

FILED
Court of Appeals
Division II
State of Washington
7/16/2020 12:08 PM

No. 54250-1-II

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

APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

BRIEF OF RESPONDENT PADDY COOK

VICTORIA BLACHLY, WSBA No. 30622
DARLENE PASIECZNY, WSBA No. 51728
Samuels Yoelin Kantor LLP
111 SW Fifth Avenue, Suite 3800
Portland, OR 97204
Tel. (503) 226-2966
VBlachly@SamuelsLaw.com
DarleneP@SamuelsLaw.com
*Of Attorneys for Respondent Paddy Cook, as Trustee
of the Catherine P. Davis Living Trust*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. RESTATEMENT OF THE ISSUES	6
III. RESTATEMENT OF THE CASE.....	8
A. Key Background Facts Supported by Uncontroverted Evidence and Not Assigned Error	8
B. Clarification of Evidence Presented At Trial	14
IV. ARGUMENT.....	15
A. Clarification of the Standard of Review.....	15
1. Uncontested Findings of Fact to be Accepted as True in Informing the Court’s De Novo Review of Conclusions of Law	15
2. Attorney Fees Awarded by Trial Court	17
B. The Express Terms of the Trust, Statutes and Common Law provide Ample Authority for the Trustee to Sell Trust Property During the Lifetime of Cathy	18
1. The Trial Court has Broad Authority under RCW 11.96A. ..	18
2. The Trustee Has Broad Powers to Sell the Seattle House	19
3. The Trial Court Properly Read the Trust in its Four-Corner Context to Mean that Section 3.4 Could be Read In Harmony With Section 3.3, and the Trustee Is Expressly Required to Consider Cathy’s Wishes.	21
4. Cases Cited by Lance Are Distinguishable – No Express Terms Mandating Consideration of Settlor’s Underlying Direction (e.g. Wishes or Desires)	23
5. The Sale of the Seattle House to Kim is Not a “Distribution” of Trust Assets or Gift.....	27
C. The Court Properly Considered Extrinsic Evidence For Two Key Determinations	28
1. Cathy Intended the Term “Wishes” in Section 3.4 of the Trust to Mean Her On-Going Wishes	28

2. Cathy’s On-Going Wish Was To Sell the Seattle House to Kim According to the Terms Documented in 2014 and 2018, And Consummation of this Plan Was A Benefit To Cathy	30
D. The Court Properly Awarded Attorney Fees.....	31
V. TRUSTEE’S REQUEST FOR ATTORNEY FEES AND EXPENSES INCURRED IN THIS APPEAL	33
VI. CONCLUSION.....	34

APPENDIX

Catherine Patricia Davis Living Trust Dated July 6, 1994, As Amended and Restated (CP 24-40; also entered as Ex 1)

Order on Petition for Authority to Sell Real Property (entered October 17, 2019 (CP 309-313))

TABLE OF AUTHORITIES

Cases

<i>Casterline v. Roberts</i> , 168 Wn. App. 376, 381, 284 (2012)	16
<i>Ermine v. City of Spokane</i> , 100 Wn. App. 115, 119–20 (2000), <i>aff'd</i> , 143 Wn.2d 636 (2001)	17
<i>Goodwill Indus. v. U.S. Bank</i> , 196 Or. App. 556, 561–62 (2004)	21
<i>In re Estate of Black</i> , 116 Wn. App. 476, 489 (2003), <i>aff'd on other grounds</i> , 153 Wn.2d 152 (2004)	32
<i>In re Estate of Mower</i> , 193 Wn. App. 706, 727 (2016)	17, 31
<i>In re Washington Builders Ben. Tr.</i> , 173 Wn. App. 34, 75 (2013)	16
<i>Jarrett v. U.S. Nat. Bank of Oregon</i> , 81 Or.App. 242, 247 (1986), <i>rev den</i> , 302 Or 476 (1987)	23, 24
<i>Templeton v. Peoples Nat. Bank of Washington</i> , 106 Wn.2d. 304 (1986)	25, 26
<i>Wood v. Med. Research Found. of Oregon</i> , 130 Or.App. 114, 117 (1994)	23, 24

Statutes

ORS 130.665	23
ORS 130.720	19
ORS 42.230	21, 22
RCW 11.96A	16, 18
RCW 11.96A.020	18
RCW 11.96A.030(2)(c)	18
RCW 11.96A.040(3)	18
RCW 11.96A.060	18
RCW 11.96A.150	1, 17, 32
RCW 11.96A.150(1)	31, 33

I. INTRODUCTION

Respondent Paddy Cook (“Trustee”), as Trustee of the Catherine Patricia Davis Living Trust, dated July 6, 1994, as amended and restated (“Trust”), respectfully asks this Court to affirm the trial court’s Order on Petition for Authority to Sell Real Property (“Order”). The Order authorizes a sale of a Trust asset, real property located at 2821 NW 61st Street, Seattle, Washington (“Seattle House”) to Respondent Kimberly Brandenburg (“Kim”) and her husband Michael, on terms that the trial court found to be the desired terms of Catherine Davis, settlor of the Trust (“Cathy”).¹ Kim has resided in the Seattle House for over 25 years, first moving in when she was in college. She lives there today with her husband and three children.

The sole objector to the Trustee’s Petition for Authority to Sell Real Property (“Petition”) was Appellant Douglas Lance Davis, Jr. (“Lance”). The Order also awards attorney fees and costs pursuant to the broad discretionary powers of the court under RCW 11.96A.150, and orders Lance to pay over \$88,000.00 combined to Trustee and Kim for their respective fees and costs in litigating his Objection.

Cathy is 81 years old, with diminished cognitive and communication abilities from Alzheimer’s disease. She had a successful professional career as a tax preparer with her own business, as well as

¹ Following the convention of Appellant’s Brief, first names are respectfully used for Davis family members.

actively coaching sports, serving as a sports official and eventually as the Commissioner for the Northern Oregon Board of Officials for over thirty years. Cathy now comfortably resides in an assisted living facility in Vancouver, Washington. Recognizing that her abilities were in decline, Cathy resigned as co-trustee of the Trust in January 2016 (leaving daughter Paddy as sole Trustee).² Trustee also was appointed attorney-in-fact for Cathy under a power of attorney executed on April 07, 2015. Cathy moved in to assisted living on December 27, 2015. Cathy is the current beneficiary of the Trust. Her four adult children – Trustee, Kim, Lance, and Kevin Davis, are the contingent beneficiaries of the Trust.³ A full copy of the Trust, (CP 24-40, also received as Ex. 1 at the hearing), is attached to the Appendix.

Through the Petition, Trustee sought the trial court's permission to consummate Cathy's decades-long desire to sell the Seattle House to daughter Kim on terms that Cathy had previously decided were fair and what she wanted to have happen. The evidence presented by the Trustee and Kim over the course of the two-day hearing before the Hon. Bernard F. Veljacic confirmed that these terms were Cathy's wishes. The corroborating evidence included documentation of the desired sales terms, no less than six testifying witnesses who had no financial incentive in the

² Contrary to unsupported statements in Appellant's Brief, there has never been an adjudication of incapacity for Cathy. The trial court expressly noted that the issue of legal determination of incapacity was not before it, and the court was not making any findings or rulings regarding the same. (RP vol 4, 21:2-21).

³ Kevin Davis was provided notice of the Petition but did not object to or otherwise appear in response to the Petition in the trial court proceedings.

outcome of the Petition hearing, and an additional seventh disinterested witness's testimony via sworn declaration. These witnesses included Cathy's long-time financial and tax professionals, her personal friends, and her former husband. Lance attended but did not testify at the hearing. Lance presented *no* witnesses or documentary evidence, nor did he impeach any of the Trustee's witnesses, to contradict Cathy's desired terms which were memorialized in writing in 2014, and again in 2018. These terms were to sell the Seattle House to Kim for \$312,500.00, seller to pay closing costs, with \$62,500.00 of that amount to be treated as a gift of equity in the home and Kim paying \$250,000.00. Cathy believed this was fair. It took into consideration the over 25 years of monthly mortgage payments that Kim had been paying (\$397,600.00 paid through February 2019), as well as money Kim invested in maintenance and improvements (\$93,617.00 through February 2019), and it was within Kim's ability to secure a \$250,000.00 mortgage. The trial court noted that the \$62,500.00 amount was 20 percent of the purchase price, "a typical down payment amount, and would be consistent with . . . Cathy's practice of providing down payments for her other children over the years." (RP vol. 2, 381:12-15).

Lance's Objection primarily relied on his argument that *no extrinsic evidence whatsoever* should be considered by the trial court in evaluating whether to authorize the sale of the Seattle House to Kim as proposed in the Petition. Lance's entire legal argument for exclusion of extrinsic evidence is based on his assertion that there are *no ambiguities* in

the Trust language, and hence, under basic contract law no evidence beyond the four corners of the Trust should be considered. Lance's position is that Section 3.3 of the Trust mandates that during Cathy's lifetime the only distribution of Trust assets can be for Cathy and thus the Seattle House should stay in the Trust, or (contradictorily), if there is a sale during Cathy's lifetime, it can only be a sale for the "highest" sales price, because the only "benefit" to be considered is maximum financial benefit to Cathy. Section 3.3 reads in full (CP 27):

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.

However, Lance's argument hinges on improperly *ignoring* key express language in the Trust, namely in the very next paragraph, Section 3.4, which reads in full (CP 27) (emphasis added):

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.

Section 3.4 cannot, and was not, ignored by the trial court. Section 3.4 directly *and unambiguously* instructs the Trustee to consider extrinsic evidence (to involve Cathy, to determine what Cathy’s wishes are about a particular matter) when making decisions about financial matters, which would include selling Trust property. *On these express terms alone*, it was proper and necessary for the trial court to consider extrinsic evidence in evaluating the Petition’s sale terms, and whether those terms *conformed to Cathy’s wishes*. The Trustee, and thus the trial court, were mandated to consider extrinsic evidence of what Cathy’s wishes were regarding the sale price for the Seattle House.

Alternatively – but ultimately getting to a similar result – the term “wishes” may be an ambiguous term in the Trust. Lance’s argument is that “wishes” in Section 3.4 means only what is expressly provided in the Trust terms, locked in at the time of the Trust’s amendment and restatement on April 7, 2015. Appellant’s Brief, pages 35-36. A *more plausible* interpretation (and what the trial court ultimately found) is that Cathy intended an on-going process – that the Trustee would check in with her as much as possible as needs and matters arose for decision-making after the Trust’s execution date. If the term “wishes” has more than one plausible interpretation, it is an ambiguous term, and it was proper for the trial court to consider the uncontested extrinsic evidence presented at the hearing.

While there are intertwining issues here, and several paths that the court may take to affirm that the trial court properly considered extrinsic

evidence, the basic principles of contract interpretation are relatively straightforward. The court should affirm the trial court's authorization of the sale of the Seattle House. Likewise, the court should affirm the trial court's discretionary award of attorney fees in the Order to Trustee and Kim, deny Lance's present request for an award of his fees in this appeal, and award Trustee her attorney fees incurred in this appeal.

II. RESTATEMENT OF THE ISSUES

Lance's Assignment of Error assigns error to the trial court authorizing the sale of the Seattle house to Kim on the terms proposed in the Petition, and awarding attorney fees and costs against Lance in favor of Trustee and Kim, for their fees and costs in responding to Lance's Objection to the Petition and litigating the matter.

Later, in his Argument, Section V (D), Lance more specifically argues that the trial court erred "by failing to enforce the clear and unambiguous provisions of the Trust" and "[a]s a result of this fundamental error, the trial court also reached three erroneous conclusions of law." Lance identifies the following three conclusions in Judge Veljacic's Order (CP 309-313) to be errors by the trial court:

- #15 (that the term "wishes" in Article 3 of the Trust means Cathy's on-going wishes and extrinsic evidence of her on-going wishes could be considered by the court);

- #21 (that the Trustee acted according to her duties in following the mandate of Section 3.4 to make every effort to include Cathy in decision making); and
- #23 (that Cathy's wishes regarding the Seattle house could include benefits to her other than financial and did not require only a sale at the highest price).

As further explained herein, the trial court's findings of fact were based on uncontroverted evidence, and thus should be treated as true without further review. For clarity's sake, a restatement of the legal issues may assist the court:

1. Did the trial court properly read the Trust in its full four-corner context to mean that Section 3.4 could be read in harmony with Section 3.3, and that the unambiguous express terms of Section 3.4 required the Trustee to consider Cathy's wishes regarding financial decisions, including the sale of the Seattle house to Kim? (Legal issue). YES.
2. Did the trial court properly consider uncontroverted extrinsic evidence (legal issue) when it interpreted the ambiguous term "wishes" to mean (factual conclusion not subject to review) Cathy's *on-going* wishes and desires, rather than just her wishes at a static moment in time at the execution of the Trust? YES.
3. Did the trial court properly consider uncontroverted extrinsic evidence (legal issue) when it found that Cathy's wishes (factual

conclusion not subject to review) were to sell the Seattle property to Kim at a price Cathy felt was fair and wanted to have happen, as documented in writing in 2014 and 2018, and that the consummation of this sale was a benefit to Cathy beyond mere financial return? YES.

4. Did the trial court properly award attorney fees, to be paid by Lance, for the Trustee's fees and Kim's fees in defending against Lance's Objection? YES.

III. RESTATEMENT OF THE CASE

A. Key Background Facts Supported by Uncontroverted Evidence and Not Assigned Error

Cathy originally purchased the Seattle House in 1993, to assist Kim's immediate needs for housing while Kim was attending college, but also with a long-term plan to help Kim eventually have a home of her own. (RP vol 1., 87: 1-11; 22- 88:1-2; RP vol 1, 132: 6-23; 133: 3-13; Ex 14, ¶ 5; Ex 16, ¶ 4; Ex 17, ¶ 2). Cathy had helped each of her other three children with money for down payments on their homes, as well as other financial support. (Ex 14, ¶¶ 6, 8; Ex 15, ¶ 2; Ex 17, ¶ 3; RP vol 1, 141:7-17). As the youngest child, and still in college, Kim was not quite ready for home ownership, but it was Cathy's wish to also help Kim with the financial security of a home of her own. (Ex 15, ¶ 4). Cathy wanted Kim to be able to stay in the Seattle House if Kim chose to do so, and to eventually purchase the home from Cathy on terms that Cathy believed were fair, and that took into consideration the payments Kim had made

over time. (Ex 14, ¶¶ 7, 9; Ex 15, ¶¶ 6-7; Ex 16, ¶ 5; Ex 17, ¶ 3). With the exception of two brief interludes, including when she first was married, Kim has continuously resided in the Seattle Home. (RP vol 1, 262:15-263:2). Even while she was briefly residing elsewhere, Kim continued making the monthly mortgage payments to Cathy for the Seattle House. (Ex 8 (schedule of payments totaling \$397,600.00 through February 2019); RP vol 1, 263:5-9, 268:15-269:1-13). Kim's payments paid enough to cover the mortgage, insurance, property tax, and some for Cathy's care. (RP 245:4-10). Kim and her husband paid for numerous repairs and maintenance on the house and invested insurance proceeds after a fire to make improvements on the house. (Ex 16, ¶ 7; Ex 9 (schedule of payments totaling \$93,617.00)). In 2014, Kim and Cathy were ready to move forward with a sale, and Cathy wanted to structure the deal in a way that was fair to Kim, that took into account her prior payments, and also structured to be tax advantaged. (Ex. 15, ¶ 3; Ex 16, ¶ 8; RP vol. 1, 104:2-8). Cathy worked with a mortgage lender, Wayne Wright, on the terms of sale to Kim, (CP 1-3; Ex 16, ¶ 8), and a sales agreement was drawn up reflecting the terms Kim and Cathy agreed were fair: \$312,500.00 purchase price, with 20% of that as a gift of equity in the amount of \$62,500.00, and seller paying closing costs. (Ex 6; CP 41-44; RP vol 1, 205:14-25, 206:1-13).

Cathy's health was more noticeably declining in 2015. (RP vol 1, 192:1-3) The Trustee spent time with Cathy, called various family meetings to engage her siblings in discussions about helping Cathy,

transitioning her to an assisted living facility, and taking care of Cathy's wishes for her ongoing care and management of her assets. (RP vol 1, 192:8-22; 223-224). Lance knew about the 2014 proposed sale terms and stalled the consummation. (RP vol 1, 207:2-22). Lance asked his mother to delay the sale to Kim in front of witnesses, like Cathy's long-time friend Ann Fruechte, who felt that Lance was pressuring Cathy to delay the sale to Kim, and that Cathy was trying to keep peace in the family. (RP vol 1, 137:14-25; Ex 16, ¶¶ 9-10). Lance had a personal interest in this – if the Seattle House was part of the Trust residue at Cathy's death, under the distribution terms of the Trust he would be entitled to a quarter interest as a contingent beneficiary. (Ex 1). Lance helped arrange for Cathy to meet with an estate planning attorney in January 2015 to review her estate plan and finances. (RP vol 1, 192:17-25). The attorney, Ann Thompson, told Lance that he should start paying back the significant debt *he* owes to Cathy from prior personal and business loans, (Ex 16, ¶ 11), and she suggested that the Seattle House could be sold for fair market value.⁴ After that meeting, Cathy adamantly told the Trustee that she did *not* want to sell the house for the fair market value, that she wanted to

⁴ In addition to providing Lance financial assistance for the purchase of a home, Cathy loaned Lance hundreds of thousands of dollars including loans to purchase a gravel pit for the purposes of converting it to a water park and water ski school. (RP vol 1., 96:9-25, 97:1-16; RP vol 1, 113:5-25, 114:1-7). Lance's gravel pit /ski school business never got off the ground, despite additional loans from Cathy to Lance. Cathy tried to keep track of Lance's outstanding debt on the loans, (CP 80), and at the hearing the Trustee estimated about \$253,000.00 was still owing. (RP vol 1, 202-203). Lance admits there are outstanding loans. (CP 126). Cathy was frustrated and disappointed that Lance was not making regular payments on the loans but instead was going on expensive trips and purchasing expensive toys. (Ex 16, ¶¶ 6, 14).

keep to the plan to sell the house to Kim at the lower purchase price that Cathy believed was fair. (RP vol 1, 254:24-255:1-20). Cathy told her trusted friends and advisors that she wanted to take into account Kim's payments for the eventual sale price, and she wanted it to be fair. (RP vol. 1, 76:4-24 (Holloway); RP vol. 1, 119: 6-19 (Allen). Cathy told the Trustee that the Seattle House was none of Lance's [explicative] business. (RP vol. 1, 198: 18-23). Cathy was concerned about Lance being unhappy with her wish to sell the Seattle House to Kim. (Ex. 15, ¶ 8.) Shortly before the Trust was amended and restated in April 2015, Cathy gave the Trustee a list of six or seven priorities that she wanted to accomplish, which included third-party debtors paying her back on loans to others she had made, Lance paying her back on his significant outstanding debts, donations to Cathy's favored charities, and finishing the sale of the Seattle House to Kim. (RP vol. 1, 198-199; 200:12-20; 201:11-15).

Trustee turned her attention to the items on the list. However, with Cathy's declining health, Lance's objections causing friction when the topic was brought up, and other priorities demanding attention like Cathy's medical care, the sale to Kim was not finalized. (RP vol 1, 208: 15-25; Ex 17, ¶ 3). The Trustee called a family meeting in July 2017 with all siblings and their spouses and brought up the 2014 terms and recent financial plans for Cathy that supported the sale. (RP vol 1, 223-224). Lance expressed dissatisfaction with being asked "to give up my inheritance so [Kim] can have a house." *Id.*

Numerous witnesses who had known Cathy for decades confirmed that Cathy's character was generous, loving, and that she wanted to treat her four children *fairly*, which did not necessarily mean equally, depending on the needs and position of each child. (RP vol 1, 83:13-19; 104: 17-25, 105:1- 12 (Casey); RP vol 1, 200:3-11 (Trustee); Ex 15, ¶ 7, 9 (Allen). Witnesses confirmed that Cathy wanted to help each of her four children be set up for financial success, but that meant different things for each child. (RP vol 1, 86:9-21; 94:7-9 (Casey) Ex 16, ¶ 14 (Fruechte). And numerous witnesses testified that Cathy was firmly consistent over the years in her expressed wishes that the Seattle House was for Kim (RP vol 1, 73:7-11; 75:12-21; 80:17-19 (Holloway); RP vol. 1, 99:19-23 (Casey); RP vol 1, 115:3-9; 123:11-17 (Allen); RP vol 1, 133:17-22, 140:17-20; 153:14-20 (Fruechte); RP vol 1, 208:9-14-25; 220-221: (Trustee); Ex 16, ¶¶ 12-13, 15-16). As she declined in health, it was a priority for Cathy to consummate her plan for Kim to get the house, on the terms she worked out with the mortgage advisor Wayne Wright back in 2014. (Ex 15, ¶¶ 5, 9; Ex 16, ¶ 16; Ex 17, ¶ 4; RP vol 1, 162:1-24); RP vol 1, 227:3-9 (Trustee testifying that she has a clear understanding that Cathy's wishes were to sell the house to Kim on the 2014 terms). Consummating the sale to Kim on terms Cathy believed fair was more important to her than whatever financial gain she could receive from the increase in home values since then. (RP vol 1, 226: 13-22; Ex 16, ¶ 16; RP vol 2, 310:18-20 (Trustee testifying it was *not* Cathy's wish for Kim to pay fair market value for the house). Cathy was frustrated that she hadn't

been able to consummate the sale of the house to Kim before she moved into assisted living, and was frustrated with the family friction delaying the finalizing of the sale on the terms she always intended for Kim. (RP 111:14-25, 112:1-18 (Allen)). And she was frustrated that Lance was not paying her back the money he owed her. (RP vol 1, 160:8-22)

Cathy resigned as co-Trustee in January 2016, but the Trustee continued to check in with Cathy about finances, and also checked in with Cathy's long-term financial professionals. (RP vol 1, 215:10-25, 216-217:1-5, 243:25-244:1-8). The Trustee sought input from tax professionals and financial advisers to confirm that a sale of the Seattle House to Kim on the 2014 terms was tax advantaged and prudent in Cathy's overall financial status, and the advisers projected that she would have sufficient assets for her support through her life expectancy. (RP vol 1, 170: 2-25, 171:1-10; 172:19-25 (Fischer); RP vol 1, 178:8-24, 182:2-21 (Buczowski); Ex 2; Ex 3, Ex 6). The 2014 sale terms were reaffirmed in 2018 with the preparation of a new purchase and sale agreement in March 2018 (Ex 7). There was no evidence presented by Lance that Cathy changed her mind regarding the 2014 terms or desire to sell to Kim.⁵ The Trustee filed her Petition for Authority to Sell Real Property shortly after, on April 18, 2018 (CP 17-107).

⁵ Lance's argument that the fact the transaction was not finalized by Cathy should mean something is argument – not evidence. No evidence was presented that Cathy affirmatively changed her wishes as expressed to decades-long friends and financial professionals who provided credible and consistent testimony.

B. Clarification of Evidence Presented At Trial

After full briefing, the trial court held a two-day hearing on the Petition over July 1, 2019, and July 2, 2019. Contrary to Lance's assertion in his Appellant's Brief, page 14, Trustee and Kim presented evidence *not only* of Cathy's desire to be included in financial decisions and her wishes for the Seattle House to be sold to Kim on certain terms, they also presented evidence of Cathy's other available assets and cost of living projections by a financial professional to show that Cathy had sufficient assets to provide for her care such that the Petition's sale terms were reasonable and appropriate for her care needs. (*See, e.g.* Ex 2; Ex 3; testimony of Amy Fischer (tax preparer) (RP vol 1, 166-173) and Gary Buczkowski (financial planner, CFP certificate) (RP vol 1, 176-181). Evidence showed that the sale would result in a financial benefit to Cathy (including minimizing the Trust's tax liability, reducing debts by paying off the mortgage). *Id.*

The trial court made findings and rulings from the bench at the conclusion of the second day, including awarding attorney fees and costs to the Trustee and Kim, against Lance, in amounts to be determined with further proceedings. (RP vol 2, 373-385). After written briefing on attorney fees, the trial court held a hearing about fees on August 27, 2019.⁶

⁶ Additionally, as part of the appellate proceedings, and *not* otherwise included the Order's attorney fee award, the trial court had briefing and oral argument on Trustee's objection to the sufficiency of Lance's \$5,000.00 cash deposit to stay the Order's authorization of sale of the Seattle House to Kim. (RP vol 4). The trial court agreed with the Trustee that the amount of funds deposited was insufficient to stay the sale. *See* Order on Trustee's Objection to Cash Supersedeas Amount and Motion to Increase Amount of Supersedeas, entered October 17, 2019 (CP 314-315). Lance did not comply

(RP vol 3, 1-52). The trial court’s findings and ruling were memorialized in the Order entered on October 17, 2019 (CP 309-313), a copy of which is included in the Appendix.

IV. ARGUMENT

A. Clarification of the Standard of Review

1. *Uncontested Findings of Fact to be Accepted as True in Informing the Court’s De Novo Review of Conclusions of Law*

Lance’s blanket assertion that the standard of review for this matter is *de novo* (Objection, pages 15-16) is not a complete statement of the standard of review applicable to this appeal.

Article 13 of the Trust (Governing Law and Trustee Powers) provides in full (CP 36-37) (emphasis added):

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 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.

It is uncontested that the Trust expressly provides that Oregon law applies to the “interpretation and operation” of the Trust. Cathy resides in Clark County and most of the Trust administration and assets are in Clark

with the order’s requirement to post bond in the amount of \$250,000.00 within seven days to stay the pending sale of the Seattle House. The sale has since been completed.

County. The Petition was properly filed in the Clark County Superior Court, and Washington law under RCW 11.96A (TEDRA) applies to the proceedings, as further described herein.⁷

The Washington Court of Appeals reviews a trial court's decision following a bench trial by asking:

whether substantial evidence supports the findings **and whether the findings support the court's conclusions of law.** [. . .] Substantial evidence is that quantity of evidence sufficient to persuade a rational, fair-minded person that a finding is true. [. . .] **We consider unchallenged findings to be verities on appeal.** [. . .].

Casterline v. Roberts, 168 Wn. App. 376, 381, 284 (2012) (internal citations omitted) (emphasis added). Unchallenged findings of fact are treated “**as verities on appeal, not subject to review.**” *Id.* at 381 (emphasis added). “Although, in general, determining a settlor's intent is a question of fact, the interpretation of a trust provision is a question of law” with *de novo* review. *In re Washington Builders Ben. Tr.*, 173 Wn. App. 34, 75 (2013) (internal citations omitted).

Here, Lance assigns no error to any of the trial court’s findings of fact. Indeed, the evidence in the record as to Cathy’s intent regarding the meaning of the term “wishes” in the Trust, and as to her wishes for the Seattle House to be sold to Kim on the terms in the Petition, is uncontested. Thus, the trial court’s findings of fact *as to Cathy’s intent* regarding the terms of the Trust (that “wishes” are on-going wishes) and

⁷ As described further herein, the operative issues of law (principles of trust interpretation regarding ambiguities and extrinsic evidence) are not in conflict between Oregon and Washington.

as to Cathy's wishes for the sale of the Seattle House (to consummate the sale to Kim on the terms discussed in 2014) are thus to be accepted by this court as true. These findings of fact supply the basis for review of the trial court's conclusions of law to which Lance assigns error in the Order's #15, #21, and # 23 (CP 311-312).

2. *Attorney Fees Awarded by Trial Court*

Lance assigns error to the trial court's award of attorney fees to Trustee and Kim under the statutory authority of chapter 11.96A RCW (TEDRA), which provides that the court may award any amount it "determines to be equitable." RCW 11.96A.150(1). "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. "We review a trial court's decision to award attorney fees under TEDRA for an abuse of discretion." *In re Estate of Mower*, 193 Wn. App. 706, 727 (2016). A court abuses its discretion "when its decision is manifestly unreasonable or based on untenable grounds or reasons." *Ermine v. City of Spokane*, 100 Wn. App. 115, 119–20 (2000), *aff'd*, 143 Wn.2d 636 (2001).

B. The Express Terms of the Trust, Statutes and Common Law provide Ample Authority for the Trustee to Sell Trust Property During the Lifetime of Cathy

1. The Trial Court has Broad Authority under RCW 11.96A.

There is no question that the parties submitted to the jurisdiction of the Washington courts, and the trial court had full and broad authority to order the sale of the Seattle House. RCW 11.96A.020 provides:

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

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

(b) All trusts and trust matters.

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

“Matters” include, among many other things, “any issue, question, or dispute” involving “the determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts . . . [.]” RCW 11.96A.030(2)(c). RCW 11.96A.040(3) gives broad authority to the court “to administer and settle all matters related to trusts,” and RCW 11.96A.060 gives the court

authority to “make, issue, and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by this title.”

2. *The Trustee Has Broad Powers to Sell the Seattle House*

Article 13 of the Trust provides that the Trustee has broad powers under common law or statute of the State of Oregon, “or any other jurisdiction whose law applies to the trust,” and “except as specifically limited” by the Trust’s terms, those powers extend to all Trust property. (CP 36-37). Oregon law provides broad powers for a trustee:

ORS 130.720 (General powers of trustee):

(1) A trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, except as limited by the terms of the trust:

- (a) All powers over the trust property that an unmarried financially capable owner has over individually owned property;
- (b) Any other powers appropriate to achieve the proper investment, management and distribution of the trust property; and
- (c) Any other powers conferred by this chapter.

...

ORS 130.725 (Specific powers of trustee):

Without limiting the authority conferred by ORS 130.720, a trustee may do any of the following:

- (1) Collect trust property and accept or reject additions to the trust property from a settlor or any other person.
- (2) Acquire or sell property, for cash or on credit, at public or private sale.
- (3) Exchange, partition or otherwise change the character of trust property.

...

The Trust does not have any express terms that prevent the Trustee from selling trust property, let alone prevent the sale of the specific Seattle House. Lance argues, incorrectly, that Section 3.1 (“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 Section 3.3 (Trustee “shall liberally distribute income and principal of the Trust for my benefit”) somehow limits the Trustee’s powers to *only* those actions. Lance argues, incorrectly, that Section 3.3 mandates that “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.” Appellant’s Brief, page 27.

This is simply not a reasonable reading of these paragraphs, even if read in isolation without considering the full context of the Trust (*e.g.* Section 3.4) and the broad reference to powers of the Trustee under common law and statute (Article 13). To adopt Lance’s reading would mean the Trustee could not sell the Seattle House for *any* price, as if somehow, illogically, retaining the illiquid property in trust would “best”

provide for Cathy's support. Rather, this self-serving reading requiring keeping the property in Trust is for the benefit of *Lance* and his contingent beneficial interest in the Trust residue.

3. *The Trial Court Properly Read the Trust in its Four-Corner Context to Mean that Section 3.4 Could be Read In Harmony With Section 3.3, and the Trustee Is Expressly Required to Consider Cathy's Wishes.*

Indeed, Oregon law on the interpretation of trusts requires looking at language in the full context of the Trust agreement as a whole. The parties agree as to the basic framework for trust interpretation:

When a trust instrument is fully integrated and is not ambiguous on its face, extrinsic evidence is not admissible to establish the grantor's intent. [. . .] Whether a term in a trust instrument is ambiguous is a question of law. [. . .] An ambiguity is presented only **when the language of the instrument is reasonably capable of more than one plausible interpretation**. *Id.* In determining whether an ambiguity exists, we **“look to the entire trust agreement and construe it in accordance with the trustor's intent, and, if possible, give effect to all of its provisions”**. ORS 42.230 [. . .]

Goodwill Indus. v. U.S. Bank, 196 Or. App. 556, 561–62 (2004)

(emphasis added).

ORS 42.230 provides (emphasis added):

In the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, **such construction is, if possible, to be adopted as will give effect to all**.

Contrary to *Lance's* arguments, Sections 3.3 and 3.4 of the Trust are not inconsistent or otherwise in conflict, such that the former “trumps” the latter (or vice versa). The trial court was correct that the sections can

be read in harmony. (CP 310, finding #14, which has not been assigned error).⁸ Pursuant to ORS 42.230, the court seeks a construction that gives effect to all provisions. As Judge Veljacic noted during his rulings from the bench:

Can they be so read? Yes, they can. **To determine the trustor or settlor's wishes is consistent with a trustee distributing as much of the net income as the trustor may from time to time direct.** Those two things are consistent. Wishes would be underlying direction. Those -- again, those -- those two and three -- 3.3 as well, these provisions can all be read consistently. **They do not rule out that the wishes of the trustor or the settlor are to be determined.**

(RP vol. 2, 374:24-375:7 (emphasis added))

Lance's fear of a slippery slope (e.g. what if Cathy expressed a "wish" to give the entire Trust assets away? Appellant's Brief, page 32) if the court allows consideration of Cathy's wishes to "trump" the distribution of income and principal for her care and support needs, is likewise unpersuasive. There is no question that the Trustee has a duty to take Cathy's care needs in consideration and can do so *while also* evaluating how Cathy's wishes can be achieved. Lance calls this a "level of prescience" that would require a "crystal ball." Appellant's Brief, page 30-31. And yet, trustees and other fiduciaries commonly review financial

⁸ Lance seems to argue that Section 3.3 unambiguously provides the complete "intent" of Cathy, merely because it is titled "Intention." Appellant's Brief, page 26. And his own argument is internally inconsistent – Lance insists that the Trustee has no discretion or ability to "make judgment calls when it comes to preserving the Trust estate" and all decisions are for preserving Trust assets during Cathy's lifetime to pay for her "care and support." *Id.* at 26-27. And yet, the plain language within Section 3.3 allows the Trustee to consider the "rights of the successor beneficiaries" albeit "secondary" to Cathy during her lifetime. That is not a prohibition of considering the contingent beneficiaries.

projections and budgeting to assist making prudent support decisions for protected persons. Trustees have a duty to consider context and weigh options. ORS 130.665 (Prudent administration) provides that “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.” The trial court was correct that these trust terms could be read in harmony, rather than one canceling the other out. It was another question for the court to interpret what the term “wishes” meant in order to make that harmonious reading. As discussed below, having determined that the Trustee was mandated by the express terms of the Trust to consider Cathy’s “wishes,” the court necessarily had to consider extrinsic evidence as to 1. Whether “wishes” meant Cathy’s on-going wishes and desires, and 2. What those “wishes” were regarding the Seattle House.

4. *Cases Cited by Lance Are Distinguishable – No Express Terms Mandating Consideration of Settlor’s Underlying Direction (e.g. Wishes or Desires)*

There is no dispute regarding what the “guiding principles” of trust interpretation are under the two Oregon cases that Lance relies on in his Appellant’s Brief, pages 16-22, *Jarrett v. U.S. Nat. Bank of Oregon*, 81 Or. App. 242, 247 (1986), rev den, 302 Or 476 (1987), and *Wood v. Med. Research Found. of Oregon*, 130 Or.App. 114, 117 (1994). Both cases excluded the consideration of extrinsic evidence of settlor’s intent because

the court found the respective trust and will to be unambiguous on their face. However – and importantly – both cases are easily distinguishable from the present case, *because neither involved trust language anything like the language of Section 3.4*, which mandates the Trustee to consider the wishes of the trust settlor. Appellant’s Brief fails to account for this critical difference.

The *Jarrett* court, in considering whether the trustee breached fiduciary duties by allowing an untimely renewal of a lease rather than renegotiate for better terms, noted the *absence* of any such language in the trust (the trust “did not indicate any purpose of [settlor] to favor the [leasee] Company”), and the court even looked to the language of the lease at issue for its “time and punctual and exact performance . . . are of essence . . .” language of the (extrinsic) lease. *Jarrett*, 81 Or. App. at 246.

In the *Woods* case, the interpretative issue was language in a will directing funds to be given to a medical research foundation, and used for the benefit of cardiopulmonary research “under 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” [now OHSU]. *Wood*, 130 Or. App. at 116. The two named doctors sought the court’s ruling on whether they were entitled to use the funds at a facility *other* than OHSU. Defendant OHSU argued that the plain language was unambiguous, meant the funds had to be used at OHSU, and thus no extrinsic evidence of settlor’s intent (whether the funds were to follow the named doctors regardless of facility location, or whether they

could only be used at OHSU). The Court of Appeals focused on the syntax of the phrase, “*in the Department . . . at [OHSU],*” unambiguously meant OHSU. “The language of the will simply does not provide any alternative to OHSU as the site of the work.” *Id.* at 117. Once again, there was no language in the will in *Wood* anything like the language of Section 3.4 of the Trust, mandating the Trustee to consider Cathy’s “wishes” in making decisions – effectively, consider the direction of the settlor in making a decision. The two cases may provide guiding principles for the process of interpretation, but their facts are simply not analogous to the present matter.

Lance also references a Supreme Court of Washington case for the guiding principles of trust interpretation under Washington Law. Appellant’s Brief, pages 22-25, *Templeton v. Peoples Nat. Bank of Washington*, 106 Wn.2d. 304 (1986). *Templeton* case is similarly distinguishable. In *Templeton*, the dispute involved on-going annuity payments received by the trustee of decedent’s trust, and whether the trustee should have been distributing more of those payments to the trust’s income beneficiary, the surviving spouse. *Templeton*, 106 Wn.2d. at 307. Upon receiving the annuity payments, the trustee was allocating part of the annuity payments to trust income (which the surviving spouse received), and some to trust principal (which she did not receive). The Supreme Court of Washington focused on the clear language of the trust that expressly granted the trustee discretion in determining what is principal or income, and the trust’s specific instructions that the trustee “shall

distribute the income from the said Trust” to the surviving spouse as long as she lived. *Id.* at 308. Finding this plain language unambiguous, the court found it was not necessary to look at language in extrinsic documents (the decedent’s will, the annuity contracts) and was satisfied that the trustee did not abuse its discretion. *Id.* at 312.

Once again – principles are not in dispute, but the facts of *Templeton* are simply not analogous to the present matter. If anything, the court’s holding that the plain language instructions and discretion controlled, support enforcement of Section 3.4 (that the Trustee must consider Cathy’s wishes regarding financial decisions.) This is an unambiguous direction to the Trustee, to keep Cathy involved in decision making as much as possible, try to discern her “wishes” regarding financial and personal decisions, and to conform to those wishes in making decisions. The Trustee necessarily needs to consider her physical and financial needs (Section 3.3), as well as intangible things that Cathy may find value in – what the Trustee, in her discretion, thinks Cathy would want, her wishes (Section 3.4). This kind of balancing is what trustees do. And here, the Trustee had a duty to balance the two to the best of her ability. The overwhelming evidence is that Cathy wanted to sell the Seattle House to Kim on the terms in the Petition, and that it was financially reasonable to do.⁹

⁹ Indeed, the failure to consider Cathy’s wishes regarding the Seattle House, in light of the overwhelming evidence and sustained expressed wishes, could arguably have been a breach of fiduciary duty. Accordingly, petitioning for court instruction on the sale and its terms was exactly what a reasonably prudent trustee should have done.

5. *The Sale of the Seattle House to Kim is Not a
“Distribution” of Trust Assets or Gift*

Lance’s incorrect binary reading of these sections may be informed by his apparent confusion over what is a “distribution.” Lance argues, “Only after Catherine passes away can any Trust assets be distributed to any of the residuary beneficiaries.” Appellant’s Brief, page 27. Lance appears to equate sale of Trust asset to a beneficiary with being a “distribution” to a beneficiary. That is incorrect. The sale to Kim on the 2014 / 2018 terms, and the net received by the Trust out of that sale, is not a “distribution” of the Seattle House to Kim. It is a sale, within the Trustee’s broad powers under Oregon law and not otherwise limited by any language prohibiting sales in the Trust. The Trust receives value. The Trust expressly directs the Trustee to consider Cathy’s wishes in making financial decisions, and the uncontested facts support that the sales price on the 2014 / 2018 terms was in conformity with Cathy’s wishes. Nor is the transaction a “gift” as Lance attempts to characterize it. Appellant’s Brief, page 30. Simply comparing the \$250,000.00 net sales price to an estimated higher current fair market value, and deciding the difference must be a “gift,” is an oversimplification. It ignores the decades that Kim paid on the mortgage and maintenance and improvements, the “sweat equity” of upkeep. It ignores that Cathy believed it was fair under all the circumstances. It also ignores the fact that the current Trustee – Paddy – was not trying to do anything other than get a ruling from the trial court as

to whether or not she, as current Trustee, should proceed with a transaction that had been started, and the terms identified in 2014, but not finalized by Cathy, the settlor of the Trust, by the time she resigned as co-trustee in January 2016.

C. The Court Properly Considered Extrinsic Evidence For Two Key Determinations

1. Cathy Intended the Term “Wishes” in Section 3.4 of the Trust to Mean Her On-Going Wishes

Having determined that Section 3.4 and Section 3.3 could be read in harmony, and that the express mandate to consider Cathy’s wishes was akin to considering direction from the settlor, (RP vol 2, 375:3-4), the trial court noted that what “wishes” meant was being argued in two ways, thus creating an ambiguity that allowed consideration of extrinsic evidence:

I can see the alternative argument that wishes either mean intent – which is a term of art, make no mistake. It is a term of art in the law with extensive definitional law interpreting it both in Oregon and Washington. So it either means intent, the term of art, or current desires as those may arise or change and so, therefore, wishes would be subject to more meaning . . . meaning it’s ambiguous. We there at that point look to parol evidence to see what it means.

(RP vol 2, 375:15-25). Lance argues that “wishes” could not mean anything beyond the date that Cathy executed the amendment and restatement of the Trust (April 7, 2015), and frozen in his interpretation of Section 3.3: preservation of Trust assets, no discretion or judgment calls by the Trustee, and only distributions to Cathy for her care and support.

Appellant's Brief, pages 26-27.¹⁰ In reviewing the evidence from the hearing, the court found that Trustee's witnesses and Kim's witnesses were credible, they corroborated each other, and the evidence was uncontroverted. (CP 311, Finding #16, not assigned error), and that the uncontroverted evidence was that "from 2014, [Cathy] wished for the Seattle House to be sold to [Kim] for terms consistent with Trial Exhibits 6 and 7 [the 2014 terms]," and that "the Trust commands the Trustee to determine her mother's wishes and to act accordingly. The clear and convincing evidence at trial is that the Settlor wished to sell the Seattle House to [Kim]." (CP 311, Findings #19 and #22, not assigned error). The court noted from the bench that "in parol evidence, the way Cathy has behaved, Paddy has behaved, everyone has behaved is that the parol evidence shows that Cathy believes that it means her wishes as those may arise or change post-drafting of this document versus intent, which is typically something that's frozen at the time of drafting." (RP vol 2, 376:1-7). "[I]n light of her character, the way she conducted herself throughout her life and even in later years . . . the term wishes means present wishes." (RP vol 2, 376:13-16).

¹⁰ Lance's argument here is self-contradictory: Section 3.3. expressly allows for the consideration of rights of successor beneficiaries, albeit secondarily. (CP 27)

2. *Cathy's On-Going Wish Was To Sell the Seattle House to Kim According to the Terms Documented in 2014 and 2018, And Consummation of this Plan Was A Benefit To Cathy*

Judge Veljacic noted from the bench numerous specific examples of the uncontroverted fact evidence presented at the hearing that it found important in reaching its conclusion that “it’s clear what [Cathy’s] wishes are: To sell that house at \$312,500.00 to Kim and her husband.” (RP vol 2, 377-38). The court also was clear, that “wishes to be of benefit to Cathy need not be absolutely a sale for the highest price. . . . Cathy was clear . . . benefiting her includes doing right by her children, in addition to financial aspects. A cold look at what the highest number is leaves unmet this important interest that she was very clear about, helping her kids get set in a middle-class life-style.” (RP vol 2, 383:11-19).

It should be noted that the Trust does not contain language of maximizing financial returns. It could have – but it does not. On the contrary, the express terms to consider Cathy’s “wishes” reinforces that there could be other “benefits” even more important than highest dollar return. The court correctly found that the uncontroverted evidence supported not only the desired sale terms, but that it was important and a benefit to Cathy to fulfill the plans she started decades prior that she considered “fair” to Kim, just as she had generously helped her other children.

D. The Court Properly Awarded Attorney Fees

Lance asks this court to find the trial court erred in awarding attorney fees and costs to Trustee and Kim in the Order. RCW 11.96A.150(1) provides:

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.

Lance does not argue that the trial court abused its discretion, which is the standard for overturning such an award. *Mower*, 193 Wn. App. at 727. He does not assign error to the *amount* award by the trial court. Rather, he states that the award “should be reversed . . . because it is premised on the fact that Kim and Paddy [Trustee] prevailed.” Appellant’s Brief, page 39. But there is no such finding by the trial court in its Order that the fees and costs were awarded “because of” anything. (CP 309-313). It merely orders that “[t]he Trustee’s attorney fees and costs shall be paid by [Lance] individually” in the amount ordered, and similar language ordering payment of Kim’s attorney fees and costs. (CP 313). The Washington courts “will not interfere with the decision to allow attorney fees in a probate matter, absent a manifest abuse of discretion.”

In re Estate of Black, 116 Wn. App. 476, 489 (2003), *aff'd on other grounds*, 153 Wn.2d 152 (2004).

Additionally, Lance requests this court *direct the trial court* to order the Trustee and Kim pay Lance's attorney fees incurred in the underlying trial court proceedings. When the trial court ruled in favor of authorizing the Petition from the bench, it made no specific rulings regarding attorney fees at that time other than setting further briefing and hearing on fees. All three parties requested attorney fees pursuant to RCW 11.96A.150 in their briefing before the hearing (Lance requested attorney fees in his trial memorandum. (CP 192)). However, only the Trustee and Kim filed motions and supporting documentation for their fees and costs. The trial court did not preclude Lance from filing a motion for his fees and costs. Lance failed to move for his fees and costs. Thus, the trial court made no rulings regarding attorney fees and costs for Lance, and there is nothing for this court to review, let alone, order to be paid.

Lance claims he "deserves" his fees paid because "he has prevented a \$600,000.00 reduction in value of the Trust Estate."¹¹ Appellant's Brief, page 39. At best, if this court or the trial court finds it equitable to award Lance fees, such fees should be paid by the Trust - not from Trustee or Kim, individually. Trustee's Petition was a good faith request that the court determine whether or not to authorize the sale.

¹¹ This statement is not accurate. The trial court record includes the court's Order regarding supersedeas bond to stay a sale of the Seattle House to Kim. (CP 314-316). The trial court docket contains no such posting of a bond, as Lance failed to comply with the Order and failed to post sufficient bond. Trustee has complied with the court's Order to sell the Seattle House to Kim (CP 312-131).

Consummating the sale of the Seattle Property, and following the directions of the trial court, was not a “gift” to Kim, it was a sale at a purchase price that took into account numerous financial considerations, as well as providing a benefit to Cathy of the consummation of her long-standing plans to help Kim.

Finally, Lance asks the court to award his attorney fees and costs incurred in this appeal, to be paid by Trustee and Kim. Lance elected to appeal the trial court’s Order on the Petition. If the court affirms the trial court’s ruling on the Petition, it is only equitable to deny Lance’s request for his attorney fees on appeal.

V. TRUSTEE’S REQUEST FOR ATTORNEY FEES AND EXPENSES INCURRED IN THIS APPEAL

Pursuant to RAP 18.1(a) and (b), in addition to prevailing party costs, Trustee requests her reasonable attorney fees and expenses incurred in defending against this appeal, including but not limited to fees incurred in successfully objecting to Lance’s insufficient supersedeas cash deposit, to be awarded against Lance personally. Trustee has the right to recover her fees and costs from Lance under RCW 11.96A.150(1), which provides in relevant part that “[e]ither 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 [.]”

VI. CONCLUSION

The trial court's findings of fact were based on uncontested evidence presented by multiple credible witnesses and documentary evidence and were not assigned error in this appeal. The findings of fact – in particular that Cathy's on-going wish was to finalize the sale of the Seattle House to Kim on the terms laid out in 2014 and 2018 - should be accepted as true.

For the specific conclusions identified for error by Lance in #15, #21, and #23 of the Order that are findings of law, and applying the principles of trust interpretation, the court should find that the trial court correctly determined that the express directions to the Trustee in Section 3.4 were not negated or to be ignored, but rather read in harmony with Section 3.3 and the other Trust provisions. As such, the mandates that the Trustee involve Cathy in decision making, make every effort to determine Cathy's wishes and make decisions that conform to her wishes, as well as the ambiguous meaning of the term "wishes," required considering information extrinsic to the language of the Trust. And reading these sections in harmony, the trial court correctly found that consideration of Cathy's wishes and desires means that it could be (and was) a benefit to Cathy to sell the Seattle House to Kim, in furtherance of her care and support, even though the sale price was not necessarily the highest financial price.

For the reasons set forth herein, the Order should be affirmed, Trustee should be awarded her reasonable attorney fees and costs incurred in this appeal in addition to prevailing party fees, and Lance's request for attorney fees should be denied.

July 16, 2020

Respectfully Submitted,

s/ Darlene Pasieczny

Victoria Blachly, WSBA #30622

Darlene Pasieczny, WSBA #51728

Samuels Yoelin Kantor LLP

111 SW Fifth Avenue, Suite 3800

Portland, OR 97204

T. 503-226-2966

VBlachly@SamuelsLaw.com

DarleneP@SamuelsLaw.com

*Of Attorneys for Respondent Paddy Cook, as
Trustee of the Catherine Patricia Davis
Living Trust Dated July 6, 1994, As
Amended and Restated*

21232-00002:1236813

APPENDIX

Catherine Patricia Davis Living Trust Dated July 6, 1994, As Amended and Restated (CP 24-40; also entered as Ex 1)

Order on Petition for Authority to Sell Real Property (entered October 17, 2019 (CP 309-313))

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

Anne M. Thompson
The Thompson Law Firm
9400 SW Barnes Rd., #300
Portland, OR 97225
(503) 292-8990 Telephone
www.amthompsonlawfirm.com

CATHERINE PATRICIA DAVIS LIVING TRUST, DATED JULY 6, 1994,**AS AMENDED AND RESTATED****Table of Contents**

ARTICLE 1 Trust Name.....	1
ARTICLE 2 My Family.....	2
ARTICLE 3 Trust Provisions During Lifetime	2
ARTICLE 4 Payments After Death	3
ARTICLE 5 Tangible Personal Property.....	4
ARTICLE 6 Residue.....	4
ARTICLE 7 Separate Trusts for a Grandchild or More Remote Descendant	5
ARTICLE 8 Maximum Duration for Trusts	6
ARTICLE 9 Spendthrift Provision	6
ARTICLE 10 Trustees	7
ARTICLE 11 Fiduciary Provisions	8
ARTICLE 12 The Closely-Held Business.....	10
ARTICLE 13 Governing Law and Trustee Powers.....	11
ARTICLE 14 Definitions and Miscellaneous Provisions.....	13
ARTICLE 15 Revocability of Trust and Rights Reserved	14
ARTICLE 16 Savings Clause	15

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

- 1 -

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

- 2 -

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

- 4 -

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

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

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

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

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

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

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

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

- 10 -

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

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

- 11 -

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

- 13 -

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.

Catherine Patricia Davis Living Trust, Dated July 6, 1994, as Amended and Restated

- 14 -

FILED
OCT 17 2019 12:17
Scott G. Weber, Clerk, Clark Co.

5
2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

IN THE MATTER OF THE:

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

Case No. 18-4-01509-1

**ORDER ON PETITION FOR
AUTHORITY TO SELL REAL
PROPERTY**

This matter came before the court on Petitioner Paddy Cook’s *Petition for Authority to Sell* (“Petition”) on July 1 and 2, 2019, before the Honorable Bernard F. Veljacic. The Court, having heard sworn witnesses, received exhibits, considered evidence and arguments, reviewed the records and files herein, and being fully advised in the premises, makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The following parties appeared in this action:
 - (a) Catherine Patricia Davis (“Settlor”) by and through Paddy Cook, attorney-in-fact;
 - (b) Paddy Cook (“Trustee”);
 - (c) Kimberly Brandenburg (“Interested Party”)
 - (d) Douglas Lance Davis, Jr. (“Lance Davis”);

///

///

- 1 2. The Settlor established the Catherine Patricia Davis Living Trust on July
2 6, 1994 (“Trust”).
- 3 3. The Settlor amended and restated the Trust on April 7, 2015.
- 4 4. One of the assets of the Trust is a residence located at 2821 NW 61st St.,
5 Seattle, WA 98107 (“Seattle House”).
- 6 5. Kimberly Brandenburg and her husband attempted to purchase the Seattle
7 House from the Trust in 2014.
- 8 6. Because of the Settlor’s declining health, Lance Davis assisted the Settlor
9 in locating estate planning counsel.
- 10 7. Although Lance Davis met with the attorney, the Settlor, the Trustee, and
11 Anne Fruetche on January 14, 2015, but he did not participate in further meetings. *Ci* 
- 12 8. The Settlor had ~~two~~ *MINUS A FEW* subsequent meetings on February 10, 2015, and April
13 7, 2015, with the estate planning attorney to finalize and execute the amended and restated Trust.
- 14 9. Prior to the execution of the amended and restated Trust, the Settlor fully
15 disclosed and discussed the Settlor’s financial circumstances with the estate planning attorney.
- 16 10. Because of the Settlor’s declining health and need to conserve funds for
17 future care, the estate planning attorney advised that the “Bank of Cathy” should be closed.
- 18 11. The “Bank of Cathy” referred to loans made by the Settlor to Lance Davis
19 and to others.
- 20 12. The Settlor served as co-trustee of the amended and restated trust with the
21 Trustee until January 16, 2016, when the Settlor resigned.
- 22 13. Article Three of the Trust applies because the Settlor is alive.
- 23 14. The paragraphs of Article Three, when read in harmony direct the Trustee
24 to determine the Settlor’s wishes, and to distribute as much of the net income to the Settlor as the
25 Settlor may from time to time direct.
- 26

1 15. The term “wishes” in the context of Article Three of the Trust refers to the
2 Settlor’s current desires as those may arise or change, and because the Trust uses a term that is
3 not frozen at the time of drafting, parole evidence is allowed to show what the Settlor means her
4 wishes are as they may arise or change post drafting of the Trust.

5 16. Petitioner’s witnesses and the witnesses of Kim Brandenburg: Joseph
6 Holloway, Ann Casey, Libby Allen, Ann Fruechte, Amy Fischer, Gary Buczkowski, Doug
7 Davis, Paddy Cook, Kim Brandenburg, and Doug Davis were credible, they corroborated each
8 other, and the evidence was uncontroverted.

9 17. Lance Davis neither testified nor called witnesses in support of his
10 objections to the Petition.

11 18. The uncontroverted evidence shows that the Settlor wished to transfer the
12 Seattle House to Kimberly Brandenburg since the date of its purchase in 1993.

13 19. The uncontroverted evidence shows that from 2014, the Settlor wished for
14 the Seattle House to be sold to Kim Brandenburg and her husband for terms consistent with Trial
15 Exhibits 6 and 7, at the price of \$312,500.00, with a gift of equity in the amount of \$62,500.00.

16 20. Kim Brandenburg and her husband, in reliance on the Settlor’s ongoing
17 wishes have invested more than ~~\$112,000.00~~ ^{\$ 490,000} in the Seattle House, as documented at trial in
18 Exhibits 8 and 9. ci
→ through February 2019
[initials]

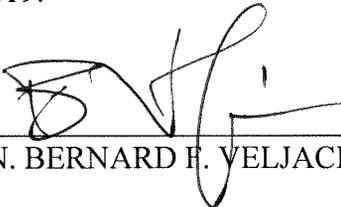
19 Kim Brandenburg and her husband, in reliance on the Settlor’s ongoing ci
20 wishes have testified they made \$ 397,600 in mortgage payments and spent [initials]
21 \$ 93,617 on maintenance and improvements, as documented in Exhibits 8 and 9. → through February 2019
[initials]

22 Except for mortgage payments, the Trustee did not independently verify the amounts spent by
23 Kim Brandenburg and her husband on maintenance and improvements.

24 21. The Trustee/attorney-in-fact for the Settlor has acted according to her
25 duties, wherein Section 3.4 of the Trust requires that the Trustee shall make every effort to
26 involve the Settlor in decision making regarding both financial matters and personal care.

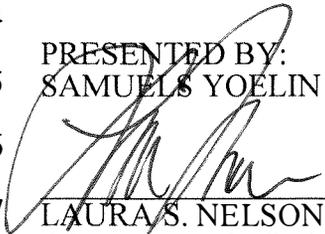
- 1 3. The Trustee is authorized to proceed with the sale and enter into any necessary
- 2 documents to finalize the sale.
- 3 4. The Trustee's attorney fees and costs shall be paid by Douglas Lance Davis, Jr.,
- 4 individually in the amount of \$44,270.24, which includes a reduction of \$1,716.00,
- 5 and the court shall issue a judgment against Douglas Lance Davis, Jr. for the attorney
- 6 fee award with statutory interest.
- 7 5. Kimberly Brandenburg's attorney fees shall be paid by Douglas Lance Davis, Jr.,
- 8 individually in the amount of \$43,733.62, which includes a reduction of \$4,205.00,
- 9 and the court shall issue a judgment against Douglas Lance Davis, Jr. for the attorney
- 10 fee award with statutory interest.

11 Dated this 17th day of October, 2019.



 HON. BERNARD H. VELJACIC

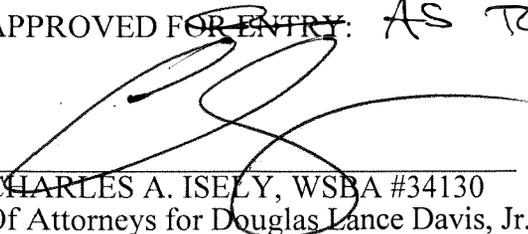
14 PRESENTED BY:
 15 SAMUELS YOELIN KANTOR LLP

16 
 17 _____
 18 LAURA S. NELSON, WSBA #47110
 Of Attorneys for Paddy Cook, Petitioner

19 APPROVED AS TO FORM AND CONTENT:

20 
 21 _____
 22 MICHELLE NISLE, WSBA # 35899
 Of Attorneys for Kimberly Brandenburg

23 APPROVED FOR ENTRY: AS TO FORM!

24 
 25 _____
 26 CHARLES A. ISELEY, WSBA #34130
 Of Attorneys for Douglas Lance Davis, Jr.

CR 5(b) CERTIFICATE OF ATTORNEY

I certify that I mailed and emailed a copy of the foregoing BRIEF OF RESPONDENT PADDY COOK to:

Steven E. Turner
1409 Franklin St., Ste 216
Vancouver, WA 98660

steven@steventurnerlaw.com

Attorney for Appellant Douglas Lance Davis

Michelle Nisle
Brian Esler
Miller Nash Graham & Dunn LLP
500 Broadway St., Ste 400
Vancouver, WA 98660

Michelle.nisle@millernash.com
Brian.esler@millernash.com

Of Attorneys for Respondent Kimberly Brandenburg

By first class mail, postage prepaid, and by email, on the date indicated below.

Date: July 16, 2020

s/ Darlene Pasiieczny

Darlene Pasiieczny, WSBA #51728

Of Attorneys for Respondent Paddy Cook, as Trustee of the Catherine Patricia Davis Living Trust Dated July 6, 1994, as Amended and Restated

SAMUELS YOELIN KANTOR LLP

July 16, 2020 - 12:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54250-1
Appellate Court Case Title: In the Matter of: The Catherine P. Davis Living Trust
Superior Court Case Number: 18-4-01509-1

The following documents have been uploaded:

- 542501_Briefs_20200716120543D2228418_4091.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brief of Respondent Paddy Cook.pdf

A copy of the uploaded files will be sent to:

- kendra.hash@millernash.com
- michelle.nisle@millernash.com
- steven@steventurnerlaw.com
- vblachly@SamuelsLaw.com

Comments:

Sender Name: Jennifer Kilbourn - Email: jkilbourn@samuelslaw.com

Filing on Behalf of: Darlene Pasieczny - Email: DarleneP@SamuelsLaw.com (Alternate Email:)

Address:
111 SW 5th Avenue, Suite 3800
Portland, OR, 97204
Phone: (503) 226-2966

Note: The Filing Id is 20200716120543D2228418