last spouse's death, all remaining assets be distributed to their only child, Leah Miller.

B. In the Year 2000, Attorney Olson Confirmed that the Trust was Only Funded with Gib's Half of the Property.

When Gib died in 1998 and the Trust was funded in early 1999, Leah was approximately 58 years old (CP 67) and Evelyn was approximately 86 years old (CP 68). Evelyn and Leah served as co-Trustees of the Trust. CP 70. In 1999, the year after Gib's death, attorney Olson prepared a number of letters, documents, and agreements relating to the Property, and prepared them all to be signed by Evelyn and Leah as co-Trustees. CP 220, ¶¶ 12 – 14. In a declaration signed in March, 2018—approximately 19 years later—Olson stated that the fact that he drafted these documents to be signed by Evelyn and Leah as co-Trustees suggested that he “believed” the Trust held 100% of the Property. *Id.*

However, in a letter dated March 27, 2000—contemporaneous to the relevant actions—attorney Olson stated to Leah:

As you know, we already transferred Gib's half interest in the Exit 70 property to you and your Mom as co-trustees under the credit shelter trust. We may be able to squeak out a little bit more but I'll have to check the numbers again.

CP 70.

The parties acknowledge that the sole purpose for establishing the Trust was “for avoidance of estate taxes.” CP 64. Despite the fact that Evelyn never transferred her half of the Property to the Trust, all of Evelyn's accountants and advisors prepared the Trust's tax returns and

Evelyn's personal tax returns as though the Trust owned 100% of the Property. However, the record shows that the tax treatment was inconsequential—"the tax effect would have been exactly the same with one half of the costs and fees attributed to the [Trust] and one half of the costs and fees attributed to Evelyn Miller, individually." CP 72-73.

Additionally, because of the higher federal estate tax exemption in 2012 at Evelyn's death (\$5,120,000), no estate tax benefits would have been achieved if Evelyn's half of the Property were transferred to the Trust instead of remaining in her own name. There is no dispute that the tax consequences would be any different if Evelyn's half of the property had been held in trust versus held by Evelyn outright.

C. When Leah Died in 2011, Evelyn Executed a New Will.

Leah died on October 8, 2011. CP 67. Approximately six months later, on June 12, 2012, Evelyn signed a new Will. CP 174-178. Evelyn's Will made several specific bequests and gave the residue of her estate—including her one-half of the Property that she owned consistently since the date she acquired it half a century earlier with her husband—to a trust to be established for the City of Winlock, Washington. Evelyn directed that these assets should be used

for economic development for the City of Winlock.
Consideration should be given to attracting professional services to the city, including, but not limited to, legal,

accounting and health professionals. In addition, the attraction of food and entertainment providers is encouraged. The trust may, for example, provide subsidies such as first year's rent and/or first year's utilities to persons or entities providing the services referenced above. Preference should be given to tenants willing to occupy currently vacant facilities. ...

CP 175-76.

D. A Judicial Proceeding was Required to Determine the Trust's Heirs after Evelyn's Death.

Evelyn died on October 18, 2012 and her Will was admitted to probate on November 29, 2012. CP 179-180. Although Evelyn was able to update her Will following Leah's death, the terms of the Trust were irrevocable and could not be changed. Because the only remainder beneficiary of the Trust predeceased Evelyn, it was difficult to determine who should inherit assets remaining in the Trust. By an order dated December 18, 2015, a Lewis County Superior Court established that the beneficiaries of the Trust should be Gib's and Evelyn's remote heirs at law (collectively, the "Heirs") and authorized distribution of trust assets to them. The parties agree that distribution of the Trust's assets to the Heirs is proper.

Evelyn's Will is exceedingly clear that, with her own assets, she wished to benefit the City of Winlock, where she was born in 1912 (CP 68), and where she and Gib lived and were actively involved in community development. CP 23. The Heirs do not contest Evelyn's

intent to benefit the City of Winlock with her own assets. However, the Heirs claim that Evelyn's half of the Property did not belong to her, and should now therefore pass to them rather than the City of Winlock.

E. The Heirs Petitioned the Court to Obtain Evelyn's Half of the Property.

A few months after learning about their unexpected windfall from the Trust, the Heirs petitioned under Cause No. 14-4-00164-4, for a declaration of rights and to impose a constructive trust over Evelyn's half of the Property. CP 291-301. On June 2, 2017, the Heirs of Gilbert Miller petitioned again in Lewis County Superior Court, this time under a new Cause Number (17-4-0017921) seeking to establish some right in Evelyn's half of the Property that was never transferred to the Trust and remained in her name at her death. CP 1-6. The Heirs of Evelyn Miller joined in the Gilbert Miller Heirs' Petition on June 16, 2017 (the Heirs at Law of Gilbert and Evelyn will be referred to collectively as the "Heirs" throughout this brief). CP 74-80. The Heirs alleged, among other things, that the "Trustee breached her duty to fully fund the Trust." CP 297. Because of this alleged breach, the Heirs argued that a constructive trust should be imposed on Evelyn's half of the Property that remained in her name. CP 299.

The Petition itself describes the situation as follows:

The [Trust] owns one half of the real property. One half remains in the name of Mary Evelyn Miller and subject to administration through the estate. The parties disagree as to the rightful owner of the one half interest and therefore a judicial proceeding to determine the relative rights to that property interest is required.

CP 4:17-21.

F. The Trial Court Ignored the Statutes of Limitation and Granted Summary Judgment to the Heirs Based on Court's Authority Under TEDRA.

The Estate filed a motion for summary judgment on February 12, 2018. CP 101-116. On March 19, 2018, the Heirs responded. CP 191-210. Evelyn's Heirs responded separately on the same day, specifically regarding the Estate's request for attorney's fees. CP 211-216. The Estate replied in support of its Motion on March 23, 2018, and the matter was heard on March 30, 2018. CP 310-319. In that hearing, the Honorable Judge Toynebee expressed significant questions regarding the interplay between the statutes of limitation under RCW 11.96A (Washington's Trust and Estate Dispute Resolution Act, "TEDRA") and TEDRA's broad grant of authority to courts to resolve issues under TEDRA. Judge Toynebee asked:

How do the statutes of limitation that are under TEDRA reconcile with the declaration in TEDRA in 11.96A.020, which is the wide and ample plenary powers of the court in resolving issues that arise? It seems to almost lay it all open for the court to have all sorts of authority. When in doubt, the court nevertheless has full power and authority to

proceed with such administration and settlement in any manner and way that the court deems right and proper.

How does that reconcile with these statutes of limitation?

Verbatim Report of Proceedings (“RP”) 10:18-11:1-2.

Despite the fact that all actions or inactions occurred almost 20 years before the date of the hearing, Judge Toynbee made several findings regarding Evelyn’s intent following Gib’s death in 1998, 1999, and 2000 when the Trust was formed and funded. RP 25-26. The Judge also stated:

I realize that this is a case that in my estimation would have benefited from some guidance from the appellate courts, and finding none myself, I will urge the parties to pursue this case so that we may have – so we may be better informed, I guess in my words, by somebody who has more authority than I do. I would have greatly appreciated some guidance, and I think this is the type of case that should be – you know, either I’m correct or I’m incorrect, and if the statute of limitations applies in this case, then it’s done.

RP 26:15-20.

The Estate timely filed a Motion for Reconsideration (CP 324-239), which was denied. CP 370. The Estate timely appealed. CP 371-380.

V. ARGUMENT

A. Standard of Review Is De Novo.

This Court reviews a grant of summary judgment de novo. Verdon v. AIG Life Ins. Co., 118 Wn. App. 449, 452, 76 P.3d 283 (2003).

Summary judgment is appropriate if the record demonstrates an absence of

any genuine issues of material fact. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. Atherton Condo. Apt.-Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In certain cases, when a challenged factual finding is required to be proved at trial by clear, cogent, and convincing evidence, the Court of Appeals will incorporate that standard of proof in conducting substantial evidence review. In re Trust & Estate of Melter, 167 Wn. App 285, 300, 273 P.3d 991 (2012). Washington courts have been clear that “[e]vidence which is ‘substantial’ to support a preponderance may not be sufficient to support the clear, cogent, and convincing” standard. In re Estate of Reilly, 78 Wn.2d 623, 640, 479 P.2d 1 (1970).

On appeal, the trial court’s findings on summary judgment are entitled to no weight. Chelan Cty. Deputy Sheriffs’ Ass’n v. Cty. of Chelan, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987); Eagle Grp., Inc. v. Pullen, 114 Wn. App. 409, 58 P.3d 292 (2002).

The Heirs’ central claim is that Evelyn intended to transfer her half of the Property to the Trust after Gib’s death, and is based on Evelyn’s lack of action in 1998, 1999, and 2000. The only possible evidence relating to Evelyn’s intent are documents from that time period prepared by her attorney, which are contradicted by statements the same attorney

made contemporaneously when the Trust was funded. Based on the lack of any cogent or convincing evidence as to any person's intent or belief in 1998, 1999, and 2000 when the Trust was formed and funded, among other reasons, the Estate of Evelyn Miller implores this Court to reverse the trial court's order on summary judgment.

B. The Statutes of Limitation Bar the Heirs' Claims that the Trust Was Improperly Funded.

More than 17 years passed between the time a party could have filed an action regarding the Trust's funding and when the Heirs filed their claim. Washington's legislature has been extremely clear that claims relating to an estate or trust brought 17 years after the complained-of action or inaction may not be heard.

1. The Heirs' Claim that Evelyn Did Not Properly Fund the Trust are Time-Barred.

RCW 11.68.110(2) provides that an estate's personal representative

will be automatically discharged without further order of the court and the representative's powers will cease thirty days after the filing of the declaration of completion of probate, and the declaration of completion of probate shall, at that time, be the equivalent of the entry of a decree of distribution in accordance with chapter 11.76 RCW for all legal intents and purposes.

RCW 11.68.110(2).

Under RCW 11.96A.070(2),

an action against a personal representative for alleged breach of fiduciary duty by an heir, legatee, or other interested party must be brought before discharge of the personal representative.

RCW 11.96A.070(2).

Gib's Will was admitted to probate on March 3, 1999, and a declaration of completion of the probate of his estate was filed on April 19, 2000. CP 38. Evelyn as personal representative of Gib's estate had the obligation to fund the Trust according to Gib's Will. At the time, Evelyn was 86 years old and relied on attorney Ralph Olson.

Under clear Washington law, Evelyn was discharged as the non-intervention personal representative of Gib's estate on May 19, 2000. Yet the Heirs' claim stems directly from Evelyn's actions or inactions as personal representative of Gib's estate. Specifically, the Heirs allege that they are now entitled to Evelyn's half of the Property because:

Ms. Miller never transferred the other half of the real property to the [Trust] and never completed funding of the [Trust] with other assets.

CP 3:16-17.

The Heirs claim that the Trust created under Gib's Will was improperly funded was made on June 2, 2017 – more than 17 years after Gib's probate was closed and Evelyn was discharged as personal representative.

Any claims that Evelyn, as personal representative, failed to properly fund the Trust created under Gib's Will are time-barred and should be dismissed with prejudice.

2. The Heirs' Claim that Leah or Evelyn as Co-Trustees Failed to Properly Fund the Trust are Time-Barred.

RCW 11.96A.070(1)(c) provides that a beneficiary must initiate a judicial proceeding for breach of trust against a trustee within three years after the trustee's death.

Leah served as co-Trustee of the Trust and died on October 8, 2011. Thus, any claims against her regarding her role as co-Trustee had to be filed by October 8, 2014.

Based on attorney Olson's March 27, 2000 letter to Leah reminding her that they had already transferred "Gib's half interest in the [Property] to you and your Mom as co-Trustees..." (CP 70), Leah knew that the Trust was only funded with half of the Property.

Leah, as the remainder beneficiary of the Trust, had the right to object if the Trust was not fully funded. As co-Trustee, she also had the authority to fund the Trust with additional assets. She did not. The time period during which any claims could have been raised about any wrongdoing by Leah has long passed.

The same statute applies to bar claims against Evelyn as co-Trustee. Evelyn died on October 18, 2012, and no claim was filed against her by October 18, 2015.

3. Claims Are Time-Barred to Avoid Unreliable Evidence.

The record contains clear evidence that at the time Gib's half of the Property was transferred to the Trust, the transfer of Gib's half (rather than the whole) was intentional. See Gib's estate tax return, Form 706, CP 264-267; March 27, 2000 letter from attorney Ralph Olson stating that Gib's half of the Property had been transferred to the Trust, CP 70.

Perplexingly, the record also contains evidence that Evelyn's professional advisors—attorney Olson and CPAs—thought the Trust was the sole owner of the Property. See CP 218-221.

Attorney Olson prepared Gib's Will, was Evelyn's lawyer through the probate of Gib's Will and advised Evelyn on the creation and funding of the Trust. The clearest and most direct source of contemporaneous evidence of intent is a letter from Olson to Leah dated March 27, 2000:

As you know, we already transferred Gib's half interest in the Exit 70 property to you and your Mom as co-trustees under the credit shelter trust. We may be able to squeak out a little bit more but I'll have to check the numbers again.

CP 70.

Nevertheless, 18 years later, Olson inferred that he had intended to transfer the whole of the Property to the Trust:

I did transfer by deed Gilbert's one half of the commercial property to the [Trust] on December 20, 1999. I understand that the other half was never transferred to the [Trust] and that is the nature of this litigation. I honestly do not know why that did not occur, but I am absolutely confident that the intent was to include all of that commercial property in the [Trust].

CP 220, ¶ 10.

Olson bases his “confidence” about Evelyn’s intent on the fact that he drew up several documents at the time to be signed only by the co-Trustees as the owners of the Property. See id. However, Olson’s drafting of those documents and his direct communications with Leah and Evelyn at the time contradict his belated expression of his intent 18 years later. The contemporaneous documents prepared by Olson show an intent to transfer only Gib’s half of the property, which is what happened.

The record—particularly attorney Olson’s March 27, 2000 letter to Leah only—suggests that Evelyn, then 86 years old, was not involved in the day to day concerns of trust administration. Therefore, any inference as to Evelyn’s “intent” is exceedingly hard to draw.

Confoundingly, Olson is the only living person able to shed any light on anyone’s intent at the time. However, neither his contemporaneous documentation nor his speculative recollection of what

occurred or why can or should be relied upon in this proceeding. Olson's equivocations are not clear evidence of any party's intent: Olson did one thing, now says he meant another, and does not remember what happened or why, but has pieced together an explanation that makes sense to him in light of the documents he reviewed almost 20 years later. This is not evidence, and certainly not sufficient evidence to overturn a recorded deed that shows that Evelyn has owned the Property in question since she acquired it in the 1950s, or to prove anything about Evelyn's intent in 1998, 1999, and 2000 when the relevant actions occurred.

Adding to the confusion, Gib's federal estate tax return (Form 706) reveals that Gib filed a prior federal gift tax return for 1996, but the record contains no indication as to how much of Gib's gift tax exemption was previously consumed. CP 226, 7a. The 706 reports that Gib's Trust would be funded with \$625,000, the then-available estate tax exemption. But it is unclear whether Gib's previous taxable gift reduced the available exemption at his death.

The fact that all actions (or alleged inactions) took place in 1998, 1999, and 2000, and that all of the key actors are long deceased, makes it extremely difficult to prove anything regarding what Gib or Evelyn intended at the creation or funding of the Trust. The only person who can offer true insight into Gib's or Evelyn's intent has made statements that

contradict his own statements and actions at the time, and has admitted that he cannot clearly remember why he only transferred Gib's half of the Property to the Trust. This evidence cannot meet the clear, cogent, and convincing standard as required under law, and the inability to produce cogent evidence of Gib's or Evelyn's intent 20 years ago exemplifies the legislative reasons for barring Petitioners' claims under the relevant statute of limitations, which limits actions relating to trusts and estate to three years after a fiduciary's death.

C. The Trial Court Erred in Supplanting Evelyn's Decision as Nonintervention PR of Gib's Estate.

Evelyn as nonintervention personal representative of Gib's estate had broad authority to interpret and effectuate the terms of his Will, and her decisions should remain undisturbed. In re Estate of Rathbone, 190 Wn.2d 332, 412 P.3d 1283 (2018). Rathbone provided clear instructions as to how to resolve the legislature's broad grant of authority to courts under TEDRA versus the authority of a nonintervention personal representative to administer an estate without a court's intervention. In our Supreme Court's own framing, Rathbone "involves the issue of whether and to what extent superior courts have the authority to intervene in the administration of nonintervention estates." Id. at 334.

As in this case, the Rathbone matter involved one beneficiary's assertion of what the decedent's intent was ("Glen argued that Ms. Rathbone intended to give him either the Road K Property or \$350,000.") Id. at 337 (emphasis added). According to Glen, the nonintervention personal representative's decision regarding allocation and funding reduced Glen's portion of the estate (and enriched the personal representative). Id. Washington's Supreme Court held:

Because this case involves a nonintervention will, respect for Ms. Rathbone's wish that a court not be involved in the administration of her estate must frame our analysis.

Ms. Rathbone gave Todd nonintervention powers and authority to construe the will and resolve all matters pertaining to disputed issues or controverted claims. ...

The issue is whether a statute establishes authority for a trial court to interpret a will's language overruling a personal representative's interpretation, as the trial court did in this case.

Id. at 338-39.

In Rathbone, as in this case, the trial court concluded that "TEDRA itself" gave the superior court wide latitude. But Washington's Supreme Court disagrees:

...the power to administer an estate and "construe" a will's directions lies with the personal representative in a nonintervention probate—not the courts.

Id. at 346.

Rathbone made clear that “[t]he purpose of nonintervention powers is to prevent courts from managing personal representatives’ decisions regarding estate administration.” Id. at 345. If TEDRA gave superior courts the kind of broad authority the trial court believed it had,

courts could rule on any issue permitted under TEDRA, which could include any dispute over the administration of an estate. *See* RCW 11.96A.030(2). Such broad intervention by courts goes against Ms. Rathbone’s intent that courts not be involved in the administration of her estate.

Id. at 346-47. Our Supreme Court squarely rejected the idea that TEDRA grants broad authority for courts to intervene and second-guess the administration decisions of nonintervention personal representatives. Id.

Here, as in Rathbone, Gib’s Will granted broad powers to his nonintervention personal representative. The Will itself recognized that the Trust might not be funded at all:

I recognize that the sum established by this paragraph may be zero and may be affected by the actions of my Personal Representative in exercising certain tax elections.

... Except as specifically provided for, it shall be at the sole discretion of my Executor which assets shall be transferred either to the Credit Shelter Trust or the Residual/Marital Deduction Trust.

CP 128-129 (emphasis added).

The parties agree that Evelyn did not transfer her half of the Property to the Trust. Under Rathbone, conclusions that would disturb the

decisions and actions of Evelyn as nonintervention personal representative (such as whether Evelyn's interpretation and effectuation of Gib's intent expressed in his Will was proper) are beyond the trial court's reach.

D. The Trial Court Erred in Determining Evelyn's Intent.

The trial court's findings regarding Gib's and Evelyn's intent in the late 1990s were in error not only because the statute of limitations bars such speculative and hypothetical exercises, but also because Washington law is clear that: (a) the testator's intent controls the disposition of his assets (In re Riemcke's Estate, 80 Wn.2d 722, 728, 497 P.2d 1319, 1323 (1972)); and (b) intent should be determined by the four corners of the testator's Will (Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 113 P.3d 463 (2005)). Here it is undeniable that Gib intended his estate would be administered without court intervention and that his personal representative had wide latitude in funding the Trust—indeed, Gib's Will expressly authorizes that the Trust may not be funded at all.

Gib and Evelyn's estate planning attorney testified that the sole reason the Trust was created was to avoid estate liability, CP 64-65. In practical terms, the tax consequences of Evelyn's funding (or failure to fully fund) the Trust had no impact whatsoever on her income or estate tax liability (CP 72-73).

There is no evidence in the record showing that Evelyn was required to transfer her one-half of the Property into the Trust. She had a duty to effectuate the terms of Gib's Will, but there is no reason to believe that she was required to do so by transferring her own property to the Trust. The Trust was to be funded with Gib's half of the community property. Indeed, transferring 100% of the Property to the Trust would have overfunded the Trust—the maximum estate tax exemption amount was \$625,000, and the Property was worth more. Gib's estate had ample liquid assets which could have been used to fund the Trust, and all available contemporaneous records suggest that liquid assets—not Evelyn's half of the Property—would be used to fund the Trust to the amount of Gib's estate tax exemption, although the record is not clear what that amount was. (See Gib's Form 706, CP 264-267; March 27, 2000 letter from Olson, CP 70.) Evelyn's right to invade the Trust's principal during the 14 years she survived after Gib's death, and Gib's clear direction that any questions regarding distribution of principal be resolved in Evelyn's favor, renders highly speculative the question of if liquid assets had been transferred to the Trust, whether any of those assets would remain, and if any, how much.

E. The Trial Court Erred in Imposing a Constructive Trust.

If this Court concludes that making findings regarding Gib's and Evelyn's intent 20 years ago is appropriate and not barred by the statute of limitations, the record fails to meet the requirements to impose a constructive trust.

Constructive trusts are creatures of equity and are only imposed by Washington courts when equity is required to correct an otherwise inequitable result. Here, the alleged "inequity" is that Evelyn retained her half of the Property, which had belonged to her since the 1950s and which all parties acknowledge was her sole and separate property following Gib's death. The Heirs' claim rests on a foundational allegation that Evelyn was unjustly enriched by keeping her own Property, and that consequently, Evelyn's intended beneficiary under her Will (the City of Winlock, where she was born, where she and Gib lived, and they were devoted community members), would be unjustly enriched by receiving Evelyn's bequest. For the reasons outlined below, the trial court's imposition of a constructive trust in this case was in error.

1. The Heirs Cannot Prove Constructive Trust by Clear, Cogent, and Convincing Evidence.

Clear, cogent, and convincing proof is essential for the imposition of a constructive trust, whereby equity compels the conveyance of property interests unjustly or unconscionably to the person justly entitled thereto, and

fraud, misrepresentation, bad faith or overreaching usually forms the base upon which a constructive trust is erected.

Manning v. Mt. St. Michael's Seminary of Philosophy & Sci., 78 Wn.2d 542, 546, 477 P.2d 635 (1970). (Emphasis added.)

The Heirs have not shown that Evelyn received any benefits from funding the Trust with only Gib's half of the property. Evelyn simply kept her half of the Property, which all parties agree belonged to her since she and Gib acquired the Property in the 1950s. There is no proof whatsoever in the record that Evelyn was required to transfer her half of the Property to the Trust after Gib's death. Evelyn had a duty to fund the Trust, but was not specifically required to transfer her own property to the Trust.

Gib's Will gave his personal representative (Evelyn) wide latitude in deciding which assets would fund the Trust:

[e]xcept as specifically provided for, it shall be at the sole discretion of my Executor which assets shall be transferred...

CP 129.

Gib's Will also acknowledged that the Trust might not even be funded at all, based on his personal representative's actions:

I recognize that the sum established by this paragraph may be zero and may be affected by the actions of my Personal Representative...

CP 128.

As it happened, the Trust was funded exclusively with Gib's half of the property, which is now valued at approximately \$500,000. The trial court imposed a constructive trust in this case based on its speculative conclusions regarding Gib's intent in including the credit shelter trust provision in his Will and Evelyn's intent in funding the Trust in the late 1990s. But the trial court's conclusions are not based on clear, cogent, and convincing evidence.

The only evidence regarding Gib's intent is the terms of his Will and attorney Olson's testimony regarding Gib's intent as expressed in his Will.

Attorney Olson testified that Gib's and Evelyn's intent in including the provisions for a credit shelter trust as follows:

Inclusion of trusts within the wills was for avoidance of estate taxes. Neither party expressed to me any concern regarding the ability of the other to manage financial assets. Neither party requested me to arrange for their estates to be held in trust, other than agreeing with my suggestion that a trust be used to avoid potential estate taxes in the future.

CP 64-64.; see also Article III Section B(1), (2), and (3) of Gib's Will, CP 129.

Gib's dual purposes in creating the Trust were to reduce exposure to estate taxes and to benefit Evelyn. Article III(B) of Gib's Will directs that all income from the Trust be paid to Evelyn during her lifetime, and if

the income was not adequate for her health, education, maintenance, and support,

...the trustee is authorized to distribute such portions of the principal of the trust estate as, in the discretion of the trustee, is reasonable for such purposes...

And that:

...I desire that the trustee resolve in [Evelyn's] favor any uncertainty concerning distributions from the principal.

CP 129.

Because the Heirs have not and cannot prove that Gib's primary purposes in establishing the Trust were anything other than to:

(1) minimize tax exposure and (2) benefit Evelyn, Gib's intent should not now be twisted to forcibly remove Evelyn's half of the Property from her estate. The trial court's imposition of a constructive trust in an attempt to effectuate Gib's intent was done so in error.

Likewise, the only evidence regarding Evelyn's intent from the late 1990s are (a) various documents prepared by attorney Olson; (b) Evelyn's advisors' "belief" that the Trust held 100% of the Property; and (c) Olson's current inconsistent and speculative statements regarding Evelyn's intent 20 years ago (see CP 221 ¶ 16). Olson is the only witness with any relevant knowledge regarding Evelyn's intent. But strong contemporaneous evidence casts grave doubt on Olson's present beliefs: Olson prepared a deed in 1999 which clearly only transferred Gib's half of

the Property to the Trust (CP 59-62; CP 223 ¶ 10); and Olson confirmed to Leah in 2000 that only Gib's half of the Property had been transferred to the Trust. CP 70.

It is not surprising that now, almost 20 years after the relevant transactions, Olson cannot remember why certain things were or were not done. Furthermore, Olson's contradictory statements fail to meet the clear, cogent, and convincing evidence necessary to impose a constructive trust in this case.

Moreover, there is no evidence that Evelyn was "unjustly enriched" by holding title to her own Property, or that the City of Winlock would be unjustly enriched by receiving the bequest that Evelyn clearly intended.

2. Evelyn Intended to Benefit the City of Winlock.

Evelyn's intent that her estate benefit the City of Winlock is clear and undisputed. If Evelyn had wanted other, and specifically the Heirs, to benefit from her estate assets, she had ample time to include them in her Will but she did not.

To the extent the trial court imposed a constructive trust based on its determination of Evelyn's intent regarding the funding of the Trust, it did so in error. The only evidence in the record the trial court could have relied on in reaching its conclusions about Evelyn's intent were the

contradictory statements and actions of her advisors relating to the Property. Attorney Olson transferred only Gib's half of the Property to the Trust and confirmed contemporaneously that only Gib's half had been transferred. Olson's current "belief" and that of Evelyn's advisors is not evidence of Evelyn's intent. Evelyn's intent can be clearly seen in her actions and in her Will: she did not transfer her half of the Property into Trust after Gib's death, and she did change her Will to benefit her intended beneficiaries. If her attorney or CPA prepared incorrect forms and documents that Evelyn signed (between age 86 when Gib died and age 100 when she died), those forms cannot and should not override Evelyn's own actions, which clearly show that she intended to keep the Property she had owned since the 1950s and that she wanted her assets, including her half of the Property, to benefit the City of Winlock. To the extent the trial court found that the mistaken actions of Evelyn's advisors was sufficient to prove Evelyn's intent by clear, cogent, and convincing evidence when Evelyn's own actions support a diametrically opposite finding of her intent was error.

F. This Court Should Award the Estate its Attorney's Fees on Appeal.

The trial court erred in failing to award the Estate its attorney's fees. A court has discretion to award attorney's fees to any party in a

TEDRA action. RCW 11.96A.150(1). The court may award fees as it deems equitable, considering any factors it deems relevant and appropriate. Id. This Court reviews the trial court's attorney fee decision for an abuse of discretion. In re Guardianship of Matthews, 156 Wn. App. 201, 212, 232 P.3d 1140 (2010).

The Heirs are entitled to, and in fact, received all assets in the Trust. But this action is based solely on the Heirs' allegations that they are entitled to more than what was in the Trust when Evelyn died. These allegations are founded on the Heirs' speculation regarding Gib's intent to create the Trust and Evelyn's intent to fund the Trust nearly 20 years ago. Despite the scant evidence regarding intent, and fact that Evelyn died for more than six years ago, the Heirs continue to insist that they should receive Evelyn's half of the Property, which is not an asset of the Trust.

This action was clearly time-barred and should never have been brought. Thus, the Heirs had no basis to claim an interest in the Property. The Heirs already received an unexpected windfall of approximately \$500,000 from remote relatives, and then forced Evelyn's Estate to incur needless attorney's fees to defend their baseless claims.

Washington courts generally favor the protection of estates through the award of attorneys' fees. Laue v. Elder, 106 Wn. App. 699, 713, 25 P.3d 1032 (2011). Because preservation of the estate for the intended

beneficiaries is a primary concern with respect to fee awards in estate cases, courts have frequently found that equity requires a party who unsuccessfully brings a suit that does not benefit the estate to pay the attorney's fees of others involved in the litigation. In re Estate of Kerr, 134 Wn.2d 328, 344, 949 P.2d 810 (1998). In this case, the Personal Representative of Evelyn's Estate was duty-bound to uphold Evelyn's Will and protect her assets. The Estate's beneficiary—the City of Winlock—should not be forced to bear the costs of this litigation. This Court should remand for the trial court to consider an award of attorney's fees in light of the required reversal.

This Court should also award the Estate's appellate attorney's fees under RCW 11.96A.150 and RAP 18.1. This Court has discretion to award attorney's fees on appeal. RCW 11.96A.150(1); Kwiatkowski v. Drews, 142 Wn. App. 463, 500-01, 176 P.3d 510 (2008). The Court should reverse the trial court's ruling, remand for an award of attorney's fees, and award the Estate's attorney's fees on appeal.

VI. CONCLUSION

For the reasons stated above, the trial court incorrectly ruled that Evelyn's half of the Property, which was never transferred to the Trust, should be distributed to the Trust's Heirs. This Court should reverse and

remand for consideration of an award of trial court fees and should award the Estate's fees on appeal.

RESPECTFULLY SUBMITTED this 19th day of October, 2018.

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CERTIFICATE OF SERVICE

I, Nicola Derbyshire, hereby certify that on October 19, 2018, I served a copy of the preceding Appellant's Opening Brief on the parties listed below in the manner shown:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of October, 2018.



Nicola Derbyshire, Paralegal

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