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Division II
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CASE NO. 52630-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICA JEAN McLEAN (aka WRIGHT), LUKE G. SPRAGUE, and
ZECHARIAH E. SPRAGUE,

PETITIONERS,

v.

THE GORDON AND FRANCES SALES FAMILY TRUST,

RESPONDENTS

PETITIONERS' OPENING BRIEF

W. Jeff Davis, WSBA No. 12246
BELL & DAVIS PLLC
526 North Fifth Avenue
Sequim, Washington 98382
(360) 683-1129
Attorneys for Petitioners

TABLE OF CONTENTS

Cover Sheet.....i

Table of Contents.....ii,iii

Table of Authorities.....iii,iv

Table of Statutes.....v

Table of Court Rules.....v

I. INTRODUCTION.....1,2

II. ASSIGNMENT OF ERROR.....2,3

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....3

IV. STATEMENT OF THE CASE.....3,13

 A. Overview of Case.....3-5

 B. Procedural History 5-11

 C. Standard of Review.....11-13

V. ARGUMENT.....12-32

 A. RCW 11.96 A.020 Does not give the Trial Court the Ability to Interpret a Trust Abstract to Re-Create Missing Trust Terms.....13-16

 B. The Trial Court Improperly Used the Abstract to Re-Create Missing Trust Terms.....16-19

 C. The Trial Court Had No Authority to Re-Create Missing Trust Provisions.....19-22

 D. The Findings of Fact Are Not Supported by Substantial Evidence and the Findings Do Not Support The Conclusions of Law.....22-32

| | |
|-----------------------------|----|
| VI. ATTORNEY'S FEES..... | 33 |
| VII. CONCLUSION..... | 34 |
| CERTIFICATE OF SERVICE..... | 35 |

TABLE OF AUTHORITIES

| | |
|--|--------|
| <i>Black’s Law Dictionary,</i> 1292 (Revised 4 th ed. 1968)..... | 21 |
| <i>Black’s Law Dictionary,</i> 1294 (Revised 4 th ed. 1968)..... | 22 |
| <i>Casterline v Roberts,</i> 168 Wn App. 376, 284, P.3d 743, 745-746 (2012)..... | 22 |
| <i>Choi v Sung,</i> 154 Wn. App.303, 225 P.3d 425, 431 (2010)..... | 13, 22 |
| <i>Farrell v Mentzer,</i> 102 Wash. 629, 632, 174 P.2D 482 (1918)..... | 19 |
| <i>Hubbell v Ward,</i> 40 Wn2d 779, 246, P.2d 468 (1952)..... | 19 |
| <i>In re Button’s Estate,</i> 79 Wn.2d 849, 490 P.2d 731 (1971)..... | 28 |
| <i>In re Det. of LaBelle,</i> 107 Wn.2d 196, 209, 728, P.2d 138 (1986)..... | 13 |
| <i>In re Estate of Black</i> 153 Wn.2d 152, 102, P.3d 796, 802 (2004)..... | 13 |
| <i>In re Estate of Jones,</i> 152 Wn.2d 1, 8, 93, P.3d 147 (2004)..... | 22 |
| <i>In re Estate of Wimberly,</i> 186 Wn. App. 475, 349, P.3d 11 (2015)..... | 26 |

| | |
|---|--------|
| <i>In re Involuntary Treatment of A.J.</i> 196 Wn. App. 79, 82, 383, P.3d 536 (2016)..... | 13 |
| <i>In re Rathbone v Estate of Rathbone</i> , 190 Wn.2d 332 412 P.3d 1283 (2018)..... | 15,16 |
| <i>In re Marriage of Lutz</i> , 74 Wn App 356, 365, 873 P.2d 566 (1994)..... | 19 |
| <i>Maytown Sand & Gravel LLC v Thurston County</i> , 423 P.3d 223 (2018)..... | 33 |
| <i>Old Nat’l Bank v Campbell</i> , 1 Wn App. 773, 777, 463 P.2d 656 review denied, 78 Wn 2d 992 (1970)..... | 19 |
| <i>Poltz v Tyree</i> , 41 Wn. App. 695, 705, P.2d 1229 (1985)..... | 22, 28 |
| <i>Setterlund v Firestone</i> , 104 Wn 2d 23, 25, 700 P.2d 745 (1985)..... | 19 |
| <i>Shoemake v Ferrer</i> , 143 Wn. App. 819, 182, P.3d 992, 998 (2008)..... | 33 |
| <i>Waits v Hamlin</i> , 55 Wn. App 193, 199, 776 P.2d 1003 (1984)..... | 19 |
| <i>Viking Bank v Firgrove Commons 3, LLC</i> , 183 Wn. App. 706, 334 P.3d 116, 119 (2014)..... | 11 |
| <i>Id</i> , 334, P.3d at 120..... | 11 |
| <i>Weyerhaeuser Co. v Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000)..... | 12 |

TABLE OF STATUTES

RCW 11.68.070.....15

RCW 11.96A.....3

RCW 11.96A.020.....13, 14

RCW 11.96A.030(c).....14

RCW 11.96A.125.....14

RCW 11.96A.150.....33

RCW 11.98.011(1).....10, 29

RCW 11.98.075.....16

RCW 11.98.075(1)(a)-(g).....18, 25

RCW 11.98.075(4).....18

TABLE OF COURT RULES

CR 12(b)(6).....2

I. INTRODUCTION

This lawsuit involves Echo's¹ use of a Trust Certificate, or Abstract, alone, to have a Trial Court re-create missing Trust terms which are then the basis to challenge the now deceased Surviving Trustor's transfer of property out of Trust during her lifetime.

On January 10, 1994, Gordon and Frances Sales created their Revocable Living Trust. CP 012, line 4, CP 019. On May 25, 1994, they recorded a Certificate of Trustee's Power and Authority and Abstract of Trust with the Clallam County Auditor (the "Abstract"). CP 019. They transferred real property into the Trust. CP 011, lines 22 – 26, CP 061 – 069. Gordon Sales died on October 6, 2000. CP 221, lines 2 - 3. Frances Sales took over as Trustee. CP 221, lines 2 – 3. She died on August 22, 2017. CP 221, lines 2 – 3. By the time of her death, she had transferred all of the property out of Trust. CP 017, lines 1 – 2, RP 11, lines 15 – 19, RP 13, lines 4 – 17.

Although Echo Sales knew, before her mother's death, that Frances had transferred property out of Trust, CP 154 – 155, she never brought suit to enjoin her mother's actions.

¹For clarity, rather than refer to the parties as Appellant, Respondent, or Petitioner, Respondent, Echo and Bruce Sales will be referred to as Echo and Mica Wright and her sons, Luke and Zechariah Sprague will be referred to as Mica

Instead, Echo waited until after her mother's death to bring the present TEDRA action against her sister and nephews to seek recovery of property transferred out of Trust. CP 218 – 237.

No original Trust Agreement was found. CP 012, lines 1 – 2, CP 222, lines 1 – 3. No copy of the signed Trust Agreement was found. CP 052, lines 2- - 21. No unsigned copy of the Trust Agreement was found. No draft of the Trust Agreement was found. RP 6, lines 19 – 23.

After the Trial Court denied two CR 12(b)(6) motions by Mica, CP 168 – 194, CP 113 – 146, on September 4, 2018, a Trial was held in which the only evidence presented was the recorded Abstract and several Deeds. RP 1 – 34. After argument, the Trial Court found that the Trust became irrevocable upon Gordon's death, that Frances had no authority to transfer assets out of Trust, that Frances was not a Trust Beneficiary, and that the Trust had not been terminated although it held no assets. RP 31, lines 12 – 25, RP 32, lines 1 – 17.

II. ASSIGNMENT OF ERROR

1. The Trial Court erred in finding that TEDRA provided it with authority to “interpret” the Trust Abstract to re-create missing Trust terms.

2. The Trial Court erred in finding clear, cogent, and convincing evidence, from the Trust Abstract alone, to re-create missing Trust terms.

3. The Trial Court erred in entering Findings of Fact numbers 6, 7, 8, 9, 10, 12, 14, 15, 16, 17, 18, 19 and 20, and Conclusions of Law numbers 2, 3, 4, 5 and 6.

4. The Trial Court erred in not entering judgment dismissing the Petition.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether TEDRA (RCW 11.96A) provided the Trial Court authority to interpret a Trust Abstract to re-create missing Trust terms.

2. Whether a Trust Abstract, alone, may be used by Beneficiaries, to re-create, by clear, cogent and convincing evidence, missing Trust terms.

3. Whether clear, cogent and convincing evidence supported each finding of fact and whether the conclusions were supported by the findings.

IV. STATEMENT OF THE CASE

A. Overview of Case. Gordon and Frances Sales created a Revocable Family Trust on January 10, 1994. CP 012, line 4, CP 019. Subsequently they transferred real property into the Trust. CP 011, lines 22 – 26, CP 061 – 069.

They recorded a “Certificate of Trustee’s Power and Authority and Abstract of Trust” with the Clallam County Auditor on May 25, 1994. CP 019. It contained a limited number of paragraphs from the Trust. These were titled:

- 1.1. Trust Property.
- 1.2. Names and Addresses of Beneficiaries.
- 1.3. Designation of Successor Trustees.
- 1.4. Acts of Trustees.
- 1.10. Place of Constructive Notice of Trust.
- 3.1. Power in Grantors During Lifetime of Both Grantors
- 4.2. Trustee Powers (with various sub-paragraphs)
- 4.6. Authority
- 6.19. Trustee
- 8.4. Distributions. (with various sub-paragraphs) and
- 10.4. One Trustee Authority to Sign Insurance Applications and Tax Documents.

CP 034 – 042.

The Abstract is missing many subparagraphs of sections 1, 3, 4, 6, 8 and 10. It is completely missing sections 2, 5, 7 and 9. CP 034 – 042. It lacks the provisions dealing with a Surviving Trustor’s control over

Trust property, the authority to transfer property into and out of Trust; when, if ever, the Trust becomes Irrevocable; and the dispositive scheme for after the Surviving Trustor passes. CP 034 – 042.

B. Procedural History. Almost five months after Frances Sales' death, on January 12, 2018, Echo and Bruce Sales filed a TEDRA Petition for Determination of Beneficiaries' Interests, Judgment Against Prior Trustee for Breach of Fiduciary Duty, Judgment for Improper Asset Distribution, and Quiet Title naming Mica Jean McLean (aka Wright) and her two sons Luke and Zechariah Sprague Respondents.¹ CP 218 – 237. Acknowledging that there was no original Agreement, or signed copy of the original Trust Agreement, CP 222, lines 1 – 3, lines 19 – 21, RP 6, lines 19 – 23, the Petition sought a Court Order “interpreting” the Trust Abstract to mean “unless the Trust is properly revoked, assets of the Trust may only be distributed to Beneficiaries of the Trust, that the only known Beneficiaries are Bruce Gordon Sales, Mica Jean McLean (aka Wright), Echo Marie Sales, Luke G. Sprague, and Zechariah E. Sprague and because Frances J. Sales, although a Trustor, was not listed as a Trust Beneficiary that any transfers other than the named Beneficiaries was a breach of her fiduciary duty and are void. CP 223 – 224. Part of the prayer for relief was to recover property Frances had transferred to Mica before her death. CP 224, lines 12 – 13.

Mica was served a Citation to appear and show cause, on March 9, 2018, why the requested relief should not be granted. CP 213 – 217. On March 2, 2018, Mica responded, through counsel, asking for more time to find the original, or a copy of, the Trust Agreement. CP 212. On June 28, 2018, Mica filed her Motion to Dismiss for Failure of Petition to State a Claim Upon Which Relief can be Granted. CP 168 – 194. On July 3, 2018, Mica filed a more extensive response to the Petition. CP 156 – 159. On August 31, 2018, the parties stipulated to bifurcate the liability issues to be heard at Trial reserving the damages, if any, for a later hearing. CP 109 – 112.

A Bench Trial was held on September 4, 2018. The only evidence presented by Echo was the Abstract, and the Deeds transferring real property into Trust. RP 4, lines 14 – 22, RP 5, lines 7 – 19. RP 7, line 14 – 19, CP 30, lines 19 – 25. The parties, through Counsel, argued their positions. Echo argued the Court had the authority, and could find from the Abstract alone, that the Trust became Irrevocable upon Gordon's death by referencing the missing paragraph 3.3, that Frances was not a Beneficiary of the Trust, because she was not named as such in the section that named their children and grandchildren as Beneficiaries, that Frances had no authority to transfer assets out of Trust to herself, and the Trust

was not terminated even though Frances had transferred all assets out of Trust before her death. RP 7, lines 21 – 25, RP 8 – 10, lines 1 – 22, RP 12, line 25, RP 13 – 18, lines 1 – 5, RP 22, lines 14 – 25, RP 23 – 25, line 1.

Mica argued the Abstract alone did not provide clear, cogent and convincing evidence supporting any of Echo's claims. For all they knew, upon Gordon's death, all assets went to Frances with the right to disclaim to an Irrevocable Credit Trust, that clearly just referencing the missing paragraph 3.3 which title indicated that paragraph talked about some kind of irrevocability, but without any details, was insufficient to find that the Trust became Irrevocable upon Gordon's death or that Frances, as Trustor, was not a Beneficiary. RP 10, lines 24 – 25, RP 11 – 12, lines 1 – 24, RP 18, lines 7 – 25, RP 19 – 22, lines 1 – 13, RP 25 – 26, lines 1 – 4.

The Court, in an oral ruling from the bench, granted Echo's requested relief. RP 26, lines 5 – 25, RP 27 – 32, lines 1 – 17.

Echo submitted proposed Findings of Fact and Conclusions of Law and a Partial Order on the Merits. On September 13, 2018 and October 10, 2018, Mica filed objections to some of the proposed findings and conclusions. CP 051, CP 049. On October 12, 2018, the formal findings

and conclusions were entered. CP 011-015. The findings and conclusions that Mica objected to were:

6. The Abstract of Trust contains a number of formatting and structural inconsistencies, including jumps in paragraph number and some reference to clauses not included, but despite these inconsistencies, the Abstract of Trust is logically consistent with sufficient information to determine the intent of the Trustors;

7. Paragraph 1.1 of the Abstract of Trust expresses a clear intention on the part of Gordon and Frances Sales to create a Trust;

8. Paragraph 1.2 of the Abstract of Trust defines specific Beneficiaries of the Trust;

9. The Abstract of Trust generally contains the duties of a Trustee is to perform for the Trust;

10. The Abstract of Trust does not identify one or more individuals as both the Sole Trustees and the Sole Beneficiaries of the Trust;

12. By the language of the paragraph 1.10, it was the intent of the Trustors for all parties to rely on the terms set forth in the Abstract in lieu of the original Trust document itself;

14. By including the language “(Irrevocability on Death of First Grantor Spouse)” Gordon Sales and Frances Sales intended the Trust to become Irrevocable upon the first of them to die;

15. The Trust became Irrevocable upon the death of Gordon Sales;

16. The parties provided no evidence that either Gordon Sales or Frances Sales, acting together or separately, intended to revoke the Trust;

17. As the Surviving Grantor and Trustee of the Trust, Frances had no authority to transfer assets of the Trust to herself outside of the Trust;

18. From the time of Gordon Sales’ death, the corpus of the Trust should have remained in the Trust;

19., The Findings set forth herein is not a full adjudication of all matters before this Court in the above entitled action, but it is a full and final adjudication regarding the formation, continuation, and terms of the Trust;

20. No future determination or finding regarding those matters that remain at issue will have effect on those findings set forth herein.

Mica also objected to the following conclusions of law:

2. The Abstract of Trust meets the requirements of a Trust as set forth in RCW 11.98.011(1), namely:

(a) Gordon and Frances Sales had capacity to form a Trust;

(b) They indicated an intention to create a Trust;

(c) They named defined Beneficiaries;

(d) They assigned duties for the Trustee of their Trust to perform;

(e) The same individuals were not the sole Trustee and sole Beneficiary;

3. The Trust was never revoked;

4. The Trust became Irrevocable upon the death of Gordon Sales;

5. Frances Sales had no authority to remove assets from the Trust or transfer assets to herself outside of Trust;

6. The Abstract of Trust sets forth the terms of the Trust and shall be enforceable against the parties.

In addition to entering the Findings of Fact and Conclusions of Law, the Trial Court also entered a Partial Order on Merits. CP 016-043. This order reiterated the above-mentioned Findings and Conclusions, but also included the following findings:

2. This Court certifies, and all parties to this litigation stipulate, that this Order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation; and

3. This is a case of first impression, in that, this is the first time that a Trust certificate, or Abstract, alone, is used to re-create missing Trust provisions.

Based on this Partial Order on Merits, on November 2, 2018, Mica filed her Notice for Discretionary Review to Court of Appeals II, CP 009-010, and on November 11, 2018 filed her Motion for Discretionary Review. CP 007. On January 23, 2019, Court Commissioner Aurora Bearse heard oral argument on the Motion for Discretionary Review. On March 5, 2019, discretionary review was granted.

C. Standard of Review. As noted below, a Trust is a Contract. When a Court relies on inferences drawn from extrinsic evidence, interpretation of a Contract is a question of fact. But when no extrinsic evidence is used, Contract interpretation is a question of law. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 334 P.3d 116, 119 (2014). The primary goal in contract interpretation is to ascertain the mutual intent of the parties at the time the contract is signed. *Id.*, 334 P.3d

at 120. Washington follows the “objective manifestation theory” of contract interpretation, under which the focus is on the reasonable meaning of the contract language to determine the parties’ intent. *Id.* The Court is looking at the Contract as a whole, interpreting particular language in the context of other contract provisions. *Id.* (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000)).

When a Trial Court has weighed the evidence in a Bench Trial, the Appellate Court limits its review to whether substantial evidence supports the Trial Court’s factual findings, and, if so, whether those findings support the Trial Court’s Conclusions of Law. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. The Appellate Court reviews only those findings to which Appellants assign error, unchallenged findings are verities on appeal. Evidence is reviewed in the light most favorable to the prevailing party and the Appellate Court will defer to the Trial Court regarding witness credibility and conflicting testimony. However, questions of law and conclusions of law are reviewed de novo. Conclusions of law that are erroneously labeled findings of fact are

reviewed de novo. *Choi v. Sung*, 154 Wn. App. 303, 225 P.3d 425, 431 (2010).

Interpretation of Trusts are governed by the law for the interpretation of Wills. CP 222, lines 12 - 18. Therefore, Echo has the burden of proving the missing Trust provisions by clear, cogent, and convincing evidence. *In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796, 802 (2004), RP 7, lines 20 – 21, CP 106, lines 9 – 11. This means the ultimate fact in issue must be shown by evidence to be “highly probable.” *In re Det. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986); *In re Involuntary Treatment of A.J.*, 196 Wn. App. 79, 82, 383, P.3d 536 (2016).

Here, because no extrinsic evidence was entered regarding the missing Trust terms, this Court’s review is a matter of law and de novo.

V. ARGUMENT.

A. RCW 11.96A.020 Does Not Give the Trial Court the Ability to Interpret a Trust Abstract to Re-Create Missing Trust Terms.

The Trial Court erred when it determined that it had authority to re-create missing Trust terms by “interpreting” the Abstract under RCW 11.96A.020. That section states:

General power of Courts---Intent—Plenary power of the Court.

(1) It is the intent of the legislature that the Courts shall have full and ample power and authority under this title to administer and settle:

(a) All matters concerning the Estate and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this title; and

(b) All Trusts and Trust matters.

(2) If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section, the Court nevertheless has full power and authority to proceed with such administration and settlement in any matter and way that to the Court seems right and proper, all to the end that the matters be expeditiously administered and settled by the Court.

The question is whether this statute, or any other statute under TEDRA, or the probate code, provides authority to re-create completely missing Trust provisions. Nowhere in RCW 11.96A.020 does it authorize a Court to interpret a Trust Abstract to re-create missing Trust terms.

Similarly, RCW 11.96A.030(c) defines “Matter” that a Court can decide includes the construction of Wills, Trusts, Community Property Agreements and other writings. Nothing in the definitional section includes re-creating missing Trust terms from a Trust Abstract. Similarly, RCW 11.96A.125, allows a Court to reform a Will or Trust “to conform the terms to the intention of the Testator or Trustor if it is proved by clear, cogent, and convincing evidence that both the intent of the Testator or

Trustor and the terms of the Will or Trust were affected by mistake of fact or law, whether in expression or inducement.

This section does not provide for re-creating missing Trust terms using a Trust Abstract.

Respondents cite no probate code provisions allowing for re-creating missing Trust terms through the interpretation of a Trust Abstract and simply assert that TEDRA, alone, allows the Court to interpret the Trust Abstract and authorizes it to re-create missing Trust terms. In *Rathbone v. Estate of Rathbone*, 190 Wn.2d 332, 412 P.3d 1283 (2018), the Washington Supreme Court dealt with the issue of whether TEDRA provides an independent cause of action to construe a Will. “The last issue is whether TEDRA independently gives the Trial Court authority to construe a non-intervention Will. The Trial Court concluded that even if RCW 11.68.070 did not apply, TEDRA itself gave the superior authority to construe the Will. We disagree. TEDRA provides that its provisions ‘shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained’ in Title 11 RCW. . . This language suggests limitations, not new, freestanding procedure.” *Id.* at 1289.

The present Trial Court did not believe *Rathbone* applied and limited it to its facts of dealing with a Court overruling a Personal

Representative's interpretation of a non-intervention Will. CP 25, lines 3 – 25, CP 26, 1 – 5. However, that is wrong. This case is more compelling to apply *Rathbone*. Here the Court re-created missing Trust terms pursuant to the wishes of one set of heirs. *See*, CP 22, lines 14 – 15. It ignored Frances' actions during her lifetime, that were known by her heirs without objection, that showed Frances treated the Trust Property that she and Gordon put into Trust, as her own.

TEDRA, alone, does not provide a Trial Court authority to re-create missing Trust terms from an Abstract.

B. The Trial Court Improperly Used the Abstract to Re-create Missing Trust Terms.

This case represents an unprecedented, and unauthorized, use of a Trust Abstract as the actual original Trust Agreement. RCW 11.98.075 provides for Certification of Trust for use by people, other than Beneficiary.

RCW 11.98.075 -Certification of Trust.

(1) Instead of furnishing a copy of the Trust instrument to a person other than a Beneficiary, the Trustee may furnish to the person a Certification of Trust containing the following information:

(a) That the Trust exists and the date the Trust instrument was executed;

(b) The identity of the Trustor;

(c) The identity and address of the currently acting Trustee;

(d) Relevant powers of the Trustee;

(e) The revocability or irrevocability of the Trust and the identity of any person holding a power to revoke the Trust;

(f) The authority of Co-Trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the Trustee; and

(g) The name of the Trust or the titling of the Trust property.

(2) A Certification of Trust may be signed or otherwise authenticated by any Trustee or by an Attorney for the Trust.

(3) A Certification of Trust must state that the Trust has not been revoked, modified or amended in any manner that would cause the representations contained in the Certification of Trust to be incorrect.

(4) A Certification of Trust need not contain the dispositive terms of a Trust.

(5) A recipient of a Certification of Trust may require the Trustee to furnish copies of those excerpts from the original Trust instrument and later amendments which designate the Trustee and confer upon the Trustee the power to act in the pending transaction or any other reasonable information.

(6) A person who acts in reliance upon a Certification of Trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the Certification. Knowledge of the terms of the Trust may not be inferred solely from the fact that a copy of all or part of the Trust instrument is held by the person relying upon the Certification.

(7) A person who in good faith enters into a transaction in reliance upon a Certification of Trust may enforce the transaction against the Trust

property as if the representations contained in the Certification were correct.

(8) A person making a demand for the Trust instrument in addition to a Certification of Trust or excerpts is liable for damages, including reasonable attorney fees, if the Court determines that the person did not act in good faith in demanding the Trust instrument.

(9) This section does not limit the right of a person to obtain a copy of the Trust instrument in a judicial proceeding concerning the Trust.

The Certification need only contain certain specified information, RCW 11.98.075(1)(a)-(g). It does not have to contain the dispositive scheme. RCW 11.98.075(4). The Certification is meant to be relied upon by people dealing with the Trust to be confident their transactions are valid. A Certification is not for Beneficiaries to use as the Trust or to re-create missing Trust provisions. At best, the Certification can be used to establish those provisions actually set out in the Certificate.

It was an abuse by the Trial Court to interpret the Abstract to completely re-create missing Trust provisions. The opening paragraph of the Abstract states:

[H]owever, in the unlikely event there is a clerical error causing a discrepancy between the original Trust and this Certificate of Trustee's Power and Authority and Abstract of Trust, the ***original Trust Agreement*** will control the interpretation and administration of the Trust. (emphasis added)

The Abstract was not intended as a substitute for the original trust agreement. The Trial Court's use of it to "interpret" new Trust terms is reversible error.

C. The Trial Court Had No Authority to Re-create Missing Trust Provisions.

An express Revocable Trust is a contract between, generally, husband and wife. *In re Marriage of Lutz*, 74 Wn. App. 356, 365, 873 P.2d 566 (1994)(citing *Farrell v. Mentzer*, 102 Wash. 629, 632, 174 P.2d 482 (1918)('an express Trust is 'created by contract of the parties and intentionally.'"). A Court in construing such a Trust seeks to determine the Trustors' intent. That intention must come from the whole document itself. *Waits v. Hamlin*, 55 Wn. App. 193, 199, 776 P.2d 1003 (1984)(citing *Old Nat'l Bank v. Campbell*, 1 Wn. App. 773, 777, 463 P.2d 656, review denied, 78 Wn.2d 992 (1970). As with other contracts, a Court is not at liberty to fill in missing material terms. *Setterlund v. Firestone*, 104 Wn.2d 23, 25, 700 P.2d 745 (1985); *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952). In particular, here, you do not have a clear term saying when, if ever, the Trust becomes Irrevocable. As will be discussed below, the Trial Court ignored the wording and pagination of paragraph 3.1 when it found the Trust became Irrevocable upon the first spouse's

death. That sentence reads “Subject to paragraph 3.3 (Irrevocability on Death of First Grantor Spouse), Grantors reserve the right to amend or revoke this Trust Agreement . . .” The words relied on by the Trial Court were merely the title to the third sub-paragraph of paragraph 3. It was not an operative statement, but merely descriptive. You do not know from this language what exactly was contained in paragraph 3.3 which is completely missing. You do not know by clear, cogent and convincing evidence when or what becomes Irrevocable upon the first spouse’s death.

Similarly, the Trust Abstract contains no distribution scheme. You cannot tell from the Abstract, alone, which provision contained the dispositive scheme, or when and how Trust property can be distributed.

For the Trial Court to rule that Frances was not a Beneficiary of the Trust and could not manage the Trust Property for her benefit is not supported by the Abstract. This was a Grantor of the Revocable Trust. A Grantor need not name themselves a Beneficiary as they are assumed as such. It is their property transferred into Trust. For all we know, on Gordon’s death, Frances received all of the assets with the discretion to transfer assets into a Credit Trust, which would be Irrevocable. There is no record of any such Trust and Frances was free to deal with the property as she sought fit.

Further, the named “Beneficiaries” are clearly contingent.

Paragraph 1.2 of the Abstract states in part:

1.2 **Names and Addresses of Beneficiaries.** We hereby disclose the names and addresses of the beneficiaris of this Trust, as follows:

| | |
|---------------------------|-------------|
| Bruce Gordon Sales | Per Stirpes |
| Mica Jean McLean (Wright) | Per Stirpes |
| Echo Marie Sales | Per Stirpes |
| Luke G. Sprague | Per Capita |
| Zechariah E. Sprague | Per Capita |

CP 034

Their interest is either “per capita” or “per stirpes”. This is inheritance language, not a present interest. Per Capita means “By the heads or polls; according to the number of individuals; share and share alike. This term, derived from the civil law, is much used in the law of descent and distribution, and denotes that method of dividing an intestate estate by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent, without reference to their stocks or the right of representation. It is the antithesis of per stirpes.” *Black’s Law Dictionary* 1292 (Revised 4th ed. 1968). Per Stirpes means “By roots or stocks; by representation. This term, derived from the civil law, is much used in the law of descents and distribution, and denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased would have been entitled

to, taking thus by their right of representing such ancestor, and not as so may individuals. “*Black’s Law Dictionary* 1294 (Revised 4th ed. 1968).

Only if there is property in the Trust on the date the Surviving Trustor dies would they receive a distribution. *See, Poltz v. Tyree*, 41 Wn.App. 695, 705 P.2d 1229 (1985).

Echo never claimed a present interest to Trust Property during Frances’ life. Frances always dealt with Trust Assets as her own.

The problem with the Trial Court’s action is it misapplied the concepts of contract interpretation and construction. These rules are designed to determine the parties’ intent from an entire written agreement. These concepts are not used to re-create missing material terms. As noted above, Trial Courts are not at liberty to insert missing contract terms.

D. The Findings of Fact Are Not Supported by Substantial Evidence and the Findings Do Not Support the Conclusions of Law.

Findings of Fact must be supported by substantial evidence. *Casterline v. Roberts*, 168 Wn. App. 376, 284 P.3d 743, 745-746 (2012); *Choi v. Sung*, 154 Wn. App. 303, 225 P.3d 425, 431 (2010). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93, P.3d 147 (2004). The Abstract, alone, does not support the following findings Mica objected to as set forth above.

6. The Abstract of Trust contains a number of formatting and structural inconsistencies, including jumps in paragraph number and some reference to clauses not included, but despite these inconsistencies, the Abstract of Trust is logically consistent with sufficient information to determine the intent of the Trustors.

What does this finding even mean? The Trial Court acknowledges the Abstract contains formatting and structural inconsistencies; improper paragraph numbering and references to clauses not included, but states the Abstract is logically consistent with sufficient information to determine the Trustors' intent. How can it contain sufficient evidence to meet the required clear, cogent and convincing standard when the Abstract is missing so many crucial clauses? You cannot determine the distribution plan because none is contained in the Abstract. You do not know what happens during the joint lives of the Trustors, after one Trustor dies, and what happens after both Trustors are gone. Although, given how Remaindermen Beneficiaries are named, one assumes if there are any assets left in Trust, when the last Trustor dies, that the Remaindermen would take. Finding number 6 is not supported by substantial evidence.

8. Paragraph 1.2 of the Abstract of Trust defines specific Beneficiaries of the Trust.

Echo attempts to use this finding to say that Frances was not a Trust Beneficiary and had no right to access Trust Property or to transfer Trust Property out of Trust. However, this was a Family Trust. Trustors,

during their joint lives, could revoke the Trust in its entirety. We know this by reading paragraph 3.1, which states “Subject to paragraph 3.3 (Irrevocability on Death of First Grantor Spouse), Grantors reserve the right at any time or times to amend or revoke this Trust Agreement . . .” The fact they have the power to revoke means they are Beneficiaries of their own Trust. Therefore, although paragraph 1.2 defines specific remainder Beneficiaries, it does not name all Trust Beneficiaries which includes the Trustors who have the power to enjoy the Trust Assets during their lives. Paragraph 1.2 was improperly interpreted for which it is being used and Finding No. 8 is not supported by substantial evidence.

9. The Abstract of Trust generally contains the duties of a Trustee is to perform for the Trust.

This finding fails to take into account the Trustors’ ability to revoke or amend the Trust or how the Surviving Trustor can deal with the property during their lifetime. We do not know to what extent, if any, that reserved revocation or amendment rights were lost on the death of the first Trustor. Paragraph 3.3 is completely missing. As noted above, a Trial Court cannot re-create missing Trust terms. Therefore, there is insufficient evidence to support this finding of fact.

10. The Abstract of Trust does not identify one or more individuals as both the Sole Trustees and the Sole Beneficiaries of the Trust.

This finding makes no sense. It ignores the Trustors' reserved powers to amend and remove the Trust. It fails to acknowledge a complete lack of disbursement terms. We simply do not know if, when and how Trust Assets may be taken out of Trust. We do know that Frances did, in fact, take all assets out of Trust years before she died. That is evidence she had the authority to remove property during her lifetime. This finding is not supported by substantial evidence.

12. By the language of the paragraph 1.10, it was the intent of the Trustors for all parties to rely on the terms set forth in the Abstract in lieu of the original Trust document itself.

This finding is not supported by substantial evidence, misconstrues paragraph 1.10 and takes it out of context. Nowhere in paragraph 1.10 does it say the Abstract is a substitute for the actual Trust Agreement. That provisions provides for the recording of the Abstract and then states:

All parties dealing with this Trust may rely on the Abstract, Amended Abstract and other documents filed or recorded with that public office in ascertaining the status of this Trust and may assume, if there are no recordings to the contrary, that no material modifications have been made to the Trust since the last recording.

This latter language is the basic premise of RCW 11.98.075(1)(a)-(g). It confirms that third parties dealing with the Trust, not Remaindermen Beneficiaries, can rely on the Abstract as establishing the Trustee's powers to deal with the third parties. This paragraph does not

say, or even imply, that the Remaindmen Beneficiaries can use the Abstract to re-create missing Trust provisions.

14. By including the language “(Irrevocability on Death of First Grantor Spouse)” Gordon Sales and Frances Sales intended the Trust to become Irrevocable upon the first of them to die.

This finding totally takes that wording of paragraph 3.1 out of context. Paragraph 3.1 starts out saying “Subject to paragraph 3.3 (Irrevocability on Death of First Spouse), Grantors reserve the right at any time or times to amend or revoke this Trust Agreement and the Trusts hereunder, in whole or in part, . . .” Paragraph 3.3 is completely missing. The language cited by the Trial Court appears to be the title of paragraph 3.3, not it’s operative language. You do not know to what Trust paragraph 3.3 applies or how it applies. For all we know, on the death of the first spouse, all assets pass to the Surviving Grantor with the right to disclaim to a Credit Trust, or the Trust is divided into Trust A, Survivor’s Trust and Trust B, which is a Credit Trust. *See, In re Estate of Wimberly*, 186 Wn. App. 475, 349 P.3d 11 (2015). Credit Trusts are generally Irrevocable once established. We know Frances did not set up a Credit Trust and she transferred all assets out of Trust before she died. That is proof the Family Trust did not become Irrevocable on the first Grantor’s death.

This finding, also, ignores the Trustee's authority, under paragraph 4.2 in the Trust, to treat Trust property as if it was not in Trust.

This paragraph states in part:

4.2. **Trustee Powers.** In the investment, administration and distribution of the Trust estate and the several shares thereof, the Trustee (subject only to the duty to apply the proceeds and avails of the Trust Estate to the purposes herein specified,) may perform every act in the management of the Trust property which *individuals may perform in the management of like property owned by them free of Trust. Trustee may exercise every power with respect to each item of property in the Trust estate, real or personal, which individual owners of like property may exercise, including, by way of illustration but not by way of limitation,* the following . . . (emphasis added)

This is not limited by the death of the first Trustor, but applies throughout the life of the Trust.

This finding is not supported by substantial evidence.

15. **The Trust became Irrevocable upon the death of Gordon Sales.**

The Abstract does not say when, if ever, the Trust becomes Irrevocable. This finding is Echo's wishful thinking. However, Gordon died in 2000 and Frances continued for the next Seventeen (17) years transferring assets out of Trust for her benefit with Echo's knowledge. This finding is not supported by substantial evidence.

16. The parties provided no evidence that either Gordon Sales or Frances Sales, acting together or separately, intended to revoke the Trust.

This finding ignores the admitted fact that Frances had taken all assets out of Trust before her death. There were no assets to administer. Echo is arguing that there was no formal written Termination Notice delivered to the Trustee, Frances. It is generally true, that if a Trust Agreement provides that Termination is by written notice to the Trustee, that process must be followed. *In re Button's Estate*, 79 Wn.2d 849, 490 P.2d 731 (1971). However, where the Surviving Trustor is also the Sole Trustee and present Beneficiary, such an act would be superfluous. By totally defunding the Trust during her lifetime, Frances effectively terminated the Trust. *See, Poltz v. Tyree*, 41 Wn.App. 695, 705 P.2d 1229 (1985).

17. As the Surviving Grantor and Trustee of the Trust, Frances had no authority to transfer assets of the Trust to herself outside of the Trust.

18. From the time of Gordon Sales death, the corpus of the Trust should have been remained in the Trust.

These two findings ignore the fact that the Abstract does not say the Trust became Irrevocable upon Gordon's death, that Frances was not allowed to transfer assets to herself, or to completely defund that Trust.

Again, these findings are Echo's idea as to what the Trust should have said. They are not supported by substantial evidence.

19. The findings set forth herein is not a full adjudication of all matters before this Court in the above entitled action, but it is a full and final adjudication regarding the formation, continuation, and terms of the Trust.

20. No future determination or finding regarding those matters that remain at issue will have effect on those findings set forth herein.

It is not clear what purpose these findings serve. To say the findings is a full and final adjudication regarding the formation, continuation and terms of the Trust is not supported by the evidence. You do not know what the many missing terms actually say. These findings are all conjecture and made up by the Court based upon Echo's arguments and wishful thinking to allow Echo to recover something from Mica even though Frances left nothing to Echo. Finding 20 appears to try to insulate this ruling from the new Judge the Trial Court knew would be taking over, as the Judge retired at the end of 2018. It is doubtful a retiring Judge can tie the hands of any future Judge who takes over the case.

Similarly, most of the Conclusions of Law are not supported by the Findings of Fact. The Conclusions objected to are:

2. The Abstract of Trust meets the requirements of a Trust as set forth in RCW 11.98.011(1), namely:

- a Trust;
- (a) Gordon and Frances Sales had capacity to form
 - (b) They indicated an intention to create a Trust;
 - (c) They named defined Beneficiaries;
 - (d) They assigned duties for the Trustee of their
- Trust to perform;
- (e) The same individuals were not the Sole Trustee
- and Sole Beneficiary;

- 3. The Trust was never revoked;
- 4. The Trust became Irrevocable upon the death of Gordon Sales;
- 5. Frances Sales had no authority to remove assets from the Trust or transfer assets to herself outside of Trust;
- 6. The Abstract of Trust sets forth the terms of the Trust and shall be enforceable against the parties.

Mica concedes conclusions 2 (a) and (b) are true. Clearly, Gordon and Frances had the capacity, and intended, to create a Trust. However, 2(c) is trying to say only the named Remaindermen Beneficiaries had an interest in the Trust, which ignores the Grantors' ability to revoke or amend the Trust during their lifetimes, and the fact Frances had the ability to freely transfer property out of Trust.

It is not clear the reason for Conclusion 2(d). It appears to be limiting the Trustee's powers over Trust Assets. However, in reading paragraph 4.2 "Trustee Powers" , of the Abstract, this section is not a limiting provision but in fact shows the expansive powers the Grantor's/Trustee's retained over Trust Property:

4.2. **Trustee Powers.** In the investment, administration and distribution of the Trust estate and the several shares thereof, the Trustee (subject only to the duty to apply the proceeds and avails of the Trust Estate to the purposes herein specified,) may perform every act in the management of the Trust property which *individuals may perform in the management of like property owned by them free of Trust. Trustee may exercise every power with respect to each item of property in the Trust estate, real or personal, which individual owners of like property may exercise, including, by way of illustration but not by way of limitation,* the following . . . (emphasis added)

The Trustee(s) retained ownership control over the Trust assets as if the property was not in Trust. To the extent this conclusion is attempting to limit Frances' ability to transfer assets out of Trust, it is not supported by the actual Trust language.

Conclusion 2(e) ignores the fact that Grantors' reserved the right to amend or revoke the Trust. Such authority makes them the Sole Beneficiaries and Trustees during their lifetimes or while they were still capable of managing their own affairs. Clearly, Echo and Bruce Sales were only Successor Trustees, and Remaindermen Beneficiaries with Mica, Luke and Zechariah.

To say the Trust was never revoked ignores the fact that Frances took all assets out of the Trust before she died. The fact she did not formally write to herself as Grantor and Trustee and say she is terminating the Trust is meaningless. The very fact she defunded the Trust, in its entirety, is proof of her intentions to terminate the Trust. Nothing more is

needed to prove termination. Conclusion 3 is not supported by the evidence.

Conclusion 4, saying the Trust became Irrevocable upon Gordon's death is not supported by the evidence. No operative language in the Abstract actually states the Trust becomes totally Irrevocable upon the death of a Grantor. It alludes to a possibility that some part of the Trust may become Irrevocable, but there is no evidence as to what that provision may say. The Abstract does not meet the clear, cogent and convincing standard allowing the Trial Court to reach that conclusion.

Conclusion 5, saying Frances had no authority to transfer assets out of Trust or to herself, again ignores her authority to revoke or amend the Trust and her power as Trustee to treat the property as her own, free of Trust. This conclusion is not supported by the Abstract or the fact that Frances did in fact remove all assets out of Trust. No one even attempted to stop her from removing the assets out of Trust and only waited until after her death to seek recovery.

Conclusion 6, saying the Abstract sets forth the terms of the Trust which can be enforced against the parties is outrageous and overreaching. To have so many missing terms, including the complete dispositive scheme, simply makes this conclusion without basis. You do not have the ability to even start reconstructing any of the missing terms.

VI. ATTORNEY'S FEES

Assuming Mica prevails on Appeal, she should be awarded reasonable attorney's fees and costs for pursuing this Appeal.

Washington Courts award fees based upon the American Rule. This means that reasonable fees may be awarded if provided for in contract, by statute, or rule in equity. *Maytown Sand & Gravel, LLC v. Thurston County*, 423 P.3d 223 (2018); *Shoemake v. Ferrer*, 143 Wn. App. 819, 182 P.3d 992, 998 (2008). RCW 11.96A.150 states in part:

(1) Either the Superior Court or any Court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; . . .”

Mica has been forced to defend this action brought against her and her sons by her sister and brother. It is an attempt by Echo to undo transfers by Frances years after the fact. The basis is a conjuring up of unknown and unprovable missing Trust terms by having the Trial Court create terms under the guise of interpreting the woefully incomplete Abstract. Such action is not sanctioned by Washington law and Mica should be awarded reasonable attorney's fees and costs for having to defend.

VII. CONCLUSION.

Echo cannot prove the missing Trust terms by clear, cogent and convincing evidence. Echo had no basis to challenge Frances' transfers of properties out of Trust. There is no basis for a Trial Court to create missing Trust terms by interpreting an Abstract. The Abstract is so incomplete as to relevant terms, such as the revocability and dispositive provisions, that the Trial Court's decisions were not supported by the evidence. The Trial Court's ruling should be reversed and the matter remanded with instruction for entry of an Order Dismissing the case. Mica should be awarded reasonable attorney's fees and costs for this appeal.

Respectfully submitted this 19th day of June, 2019.

BELL & DAVIS PLLC

By: 
W. JEFF DAVIS, WSBA No. 12246
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Mindy Davis, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of BELL & DAVIS PLLC, 526 N. 5th Ave. Sequim, WA 98382.

3. On the date listed below, (1) cause to be filed with this Court a Petitioner's Opening Brief; and (2) to be delivered via email agreement to Patrick M. Irwin, 106 N. Laurel St. Port Angeles, WA 98362; pmirwin@patrickirwin.com and sheri@patrickirwin.com, who are counsel of record of The Gordon and Frances Sales Family Trust.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: June 19, 2019



MINDY DAVIS

BELL & DAVIS PLLC

June 19, 2019 - 2:05 PM

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