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Case No 52630-1-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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

Petitioners,

v.

ECHO MARIE SALES and BRUCE GORDON SALES, Co-Successor  
Trustees of the GORDON AND FRANCES SALES FAMILY TRUST,

Respondents,

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APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Christopher Melly  
Cause No. 18-4-00021-05

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**RESPONDENTS' OPENING BRIEF**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	COUNTERSTATEMENT OF THE ISSUES .....	3
III.	STATEMENT OF THE CASE .....	4
IV.	STANDARD OF REVIEW .....	10
V.	ARGUMENT .....	11
1.	The Abstract of Trust Expresses Enforceable Terms of the Trust.....	12
a.	Authenticity of the Abstract is not Challenged.....	12
b.	Petitioners Confuse Establishing the Terms of a Trust with Interpreting a Trust.....	12
c.	Law of Contract .....	14
2.	The Plain Language of the Abstract of Trust Must be Enforced.....	18
a.	The Abstract Sets Forth Terms of the Trust .....	19
b.	Frances J. Sales was not a Beneficiary of the Trust .....	20
c.	Distributions were Limited to Beneficiaries Only .....	21
d.	The Trustors Never Revoked the Trust.....	21
e.	The Trust Became Irrevocable at Gordon R. Sales' Death .....	25
3.	The <i>Matter of Estate of Rathbone</i> Does Not Apply to this Case.....	26

## TABLE OF CONTENTS (Cont.)

4. The Title of a Document Does Not Justify Ignoring its Terms.....	27
5. Attorney’s Fees and Costs .....	29
VI. CONCLUSION.....	31

## TABLE OF AUTHORITIES

### Cases

<i>Bering v. SHARE</i> , 106 Wn.2d 212, 721 P.2d 918 (1986).....	10
<i>Bresemann v. Hiteshue</i> , 151 Wash. 187, 275 P. 543 (1929) .....	11
<i>Dowgialla v. Knevage</i> , 48 Wn.2d 326 (1956).....	18
<i>Farrell v. Mentzer</i> , 102 Wash. 629, 174 P. 482 (1918) .....	14
<i>Hubbell v. Ward</i> , 40 Wn. 2d 779, 246 P.2d 468 (1952).....	15
<i>In re Button’s Estate</i> , 79 Wn.2d 849, 490 P.2d 731 (1971).....	24
<i>In re Estate of Bernard</i> , 182 Wn. App. 692 (2014).....	18, 20
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004).....	13

**TABLE OF AUTHORITIES (Cont.)**

Cases

*In re Estate of Furst*,  
113 Wn. App. 839, 55 P.3d 664 (2002).....22, 23, 24, 25

*In re Marriage of Lutz*,  
74 Wn. App. 356, 873 P.2d 566 (1994)..... 14

*In re Estate of Wimberley*,  
186 Wn. App. 475,514, 349 P.3d 11 (2015).....30

*Manary v. Anderson*,  
176 Wn.2d 342, 292 P.3d 96 (2013).....24

*Matter of Estate of Rathbone*,  
190 Wn.2d 332, 412 P.3d 1283 (2018).....8, 26, 27

*Poltz v. Tyree*,  
41 Wn. App. 695, 705 P.2d 1229 (1985) .....23

*Robel v. Roundup Corp.*,  
148 Wn. 2d 35, 42, 59 P.3d 611 (2002)..... 12

*Setterlund v. Firestone*,  
104 Wn.2d 24, 700 P.2d 745 (1985) ..... 14, 15

*State v. Rowe*,  
93 Wn.2d 277, 280, 609 P.2d 1348 (1980) ..... 10, 11, 26

Statutes

RCW 11.11.020 .....24

RCW 11.20.070 ..... 13

RCW 11.96A.020 ..... 11

RCW 11.96A.040 ..... 5

**TABLE OF AUTHORITIES (Cont.)**

Statutes

RCW 11.96A.150 ..... 30

RCW 11.97.020 ..... 18

RCW 11.98.011 ..... 8, 15, 16, 18

RCW 11.98.014 ..... 13, 17

RCW 11.98.075 ..... 9, 27, 28

RCW 11.98.078 ..... 6

RCW 11.103.030 ..... 22

RCW 64.04.010 ..... 18

RCW 64.04.020 ..... 18

Court Rules

CR 12(b)(c) ..... 7

CR 12(c) ..... 7

## I. INTRODUCTION

On January 12, 2018, Respondents Echo Marie Sales and Bruce Gordon Sales (hereafter “Sales”), siblings, as beneficiaries and the Successor Trustees of the Gordon and Frances Sales Family Trust (the “Trust”), petitioned the Superior Court of Clallam County to enforce the terms of the Trust as they are stated in a document titled Certificate of Trustee’s Power and Authority and Abstract of Trust (the “Abstract of Trust” or “Abstract”), which specifically states that it contains the original terms of the Trust, if the original Trust was lost. Clerk’s Papers (“CP”) 218-237.

Sales petitioned the court for: (a) a determination of the beneficiaries of the Trust, (b) an order returning all assets taken from the Trust to the Trustees, (c) quiet title in real property that is or was an asset of the Trust, (d) judgment against the Estate of Frances Sales and Mica Jean McLean (aka Wright) for the value of any wrongful distributions from the Trust, and (e) an award to Sales for their attorney’s fees. CP at 224.

The trial court set the initial hearing date for March 9, 2018 but Judge Christopher Melly (“Judge Melly”) reset on the hearing to April 27, 2018 from the bench when Mica Jean McLean (aka Wright), Luke G. Sprague, and Zechariah E. Sprague, (“Petitioners”) requested additional

time to locate the original Trust. CP at 212. At hearing, Judge Melly reserved judgment and set the matter for trial.

On August 31, 2018, in anticipation that Petitioners would challenge the use of the Abstract of Trust as a means of enforcing terms of the Trust, the parties stipulated to an order bifurcating trial to address the applicability of the Abstract of Trust and postpone enforcement of the Trust as found in the Abstract of Trust until after applicability could be determined. CP at 109-112.

The first trial was set for September 4, 2018. Record of Proceeding (“RP”) at 1. Prior to trial, Petitioners made two separate motions to dismiss Sales’ Petition. CP at 113-120 and 168-172. In both motions, the Petitioners made the same legal arguments Petitioners made at trial. RP at 10-12 and 18-22. Petitioner argued variations of: (a) a “Certificate of Trust” cannot be used to determine terms of an original trust because a certificate serves a limited statutory purpose, (b) the trial court has no statutory authority to use any document other than a full copy, or the original trust, to determine the terms of a trust, and (c) the Abstract of Trust is unenforceable because it does not contain all of the trust terms. CP at 113-120 and 168-172, and RP at pages 10-12 and 18-22. Sales asserted that while not the original document, the Abstract of Trust contained sufficient information to qualify as an enforceable trust, and the terms of the Trust as

found in the Abstract were sufficient to determine the intentions of Gordon R. Sales and France J. Sales. CP at 103- 106, 162-164, and 222-223.

At the September 4, 2018 trial, the court admitted four documents into evidence, the Abstract of Trust, and copies of deeds transferring real property into the Trust. RP at 5, and CP at 016-018. From the bench, the trial court admitted that the Abstract of Trust had “structural issues” but accepted the Abstract of Trust as an expression of terms of the Trust (a) found that the Trust continued in force and neither Gordon R. Sales nor Frances J. Sales revoked the Trust, (b) found that the Abstract of Trust did not name Frances J. Sales as a beneficiary, and (c) Frances J. Sales had no authority to transfer assets out of the Trust. RP at 26-32.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Does the Abstract of Trust contain the material terms to allow for enforcement of the Trust?
2. Do the terms set forth in the Abstract of Trust allow the Court to determine the intentions of the original Trustors for those matters the Sales seek to enforce?
3. What are the intentions of the Trustors as set forth in the Abstract of Trust?
4. Should this Court award Sales their attorney fees and costs for this appeal?

### III. STATEMENT OF THE CASE

On or about January 10, 1994, Gordon R. Sales and Frances J. Sales, husband and wife, (herein also “Trustors” and “Grantors”) executed a document titled the “Gordon and Frances Sales Family Trust: Certificate of Trustee’s Power and Authority and Abstract of Trust” (identified above as the “Abstract of Trust” or “Abstract”) CP at 019-029. The document itself states that Gordon R. Sales and Frances J. Sales had executed, at or before the time of their execution of the Abstract of Trust, an original Trust Agreement for the Gordon and Frances Sales Family Trust. *Id.* On May 25, 1994, Gordon R. Sales and Frances J. Sales filed the Abstract of Trust under Clallam County Auditor’s File No. 706567. *Id.*

According to the terms set forth in the Abstract of Trust, Gordon R. Sales and Frances J. Sales were both the Grantors and the initial Co-Trustees of the Trust. CP at 019. Soon after filing the Abstract of Trust, Gordon R. Sales and Frances J. Sales funded the trust by transferring, at the very least, two or more parcels of property to themselves in their capacity as the Trustees of the Trust. CP at 061-069.

On October 6, 2000 Gordon R. Sales died leaving Frances J. Sales as the sole remaining Trustee of the Trust. CP at 221 (Petition) and 157 (Response to Petition). Over the next few years, Frances J. Sales sold real estate out of the Trust and deposited the proceeds of those sales into her

own separate accounts. Petitioners' Opening Brief, page 31, lines 21-22. Unaware of how Frances J. Sales had managed the proceeds, in her capacity as a beneficiary of the Trust, made two separate demands to Frances J. Sales to make an accounting of the Trust's assets. CP at 154-155. One on January 13, 2015 and the other on September 13, 2017. *Id.* Unknown to Echo Sales, Frances J. Sales had died August 22, 2017. CP at 221 (Petition) and 158 (Response to Petition).

On the death of Frances J. Sales, Echo Marie Sales and Bruce Gordon Sales became the Successor Trustees of the Trust. CP at 020. Their sister, Mica Jean McLean (aka Wright) (herein individually "Mica"), one of the Petitioners, was appointed as the Personal Representative of the Estate of Frances J. Sales in the state of Montana. CP 219 (Petition) and 156 (Response to Petition). On January 12, 2018, Sales filed their Petition for Determination of Beneficiaries' Interest joining Mica, personally, and in her capacity as the Personal Representative of the Estate of France J. Sales, along with the other listed beneficiaries, Luke G. Sprague and Zechariah E. Sprague. CP at 218-219. The petition was filed pursuant to RCW 11.96A.040 and the procedure set forth in Chapter 11.96A of the Revised Code of Washington, the Trust and Estates Dispute Resolution Act ("TEDRA").

In their TEDRA petition, Sales requested the court interpret the Trust to establish the beneficiaries of the Trust, establish the terms and Trustee's authority under the Trust, and apply those terms to the actions of the prior Trustees of the Trust, namely Gordon R. Sales and Frances J. Sales. CP at 219 (paragraph 3.1 of the Petition). Sales assumed in their petition that the terms set forth in the Abstract of Trust were the same as that of the Trust. CP at 220-221. Sales requested that once the terms of the Trust were established, that the court find that any transfers made by Frances J. Sales out of the Trust were void under RCW 11.98.078, that Frances J. Sales had breached her fiduciary duties to the beneficiaries of the Trust, and that title to real property that is or was in the name of the Trust be quieted in the Trust. CP at 219-220.

Procedurally, the initial hearing on the TEDRA petition was set for March 9, 2018. The Petitioners filed a request for continuance of the hearing to give them time to locate the original Trust. CP at 212. The hearing was continued to April 27, 2018. The original Trust was not produced at hearing, and the Court ordered from the bench that Mica was to provide an accounting of the Trust on behalf of the Estate of Frances J. Sales for Frances's term as Trustee, and set the matter for trial scheduled for September 4, 2018. RP at 1.

On June 25, 2018, Sales filed a motion for contempt against Mica for her failure to account for the Trust. CP at 195-200 (Motion), and CP at 203 (Response to Request for Accounting). On June 28, 2018, the Petitioners filed their first Motion to Dismiss on the pleadings of the case based on CR 12(b)(6) and CR 12(c). CP at 168-172. The trial court denied the motion for contempt and for dismissal.

As trial approached, both Sales and Petitioners filed Motions in Limine. CP at 057-060 and 113-120. In its same filing, the Petitioners renewed their motion to dismiss all claims. CP at 113-120. In part the Motions in Limine involved the testimony of witnesses. CP at 057-060 and 113-120. The respective motions were settled by stipulation at trial. RP at 5-7.

Petitioners' renewed motion to dismiss was also disregarded by stipulation at trial with the court addressing all matters before it as "a fairly condensed version of a trial." RP at 7.

The reason for the "condensed version of a trial" is because the trial court, by prior order, had significantly narrowed the issues before the court for trial. In anticipation of this very appeal, the trial court ordered, by stipulation, that the matters before the court be bifurcated with the parties trying those issues regarding establishing terms of the Trust and the status

of the Abstract of Trust first and any issues regarding breach of fiduciary duty and the assets of the Trust at a later date. CP at 109-112.

At trial, the only evidence before the court was the Abstract of Trust, Deeds purportedly transferring real estate into the Trust, those facts stipulated to at trial, and those facts admitted in the petition and response to petition. CP at 019-029, RP at 5-7, and CP at 156-159 (regarding facts admitted in pleadings).

In their trial briefs, and at trial, the parties repeated the same arguments made at prior hearings. Sales asserted that while the original Trust could not be found, the Abstract of Trust satisfied the fundamental elements of an enforceable trust as set forth in RCW 11.98.011(1). CP at 102-105. Once the fundamental elements of an enforceable trust are established, the court then had the duty to interpret the available terms to determine the intent of the Trustors. CP at 105-107. Based on a plain reading of the Abstract of Trust, Sales asserted that Frances J. Sales was not a beneficiary of the Trust, neither Frances J. Sales nor Gordon R. Sales revoked the Trust, the Trust became irrevocable at the death of Gordon R. Sales, and Frances J. Sales had no authority to remove assets from the Trust without first revoking the Trust. *Id.*

Relying heavily on the case of *Estate of Rathbone*, 190 Wn.2d 332, 412 P.3d 1283, Petitioners argued that the court had no authority to

“interpret” the Abstract of Trust in order to find it contains actual terms of the Trust. CP at 056. The Petitioners also argued that the terms set forth in the Abstract of Trust could not be enforced because of the many terms of the Trust that could not be found in the Abstract of Trust, and that the Abstract could not be relied upon because it was a Trust Certificate under RCW 11.98.075 and not statutorily intended for such enforcement. CP at 053-055.

Judge Melly asked and answered rhetorically, “[I]s the abstract that has been filed an example of absolute clarity? Absolutely not.” RP at 26, lines 12-13. He then concluded that the Abstract of Trust was a reliable expression of Gordon R. Sales and Frances J. Sales’ intentions regarding their Trust with regard to the matters before the court. RP at 26-29. Reading the terms set forth in the Abstract of Trust, Judge Melly determined that Gordon R. Sales and Frances J. Sales intended to form a Trust, make that trust irrevocable at the first of them to die, and prevent the survivor from removing assets from the Trust after the first spouse died. *Id.* On October 12, 2018, shortly before his retirement, Judge Melly executed Findings of Fact and Conclusions of Law and a Partial Order on Merits. CP at 011-029.

Petitioners now appeal Judge Melly’s Findings of Fact and Conclusions of Law regarding the use of the Abstract of Trust as a means of determining and enforcing the terms of the Trust. CP at 009-010. It is

important to note that Petitioners assign no error and do not appeal the fact that the Trust was formed and funded, Gordon R. Sales and Frances J. Sales had the capacity to form the Trust, and the Abstract of Trust was executed and filed with the Clallam County Auditor by Gordon R. Sales and Frances J. Sales. Petitioners' Opening Brief, page 3. The only claim on appeal is that the Abstract of Trust is not a proper document on which to find and enforce the terms of the Trust.

#### **IV. STANDARD OF REVIEW**

Although this matter is an appeal from a trial court decision at trial, the standard of review for both the Findings of Fact and the Conclusions of Law is de novo. Ordinarily, factual determinations made at trial are reviewed to determine if they are supported by substantial evidence and matters of law are reviewed de novo. *See Bering v. SHARE*, 106 Wn.2d 212, 220-221, 721 P.2d 918 (1986). However, the Clallam County Superior Court's Findings of Fact are exclusively based on written documentation without any supporting oral testimony. CP at 030-032. In the case of *State v. Rowe*, 93 Wn.2d. 277, 280, 609 P.2d 1348 (1980), the court determined that, "Where the interpretation of a document must be made from the face of the instrument itself, this court is in as good a position as the trial court to interpret its meanings." (Citations Omitted). *State v. Rowe, id.* Thus, this Court is not bound by the trial court's Findings of Fact.

While addressed more specifically below, since the Abstract of Trust and the Trust itself are fundamentally contracts, Sales had the burden at trial to establish all facts based on a preponderance of the evidence. *See Bresemann v. Hiteshue*, 151 Wash. 187, 275 P. 543 (1929). Based on the case of *State v. Rowe*, 93 Wn.2d. 277, this standard would continue before the court of Appeals.

## V. ARGUMENT

Petitioners contend that this Court should reverse the Clallam County Superior Court because (1) the Abstract of Trust contains “missing” trust terms and Chapter 11.96A of the Revised Code of Washington, specifically RCW 11.96A.020, does not allow for the court to “interpret” the Abstract of Trust to assume its terms are the terms of the Trust, (2) the Abstract of Trust itself is not a sufficient document on which to interpret trust terms because it is a Trust Certificate, not the Trust itself, (3) the Abstract of Trust has too many missing terms in order to use it to “re-create” the Trust, and (4) if the Abstract is sufficient on which to determine trust terms, the court should have done so for Mica’s benefit. Those claims are unavailing.

This Court should affirm. Sales assert that while the Abstract of Trust is not an ideal expression of the Trustors’ intentions, it is an explicit expression of their intentions on those matters Sales seek to enforce. This

Court should affirm the Clallam County Superior Court's Order and Findings that the Abstract of Trust is enforceable in lieu of the original Trust, that Frances J. Sales was not a beneficiary of the Trust, the Trust was never revoked, the Trust became irrevocable upon the death of Gordon R. Sales, and Frances J. Sales did not have the authority to remove assets from the trust after the death of Gordon R. Sales.

1. *The Abstract of Trust Expresses Enforceable Terms of The Trust*

**a. Authenticity of the Abstract is not Challenged**

With regard to establishing proof of the terms set forth in the Abstract of Trust, please note that the Abstract of Trust is in writing and, according to Finding of Fact No. 5, Petitioners "do not challenge the authenticity of the Abstract of Trust or Gordon Sales' or Frances Sales' signatures to the Abstract of Trust, therefore the authenticity of the Abstract of Trust is assumed by this Court." CP at 012. Since the Petitioners did not challenge this finding, it is a verity on appeal. *See Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002).

**b. Petitioners Confuse Establishing the Terms of a Trust with Interpreting a Trust**

The Petitioners significantly misstate the standard of proof that must be met in order to establish that the terms set forth in the Abstract of Trust are in fact terms of the Trust itself. Petitioners make the leap that since the

“Interpretation of Trusts are governed by the law of the interpretation of Wills. . . Therefore, Echo has the burden of proving the missing Trust provisions by clear, cogent, and convincing evidence.” *See* Petitioners’ Opening Brief page 13, Lines 3-6. While “clear, cogent, and convincing evidence” is the standard where written terms of a trust are unavailable when written terms are available, all that is required is that the document the parties intend to enforce contain all material terms of the trust.

It is true that RCW 11.98.014 sets forth that “the creation of an oral trust and its terms may be established only by clear, cogent, and convincing evidence.” (Emphasis added.) This same standard does not exist for expressed trusts memorialized in writing. The Petitioners can point to no case to the contrary. Presumably because a written and authenticated document is clear, cogent, and convincing in and of itself.

For the proposition that the terms of a trust must be established by “clear, cogent, and convincing” evidence, the Petitioners cite *In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796, 802 (2004). The holding *In re Estate of Black* is distinguishable from the claims involving the Trust. *Estate of Black* involved a challenge to the admission of a missing will and the application for RCW 11.20.070. *Id.* By citing *Estate of Black*, Petitioners mistakenly mix together the responsibilities of: (a) establishing or

determining the terms of a trust, and (b) interpreting the Trust terms that can be established. These two processes are distinct.

**c. Law of Contract**

Petitioners are correct to point out that fundamentally an express trust is a contract. Petitioners' Opening Brief, page 19, lines 6-10; *In re Marriage of Lutz*, 74 Wn. App. 356, 365, 873 P.2d 566 (1994) (citing *Farrell v. Mentzer*, 102 Wash. 629, 174 P. 482 (1918)). The Petitioners make repeated assertions that the Abstract of Trust is not enforceable because it does not contain all of the terms of the original Trust.<sup>1</sup> Petitioners' Opening Brief page 19, lines 17-18; page 20 lines 9-11; page 22, lines 9-10. This is not the law set forth for the enforcement of contracts. The issue is not if all of the provisions are present, but if the "material" provisions present are sufficient enough to order the relief requested. *See Setterlund v. Firestone*, 104 Wn.2d 24, 700 P.2d 745 (1985).

In their Petition filed with the trial court at commencement of the action, Sales essentially prayed the court for specific performance of the Trust based on those terms as they could be found in the Abstract of Trust. CP at 224. To request specific performance from the courts, a petitioning party need not establish all of the terms of the contract, but only the material

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<sup>1</sup> "These rules are designed to determine the parties' intent from an entire written agreement." (Emphasis Added) Page 22, lines 9-10.

terms which they intend to enforce. The case of *Setterlund v. Firestone* sets forth the enforcing parties' burden as follows:

[I]t is clear that those who seek specific performance must prove the specificity of material terms of the agreement they seek to enforce. This, then, becomes part of appellants' prima facie case for specific performance, regardless of what other issues are presented at trial. In short, the buyers had to prove the existence of a preliminary agreement which contained terms specific enough to be enforced without the court drafting the final documents.

*Setterlund v. Firestone*, 104 Wn.2d 24, 27 700 P.2d 745 (1985). What constitutes the material terms of a contract is determined by the nature of transaction itself. See *Hubbell v. Ward*, 40 Wn.2d 779, 782, 246 P.2d 468, 470 (1952). For a trust, the material terms required for enforcement are set forth by the legislature in RCW 11.98.011 (Trust creation – Requirements).

Setting aside for the moment that the Petitioners dispute the interpretation of the terms set forth in the Abstract, the Abstract of Trust itself contains each of the material provisions set forth in RCW 11.98.011.

RCW 11.98.011(1) states in relevant part:

- A trust is created only if:
- (a) The trustor has capacity to create a trust;
  - (b) The trustor indicates an intention to create the trust;
  - (c) The trust has a defined beneficiary . . . .
  - (d) The trustee has duties to perform; and
  - (e) The same person is not the sole trustee and sole beneficiary.

If each of these elements are met, then a trust is enforceable.

Addressing each element in order, although error was assigned to Finding of Fact No. 7 and generally to Conclusions of Law No. 2, from Petitioners' Opening Brief, the Petitioners do not challenge element (a) or (b), that Gordon R. Sales and Frances J. Sales had the capacity to form a trust and that paragraph 1.1 of the Abstract of Trust expresses an intention to create a trust. Petitioners' Opening Brief, page 30, liens 16-17; CP at 020 (regarding paragraph 1.1 of the Abstract).

Paragraph 1.2 of the Abstract sets forth a list of beneficiaries. CP at 020. That the Petitioners assert that the list set forth in paragraph 1.2 is not complete, or that other terms imply that Frances Sales was also a beneficiary, is a question of interpretation which is addressed below. Petitioners' Opening Brief, page 31, lines 15-18. Who the beneficiaries are may be in dispute, but that the Abstract defines beneficiaries is not.

Paragraphs 4.2 of the Abstract titled "Trustees Powers" and 8.4 titled "Distributions" contain significant and specific duties. CP at 022-027. The existence of these duties, as set forth in the Abstract of Trust, are not addressed by the Petitioners in their briefing. The Abstract meets the requirements of RCW 11.98.011(1)(d).

As to the final element in RCW 11.98.011(1) that "(e) The same person is not the sole trustee and sole beneficiary", Petitioners demand, by interpreting the Abstract, that Frances Sales was both a Trustee and a

Beneficiary. That Petitioners label, without evidence, those individuals listed in paragraph 1.2 as “Remainderman Beneficiaries”, at no point in Petitioners’ brief to this Court do Petitioners assert that those listed in paragraph 1.2 are not beneficiaries of the trust or that Frances Sales was ever the only beneficiary of the Trust.

The Petitioners assert that the Abstract of Trust is fatally flawed by alleging that the Abstract of Trust does not contain a “distribution scheme” and did not express an assumed authorization that all assets passed to the surviving spouse between Gordon R. Sales and Frances J. Sales. Petitioners’ Opening Brief, page 20 lines 9-11, and page 26, lines 13-16. The Petitioners do not describe why a “distribution scheme” is relevant to any issue before this Court or how the purported lack of a dispositive scheme makes any trust unenforceable in any other respect.

Petitioners simply assume, without evidence, that the fully formed Trust included a clause allocating all assets to the survivor of Gordon R. Sales and Frances J. Sales. Petitioners’ Opening Brief, page 26, lines 12-20. One can just as easily assume that the full Trust did not have such a clause and neither Gordon nor Frances wished the other to deprive their children of their benefit of the Trust. Such conjecture is barred by RCW 11.98.014. Such conjecture also misses the point that the parties must work within the terms of the Trust they have before them once it is established

that the contract contains all material terms necessary to adjudicate the matter.

Since the Abstract of Trust meets each of the elements of RCW 11.98.011(1) and is otherwise in an enforceable form<sup>2</sup>, the content of the Abstract contains the material terms necessary to warrant specific performance.

2. *The Plain Language of the Abstract of Trust Must be Enforced*

Once it is established that the Abstract of Trust contains materially enforceable terms, the next matter is to interpret the terms set forth therein. RCW 11.97.020 provides that rules of construction regarding the interpretation of a will also applies to the interpretation of a trust.

A court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent. We determine that intent from the instrument as a whole. Similarly, "[t]he 'touchstone of contract interpretation is the parties' intent.'" We follow "the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used."

*In re Estate of Bernard*, 182 Wn. App. 692, 697 (2014) (citations omitted).

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<sup>2</sup> Citing the then currently enacted Statute of Frauds, the court in *Dowgialla v. Knevage*, 48 Wn.2d 326, 333 (1956), extended the application of the Statute of Frauds to all trusts holding real estate. RCW 64.04.010 states broadly, "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed[.]" (Emphasis added) RCW 64.04.010. RCW 64.04.020 requires that "Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds." The Abstract of Trust was executed in compliance with RCW 64.04.020 and filed with the Auditor of Clallam County. CP at 19-29.

**a. The Abstract Sets Forth Terms of the Trust**

That the Abstract of Trust contains terms of the original Trust Agreement is not only self-evident, it is expressed in the Abstract itself. Petitioners' challenge to Findings of Fact No. 6 through 10, No. 12, and No. 14, each finding setting forth expressed terms set forth in the Abstract, ignores the words printed on the document itself. The preamble of the Abstract states in relevant part:

The following provisions are found in that certain Trust Agreement named and described above, by and between the above designated Grantors and Trustee, and may be relied upon as a full statement of the matters covered by such provisions by anyone dealing with the Trustee or any successor Trustee.

CP at 033. The preamble continues to state that if a term of the Abstract differs from the Trust Agreement, the Trust Agreement will control. *Id.* Unfortunately, the Trust Agreement was not introduced into evidence. Absent the Trust Agreement itself, the Abstract dictates that the Abstract "may be relied upon as a full statement of the matters covered by such provisions." CP at 033. Reading this language plainly, the Trustors intended the terms of the Abstract of Trust to be followed. Every term of the Abstract must be read in light of this provision.

**b. Frances J. Sales was not a Beneficiary of the Trust**

The only beneficiaries listed in any part of the Abstract of Trust are those set forth in paragraph 1.2 of the Abstract. CP at 034. The paragraph lists only Bruce Gordon Sales, Mica Jean McLean, Echo Marie Sales, Luke G. Sprague, and Zechariah E. Sprague. *Id.* As one of the original Trustees of the Trust, Gordon R. Sales and Frances J. Sales and could have named themselves as beneficiaries. They did not. They also could have labeled each of the listed beneficiaries as “contingent beneficiaries” or “residuary beneficiaries.” They did not. Assigning such labels to the listed beneficiaries is not justified by the Abstract or any evidence produced at trial.

Petitioners assert that a Grantor to a trust “need not name themselves a Beneficiary as they are assumed as such.” Petitioners’ Opening Brief page 20, lines 14-16. This assertion is made without citation to law and without support of any evidence presented to the Court. Were this Court to make such a presumption a matter of law, the holding *In re Estate of Bernard*, 182 Wn. App. 692, 697 (2014), requiring trustor intent to be construed from written agreement alone, would be meaningless.

That the Abstract includes the terms “Per Stirpes” and “Per Capita” can only be read to mean how each of the beneficiary’s interest would be distributed if they died prior to full distribution. A Per Capita beneficiary’s

share would go back to the other beneficiaries and a Per Stirpes beneficiary's share would go to their lineal descendants. CP at 034.

Reading paragraph 1.2 in light of the Preamble to the Abstract, the only reasonable interpretation is that Gordon R. Sales and Frances J. Sales intended to not include themselves as beneficiaries of their Trust.

**c. Distributions were Limited to Beneficiaries Only**

Frances Sales did not have the authority to remove assets from the Trust without first revoking the Trust. Paragraph 8.4 states in relevant part that "All distributions of income or principal shall be made to the respective beneficiaries in person . . . ." CP at 041. Neither paragraph 8.4, nor any other paragraph or clause of the Abstract of Trust authorize the Trustee or the Grantor to distribute any part of the Trust assets to anyone other than a beneficiary of the Trust. CP at 041. It is customary for a Grantor to retain the authority over a Trustee to direct distributions of a trust to beneficiaries or any third party. However, such a clause does not exist. On a plain reading of the Abstract of the Trust, distributions other than to a listed beneficiary, would require an amendment or revocation of the Trust.

**d. The Trustors Never Revoked the Trust**

Neither Gordon R. Sales nor Frances J. Sales made any attempt to revoke the Trust. According to common law and statute, if a trust states a specific means of revoking that trust, the means stated is the only way the

trust may be revoked. *See In re Estate of Furst*, 113 Wn. App. 839, 55 P.3d 664 (2002), and RCW 11.103.030(3). Paragraph 3.1 of the Abstract of Trust sets forth the means of revoking the Trust. CP at 035-036. Paragraph 3.1 states in its entirety:

Power in Grantors During Lifetimes of Both Grantors. 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 and the Trusts hereunder, in whole or in part, by an instrument in writing, signed by both Grantors and delivered in Grantors' lifetimes to Trustee; provided, however, that if there are Husband and Wife Grantors, no such alteration, amendment or revocation shall affect the character of any property held by the Trust, and the interest of the Husband and Wife in the various Trust assets, whether community, separate or otherwise, shall retain its character as such. Nothing herein shall be construed as a transfer of separate properties from Husband to Wife or from Wife to Husband, and in the event of any revocation or amendment, all property shall be reconveyed to the respective owners. If this Trust Agreement is revoked in its entirety, the revocation shall take effect upon the delivery of the required writing to Trustee. On the revocation of this Trust Agreement in its entirety, Trustee shall deliver to Grantors, or as Grantors may direct in the instrument of revocation, all the Trust estate.

CP at 035-036. At trial, Petitioners failed to produce any evidence at all that Gordon R. Sales or Frances J. Sales ever attempted to revoke the Trust in compliance with paragraph 3.1 of the Abstract of Trust. The Petitioners provided no document in writing, no testimony, and no will revoking the Trust.

Instead, the Petitioners assert that Frances J. Sales did not need to formally revoke the Trust. To justify this interpretation, the Petitioners rely on the circular argument that Frances revoked the trust by taking assets from the trust (and also justifies removing assets from the trust because Frances Sales revoked the Trust), and the holding in *Poltz v. Tyree*, 41 Wn. App. 695, 705 P.2d 1229 (1985). Petitioners' Opening Brief, page 28, lines 1-14. While the court in *Poltz* allowed for an informal revocation of a trust, it was not because the trustor in *Poltz* held the status as trustor, trustee, and present beneficiary, as asserted by the Petitioners. Petitioners' Opening Brief page 28, lines 10-11. The court allowed for an informal revocation because the trustor, "reserved the right to revoke the trust without notice to or consent of the beneficiary, and without any requirement that the revocation be in writing." *Poltz v. Tyree*, 41 Wn. App. 695, 696, 705 P.2d 1229 (1985), *see also In re Estate of Furst*, 113 Wn. App. 839, 843, 55 P.3d 664 (2002).

Since Article 3.1 of the Abstract of Trust sets forth a specific means of revoking the Trust, the case of *In re Estate of Furst*, 113 Wn. App. 839, 55 P.3d 664 (2002) applies. In the *Estate of Furst*, Mr. Furst executed and funded the Robert J. Furst Revocable Trust with most if not all of his assets. *In re Estate of Furst*, 113 Wn. App. 839, 840-841, 55 P.3d 664 (2002). Over

one year later, Mr. Furst executed a new will which designated heirs and beneficiaries different than those set forth in his Trust. *Id.*

Reviewing the trust document executed by Mr. Furst, the court found that his trust contained a specific method to revoke the trust. *In re Estate of Furst*, 113 Wn. App. 839, 842-843, 55 P.3d 664 (2002). Citing by footnote the holding *In Re Button's Estate*, 79 Wn.2d 849, 852, 490 P.2d 731 (1971), the court in the *Estate of Furst* stated in the body of its opinion that “Where the trust instrument specifies the method or revocation, only that method can be used.” *In re Estate of Furst*, 113 Wn. App. at 842. The court went on to hold that the residual designation of heirship to individuals other than the beneficiaries in the trust was not sufficient to “revoke” the trust under RCW 11.11.020 (Disposition of nonprobate assets under will). 113 Wn. App. at 843-844. While the Washington Supreme Court later refined the application of RCW 11.11.020 in *Manary v. Anderson*, 176 Wn.2d 342, 292 P.3d 96 (2013) to allow for a specific bequest of a trust asset in a later executed will is superior to a prior beneficiary designation in a trust agreement, both the court in the *Estate of Furst* and *Manary* held to the general rule that where the method of revocation of a trust is set forth in writing, only that method can be used. The court in the *Estate of Furst* held the trust was not revoked and was the operative document for disposition of

the disputed assets. See *In re Estate of Furst*, 113 Wn. App. 839, 843-844, 55 P.3d 664 (2002).

Based on *In re Estate of Furst*, and the complete lack of a writing that complies with the terms of paragraph 3.1 in evidence before the trial court, and applying the holding *In re Estate of Furst, id.* Frances J. Sales did not revoke the Trust.

**e. The Trust Became Irrevocable at Gordon R. Sales' Death**

While the fact and legal effect of Frances Sales not having revoked the Trust may make it unnecessary for this Court to address the matter that the Trust became irrevocable at the death of Gordon Sales, the fact remains that under the plain language of paragraph 3.1, the Trust could no longer be revoked after the death of the first Grantor.

Petitioners take great umbrage to the trial court reading that because paragraph 3.1 was subject to a missing paragraph 3.3, parenthetically identified as “(Irrevocability on Death of First Grantor Spouse)”, that the Trust could not be revoked at the death of the first Trustor. Petitioners’ Opening Brief, pages 26-27. Petitioners’ argument against the finding fails to see that in context of the remaining language of paragraph 3.1, the trial court correctly determined that the inclusion of the words “Irrevocability on Death of First Grantor Spouse,” expressed a intention by the Grantors to

deprive the surviving spouse of a right to revoke the Trust after their spouse's death.

The trial court's factual finding is corroborated by the fact that paragraph 3.1 provides that the mechanism for revoking the Trust is an "instrument in writing signed by *both Grantors* and delivered in *Grantors' lifetimes* to Trustee[.]" CP at 035 (emphasis added). Since an expressed means of revoking a trust is the only means of revoking a trust, and the quoted language requires a writing signed by "both Grantors" delivered during both "Grantors' lifetimes", as a practical matter the Trust became irrevocable on the first spouse's death because the requirements of paragraph 3.1 could no longer be met by the surviving spouse. Since this Court is not bound specifically by the factual findings of the trial court, this Court need not appeal to the parenthetical language found in paragraph 3.1 in order to find the Trust was irrevocable at the first spouse's death. *See State v. Rowe*, 93 Wn.2d. 277, 280, 609 P.2d 1348 (1980). However, in context of the rest of paragraph 3.1, the reference to a missing paragraph 3.3 titled "Irrevocability on Death of First Grantor Spouse," shows a clear intention to make the Trust irrevocable at the time of a spouse's death.

3. *The Matter of Estate of Rathbone Does Not Apply to This Case*

Inexplicably, the Petitioners assert that since a trust is interpreted using the same rules of interpretation as those used for wills, the holding in

the case of *Matter of Estate of Rathbone*, 190 Wn. 2d 332, 412 P.3d 1283 (2018) prevents this Court from “re-creating missing Trust terms” by referencing the Abstract of Trust. Petitioners’ Opening Brief, pages 13-16. While the case of *Matter of Estate of Rathbone* is nominally about the interpretation of a will, the holding in the case centered entirely on the limit of a court’s jurisdiction in a nonintervention probate. *See generally, Matter of Estate of Rathbone*, 190 Wn. 2d 332, 412 P.3d 1283 (2018). The first sentence of the case is: “This case involves the issue of whether and to what extent superior courts have authority to intervene in the *administration of nonintervention estates.*” *Id.* at 334 (Emphasis Added). The court did not say that the will could not be interpreted, only that the court had no jurisdiction over the probate in order to substitute the court’s interpretation for that of the Personal Representative. *Matter of Estate of Rathbone*, 190 Wn. 2d 332, 412 P.3d 1283 (2018). Since a nonintervention estate is not involved in the present litigation, *Matter of Estate of Rathbone* has no application to the above entitle action.

4. *The Title of a Document Does Not Justify Ignoring its Terms*

Petitioners fail to explain how the document referred to herein as the Abstract of Trust is only a “Certificate of Trust”, as defined by RCW 11.98.075, or how that fact is relevant to this Court’s ultimate determination. To avoid disclosing to banks, creditors, or the entire world

the entire contents of an expressed trust, each time a trustee needed to transact business on behalf of the trust, the legislature enacted RCW 11.98.075 to allow trustees to provide third parties Certificates of Trust, in lieu of the entire trust document itself, in order to confirm the Trustee's authority to act on behalf of the trust. RCW 11.98.075(1) sets forth the only information that must be included in a Certificate of Trust for it to be effective. Specifically:

- (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 cotrustees 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.

RCW 11.98.075(1). RCW 11.98.075 became effective law on January 1, 2012. The Abstract of Trust was executed on or about January 10, 1994 and filed with the Clallam County Auditor's office on or about May 25, 1994. CP at 033-043. While the Abstract of Trust serves some of the purposes of a Certificate of Trust, based on its timing, it was not filed as a means of complying with RCW 11.98.075.

By comparing RCW 11.98.075 Certificate of Trust and the Abstract of Trust at issue, this Court will find that the Abstract states who the

Trustees are (paragraph 1.3), who the Trustors are (front page), authority between Co-trustees (final page), and how the Trust may be revoked (paragraph 3.1). CP at 033-043.

In contrast, the Abstract of Trust at issue goes beyond a simple Certificate of Trust to include: who the beneficiaries are (paragraph 1.2), the full rights and authority of a Trustee of the Trust (Article 4); and a requirement that all distributions must be made to the beneficiaries only (paragraph 8.4). CP at 033-043. The full name of the document referred to herein as the Abstract of Trust is the “Gordon and Frances Sales Family Trust: Certificate of Trustee’s power and Authority and Abstract of Trust,” not just “Certificate of Trust.” CP at 033. Whatever a document is called, a Certificate or an Abstract, this Court cannot ignore material terms of a trust set forth in the document.

##### 5. *Attorney’s Fees and Costs*

Sales request this Court order an award of the payment of attorney’s fees and costs and remand the matter of the amount of that award to the trial court to be resolved upon final resolution of the litigation. TEDRA allows for the discretionary award of attorney fees and costs of litigation for a matter brought before the court as a part of the Trust Resolution process.

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; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved

RCW 11.96A.150(1). Courts in Washington will generally award attorney fees and costs if the underlying litigation was brought for the benefit of the trust. *See In re Estate of Wimberley*, 186 Wn. App. 475, 514, 349 P.3d 11 (2015).

Echo Marie Sales made two separate demands simply for information regarding the Trust. With the Abstract of Trust, she was aware that she was a successor trustee and a beneficiary of the Trust. In both instances she was rebuffed. CP at 154-155. At Frances J. Sales's death, Sales brought a petition for a determination of the terms of the Trust. CP at 218-237. Their action benefits not only themselves, but also the other beneficiaries of the Trust. Sales should not bear the expense of protecting all of the beneficiaries' rights under the terms of the Trust.

It is Sales' firm belief that this appeal is not the end of the litigation. As such, they pray that this Court order award Sales' attorney fees and costs against the Trust itself and the Petitioners, but remand to the trial court to

determine the amount awarded, and the parties against whom debt should be allocated, in context of those issues that remain un-litigated.

## VI. CONCLUSION

Missing in the Petitioners' arguments is that the Abstract sets forth the intentions of not only Frances J. Sales, but also Gordon R. Sales. For what other reason would Gordon R. Sales and Frances J. Sales have included the provisions set forth in the Abstract except for the provisions to be read and enforced? That some of the provisions in the Abstract of Trust were inconvenient to Frances J. Sales and may not have been in her own best interest does not mean that the provisions do not express her intentions or the intentions of her husband. The Trust was a bargain struck between a husband and wife regarding the disposition of their assets after both had died. That a document does not memorialize all of the terms of a trust is not a basis to ignore those material terms that are set forth in the document that are relevant to the dispute before the Court. The Abstract of Trust is not the entire Trust, but it expresses enough of the Trust to grant Sales their requested relief. It is for this reason that the trial court's findings and conclusions must be upheld.

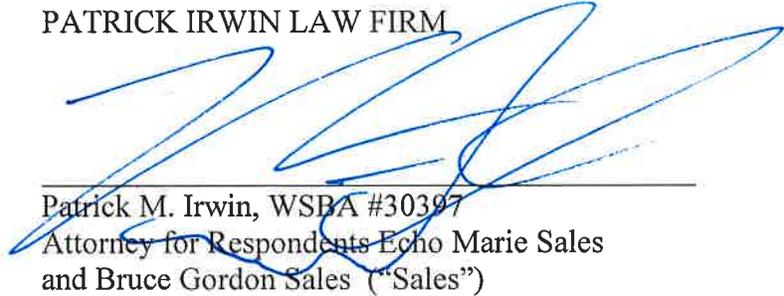
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Respectfully submitted this 15 day of July, 2019.

PATRICK IRWIN LAW FIRM



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CERTIFICATE OF SERVICE

I, Sheri Summers, certify and state as follows:

That on the 18<sup>th</sup> day of July, 2019, the undersigned delivered a copy of the attached RESPONDENTS' OPENING BRIEF in the above matter to the attorneys of record as follows:

W. Jeff Davis  
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PO Box 510  
Sequim, WA 98382

Attorney for Petitioners

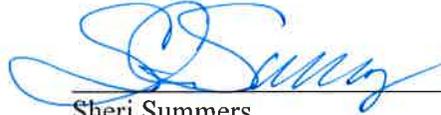
Hand Delivered

Email: [jeff@bellanddavispllc.com](mailto:jeff@bellanddavispllc.com)  
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(Approved via Email Only)

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this 18<sup>th</sup> day of July, 2019, at Port Angeles, Washington.



Sheri Summers

**PATRICK IRWIN LAW FIRM**

**July 18, 2019 - 9:14 AM**

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