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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN THE MATTER OF:
THE CATHERINE P. DAVIS LIVING TRUST

DOUGLAS LANCE DAVIS, JR.

Appellant,

v.

PADDY COOK and KIMBERLY BRANDENBURG,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves a dispute between three siblings, Douglas "Lance" Davis, Jr., Paddy Cook, and Kimberly Brandenburg. Their mother, Catherine Davis, executed an amended revocable trust (the "Trust") under which she was the primary beneficiary and her children were the successor beneficiaries. As the trust states:

> The Trustee shall liberally distribute income and principal of the Trust Estate ***for my benefit*** and the rights of the successor beneficiaries hereunder ***shall be considered secondary***. The Trust Estate is established to ensure that the best available care and support ***are provided to me to meet all lifetime needs***. ***All assets*** of the Trust Estate are to be considered available ***for that purpose***, and the Trustee shall ***at all times be guided by that purpose and intent***. (Emphasis added.)

Shortly after executing her amended Trust, Catherine lost the capacity to make decisions for herself. This left Paddy as the sole trustee. One of the main trust assets is a home in Seattle. When Paddy initiated this action, the home was estimated to be worth $840,000-$850,000. Nevertheless, after

Catherine had become incapacitated, Paddy tried to "sell" the Seattle property to her sister Kim for the "total purchase price of $250,000." Because this price was $600,000 below the estimated value of the property, such a transfer would be tantamount to giving Kim a gift of trust assets worth $600,000. Because the trust does not authorize the trustee to make any gifts, Lance objected to this transaction.

Paddy brought a TEDRA action in Clark County Superior Court, asking the Court to approve the transaction. Kim filed a response to Paddy's Petition, in which she joined in Paddy's request to approve the transaction. Lance filed an opposition, asking the court to reject the transaction.

The Court held a two-day trial, during which it considered extrinsic evidence offered by Paddy and Kim to show that Catherine had a long-held "wish" to transfer ownership of the Seattle property to Kim, "with assistance from Catherine." (CP 18.) Despite this long-held wish, however, Catherine never did transfer the property to Kim, or revise her

trust to authorize such a transfer. She could have done so at any time between 1993, when the property was first acquired, all the way until January of 2016, by which time Catherine had lost the capacity to make such decisions. Nevertheless, based on the extrinsic evidence, the trial court approved the sale of the property to Kim for $250,000. In addition, the trial court ordered Lance to pay Paddy and Kim their attorney's fees and costs.

Lance appeals and asks the Court to reverse the trial court's judgment, to rescind the sale, and to direct the trial court to award Lance his attorney's fees and costs. Lance also requests an award of attorney's fees and costs incurred on this appeal.

II. ASSIGNMENT OF ERROR

The trial court erred by approving the sale of the Seattle property to Kim for $250,000 and by ordering Lance to pay Kim's and Paddy's attorney's fees and costs.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Trust provides that the "interpretation and operation of the trust shall be governed" by Oregon law. Under Oregon Law, "[w]hen a will or trust instrument is fully integrated and is not ambiguous on its face, extrinsic evidence is not admissible to establish the testator's or settlor's intent."[1] The Trust unambiguously provides that all assets and income of the trust must be directed first to the "best available care and support" of Catherine "to meet all [her] lifetime needs," and that the interests of all her children "shall be considered secondary." The Trust also does not allow gifts, either to Catherine's children or to anyone else. Did the trial court err by relying on extrinsic evidence to authorize a transaction that is tantamount to giving a $600,000 gift to Kim?

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[1] *Jarrett v. U.S. Nat. Bank of Oregon*, 81 Or. App. 242, 725 P.2d 384 (Or. App. 1986), *review denied*, 302 Or. 476 (1987).

IV. STATEMENT OF THE CASE

A. The Non-Extrinsic Evidence

The following facts can be gleaned from the four corners of the trust instrument. Catherine Davis has four living children, Douglas Lance Davis, Jr. ("Lance"), Kevin Davis, Kimberly Brandenburg ("Kim"), and Paddy Cook ("Paddy").[2] (CP 27.) Catherine Davis, as the "Trustor," established the Catherine Patricia Davis Living Trust, dated July 6, 1994, as amended and restated (the "Trust"). (CP 26.) Catherine amended and restated the Trust in a Trust Agreement effective April 7, 2015. (CP 26.)

In the amendment, Catherine appointed herself and Paddy as co-trustees. As one of the trustees, Paddy agreed that she was "willing to continue to hold the trust property and to discharge faithfully the fiduciary duties imposed upon the Trustee under this Trust Agreement." (CP 26.) Paddy also agreed "to continue to hold and distribute the trust

[2] For the sake of brevity, and to avoid confusion, the parties are referred to by their first names, just as they were referred to in trial court.

property…according to the terms of this Trust Agreement." (CP 26.)

Article 3 sets forth the "Trust Provisions During Lifetime," and provides that—while Catherine is still alive—"any property held under this Trust Agreement shall be referred to as 'the Trust Estate' and shall be disposed of as" set forth in Article 3. (CP 27) Section 3.1 provides that the trustee "shall distribute to [Catherine]" as much of the net income and principal of the Trust Estate as Catherine or Paddy may direct. (CP 27.) Section 3.2 provides that any income that is not distributed shall be added to the principal of the Trust. (CP 27.) Section 3.3 states Catherine's intent.

> 3.3. **Intention**. The Trustee shall liberally distribute income and principal of the Trust Estate for my benefit and the rights of the successor beneficiaries hereunder shall be considered secondary. The Trust Estate is established to ensure that the best available care and support are provided to me to meet all lifetime needs. All assets of the Trust Estate are to be considered available for that purpose, and the Trustee shall at all times be guided by that purpose and intent. (CP 27.)

Following this provision, which expresses the settlor's intention, Section 3.4 provides some "General Directions to the Trustee:"

> The Trustee shall make every effort to involve me in decision-making regarding both financial matters and personal care. The Trustee shall make every effort to determine my wishes and make decisions that conform to them. If I am unable to make my wishes known, the Trustee shall make decisions that the Trustee believes that I would make, bearing in mind that the least restrictive alternatives for living arrangements are desirable so that I may live with the greatest degree of dignity possible. (CP 27.)

Article 5 of the Trust sets forth the distribution of the Trust's tangible personal property upon Catherine's death. In general, Section 5.2 provides for all tangible personal property to be given "in substantially equal shares to my surviving children…" (CP 29.)

Article 6 sets forth the distribution of the "Residuary Trust Fund," which is to be given "in equal shares to my children." Section 7.1 (which should have been numbered Section 6.1) provides for an offset, however, to the extent that

any of Catherine's children owed her money: "The share distributable to a child of mine shall be reduced by the outstanding balance of any loans that I have made to that child." (CP 29.)

Article 10 discusses the appointment of the trustees of the Trust. Section 10.1 appointed Catherine and Paddy as the co-trustees of the Trust. Section 10.2 provides upon Catherine's "resignation, incapacity or death, Paddy A. Cook may serve as the sole Trustee." (CP 32.)

Article 13 establishes that "[t]he interpretation and operation of the trust shall be governed by the laws of the State of Oregon." (CP 36.) In conformance with this choice of law, the Trust Agreement makes two other references to Oregon law regarding the operation of the trust; one pertaining to "Oregon's Advance Directive for Medical Care" (CP 28), and the other pertaining to the compensation of trustees. (CP 33.)

Article 14 contains numerous miscellaneous provisions, including Section 14.5, which addresses an "Incapacitated

Trustee." This section provides a "Trustee shall be deemed to be 'incapacitated' (and while incapacitated shall not serve as a Trustee) if another then-serving Trustee…receives written certification that the examined individual is physically or mentally incapable of managing the affairs of the trust." (CP 39.)

Finally, Article 15 is entitled "Revocability of Trust and Rights Reserved." In Section 15.1, Catherine reserved the right to "revoke or amend this Trust Agreement or any trust hereunder." After Catherine's death, however, "neither this Trust Agreement nor any trust hereunder may be revoked or amended except as expressly provided elsewhere herein." (CP 39.) There are, however, no provisions "elsewhere" in the Trust that allow for it to be revoked or amended after Catherine's death.

The amended and restated Trust Agreement was executed on April 7, 2015. Catherine signed it "as Trustor and Trustee," and Paddy signed it "as Trustee." (CP 40.)

B. The Pleadings

Paddy commenced this TEDRA action in April of 2018, by filing a "Petition For Authority to Sell Real Property ." In it, she asked the trial court to approve the sale of one of the main Trust assets, a home in Seattle, to her sister Kim (and Kim's husband) for the "total purchase price of $250,000." (CP 18.)

Paddy conceded that the proposed sale price was far below the fair market value of the property. In her petition, Paddy wrote: "An estimate of the fair market value of the property is attached as Exhibit D."(CP 20.) Paddy attached a comparable market analysis, or "CMA," that had been prepared by John L. Scott Real Estate. (CP 53-79) Based on an analysis of nineteen comparable properties, the author of the CMA suggested that the listing price of the Seattle property should be "$840,000 and $850,000." (CP 68-70.)[3]

[3] This listing price probably underestimated the fair market value of the property, however, because it was based on an analysis of fourteen sales of comparable properties for which the average listing price was $760,492, but the average sales price was $844,930, for an 11.1% premium above the listing price. (CP 69.)

In her Petition, Paddy also stated that Catherine became incapacitated within nine months of executing the amended Trust Agreement. "Effective January 28, 2016, Paddy A. Cook ('Paddy'), Catherine's daughter, was appointed as sole Trustee upon the incapacity of Catherine." (CP 17.)

In May of 2018, Lance filed an objection to Paddy's petition. In it, Lance pointed out that the Trust Agreement "makes no allowance for distributions" to any one other than Catherine during her lifetime, and that it "makes no specific bequests of real property," even after Catherine's death. (CP 109.) Lance also pointed out that the Trust Agreement "contains no provision authorizing 'gifts' of Trust assets." (CP 109.) As a result, Lance urged that the "Court should decline to authorize the purchase as requested in the Petition." (CP 112.)

In February of 2019, Kim filed a response to Paddy's petition. (CP 138.) Kim similarly conceded in her pleading that Catherine was "currently incapacitated;" Kim admitted

that "in March 2015 [Catherine] was diagnosed with dementia which soon affected her ability to make financial decisions…" (CP 140.) Kim further admitted that the Seattle property was "an asset of the Trust."(CP 139.) Kim then asserted three claims: "Promissory Estoppel," "Unjust Enrichment," and "Breach and Rescission of Oral Agreement." (CP 141-142.) In June of 2019, Lance answered Kim's pleading and denied all of her claims. (CP 160-162.)

The case was ultimately set for trial on July 1, 2019. In advance of the trial, all parties submitted trial memoranda. Both Paddy and Kim conceded in their memoranda that Oregon law applies to the interpretation and operation of the Trust Agreement. For example, in her Trial Memorandum, Paddy wrote:

> The Parties agree that the laws of the state of Oregon govern the Catherine Patricia Davis Living Trust ("Trust") on July 6, 1994. The Parties also agree that Oregon law requires the Trustee to administer the trust in good faith and in accordance with its stated terms and purposes. ORS 130.650. (CP 170.)

Similarly, in Kim's trial memorandum, she conceded that Oregon law "applies to the limited scope of the interpretation and operation of the trust." (CP 196) In addition, Kim argued that TEDRA also applied to the Trust, but only regarding matters other than the "interpretation and operation of the trust." (CP 196.)

C. The Trial

The case was tried to the court over two days. During opening statements, Kim's counsel conceded that the issue of whether there was a binding contract to sell Kim the property "is not before the court today" and that any discussion regarding the alleged contract was "merely a backdrop to why the Court should grant the petition." (RT 17:8-13) Upon further discussion, the Court clarified that, with respect to Kim's contractual claims, "[s]he just withdrew those claims and said essentially -- and I'm holding them to it -- that this isn't – there's no action for contract. There is no action for estoppel or

anything along those lines, and so we're proceeding on the petition." (RT 19:11-15.) The Court confirmed the scope of the trial: "I am not going to be ruling on claims regarding contract, estoppel and the like as further set out in [Kim's] response." (RT 21:22-25.)

Over the course of the two-day trial, the Court allowed extrinsic evidence in the form of testimony and documents, over Lance's objection. All of this extrinsic evidence, which was offered by Paddy and Kim, was geared towards proving that Catherine always wished to sell the house to Kim at a price below fair market value. At the conclusion of the evidence and argument, the Court issued its decision from the bench, authorizing the sale of the Seattle property to Kim for the net price of $250,000. (RT 382)

Thereafter, the Court entered formal Findings of Fact and Conclusions of Law. (CP 309-313.) The Court, however, did not delineate which of its statements were findings of fact and which were conclusions of law. In this final order, the Court

directed the Trustee to sell the property to Kim for the net price of $250,000. The Court also awarded Paddy and Kim their attorney's fees and costs in the amounts of $44,702 and $43,733, respectively. (CP 313.)

V. ARGUMENT

A. The Standard of Review is *De Novo*

All parties agree that Oregon law applies to the interpretation and operation of the Trust Agreement, but it is less clear whether Oregon law would also apply to the standard of review of a decision interpreting the Trust Agreement. Happily, the same standard of review would apply in Oregon and Washington, and that standard is *de novo*.

Oregon's courts have routinely applied this standard of review in disputes over the proper interpretation of trusts.[4] In addition, under ORS 19.415, in an equitable action or

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[4] *See e.g., Jarrett v. U.S. Nat. Bank of Oregon*, 725 P.2d 384, 81 Or. App. 242 (Or. App. 1986), *review denied*, 302 Or. 476 (1987); *Mest v. Dugan,* 101 Or. App 196, 790 P.2d 38 (Or. App. 1990).

proceeding, "the Court of Appeals, acting in its sole discretion, may try the cause anew upon the record or make one or more factual findings anew upon the record." In Washington, the law is clear that the "interpretation of a will or trust instrument is a question of law that we review *de novo*."[5]

B. Guiding Principles for Interpretation of Trusts

As noted above, the Trust Agreement expressly states that the "interpretation and operation of the trust shall be governed by the laws of the state of Oregon." Hence, all the parties cited the trial court to Oregon's laws in this regard. The leading case, which all three parties cited to the trial court, is *Jarrett v. U.S. Nat. Bank of Oregon*.[6] In that case, two of the residuary beneficiaries of a trust sued the trustee bank for breach of its duties of prudent management, in part, because the bank had agreed to extend the lease of trust property at a rent that was below the market. The bank conceded that the rent was

[5] *In re Estate of Bernard*, 182 Wn. App. 692, 704, 332 P.3d 480 (2014).
[6] 81 Or. App. 242, 725 P.2d 384 (Or. App. 1986).

below market value, but it argued the settlor's intent was to allow for the lease to be renewed without a rent increase. "In order to establish the settlor's intent, Bank offered double hearsay concerning [the settlor's] intent to perpetuate his business after his death."[7] Based on this extrinsic evidence, to which the plaintiff beneficiaries had objected, the trial court concluded the trustee had acted prudently and entered judgment against the beneficiaries.

In its opinion, the Oregon Court of Appeals set forth the guiding principles regarding the interpretation of trust instruments. First, the court noted that extrinsic evidence is not admissible if the trust is fully integrated and unambiguous: "When a will or a trust instrument is fully integrated and is not ambiguous on its face, extrinsic evidence is not admissible to establish the testator's or settlor's intent."[8]

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[7] *Id*. at 386.
[8] *Id*. at 386-87 (citing *Roehr v. Pittman*, 256 Or. 193, 472 P.2d 278 (1970); *Rowe v. Rowe, et al*, 219 Or. 599, 608, 347 P.2d 968 (1959); *Allen v. Hendrick*, 104 Or. 202, 212, 206 P. 733 (1922).)

Second, the *Jarrett* court rejected the argument that "the extrinsic evidence is admissible to put the court in the position of the settlor to ascertain his intent."[9] Such evidence is not necessary or warranted when the trust instrument is fully integrated and unambiguous: "The court has no occasion to put itself in the settlor's position when it construes a fully integrated, unambiguous trust document, because the intent of the settlor can be ascertained from the face of the document."[10]

Third, the *Jarrett* court observed that Oregon's laws "permit a court to consider the circumstances surrounding the execution of an agreement only when the agreement is ambiguous on its face or is not fully integrated."[11] The court thus disagreed with the trial court resorting to extrinsic evidence to create an ambiguity: "Resort to extrinsic evidence

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[9] *Id*. at 387.
[10] Ibid.
[11] Ibid.

to make an unambiguous document ambiguous is not permissible…."[12]

Oregon's courts have routinely treated the proper interpretation of a trust as a question of law: "Whether a term in a trust instrument is ambiguous is a question of law."[13] In Oregon, an ambiguity in a trust instrument "is presented only when the language of the instrument is reasonably capable of more than one plausible interpretation.[14] When considering the question of ambiguity, the entire trust instrument must be considered and given effect, in accordance with the trustor's intent. "In determining whether an ambiguity exists, we look to the entire trust agreement and construe it in accordance with the

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[12] Ibid. This approach is consistent with Oregon's "four corners" approach to the interpretation of trusts. "[W]e first look to 'the four corners' of the trust agreement to determine whether we can glean the settlor's intent." *U.S. Nat. Bank of Oregon v. Duling*, 39 Or. App. 329, 592 P.2d 257 (Or. App. 1979) (citations omitted).

[13] *Goodwill Industries v. US Bank*, 196 Or. App. 556, 103 P.3d 1165, 1167 (Or. App. 2004) (citing . *Samuel v. King*, 186 Or. App. 684, 64 P.3d 1206, *review denied*, 335 Or. 443, 70 P.3d 893 (2003)).

[14] Ibid. Oregon's test is the same as Washington's: "A trust is ambiguous if it is susceptible of more than one meaning; ambiguity is a question of law." *Waits v. Hamlin*, 55 Wn. App. 193, 200, 776 P.2d 1003 (1989) (citing *Millican of Wash., Inc. v. Wienker Carpet Serv., Inc.,* 44 Wn. App. 409, 415-16, 722 P.2d 861 (1986)).

trustor's intent, and, if possible, give effect to all of its provisions."[15]

The *Jarrett* court's approach was applied in the analogous context of will disputes in the case of *Wood v. Medical Research Foundation of Oregon*.[16] In that case, the will left the income from the testator's estate to be used for "the benefit of the direction of Dr. Albert Starr and/or Dr. James Wood, or their successors, in the Department of Cardiopulmonary Surgery at the University of Oregon Medical School."[17] The plaintiffs, Dr. Starr and Dr. Wood, sued because they "now wish[ed] to use the funds to conduct research at St. Vincent's hospital."[18] OHSU took the position that "under the terms of the will, the funds may only be used for work by the plaintiffs, or their successors, at OHSU."[19]

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[15] Ibid (citations and quotation marks omitted).
[16] 130 Or. App. 114, 880 P.2d 952 (Or. App. 1994).
[17] *Id*. at 116.
[18] Ibid.
[19] *Id*. at 116-117. As the Court of Appeals noted in a footnote, "OHSU is the successor to the University of Oregon Medical School."

The trial court found there was a latent ambiguity in the will, and it admitted extrinsic evidence to help resolve the ambiguity. In particular, it allowed the testimony of the lawyer who drafted the will. Based on this extrinsic evidence, the trial court found in favor of the plaintiff doctors and against OHSU.

OHSU assigned error to the trial court's admission of extrinsic evidence, contending that the language of the will was not ambiguous. The Court of Appeals agreed, finding that the will unambiguously directed the funded research to occur at OHSU. "The language of the will simply does not provide any alternative to OHSU as the site of the work."[20]

On appeal, the plaintiffs argued that "even if the language of the will is not ambiguous, extrinsic evidence is admissible to show the circumstances under which the will was made and, therefore, the trial court did not err in admitting and considering extrinsic evidence."[21] Citing the portions of the *Jarrett* decision already quoted above, the Court of Appeals

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[20] *Id*. at 117.
[21] Ibid.

rejected that argument. "We conclude that because the language of the will is unambiguous, extrinsic evidence regarding the formation of Eager's will may not properly be considered in determining the meaning of the disputed language."[22]

Oregon's approach to the interpretation of wills and trusts is the same as the approach taken by Washington's courts. In *Templeton v. Peoples Nat'l Bank*,[23] the question was whether a trust was ambiguous, thus allowing for extrinsic evidence to show the settlor, Dr. Templeton, intended his wife to receive all his retirement annuities after his death. The trial court considered extrinsic evidence and found in favor of the wife. The trustee bank argued that the "four corners of the trust document alone" provided adequate evidence of the testamentary intent with respect to the annuities, and there was no ambiguity.[24] As a result, the bank opposed the trial court's

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[22] *Id*. at 118.
[23] 106 Wn.2d 304, 722 P.2d 63 (1986).
[24] *Id*. at 308.

admission of extrinsic evidence for the purpose of ascertaining the trustor's intent.

Our Supreme Court agreed with the bank and reversed the trial court.

> Although the court declared the trust document ambiguous, it apparently did so only after or in concurrence with its examination of extrinsic evidence, i.e., Dr. Templeton's will. Furthermore, the trial court failed to point out the exact language in the trust document that it believed was unclear.[25]

The Supreme Court then set forth the proper approach for interpreting trusts.

> We follow the approach as set forth in *Old Nat'l Bank & Union Trust Co. v. Hughes*, 16 Wash.2d 584, 587, 134 P.2d 63 (1943), which states: "Primarily, [the trustor's] intent and purpose must be derived from the terms of the instrument--construing all the provisions together." (Citation omitted.) For additional guidance, we look to 90 C.J.S. Trusts § 161, at 18-19 (1955), which provides a persuasive summation of the rules adopted by other jurisdictions in matters of trust construction.
>
> Where the meaning of an instrument evidencing a trust is unambiguous, the instrument

[25] Ibid.

> is not one requiring judicial construction or interpretation; if the intention may be gathered from its language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction.[26]

The Supreme Court criticized the trial court for conducting its analysis in the wrong order:

> In view of these rules, the trial court first should have examined the trust document and its amendment alone. Only if those documents evidenced an ambiguity should the court have examined further evidence, such as the will, to resolve the ambiguity. The court erred when by its own admission it worked "backwards." It should not have reviewed at the outset other evidence along with the trust documents to determine whether the trust was ambiguous.[27]

The Supreme Court concluded that the "trust, viewed by itself, is written clearly and explicitly," and it gave the trustee discretion regarding the annuities; "Consequently, the trial court should not have admitted extrinsic evidence to determine

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[26] *Id*. at 308-309.
[27] *Id*. at 309.

Dr. Templeton's trust intent since such intent can be derived solely from the four corners of the trust document."[28]

In sum, under either Oregon or Washington law, the principles regarding the interpretation of trust instruments are clear: the trial court must first determine, based on a review of the four corners of the trust instrument, whether it is ambiguous; the trust instrument is ambiguous only when, construing the document as a whole in light of the settlor's intent, it is susceptible to more than one plausible interpretation; if the trust instrument is fully integrated and is not ambiguous on its face, extrinsic evidence is not admissible to establish the settlor's intent; the trial court should not review any extrinsic evidence until after it has determined that there is some ambiguity in the trust instrument; and the trial court should not work backwards from the extrinsic evidence to determine whether there is an ambiguity.

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[28] Ibid.

C. Application of Principles to Catherine's Trust

The four corners of Catherine's Trust Agreement do not contain any ambiguity. There is only one plausible interpretation of the Trust Agreement—while Catherine is alive, all principal and income must be preserved and used solely to provide the best available care and support of Catherine for the rest of her life, however long that may be.

This intent is made abundantly clear in Section 3.3 of the Trust Agreement, entitled "Intention." This first sentence of this section provides that the trustee must "liberally distribute income and principal of the Trust Estate ***for [Catherine's] benefit*** and the rights of the successor beneficiaries hereunder ***shall be considered secondary***." (CP 27, emphasis added). This language leaves no room for arguing that the secondary beneficiaries should receive one penny—let alone $600,000—from this trust while Catherine is still alive.

The second sentence of Section 3.3 states: "The Trust Estate is established to ***ensure the best available care and***

support are provided to [Catherine] to meet ***all lifetime needs***." (Ibid, emphasis added.) This sentence prohibits the trustee from using any discretion or making any judgment calls when it comes to preserving the Trust Estate—it must be preserved to the extent possible to guarantee that Catherine will receive the best available care and support for the rest of her life. Only after Catherine passes away can any Trust assets be distributed to any of the residuary beneficiaries.

This interpretation is bolstered by the third sentence of Section 3.3: "***All assets of the Trust Estate*** are to be considered available for that purpose, and the Trustee shall ***at all times be guided by that purpose and intent***." (Ibid, emphasis added.) This clear and unambiguous language leaves no room for doubt—all of the assets, including the Seattle property, must remain in the Trust to preserve the resources needed for the best available care and support of Catherine for the rest of her life, period.

In addition to these crystal clear mandates governing what the trustee can and cannot do, the Trust Agreement does not authorize the trustee to make any gifts. Paddy's counsel conceded as much to the Court: "Mr. Isely is correct. The trust does not have any gifting authority for the trustee." (RT 368:11-12.)

It is beyond argument that selling a property worth at least $850,000 for a total purchase price of $250,000 constitutes a $600,000 gift to the buyer. In other words, if the buyer were to turn around the next day and sell the property for its full value, the buyer would realize a profit of $600,000. As a result, such a transaction is not authorized anywhere in the Trust Agreement, and it would contradict the provisions discussed above, which make it abundantly clear that all Trust assets are to be devoted to one purpose while Catherine is alive—to pay for the best available care and support and meet her lifetime needs. Thus, giving a gift of $600,000 to Kim runs directly counter to the expressly stated intent of the settlor.

To counter this unambiguous language in the Trust Agreement, Kim and Paddy point to Section 3.4. That section is entitled "General Directions to Trustee," and it provides in full as follows:

> The Trustee shall make every effort to involve me in decision-making regarding both financial matters and personal care. The Trustee shall make every effort to determine my wishes and make decisions that conform to them. If I am unable to make my wishes known, the Trustee shall make decisions that the Trustee believes that I would make, bearing in mind that the least restrictive alternatives for living arrangements are desirable so that I may live with the greatest degree of dignity possible. (CP 27.)

Paddy and Kim argued, somewhat inconsistently, that this section either creates an ambiguity, or it unambiguously gives Paddy the authority to sell the Seattle property to Kim for less than its fair market value. With respect to the latter position, Kim explained her interpretation of the interplay between Sections 3.3 and 3.4 as follows:

> When these provisions are read together, the Trust Agreement allows the Trustee to distribute the principal of the trust if the Trustee believes that is what Cathy would want, so long as doing so

> does not jeopardize the Trust's purpose to ensure that Cathy may live with the best available care and greatest degree of dignity possible. Kim believes this is the unambiguous interpretation of the Trust Agreement. (CP 199.)

In other words, Kim reads these provisions as giving Paddy ***the discretion*** to bestow a $600,000 gift on Kim, so long as Paddy believes there would still be enough money left over to take care of Catherine for the rest of her life. The flaws in this interpretation are numerous.

First, this interpretation contradicts the clear language of Section 3.3, which mandates that all Trust principal and interest is to be devoted solely to ensuring that Catherine receives the best available care and support for the rest of her life. Section 3.3 does not, either expressly or implicitly, give Paddy the discretion to make judgment calls about how much Trust principal and interest will be necessary for that task.

Second, this interpretation requires a level of prescience by the trustee that is neither assumed by the settlor nor possible for the trustee to achieve. In other words, Paddy would need a

crystal ball to know how much principal and income will be needed in the future to "ensure" Catherine's care and support: Paddy would need to know such things as 1) how long Catherine will live, 2) how Catherine's health and medical needs will change over time, 3) how much the cost of Catherine's particular care, and medical care in general, will change over time 4), and how the other assets in the Trust Estate are going to perform financially for the next decade or more, to name a few.

In an implicit recognition of the difficulty created by Kim's proposed interpretation of the Trust Agreement, Paddy's counsel repeatedly argued to the trial court that Paddy was in an "impossible situation." Counsel told the Court, "As we discussed this morning, my client is in an ***impossible position***." (RT 43:7-10.) Later, counsel said: "My client, as we've seen, is in an ***impossible situation***." (RT 316:10-11.) And in her closing, Paddy's counsel argued:

> The trustee is not asking that the Court rewrite the trust as suggested by Mr. Davis. Rather, the trustee is seeking Court instruction ***in an impossible situation***. The trustee is merely asking the Court to look at the trust and the evidence to see if there's sufficient evidence of what the settlor wished with respect to the Seattle home. (RT 319:6-12 (emphasis added).)

Of course, the simplest way to avoid being put in an "impossible situation" would be to follow the clear and unambiguous expression of Catherine's intent as set forth in the Trust Agreement—preserve and devote all principal and income to Catherine's care for as long as she is alive.

Third, Kim's proposed interpretation of the Trust would also violate numerous guiding principles regarding the interpretation of trust instruments. Rather than harmonizing all of its provisions, Kim's approach would place Sections 3.3 and 3.4 in opposition. If Catherine's "wishes" trump Catherine's stated intent, then what should Paddy do if—after the Trust Agreement has been executed—Catherine expresses her "wish" that the entire Trust Estate should be donated to a church or charitable organization? Or, to put a finer point on it, what if

Catherine expressed a wish to transfer all of the Trust Estate to just one of her children after she dies? Should Paddy "conform" to those wishes, even though they directly contradict the other express terms of the Trust Agreement? And if the answer is yes, then what other wishes by Catherine—who is suffering from advanced dementia (CP 21)—should Paddy "conform" to, even if they contradict the express terms of the Trust Agreement?

Contrary to Kim's interpretation, the only reasonable interpretation of the interplay between Sections 3.3. and 3.4 is that the former trumps the latter. If Paddy is to be governed by Section 3.4, regarding Catherine's wishes, rather than Section 3.3, then it would essentially negate the settlor's intention set forth in Section 3.3. To harmonize these provisions—rather than putting them in opposition—Paddy should take her mother's wishes into account in all "personal and financial matters," but only so long as those wishes do not contradict the

express “Intention” set forth in Section 3.3. This is the only plausible interpretation of these provisions.

It is beyond argument that a court interpreting a trust instrument should neither add words that were not included nor disregard the words that were. Until she lost her capacity sometime before January of 2016, Catherine reserved the right to make any amendment to the Trust Agreement that she desired. But she never amended it to give Paddy the authority to sell the Seattle property to Kim for $250,000, or for any other below-market price. It would be erroneous to modify the Trust Agreement in this way after Catherine has lost the capacity to do so.

In sum, the Trust Agreement is not ambiguous because it is not susceptible to more than one plausible interpretation. As a result, the trial court should not have admitted or relied upon the extrinsic evidence submitted by Paddy and Kim. The extrinsic evidence showed that Catherine told many people that she wanted to transfer the Seattle property to Kim for less than

full market value. But she never expressed that intention in her Trust Agreement, and that is the only expression of her intention that matters. For these reasons, the trial court erred by overriding the clear and unambiguous terms of the Trust Agreement and authorizing Paddy to consummate this prohibited transaction.

D. The Trial Court Reached Several Erroneous Conclusions of Law

As mentioned above, the trial court did not differentiate between its findings of fact and its conclusions of law—it listed all of them in an intermingled fashion. The non-extrinsic facts, however, are not disputed, because they come straight from the four corners of the Trust Agreement, and the extrinsic facts are irrelevant because there is no ambiguity in the Trust Agreement.

The trial court erred by failing to enforce the clear and unambiguous provisions of the Trust. As a result of this

fundamental error, the trial court also reached three erroneous conclusions of law.

First, conclusion of law No. 15 states:

> The term "wishes" in the context of Article Three of the Trust refers to the Settlor's current desires as those may arise or change, and because the Trust uses a term that is not frozen at the time of drafting, parole evidence is allowed to show what the Settlor means her wishes are as they may arise or change post drafting of the Trust. (CP 311.)

What the trial court is saying here is that the term "wishes" in the Trust Agreement only applies to Catherine's wishes ***after*** the Trust was amended and restated, in April of 2015. The problem with this analysis is either Catherine has the capacity to make financial decisions or she does not. While Catherine had the capacity to make such decisions, she did not sell the Seattle property to Kim for $250,000, and she did not amend her Trust to provide for such a sale. After Catherine became incapacitated, her "wishes" cannot trump the express intention set forth in Section 3.3, which clearly dedicates all

Trust principal and interest to Catherine's care and support. Thus, this conclusion of law is erroneous.

Second, conclusion of law No. 21 states: "The Trustee/attorney-in-fact for the Settlor has acted according to her duties, wherein Section 3.4 of the Trust requires that the Trustee shall make every effort to involve the Settlor in decision making regarding both financial matters and personal care." (CP 311.) By reaching this conclusion, the trial court has elevated Section 3.4 to trump Section 3.3, by placing Catherine's "wishes" over the express intention that is found within the four corners of the Trust Agreement.

Finally, conclusion of law No. 23 states: "The wish to sell the Seattle House may be for the benefit of the Settlor, but the Seattle House does not need to be sold for the highest price, which would be too narrow a view of 'wishes' as described in the Trust." (CP 312.) Based on the proper interpretation of the four corners of the Trust Agreement, any Trust asset that is sold must be sold for the highest price. The Trust Agreement does

not give the Trustee discretion to sell any asset for less than the highest price, because doing so is tantamount to making a gift, which all parties agree the Trustee does not have the authority to do. If Catherine had wanted to give the Trustee authority to make gifts from the Trust Estate, then she would have said so in the Trust Agreement.

E. The Trial Court Erred by Awarding Attorney's Fees and Costs to Paddy and Kim

In a TEDRA action, RCW 11.96A.150 gives the courts broad discretion to award attorney's fees and costs to any party, from multiple sources:

> 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.

Because the trial court ruled in favor of Paddy and authorized the sale of the Seattle property to Kim for $250,000, the trial court also ordered Lance to pay their attorney's fees

and costs. This award should be reversed, however, because it is premised on the fact that Kim and Paddy prevailed.

In addition, RCW 11.96A.150 authorizes the courts to order the attorney's fees and costs "to be paid in such amount and in such manner as the court determines to be equitable." Because of Lance's opposition, he has prevented a $600,000 reduction in value of the Trust Estate. He deserves to be reimbursed the attorney's fees and costs he incurred in order to protect the Trust Estate. Moreover, these fees should be paid by Paddy and Kim, because it is their erroneous attempt to effectuate a $600,000 gift to Kim that has caused Lance to incur attorney's fees and costs. It would not be equitable for these fees to be paid from the Trust Estate because all principal and income from the Trust should be preserved for the best available care and support available to Catherine for the rest of her life.

VI. CONCLUSION AND FEE REQUEST

For the foregoing reasons, Lance Davis respectfully requests this Court to reverse the trial court's final order, authorizing the sale of the Seattle property to Kim for $250,000 and awarding attorney's fees and costs to Paddy and Kim, and to direct the trial court to award fees and costs to Lance. In addition, under RCW 11.96A.150 and RAP 18.1, Lance Davis respectfully requests an award of his attorney's fees and costs on this appeal to be paid by Paddy and Kim.

Respectfully submitted April 17, 2020

s/ *Steven E. Turner*

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CATHERINE PATRICIA DAVIS LIVING TRUST, DATED JULY 6, 1994, AS AMENDED AND RESTATED

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CATHERINE PATRICIA DAVIS LIVING TRUST, DATED JULY 6, 1994,

AS AMENDED AND RESTATED

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CATHERINE PATRICIA DAVIS LIVING TRUST, DATED JULY 6, 1994,

AS AMENDED AND RESTATED

THIS IS AN AMENDED AND RESTATED TRUST AGREEMENT (sometimes referred to as "this Trust Agreement") effective April 7, 2015, between Catherine Patricia Davis of Portland, Oregon (described herein in the first person and sometimes referred to as the "Trustor"), and myself and Paddy A. Cook, as Trustee (the "Trustee").

WHEREAS, I originally executed a Trust Agreement on July 6, 1994 (the "Original Trust Agreement");

WHEREAS, I reserved the right to amend the Original Trust Agreement (as it may have been amended from time to time) under Article 4.1.c of the Original Trust Agreement;

WHEREAS, I now wish to exercise this reserved power and to amend and restate the Original Trust Agreement in its entirety, without changing the name of the Original Trust Agreement, which name shall now apply to this Trust Agreement;

WHEREAS, the Trustee is willing to continue to hold the trust property and to discharge faithfully the fiduciary duties imposed upon the Trustee under this Trust Agreement;

NOW, THEREFORE, the Trustee agrees to continue to hold and distribute the trust property (property held hereunder from time to time shall be referred to as the "Trust Estate") according to the terms of this Trust Agreement.

ARTICLE 1
Trust Name

This Trust Agreement and the trusts hereunder may be referred to as the Catherine Patricia Davis Living Trust. The date of the Trust is July 6, 1994.

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ARTICLE 2
My Family

I am not married. I have four children, all of whom are presently living, namely, Douglas Lance Davis, Jr., Kevin James Davis, Paddy A. Cook and Kimberly A. Brandenburg.

ARTICLE 3
Trust Provisions During Lifetime

During my life, any property held under this Trust Agreement shall be referred to as "the Trust Estate" and shall be disposed of as follows:

3.1. **Distributions.** The Trustee shall distribute to me as much of the net income and principal of the Trust Estate as I may from time to time direct, and such additional amounts of net income or principal thereof as the Trustee may at any time and from time to time determine.

3.2. **Undistributed Income.** Any net income of the Trust Estate not so distributed shall be accumulated and annually added to principal.

3.3. **Intention.** The Trustee shall liberally distribute income and principal of the Trust Estate for my benefit and the rights of the successor beneficiaries hereunder shall be considered secondary. The Trust Estate is established to ensure that the best available care and support are provided to me to meet all lifetime needs. All assets of the Trust Estate are to be considered available for that purpose, and the Trustee shall at all times be guided by that purpose and intent.

3.4. **General Directions to Trustee.** The Trustee shall make every effort to involve me in decision-making regarding both financial matters and personal care. The Trustee shall make every effort to determine my wishes and make decisions that conform to them. If I am unable to make my wishes known, the Trustee shall make decisions that the Trustee believes that I would make, bearing in mind that the least restrictive alternatives for living arrangements are desirable so that I may live with the greatest degree of dignity possible.

3.5. **Health and Needs Assessment.** I authorize the Trustee to take appropriate steps to determine my physical health, psychosocial health, and functional needs by employing a geriatric care manager, my physician, medical specialists, therapists or other persons. To the extent necessary to permit such an assessment, I waive any physician-patient privilege or other privilege which otherwise would protect me against the disclosure of confidential information and specifically authorize any health care professional or facility to disclose all health information about me to the Trustee despite the provisions of the Health Insurance Portability and Accountability Act. I designate the Trustee as my personal representative for purposes of HIPAA.

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3.6. **Consult with My Health Care Representative.** I direct the Trustee to consult with the person or persons I have named as my Health Care Representative under Oregon's Advance Directive for Medical Care in carrying out my wishes as expressed herein.

3.7. **Legal Representation.** At my request, the Trustee shall retain an attorney to act as my individual counsel for the purpose of protecting my interests and ensuring that the instructions contained in this instrument are followed and will be accepted by a court as being in my "best interests." If I am unable to make a request, I authorize the Trustee to retain an attorney on my behalf for the same purpose.

3.8. **Independent Financial Advisor.** At my request, the Trustee shall retain an independent financial advisor to review the trust accountings with me and address any questions or concerns about trust management and distributions made from the trust.

ARTICLE 4
Payments After Death

Upon my death, the Trustee shall dispose of the Trust Estate which shall include all property distributable to the Trustee as a result of my death, whether under my Will or otherwise (such property shall be referred to as the "Trust Fund"), as follows:

4.1. **Pay Estate Obligations.** If my probate estate (excluding income) is insufficient to pay my funeral expenses, all claims against my probate estate and the expenses of administering my probate estate, the Trustee shall make available to my Personal Representative under my Will (including by direct payment thereof as directed by my Personal Representative) out of the Trust Fund such sums as my Personal Representative shall certify to be required to make good such insufficiency; provided if no such Personal Representative is serving, then the Trustee is authorized to pay such debts and expenses directly without direction by my Personal Representative. Nothing herein, however, shall be deemed to authorize the Trustee to make any such payment of property where such property was not otherwise subject to the claims to be paid.

4.2. **Death Taxes.** All estate or other wealth transfer taxes that result from my death and that are imposed by any taxing authority with respect to all property taxable by reason of my death, together with interest and penalties on those taxes, shall be charged against and paid without apportionment out of my Residuary Trust Fund as an administration expense.

4.3. **Balance of the Trust Fund.** After the foregoing payments, the Trustee shall dispose of the balance of the Trust Fund in the manner provided below.

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ARTICLE 5
Tangible Personal Property

5.1. **Memorandum of Wishes.** I may leave a writing disposing of some or all of my tangible personal property. If I do so and the writing can be incorporated by reference into this Trust Agreement or otherwise be legally binding, I direct that it be incorporated or followed and prevail over the disposition below in this Article. If the writing is not legally binding, I request that my wishes be followed. This provision shall apply whether the writing is executed before or after this Trust Agreement.

5.2. **General Gift of Tangible Personal Property.** I give all my tangible personal property held in the Trust Fund (other than items effectively disposed of above) in substantially equal shares to my surviving children, to be divided among them as they shall agree, or if they fail to agree within thirty (30) days from the date of my death, this property shall be sold or donated to an appropriate charitable organization selected by the Trustee. The proceeds of sale, if any, shall be added to and distributed as part of my Residuary Trust Fund (as defined below).

5.3. **Tangible Personal Property.** As used herein, the term "tangible personal property" includes household goods and furnishings, personal vehicles, recreational equipment, clothing, jewelry, personal effects, and other tangible personal property for personal or household use together with my rights under any insurance policies related to such property or the proceeds of such policies.

5.4. **Payment of Packing, Shipping and Delivery Expenses.** The expense of packing, shipping, insuring and delivering tangible personal property to an individual under this Article at such individual's residence or place of business shall be paid by the recipient of the property.

ARTICLE 6
Residue

Subject to the conditions below, I give the balance of the Trust Fund, real and personal ("my Residuary Trust Fund"), in equal shares to my children. The share of a child who does not survive me shall be distributed to his or her then living descendants by right of representation. These dispositive provisions are subject to the following conditions:

7.1 **Offset.** The share distributable to a child of mine shall be reduced by the outstanding balance of any loans I have made to that child.

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7.2 **Separate Trusts for Beneficiaries Under Age 25.** The share of any beneficiary under the age of twenty-five (25) years shall not be distributed outright, but shall be transferred and paid over to the Trustee of a Separate Trust for a Grandchild or More Remote Descendant, to be held as a separate trust and disposed of under the terms of the Separate Trusts for a Grandchild or More Remote Descendant under this Trust Agreement, the grandchild or more remote descendant for whom the share is set aside to be the beneficiary of his or her own Separate Trust.

ARTICLE 7
Separate Trusts for a Grandchild or More Remote Descendant

Property that is to be held in a Separate Trust for a Grandchild or More Remote Descendant shall be administered and distributed as follows:

7.1. **During the Beneficiary's Life.** The following provisions shall apply during the beneficiary's life:

7.1.1. The Trustee shall distribute to the beneficiary the net income of the trust at least annually.

7.1.2. The Trustee shall distribute to the beneficiary as much of the principal of the trust as the Trustee may from time to time select for the recipient's health, education, maintenance and support in his or her accustomed manner of living.

7.1.3. In exercising discretion over distributions, the Trustee may consider or disregard other resources available to any beneficiary.

7.1.4. The beneficiary may withdraw all principal at any time after attaining age twenty-five (25).

7.1.5. Without limiting the Trustee's discretion, the Trustee may consider the needs of the beneficiary as more important than the needs of the beneficiary's descendants or of any other beneficiary.

7.2. **Upon the Beneficiary's Death.** Upon the beneficiary's death, the property then held in his or her trust shall be set aside and divided into shares by right of representation for the beneficiary's then living descendants or, if no such descendant is then living, for the then living descendants of the nearest ancestor of such beneficiary which ancestor was a descendant of mine (or was me); provided however, the share of any beneficiary under the age of twenty-five (25) years shall not be distributed outright, but shall be transferred and paid over to the Trustee of a Separate Trust for a Grandchild or More Remote Descendant, to be held as a separate trust and disposed of under the terms of the Separate Trusts for a Grandchild or More Remote Descendant

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under this Trust Agreement, the grandchild or more remote descendant for whom the share is set aside to be the beneficiary of his or her own Separate Trust.

ARTICLE 8
Maximum Duration for Trusts

8.1. **Maximum Duration for Trusts Defined.** The Maximum Duration for Trusts shall end on the date twenty-one (21) years after the death of the last to die of the measuring lives described in the paragraph below entitled "Measuring Lives."

8.2. **Measuring Lives.** The measuring lives under the paragraph above entitled "Maximum Duration for Trusts Defined" shall consist of those of the following individuals who are living at the time that the application of such rules limiting the maximum duration of trusts is deemed to begin: All of my descendants and the surviving spouse of a descendant of mine.

ARTICLE 9
Spendthrift Provision

9.1. **No Assignment.** Each trust shall be a spendthrift trust to the maximum extent permitted by law and no interest in any trust hereunder shall be subject to a beneficiary's liabilities or creditor claims, assignment or anticipation. Notwithstanding the foregoing, no provision of this Article shall prevent the appointment of an interest in a trust through the exercise of a power of appointment.

9.2. **Protection from Creditors.** If the Trustee shall determine that a beneficiary would not benefit as greatly from any outright distribution of trust income or principal because of the availability of the distribution to the beneficiary's creditors, the Trustee shall instead expend those amounts for the benefit of the beneficiary. This direction is intended to enable the Trustee to give the beneficiary the maximum possible benefit and enjoyment of all the trust income and principal to which the beneficiary is entitled.

9.3. **Protection from Marital Claims.** All benefits granted to a beneficiary under this instrument shall be the separate property of such beneficiary (as distinguished from marital property, community property, quasi-community property or any other form of property as to which such beneficiary's spouse might have a claim or interest arising out of the marital relationship under the law of any jurisdiction, domestic or foreign). All benefits granted to a beneficiary hereunder shall also be free of any interference from, or control or marital power of, his or her spouse. For purposes of this paragraph, the term "benefits" shall include real or personal property, tangible or intangible, and the provisions of this paragraph shall apply not

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only to benefits actually paid to any beneficiary but also to trust property allocated to a trust in which the beneficiary possesses an interest hereunder.

ARTICLE 10
Trustees

10.1. **Appointment of Trustees.** I appoint myself and Paddy A. Cook to serve as the initial Trustees hereunder.

10.2. **Appointment of Successor Trustees.**

10.2.1. Upon my resignation, incapacity or death, Paddy A. Cook may serve as sole Trustee.

10.2.2. Upon the resignation, incapacity or death of Paddy A. Cook, I appoint the following individuals, to serve in succession, as successor Trustee, to serve as Co-Trustee with me if I am then serving, or to serve as sole Trustee if I am not then serving: Ann L. Fruechte, Ann L. Casey.

10.2.3. Each individual Trustee (including successors) shall have the right to appoint a successor Trustee by an instrument, in writing, such appointment to take effect upon the death, resignation or incapacity of the appointing Trustee. An appointment may be changed or revoked until it takes effect. If I have named a successor or successors to the appointing Trustee in this Trust Agreement, the appointment of a successor under this paragraph shall take effect only if and when all Trustees that I have appointed fail to qualify or cease to act.

10.2.4. The acting Trustee may appoint at any time by written instrument either (i) an individual or (ii) a corporation with fiduciary powers as a Co-Trustee.

10.3. **General Provisions Regarding Trustee.** Except as may be expressly provided elsewhere in this Trust Agreement, the Trustee shall be entitled to serve based on the following rules:

10.3.1. First, each Trustee who is a party to this Trust Agreement shall be entitled to serve.

10.3.2. Second, any successor Trustee named in this Trust Agreement shall be entitled to serve; multiple successor Trustees named by me shall be entitled to serve in the order in which they have been named by me.

10.3.3. Third, a then-serving Co-Trustee effectively appointed by another Trustee shall be entitled to continue serving.

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10.3.4. Fourth, a successor effectively appointed by another Trustee shall be entitled to serve.

10.3.5. Separate trusts hereunder may have different Trustees pursuant to these provisions.

10.4. **Compensation of Trustees.** The Trustee shall receive reasonable compensation in accordance with the law of the State of Oregon in effect at the time of payment, unless the Trustee waives compensation.

ARTICLE 11
Fiduciary Provisions

11.1. **General Provisions Regarding Changes in Fiduciaries.**

11.1.1. To the extent not prohibited by applicable law, any Trustee may resign at any time without court approval, whether or not a successor has been appointed, provided the resigning Trustee complies with any applicable state law governing the resignation of the Trustee that may not be waived by a governing instrument. Such resignation shall be by acknowledged instrument executed by the resigning Trustee and delivered to any other fiduciary acting hereunder, or if none, to my eldest living descendant who is a beneficiary of the trust of which such trustee is resigning or his or her guardian.

11.1.2. No successor Trustee shall be personally liable for any act or failure to act of any predecessor Trustee or shall have any duty to examine the records of any predecessor Trustee. A successor Trustee may accept the account rendered and the property delivered to the successor Trustee by or on behalf of the predecessor Trustee as a full and complete discharge of the predecessor Trustee without incurring any liability or responsibility for so doing. The successor Trustee shall be indemnified out of trust property for any and all claims, demands, losses, liabilities, damages and expenses arising from any act or omission of a prior Trustee occurring before the date the trust property was received by the successor Trustee.

11.1.3. If any Trustee is removed, resigns or otherwise ceases to act as Trustee of any trust hereunder, the Trustee shall immediately surrender all records maintained by the Trustee with respect to such trust to the then acting Trustees or, if no other Trustee is then acting with respect to such trust, to the successor Trustee upon receipt of written notice of the designation of the successor Trustee from the person appointing such successor Trustee.

11.2. **Accountings and Other Proceedings.**

11.2.1. I direct that a trust hereunder be subject to independent administration with as little court supervision as the applicable state law allows. The Trustee shall not be

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required to render to any court annual or other periodic accounts, or any inventory, appraisal, or other returns or reports, except as required by applicable state law and as described further below. The Trustee shall take such action for the settlement or approval of accounts at such times and before such courts or without court proceedings as the Trustee shall determine. The Trustee shall pay the costs and expenses of any such action or proceeding, including (but not limited to) the compensation and expenses of attorneys and guardians, out of the property of the trust. The Trustee shall not be required to register any trust hereunder.

11.2.2. I direct that in any proceeding relating to a trust hereunder, service upon any person under a legal disability need not be made when another person not under a disability is a party to the proceeding and has the same interest as the person under the disability. The person under the disability shall nevertheless be bound by the results of the proceeding. The same rule shall apply to non-judicial settlements, releases, exonerations and indemnities.

11.3. **Additional General Provisions Regarding Fiduciaries.**

11.3.1. Under this Trust Agreement, if two or more separate trusts with the same beneficiaries and same terms are created, either by direction or pursuant to the exercise of discretion, I intend that the separate trusts may but need not have the same investments and may, but need not, follow the same pattern of distributions. The Trustee's powers shall be exercisable separately with respect to each trust.

11.3.2. Except to the extent specifically provided otherwise in this Trust Agreement, references to the Trustee shall, in their application to a trust hereunder, refer to all those from time to time acting as Trustee and, if two Trustees are eligible to act on any given matter, they shall act unanimously, and if more than two Trustees are eligible to act on a given matter, they shall act by majority.

11.3.3. The Trustee shall be entitled to reimbursement for any out-of-pocket expenditures made or incurred in the proper administration of the trusts under this Trust Agreement or in furtherance of his or her fiduciary duties and obligations.

11.3.4. No Trustee shall be liable to anyone for anything done or not done by any other Trustee or any beneficiary.

11.3.5. If I have given the Trustee discretion concerning distributions of income or principal, that discretion shall be absolute and uncontrolled and subject to correction by a court only if the Trustee should act utterly without reason, in bad faith, or in violation of specific provisions of this Trust Agreement.

11.3.6. A Trustee may irrevocably release one or more powers held by the Trustee while retaining other powers.

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11.3.7. Any Trustee may delegate to a Co-Trustee any power held by the delegating Trustee, but only if the Co-Trustee is authorized to exercise the power delegated. A delegation may be revocable, but while it is in effect the delegating Trustee shall have no responsibility concerning the exercise of the delegated power.

11.3.8. The Trustee's discretionary power to distribute income or principal includes the power to distribute all of such income and/or principal to one or more members of a class to the exclusion of others, whether or not the terms of the trust specifically mention that possibility.

11.4. **Waiver of Bond.** No Trustee shall be required to give bond or other security in any jurisdiction and, if despite this exoneration, a bond is nevertheless required, no sureties shall be required.

ARTICLE 12
The Closely-Held Business

12.1. **Authority to Operate.** The Trustee may operate "the Business" (as defined below) and retain any equity interests in the Business, even if these interests otherwise would be a speculative or inappropriate investment for a trust. This authority shall not supersede the right of my Spouse to compel that certain trust assets be made productive. The Trustee may do all things related to the operation of the Business that I could have done if living, in a fiduciary capacity:

12.1.1. The Trustee may carry out the terms of any option or buy-sell agreements into which I may have entered.

12.1.2. The Trustee may sell or liquidate any of the Business interests at such price and on such terms as the Trustee may deem advisable.

12.1.3. The Trustee may arrange for and supervise the continued operations of the Business.

12.1.4. The Trustee may vote (in person or by proxy) as stockholder or otherwise and in any matter involving the Business on behalf of the Trust Fund.

12.1.5. The Trustee may grant, exercise, sell, or otherwise deal in any rights to subscribe to additional interests in the Business.

12.1.6. The Trustee may take any actions appropriate to cause the capital stock or securities in the Business to be registered for public sale under any state or federal securities act; may enter into any underwriting agreements or other agreements necessary or advisable for

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this registration and sale; and may grant indemnities to underwriters and others in connection with such registration.

12.1.7. The Trustee may participate in any incorporation, dissolution, merger, reorganization or other change in the form of the Business and, where appropriate, deposit securities with any protective committees and participate in voting trusts.

12.1.8. The Trustee may delegate to others discretionary power to take any action with respect to the management and affairs of the Business that I could have taken as the owner of the Business.

12.1.9. The Trustee may invest additional capital in, subscribe to additional stock or securities of and loan money or credit to the Business from the Trust Fund.

12.1.10. The Trustee may accept as correct financial or other statements rendered by the Business as to its conditions and operations except when having actual notice to the contrary.

12.2. **Compensation.** The Trustee shall be entitled to additional reasonable compensation for the performance of services with respect to the Business, which may be paid to the Trustee from the Business, the Trust Fund, or both, as the Trustee may deem advisable.

12.3. **Conflict of Interest Waived.** The Trustee may exercise the authorities granted under this Article even if the Trustee shall own personally an interest in the Business.

12.4. **The "Business" Defined.** The "Business" means any interest I, the Trust, or both, shall own at my death, representing, in the aggregate, at least five percent (5%) of the total equity interests in any actively-conducted trade or business, whether incorporated or unincorporated. The "Business" shall also include, but not be limited to, any five percent (5%) or greater equity interests in any corporations, general and/or limited partnerships as well as membership interests in any limited liability company or other business enterprise formed, operated or beneficially owned by me prior to my death or participated in (to the extent of five percent (5%) or more) by me prior to my death. The "Business" does not include any interests that are regularly traded on an established exchange or over-the-counter.

ARTICLE 13
Governing Law and Trustee Powers

The interpretation and operation of the trust shall be governed by the laws of the State of Oregon. The Trustee may, without prior authority from any court, exercise all powers conferred by this Trust Agreement or by common law or by any fiduciary powers act or other statute of the State of Oregon or any other jurisdiction whose law applies to the trust. The Trustee shall have

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sole and absolute discretion in exercising these powers. Except as specifically limited by this Trust Agreement, these powers shall extend to all property held by the Trustee until actual distribution of the property.

13.1. **Trustee Liability Provision**. Some persons may be hesitant to serve as Trustee hereunder because of a concern about potential liability. Therefore, with respect to any trust created hereunder (i) no Trustee shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken in connection with the administration of any trust created hereunder if in good faith reasonably believed by such Trustee to be in accordance with the provisions and intent hereof, except for matters involving such Trustee willful misconduct or gross negligence proved by clear and convincing evidence, (ii) no Trustee shall have any fiduciary responsibility to observe, monitor or evaluate the actions of any other Trustee and shall not be liable to any party for the failure to seek to remedy a breach of trust, or in a recurring situation to request instructions from a court having jurisdiction over the trust, and (iii) each Trustee shall be fully indemnified by the trust estate against any claim or demand by any trust beneficiary or trust creditor, except for any claim or demand based on such Trustee's willful misconduct or gross negligence proved by clear and convincing evidence. Expenses incurred by a Trustee in defending any such claim or demand shall be paid by the trust estate in advance of the final disposition of such claim or demand, upon receipt of an undertaking by or on behalf of such Trustee to repay such amount if it shall ultimately be determined that such Trustee is not entitled to be indemnified as authorized by this paragraph. In no event shall any Trustee hereunder be liable for any matter with respect to which he, she or it is not authorized to participate hereunder (including the duty to review or monitor trust investments).

13.2. **Distributions to Minor Beneficiaries.** The Trustee may distribute any of the Trust Fund to a beneficiary under twenty-one (21) years of age by distribution to any appropriate person (who may be a Trustee) chosen by the Trustee as custodian under any appropriate Uniform Transfers (or Gifts) to Minors Act, to be held for the maximum period of time allowed by law. The Trustee may also sell any asset that cannot be held under this custodianship and invest the sales proceeds in assets that can be so held.

13.3. **Security Interests.** The Trustee may grant security interests and execute all instruments creating such interests upon such terms as the Trustee may deem advisable.

13.4. **Tax Elections and Allocations.** The Trustee may make all tax elections and allocations the Trustee may consider appropriate; provided, however, this authority is exercisable only in a fiduciary capacity and may not be used to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of fiduciary duties. Tax elections and allocations made in good faith shall not require equitable adjustments.

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13.5. **Division and Distribution of the Trust.** The Trustee may divide and distribute the assets of the trust in kind, in money, or partly in each, without regard to the income tax basis of any asset and without the consent of any beneficiary. The decision of the Trustee in dividing any portion of the trust property between or among multiple beneficiaries shall be binding on all persons.

13.6. **Reliance Upon Advice.** The Trustee may employ and rely upon advice given by accountants, attorneys, investment bankers, and other expert advisors and employ agents, clerks and other employees and pay reasonable compensation to such advisors or employees in addition to fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation.

13.7. **Custodian Employed.** The Trustee may employ a custodian, hold property unregistered or in the name of a nominee (including the nominee of any bank, trust company, brokerage house or other institution employed as custodian), and pay reasonable compensation to a custodian in addition to any fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation.

13.8. **Digital Assets.** The Trustee may take any action with respect to any Digital Assets held as part of any trust hereunder as the Trustee shall deem appropriate, including, but not limited to, accessing, handling, distributing, disposing of, or otherwise exercising control over or exercising any right (including the right to change a terms of service agreement or other governing instrument) with respect to such Digital Assets.

ARTICLE 14
Definitions and Miscellaneous Provisions

The following definitions and miscellaneous provisions shall apply under this Trust Agreement:

14.1. **Survivorship.** Any beneficiary hereunder who dies within ninety (90) days following the date of my death or the termination of or distribution from any trust under this Trust Agreement for which entitlement the date of this beneficiary's death shall be relevant, shall be deemed to have predeceased me or to have died before the termination of or distribution from that trust, as the case may be, for all purposes of this Trust Agreement.

14.2. **Children and Descendants.** References to "children" and "descendants" shall include children and descendants whenever born.

14.3. **Minor and Adult.** Whether an individual is a minor or an adult shall be determined under the laws of the individual's domicile at the time in question.

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14.4. **By Right of Representation.** Property that is to be divided among an individual's surviving or then-living descendants "by right of representation" or in "shares by right of representation" shall be divided into as many equal shares as there are children of the individual who are then living or who have died leaving surviving or then-living descendants. A share allocated to a deceased child of the individual shall be divided further among such deceased child's surviving or then-living descendants in the same manner.

14.5. **Incapacitated Trustee.** A Trustee shall be deemed to be "incapacitated" (and while incapacitated shall not serve as a Trustee) if another then-serving Trustee or, if there is none, the next successor Trustee receives written certification that the examined individual is physically or mentally incapable of managing the affairs of the trust, whether or not there is an adjudication of incapacity.

14.5.1. This certification shall be valid only if it is signed by at least two (2) licensed physicians, each of whom has personally examined the Trustee.

14.5.2. This certification need not indicate any cause for the Trustee's incapacity.

14.5.3. A certification of incapacity shall be rescinded when a serving Trustee receives a certification that the former Trustee is capable of managing the trust's affairs. This certification, too, shall be valid only if it is signed by at least two (2) licensed physicians, each of whom has personally examined the Trustee, and at least one (1) of whom is board certified in the specialty most closely associated with the former incapacity.

14.5.4. No person is liable to anyone for actions taken in reliance on the certifications under this paragraph or for dealing with a Trustee other than the one removed for incapacity based on these certifications.

ARTICLE 15
Revocability of Trust and Rights Reserved

I reserve the rights listed in this article, each of which may be exercised whenever and as often as I may wish. To the extent permitted by law, the rights so reserved shall be exercisable by my agent or attorney-in-fact acting under a power of attorney.

15.1. **Amend or Revoke.** The right by an acknowledged instrument in writing to revoke or amend this Trust Agreement or any trust hereunder. After my death, neither this Trust Agreement nor any trust hereunder may be revoked or amended except as expressly provided elsewhere herein.

15.2. **Remove and Appoint Trustees.** The right to remove any Trustee and appoint substitute, additional or successor Trustees.

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15.3. **Approve Investment Decisions.** The right to approve the Trustee's investment decisions and my approval shall bind all other beneficiaries.

15.4. **Approve Trustee's Conduct.** The right from time to time to approve of the Trustee's conduct (whether in connection with an accounting by the Trustee or without an accounting), and my approval shall bind all other beneficiaries.

15.5. **Insurance Policies.** All rights I may have as the owner of any insurance policies payable to the Trustee.

ARTICLE 16
Savings Clause

Should any of the provisions or directions of this Trust Agreement fail or be held ineffectual or invalid for any reason, it is my desire that no other portion or provision of this Trust Agreement be invalidated, impaired or affected thereby, but that this Trust Agreement be construed as if such invalid provision or direction had not been contained therein.

The Trustee and I have signed this Trust Agreement, effective the day and year first above written and executed by each of us on the dates set forth below.

Cathy Davis 4-07-15

Catherine Patricia Davis, as Trustor and Trustee Date

Paddy A. Cook 4-7-15

Paddy A. Cook, as Trustee Date

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Brief of Appellant** on:

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by the following indicated method or methods:

- ☒ **E-mail.**
- ☐ **Facsimile communication device.**
- ☐ **First-class mail, postage prepaid.**
- ☐ **Hand-delivery.**
- ☐ **Overnight courier, delivery prepaid.**

DATED this 17th Day of April, 2020.

s/ *Steven E. Turner*
Steven E. Turner, WSBA No. 33840
Attorney for Appellant
Douglas Lance Davis, Jr.

STEVEN TURNER LAW PLLC

April 17, 2020 - 3:46 PM

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