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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 352706

COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

In Re:
ESTATE OF MABLE MEEKS; and,
L/M MEEKS NO. 1 TRUST

BRIEF of APPELLANT

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A. ASSIGNMENTS OF ERROR

- No.1. The court erred in its determination that Ms. Meeks' had the general power of appointment to designate beneficiaries. *See* CP 283.
- No.2. The court erred in its finding that there was clear, cogent, and convincing evidence that Ms. Meeks' tried to exercise the power of appointment. *See* CP 283.
- No.3. The court erred in its finding that the court should reform the will to reflect the designated beneficiaries as requested by Ms. Meeks. *See* CP 284.
- No.4. The court erred in its ruling wherein it stated that "Mrs. Meeks' request in the first and second amendments don't conflict with the original trust." *See* CP 283.
- No.5. The court erred in allowing a notice party, who was only named in amendments to the irrevocable trust, to become a qualified beneficiary and to direct the distribution of the trust to all beneficiaries.
- No.6. The court erred in awarding attorney fees and costs to Fred Hutchison Cancer Research Center.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The assignments of error as asserted above can be distilled into two separate issues on which the Trustee seeks review by this Court.

Issue 1. Where a trust is jointly executed, the court should not reform or circumvent an irrevocable trust agreement because of unilateral acts of the surviving grantor.

Issue 2. The trial court erred when it acted pursuant to RCW 11.96A.125 to reform the will and to create a power of appointment where one never existed, A) because clear, cogent, and convincing evidence did not exist showing that there was a mistake based on the intent of both Lloyd M. Meeks and Mabel I. Meeks as joint co-trustors; B) because no bypass trust was ever created or funded and because the retroactive creation of a bypass trust would result in onerous tax consequences; and, C) because the amendments that the power of appoints were substituted for conflict with the terms of the original irrevocable trust.

Issue 3. The trial court erred in awarding attorney fees and costs to Fred Hutchison Cancer Research Center because of the errors stated above, and because the Last Will and Testament of Mable Meeks specifically limits the distribution to a litigating party to \$1.00.

C. STATEMENT OF CASE

On March 2, 1994, Lloyd Marvin Meeks and Mabel Irene Meeks, as husband and wife, executed a joint trust agreement, as co-Grantors/co-Trustors, known as the "L/M MEEKS NO. 1 TRUST" (the "Trust"). CP 3. The Grantors also acted as the original Trustees of the Trust. CP 8.

The estate planning documents executed with the trust included: the L/M Meeks No. 1 Trust agreement, assignment of personal accounts to the Trust, a quit claim deed transferring real property to the Trust, a Community Property Agreement Revocation, the Last Will and Testament of Lloyd M Meeks, the Last Will and Testament of Mabel I. Meeks, a durable power of attorney for Lloyd M. Meeks, a durable power of attorney for Mable I. Meeks; and, health care directives for both Lloyd and Mabel Meeks. CP 8-23.

To the knowledge of the Trustee, all of the Meeks' real and personal property was placed into the trust prior to Mr. Meek's death. CP 259.

The Trust was set up to care first for the surviving Grantor. CP 9-10. The Trust instructed the surviving Grantor/Trustee to distribute any tangible property of the deceased Grantor as instructed per the will or any writing incorporated by reference. CP 9. The Trust then instructed the surviving Grantor/Trustee to segregate into a separate bypass Trust, an amount to maximize the unified tax credit for Federal Tax Purposes and to

use the bypass trust assets for maintenance and health of the surviving Grantor. CP 9-10.

Ruth Margaret Crouse, the sister of Lloyd Meeks, and a contingent beneficiary of the Trust, predeceased Mr. Meeks by about a year and a half on April 20, 2001.¹ CP 6. No changes were made to the trust upon her death. CP 180-181.

On September 30, 2002, Lloyd Meeks died. CP 4, 24. In eight years preceding Mr. Meeks's death, from the time that he jointly executed the Trust with Ms. Meeks to his death, Lloyd and Mabel, the Grantors, made no changes, no amendments, no modifications, nor any revocations to the Trust. CP 180-181.

While the Trust was revocable during the lifetime of both grantors, but in Section 3, the terms of the trust explicitly state that "Upon the death of the first Grantor, [the Trust] shall not be revocable in whole or in part nor subject to amendment." CP 4, 8.

On November 21, 2002, less than 8 weeks after her husband's death, Mabel Meeks sent a letter to her attorney, Charles Cleveland stating that she had made a "final decision on estate planning", and that she "made

¹ The Trustee's Response Brief filed on November 3, 2016, CP 170-235, incorrectly transposed the names of Ruth Crouse and Mary Ann Crouse incorrectly stating that Mary Ann Crouse was Lloyd Meeks' sister, and Ruth Crouse was his niece. To be clear, Ruth Crouse was Lloyd Meeks' sister, and Mary Ann Crouse was her daughter, the niece and adopted "daughter" of the Grantors, Lloyd and Mable Meeks.

various changes" to the Trust. CP 107

There is no evidence that, at this point, Ms. Meeks intended to create a bypass trust, no evidence that a bypass trust was ever created, and no evidence that any funds were segregated from the original trust after the death of the first Grantor, Lloyd Meeks. CP 259. The only evidence is that she, as the sole surviving grantor, wished to make changes to the trust that was, at this point, irrevocable. CP 4,8,107.

On December 6, 2002, less than three months after the death of the first Grantor, Lloyd Meeks, Mabel Meeks executed a "FIRST AMENDMENT OF L/M MEEKS NO. 1 TRUST." CP 4, 181.

On May 28, 2005, Mary Ann Crouse, the niece of Lloyd Meeks, who was a qualified beneficiary of the Trust, predeceased Mable Meeks, the surviving Grantor.² CP 6

On October 10, 2005, Mabel Meeks executed a "SECOND AMENDMENT OF L/M MEEKS NO. 1 TRUST." CP 5.

Mable Irene Meeks, the Surviving Grantor, passed away on March 25, 2015. Id.

A copy of a condensed, graphical, timeline included in the Trustee's pleadings is attached hereto as Exhibit 1. CP 263.

On May 1, 2015 the Trustee filed a Petition to Open Trust File in

² See Supra.

order to properly administer the Trust. CP 3-44. The Petition asked the Court to assist with three separate matters: to allow the Trustee to be compensated for time and expenses; that the court determine the validity and/or enforceability of the Amendments in light of the language in Section 3 of the Trust; and, to approve the final accounting, once submitted to the court, and to approve the final distribution to all qualified beneficiaries and discretionary beneficiaries. CP 6-7.

Given that the original Trust was irrevocable, and that each of the two amendments, unilaterally executed by the surviving Grantor, changed the distribution and listed different beneficiaries, the Trustee filed a Petition for Instructions for the determination of persons entitled to notice. CP 45-48. An order was entered that notice should be provided to all surviving parties listed in the original trust and in the second amendment. CP 54-56.³

On March 11, 2016, Fred Hutchison Cancer Research Center (hereinafter "FHCRC") filed a motion for the release of information from the attorney who drafted the trust and the amendments. CP 83-89. The Court granted that order and set a scheduling date. CP 107-108, 109. On October 21, 2016, FHCRC filed a Motion for Order Confirming Validity of

³ This Order did not separately include the University of Washington which was jointly listed with Fred Hutchison Cancer Research Center. Upon notice of this discrepancy, University of Washington was added as an additional notice party in later pleadings.

Trust Amendments. CP 144-158.⁴

After briefing by the parties, on January 13, 2017 the Court conducted a hearing on Fred Hutchison Cancer Research Center's Motion, and issued its oral ruling, the transcript for which was provided in the Trustee's Memorandum RE Modification of Trust Distribution. CP 257-301.

In its oral ruling, the court recognized that "Mr. and Mrs. Meeks had the trust drafted by their attorney and it contains a provision that the trust not be amended" and that "[s]ubsequently, there's been two amendments to the trust following Mr. Meeks' passing, which is prohibited under the original trust." CP 282. The court further recognized the fact that the Meeks's attorney, "Mr. Cleveland, on two separate occasions, drafted amended trusts, which under the provisions of the original trust he wasn't authorized to do." *Id.*

The court went on to state that "the Court should be reluctant to reform a trust or a will because they are drafted for a reason." CP 283 But, in the same breath, the court reversed course and agreed with FHCRC that the trust had a provision granting the surviving grantor "the power of appointment in favor of whatever charities that spouse chooses conditioned

⁴ Sadly, the assigned judge unexpectedly passed away during the course of this action, requiring the case to be reassigned in early December. See CP 247, 248, 249, 250, 251, 252.

upon what's provided in the trust." *Id.* The court further concluded that "Mrs. Meeks' request in the first and second amendments don't conflict with the original trust." The ruling ended with an order for the parties to draft memoranda on how each believed the trust should be distributed. CP 286.

The Trustee's brief objected to the ruling, pointed out errors made by the court, and explained to the court that it "must do more than reform the last will and testament of Ms. Meeks. [The court] would need to retroactively create a bypass trust subsequent to Mr. Meeks' death, or, at minimum, to change the L/M Meeks No.1 Trust to some kind of bypass trust; to move the assets from the original trust into the bypass trust; to reform Section III.B. of the Last Will and Testament of Mabel Meeks to devise and bequest the rest, residue, and remainder of her estate into the bypass trust instead of the L/M Meeks No. 1 Trust; to reform the Ms. Meek's will to exercise her power of appointment pursuant to the provisions of RCW 11.95.060; to extract and remove any invalid beneficiaries (i.e. those that violate the terms of the trust, and RCW 11.96A.127); modify the trust to extract and remove beneficiaries named in the Trust Agreement by both Grantors, AND, explain why the movant, Fred Hutchison Cancer Research Center, has the standing and right to take

the residue of the trust, including that share allocated to Saint Paschal's School which is no longer in existence." CP 261-262, 268

After briefing on this issue, a final order was issued that reflected the distributions as they were provided in the Second Amendment. CP 438-448.

The Trustee appeals this final order as improper, unlawful, and unduly onerous to the estate.

D. SUMMARY OF ARGUMENT

The core question at the heart of this appeal is how much deference must the court give to a trust instrument, and, should the court, pursuant to RCW 11.96A.125, circumvent an irrevocable trust, and create an ex post facto power of appointment to modify the beneficiaries for which no evidence exists that one was contemplated or executed by the surviving grantor during her lifetime, and the ex post facto creation of which subjects the trust and estate to onerous tax consequences in order to satisfy the wishes of a party who was not a beneficiary of the original trust.

As a collateral issue, does the fact that an attorney, who originally drafted the trust, improperly executed amendments to an irrevocable trust at the request of the surviving grantor, create clear, cogent, and convincing evidence that i) the intent of the testator or trustor was affected by a mistake of fact or law; AND, ii) the terms of the will or trust were affected by a mistake of fact or law?

Appellant asks this court to reverse the final order and judgments entered by the trial court; to approve the original trust as the sole governing instrument; and, to assess the costs and attorney fees incurred as a result of litigating this action against the Respondent.

E. ARGUMENT

1. **Where a trust is jointly executed, the court should not reform or circumvent an irrevocable trust agreement because of unilateral acts of the surviving grantor.**

A court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent. *In re Estate of Riemcke*, 80 Wn.2d 722, 728 (1972). The Grantor's intent in a trust document is determined by construing the document as a whole." *In re Estate of Wimberley*, 186 Wn.App. 475, 512 (Div. 3 2015). To determine intent in a testamentary instrument, the courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used." *In re Estate of Bernard*, 182 Wn.App. 692, 697 (Div. 1 2014). "Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation." *Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309 (1986). " Further, "if the intention may be gathered from [the trust] language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction." *Id.* Accordingly, extrinsic evidence should not be considered where "intent can be derived solely from the four corners of the trust document." *Id.*

This trust was executed, jointly, by two grantors, Lloyd M. Meeks

and Mabel I. Meeks, and goes by the title the L/M Meeks No. 1 Trust (not the Mabel Meeks Discretionary Trust). CP 8. From reading the trust it is evident that the **joint** intent of the grantors was to ensure the care and wellbeing of the surviving grantor, Mr. Meeks's sister, Ruth Crouse, and Mr. Meeks's niece, Mary Crouse. CP 10-13.

In the event that none of the lifetime beneficiaries survived the surviving grantor, as turned out to be the case here, the **joint** intent of the grantors was clearly laid out in Section 4.D.3.(b) of the trust. CP 13. Furthermore, the Trust expressly grants the current successor Trustee "all the power and discretion herein conferred upon the [grantor] Trustee(s)." CP 18.

In addition to clearly laying out the purpose of the Trust, section 3 of the Trust explicitly states that "[u]pon the death of the first Grantor, this Agreement shall not be revocable in whole or in part nor subject to amendment." CP 8.

No evidence exists of the Grantors' intent, together, to create a charitable bequest to FHCRC. CP 13-14. But, it is the clear intent of the Grantors, together, that the surviving Grantor should not have the ability to modify, amend or revoke the Trust. CP 8.

By the express terms of the Trust agreement, FHCRC was not

intended to be a beneficiary of the estate. CP 13-14.

The trial court properly concluded and reasoned that "[t]he Court should be reluctant to reform a trust or a will because they are drafted for a reason. When you look at evidence after a person's [sic] deceased, it's hard to find out exactly what their intent was at the time of execution." CP 283.

But, while the court did not specifically allow the amendment to the trust, it circumvented the trust by reforming the will. CP 284.

As a testamentary instrument, it is the court's paramount duty to construe a will to give effect to the maker's intent. *In re Estate of Riemcke*, 80 Wn.2d 722 at 728.

In this case, the intent of the Testatrix is clear from the four corners of the will.

The instrument states:

B. RESIDUE IN TRUST. I give, devise and bequeath the rest, residue and remainder of my estate to the Successor Trustee under that certain Trust Agreement entered into between myself and husband as Grantors and as Trustees, dated March 2, 1994, ("Trust Agreement"), and such residue of my estate to be received, administered and distributed by the Trustee as a part of the trust estate in accordance with all the terms and provisions of such Trust Agreement. If such Trust Agreement is revoked or if the gift to the Trustee is ineffective for any reason, the rest, residue and remainder of my estate shall be

distributed in accordance with the terms and conditions of Section 4, paragraphs B,C, and D of the L/M MEEKS NO. 1 TRUST, dated March 2, 1994, which provisions are incorporated by this reference herein. CP 41

There is no ambiguity in this instrument, there is no ambiguity in the reference, and there is no error, such as referencing the wrong trust instrument.

The requisites of a will are clearly stated in RCW 11.12.020. For a will, or codicil to be valid, it "shall be in writing signed by the testator..., and shall be attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request." RCW 11.12.020.

Exercise of power of appointment are governed by RCW 11.95.060. "The holder of a testamentary power may exercise the power only by the powerholder's last will, signed before or after the effective date of the instrument granting the power, that manifests an intent to exercise the power." RCW 11.95.060(2). "A testamentary residuary clause which does not manifest an intent to exercise a power is not deemed the exercise of a testamentary power." *Id.*

RCW 11.96A.125 does not give a party or the court the right to

circumvent the statutes that prescribe the processes for creating, and executing instruments, and executing specific rights.

There was no basis for the court to entertain a reformation of the Last Will and Testament of Mabel Meeks under RCW 11.96A.125.

2A. The trial court erred when it acted pursuant to RCW 11.96A.125 to reform the will and to create a power of appointment where one never existed because clear, cogent, and convincing evidence did not exist showing that there was a mistake based on the intent of both Lloyd M. Meeks and Mabel I. Meeks as joint co-trustors;

TEDRA is a "grant of plenary powers to the trial court." *In re Estates of Jones*, 170 Wn.App. 594, 604 (2012) (quoting *In re Irrevocable Trust of McKean*, 144 Wn.App. 333, 343 (2008)). It gives the trial court "full and ample power and authority ... to administer and settle . . . [a]ll matters concerning the estates and assets of incapacitated, missing, and deceased persons" in accordance with Title 11 RCW. RCW 11.96A.020(1).

RCW 11.96A.125 is a new statute created by the legislature in 2011, that became law on January 1, 2012. 2011 *Wash Laws* 327. Originally, the SHB 1051.SL read:

NEW SECTION. Sec. 11. A new section is added to chapter 11.96A RCW to read as follows:
The terms of a will or trust, even if unambiguous, may be reformed by judicial proceedings or binding

nonjudicial procedure under this chapter to conform the terms to the intention of the testator or trustor if it is proved by clear, cogent, and convincing evidence, or the parties to a binding nonjudicial agreement agree that there is clear, cogent, and convincing evidence, that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement. *Id.*

In 2013, the legislature changed the statute to only apply to judicial proceedings, leaving it in its current form. 2013 *Wash. Laws* 272.

To the best of my knowledge, no case law exists on this statute, although given the breadth of discretion granted to the courts and how it was used by the superior court in this case, this will likely change that fact.

On its face, the statute grants the courts the ability to reform terms of a will or trust, even if unambiguous, to confirm the terms to the intention of the testator or trustor **IF** it is proved by clear, cogent, and convincing evidence that i) the intent of the testator or trustor was affected by a mistake of fact or law; **AND**, ii) the terms of the will or trust were affected by a mistake of fact or law. RCW 11.96A.125.

On one hand, this statute gives the court the ability to easily correct common, obvious and/or harmless mistakes such as correcting an incorrect parcel number that does not correspond to the address for property that is devised under a will or trust; for correcting a misspelled name or date of birth; if the testator intended to insert A as her heir and by error inserted

B, causing the inheritance to fail; mistakes in presumption of law; or, the incorrect status of a child after a divorce. *See Generally* John Lawrence Wetherill, *Wills Executed Under Mistake of Fact*, 47 U. Pa. L. Rev. 425 (1899). "A mistake of fact may arise at the time of making of the will or from a change of circumstances after making the will." *Id.* Traditionally, a court of equity would only relive such mistakes when they appear on the face of the will. *Id.*

On the other hand, as in this case, it opens the door for well-funded persons and organizations to use the legal system to insert themselves into an estate as beneficiary for their own purposes, and to attempt to turn an otherwise frivolous claim into a claim to clarify the law.

What did not change with the statute were the requisites for a will under RCW 11.12.025. or the fact that wills and trusts are subject to the Statute of Frauds. RCW 19.36.010.

A trust is created only if: (1) the trustors have the capacity to create a trust; (b) the trustors indicate an intention to create the trust; (2) the trust has identifiable and definite beneficiaries; (3) the trustee has duties to perform; and, (4) The same person is not the sole trustee and sole beneficiary. RCW 11.98.011. While it is not mandatory that a trust be in writing, it still must be established by clear, cogent, and convincing evidence. RCW 11.98.013.

As stated above, the trustors' intent in a trust document is determined by construing the document as a whole. *In re Estate of Wimberley*, 186 Wn.App. at 505. Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation. *Id.* Accordingly, extrinsic evidence should not be considered where "intent can be derived solely from the four corners of the trust document." *Id.* In determining a trustor's intent, it is incorrect for the trial court to work "backwards", meaning, a court should not review at the outset other evidence along with the trust documents to determine whether a trust is ambiguous. *Templeton v. Peoples Nat. Bank of Washington*, 106 Wn.2d at 309.

In this case, the Grantor's intent in a trust document is clear from construing the document as a whole, the meaning of the instrument is unambiguous, and, the instrument is not one requiring judicial construction or interpretation. If the intent can be ascertained and is lawful, it supersedes judicial rules of will construction. *In re Estate of Carlson*, 40 Wash.App. 827, 831 review denied, 104 Wash.2d 1008 (1985).

There is no doubt that the surviving grantor and her attorney created unnecessary confusion by executing two unlawful "amendments" to the trust that was irrevocable upon the death of the first grantor. While here is anecdotal evidence that Mabel Meeks may have changed her mind about

how she wanted to have the estate distributed, she was only one of two grantors, and she agreed with the terms of her co-grantor at the time of executing the instrument.

It is difficult to argue that the irrevocability term of the trust was a mistake, where an entire section was dedicated to that term. Section 3 of the original lease is unambiguous. Changes are prohibited when the Trust became irrevocable. *In re Estate of Wimberley*, 186 Wn.App. at 508. In fact, the trial court agreed with this. CP 283

The facts regarding the history of the Trust tell their own story. There is no evidence that Lloyd Meeks believed there was a mistake of law or mistake of fact. The trust was in place for 8 years without amendment from March 2, 1994 until the death of Lloyd Marvin Meeks on September 30, 2002. There was ample opportunity for the Trustors, together, to modify or amend the trust or their wills while they were both alive. Less than three months after her husband's death, Ms. Meeks had the trust modified the first time. This version stayed in place for three more years until the death of Mary A. Crouse on May 28, 2005. Less than four months later, Ms. Meeks attempted to amend the trust a second time with an "amendment" dated September 19, 2005.

Given that the purpose of the trust was to provide care and support

for Mr. Meeks's sister and niece, it is quite conceivable that the irrevocability provision was included in the trust to prevent Ms. Meeks from modifying the trust for her own purposes after his death, and leaving Mary and Ruth Crouse uncared for.

In the end, all of the witnesses who can shed light on this matter are dead. There is no clear, cogent, and convincing evidence that the trustors, together, intended the trust to be carried out differently from how it was drafted and executed by the trustors. Furthermore, the trustors made no modifications, corrections, or amendments during their joint lifetime.

RCW 11.96A.125 is a statute for the purpose of correction clear and obvious errors - not to allow a party to insert themselves in as an intended beneficiary to an estate through a legal loophole. There is no basis for the court to entertain a reformation of the trust under RCW 11.96A.125.

2B. The trial court erred when it acted pursuant to RCW 11.96A.125 to reform the will and to create a power of appointment where one never existed because no bypass trust was ever created or funded and because the retroactive creation of a bypass trust would result in onerous tax consequences.

Exercises of power of appointment are governed by RCW 11.95.060.

"The holder of a testamentary power may exercise the power **only by the powerholder's last will**, signed before or after the effective date of the

instrument granting the power, that manifests an intent to exercise the power." RCW 11.95.060(2). "A testamentary residuary clause which does not manifest an intent to exercise a power is not deemed the exercise of a testamentary power." *Id.*

It is clear that Mabel Meeks intended to unilaterally modify the Trust and her attorney wrongly assisted her in doing so. There is no evidence that Ms. Meeks intended to follow the required bypass trust provisions of the trust in order to exercise her power of appointment.

The Trust provides, in section 4.C.1 that "[u]pon the death of either of the Grantors, the Trustee(s) shall segregate into a separate By-Pass Trust, such fractional share of the trust necessary to secure the maximum exemption equivalent of the maximum unified tax credit available for Federal Estate Tax purposes." CP 9.

No bypass trust was ever created, ultimately making this section of the Trust moot.

Still, the court and FHCRC relied on a sub-section 4.C.1.ii of this moot section, which is the only provision that grants a power of appointment and only over the assets in the bypass trust. *See* CP 10.

The surviving Grantor shall have a limited power of appointment over the By-Pass Trust or any part thereof. This power may be exercised only by the surviving Grantor and not in conjunction with any other person,

and may be exercised only in a provision specifically describing this power of appointment contained in the Last Will of the surviving Grantor." CP 10

The power of appointment was further limited to three classes of persons: lineal descendants of Lloyd and Mable Meeks, spouses of lineal descendants, and "[a]ny corporation, person, or organization to whom a bequest would be deductible for Washington inheritance tax and federal estate tax purposes as a bequest for a religious, charitable, scientific, literary or educational purpose." CP 10.

For the trial court to change the distributions, it would be necessary under the language of the Trust, and the statutes of Washington, to retroactively change several components of the estate documents: First, the Court would be required to retroactively create a bypass trust subsequent to Mr. Meeks' death. Then the Court would need to move the assets from the original trust into the bypass trust. Once the bypass trust was created and funded, the Court would need to reform Section III.B. of the Last Will and Testament of Mabel Meeks to devise and bequest the rest, residue, and remainder of her estate into the bypass trust instead of the L/M Meeks No. 1 Trust. And finally, the Court would need to reform Ms. Meek's will to exercise her power of appointment pursuant to the provisions of RCW 11.95.060.

Because each of these steps is required in order to fulfill the intent of the Court and wishes of FHCRC, this brings up more circular issues. The Court, in its oral ruling acknowledged that the Trust was irrevocable and it was inappropriate for the Court to reform it. CP 283 But, either changing the original trust to a bypass trust, or moving assets to a later created bypass trust that was not created by the trustee, is a modification of the original trust, and is contrary to the provisions of the trust.

There are several issues here: First, no bypass trust was ever created; secondly, the exercise of the power was specifically limited to the surviving Grantor (and not to the court); and thirdly, the power of appointment was limited to only three classes of persons. Each of these issues are problematic.

Furthermore, trust property is a non-probate asset and may not be distributed under a person's will except in specific circumstances. RCW 11.02.005(10). Reformation of a will alone does not distribute trust property. Even if all of these step were taken by the trial court, it would still be a violation of the original trust to modify, add, or delete beneficiaries who were not among those limited classes allowed by the power of appointment in section 4.C.1.ii.

Ramifications of Retroactive Creation of Bypass Trust - Because the power of appointment only applies to assets in the bypass trust, the court would be required to retroactively create and fund the bypass trust after Lloyd Meeks' death per the terms of the Trust.

A Bypass Trust is "a trust into which a decedent's estate passes, so that the surviving heirs get a life estate in the trust rather than the property itself, in order to avoid estate taxes on an estate larger than the tax-credit-sheltered amount." BLACKS LAW DICTIONARY 1225 (7th ed. Abridged 2000). In 2002, the gross estate exemption was \$1,000,000. *See, Instructions for Form 706(Rev. August 2002) United States Estate (and Generation - Skipping Transfer) Tax Return, Department of the Treasury Internal Revenue Service (Cat. No. 16779E) ., pg 1.*

At this point, I must apologize in advance for the following dry material, but this explains the tax implications and problems that are created by the court retroactively creating a bypass trust in order to exercise the power of appointment.

The U.S. tax code imposes a tax on the transfer of the taxable estate of every decedent who is a citizen of the United States. 11 U.S.C. §2001. For purposes of the tax imposed by §2001, the value of the taxable estate is to be determined, except as limited by §2056(b), by deducting from the

value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse but only to the extent that such interest is included in determining the value of the gross estate. 11 U.S.C. §§2056(a) and (b) The general rule is that where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under section 2056(a) with respect to such interest – (A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and (B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse. 11 U.S.C. §2056(b)(1) In the case of qualified terminable interest property, for purposes of §2056(a), the property shall be treated as passing to the surviving spouse, and for purposes of §2056(b)(1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse. 11 U.S.C. §2056(b)(7)(A) The term “qualified terminable interest property ” is defined as property which passes from the decedent in which

the surviving spouse has a qualifying income interest for life and to which an election under §2056(b)(7)(B)(v) applies. 11 U.S.C. §2056(7)(B)(i).

The surviving spouse, here Mable Meeks, has a qualifying income interest for life if the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and no person has a power to appoint any part of the property to any person other than the surviving spouse. 11 U.S.C. §2056(7)(B)(ii). An election under §2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by §2001. 11 U.S.C. §2056(7)(B)(ii). This section further provides that such election, once made, is irrevocable. *Id.*

A bypass trust uses these rules, specifically 11 U.S.C. §2056(b)(1), to place any property that exceeds the surviving spouse's exemption limit into a trust that is separate from her estate i.e. that bypasses the estate.

But, this has consequences - the new trust is no longer part of the surviving spouses estate, and it is subject to tax on any income generated on those assets.

By definition, the value of the bypass trust should be less than the total original trust by an amount equal to the exemption limits of the year in which the first spouse died (\$1,000,000 in 2002). *See Supra.* Because

the estate did not have assets greater than the tax-credit-sheltered amount upon the death of Lloyd Meeks, there was no need to create the bypass trust.

The problem with the trial courts decision is that the power of appointment can only apply to assets in the bypass trust, which, in this case was never created. In order to create power of appointment, the court would first be required to retroactively create the bypass trust as of 2002. Doing so would subject the assets in that trust (which looks to be the entire estate pursuant to the trial court's ruling) to unpaid income tax from 2002 to the present in addition to any penalties. Furthermore, while there would be a step up in basis at the time of Lloyd Meek's death, there would be no step up in basis at the time of Mable Meeks' death since these assets would not have been in her estate, but instead held in the bypass trust. Additionally, any tax paid by Mabel Meeks prior to 2014 would be unrecoverable due to the three year statute of limitations on filing a revised income tax return.

Because Mable Meeks never legally exercised her power of appointment, the terms of the trust purportedly allowing her to do so are moot. The court erred when it modified the distribution to beneficiaries by purportedly creating a power of appointment over a bypass trust that

never existed - and the even if it had existed, the bypass trust should not have been the full value of the estate trust.

While the trial court may have the plenary power to modify an estate under TEDRA, it does not necessarily mean it should do so. This is a keen example of how the effects of such a one-dimensional ruling can cascade into problems at multiple levels. By its order, the trial court created a mess; it unnecessarily opened a Pandora's box of tax issues, securities issues, and property segregation issues that would have never existed otherwise.

2C. The trial court erred when it acted pursuant to RCW 11.96A.125 to reform the will and to create a power of appointment where one never existed because the amendments, for which the power of appointment was substituted, still conflicts with the terms of the original irrevocable trust.

The trial court wrongly concluded that the "first and second amendments don't conflict with the original trust." CP 283. The "amendments" did, in fact, conflict with the trust as stated by the Trustee's counsel at the hearing. CP 285.

The power of appointment was limited to funds in the bypass trust, the exercise of that power was specifically limited to the surviving Grantor, and that applicability of that power was further limited to three classes of persons: lineal descendants of Lloyd and Mable Meeks, spouses of lineal descendants, and "[a]ny corporation, person, or organization to whom a bequest would be deductible for Washington inheritance tax and federal estate tax purposes as a bequest for a religious, charitable, scientific, literary or educational purpose." CP 10.

But, the amendments executed by Mable Meeks were NOT limited to the three classes. Each of the amendments named both individuals who were not lineal descendants or spouses of lineal descendants as well as changed any charitable bequests. CP 25-26, CP 28-29. A timeline and chart of these changes - a Distribution Comparison - was included with the

Trustee's response motion, and is attached hereto as well as Exhibit A. CP 263-265.

While the amendments do include some charitable organizations, they also include beneficiaries who are not subject to any limited power of appointment granted to a surviving grantor, they are not subject to the doctrine of Cy Pres, and the amendments further preclude some beneficiaries that the grantor's JOINTLY agreed upon when they executed the trust.

The Comments in the Distribution Comparison clearly show that the amendments, even if validly executed as through power of appointment violated the Trust section 4.C.1.ii which limits distribution to “lineal descendants of marriage”, “spouses of lineal descendants”, and charities. The amendments wrongly added or modified persons not in the allowed classes including Mary Ann Crouse, Eileen Cobain, Lisa Wuerch, James Shubert, Kathleen Burge, and Daniel Doyle. Further more, the amendments modified or deleted charitable beneficiaries included in the original trust including St. Paschal's School, Morningstar Boys Ranch, The Jesuits, and St. Joseph's Catholic Church.

Where any charitable purpose in the valid Trust becomes unlawful, impractical, impossible to achieve, or wasteful, the Court should not

modify the Trust according to the yearnings of an unqualified beneficiary, but, should instead defer to the discretionary powers explicitly granted to the Trustee by the Grantors with respect to the distribution of Trust property pursuant to RCW 11.96A.127.

This court should reverse the final order and judgment entered by the trial court and this court should approve the original trust as the sole governing instrument for the estate because clear, cogent, and convincing evidence did not exist showing that there was a mistake based on the intent of both Lloyd M. Meeks and Mabel I. Meeks as joint co-trustors; because no bypass trust was ever created or funded and because the retroactive creation of a bypass trust would result in onerous tax consequences; and, because the amendments that the power of appoints were substituted for conflict with the terms of the original irrevocable trust.

3. **The trial court erred in awarding attorney fees and costs to Fred Hutchison Cancer Research Center because of the errors stated above, and because the Last Will and Testament of Mable Meeks specifically limits the distribution to a litigating party to \$1.00.**

The Last Will and Testament of Mable Meeks specifically states that [i]n the event any person or beneficiary under this Will challenges this Will, such person or beneficiary shall receive One Dollar (\$1.00) and nothing else from the Testatrix pursuant to this Last Will and Testament. CP 42.

The trial court made it clear that it agreed that the trust was clearly irrevocable and should not be modified. CP 283. It then accepted the argument of FHCRC to modify the Will of Mable Meeks in order to be able to exercise the power of appointment. *Id.* Any such change is a challenge to the will and should be subject to the Will Contest provisions of Section VI of the will. CP 42.

The Trust is entitled to reimbursement for fees and costs incurred as a result of the frivolous action commenced by Fred Hutchinson Cancer Research Center.

Washington's Trust and Estate Dispute Resolution Act (TEDRA) allows superior or appellate courts in Washington to order costs, including reasonable attorneys' fees ... to any party: (a) From any party to 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. RCW 11.96A.150(1)

In determining whether an award of attorney fees is appropriate, the trial court must consider whether the litigation and the participation of the party seeking attorney fees caused a benefit to the trust. *In re Estate of Wimberley*, 186 Wn.App. at 512.

In this case, FHCRC was never a qualified beneficiary pursuant to RCW 11.98.002. Fred Hutchinson Cancer Research Center has wrongfully inserted itself into a trust proceeding, and its actions have caused the Estate to incur unnecessary expenses, and to wastefully expend needless time on frivolous issues.

In the end, with regard to the right to reimbursement of fees, the question is "did the action of Fred Hutchinson Cancer Research Center benefit the trust." This action most certainly did not.

Because FHCRC's actions provided no benefit to the trust, the court should order FHCRC to reimburse the trust for all costs and expenses related to litigation with FHCRC.

F. CONCLUSION

Under Washington law, it is the duty of the personal representative to take legitimate steps to uphold the testamentary instrument. *In re Estate of Bernard*, 182 Wn.App. at 730.. It is for this reason that the Trustee Appellant asks this court to reverse the final order and judgments entered by the trial court, to approve the original trust as the sole governing instrument, and, to assess the costs and attorney fees incurred as a result of litigating this action against the Respondent.

This is a poignant example of how tugging on one stray thread can unravel an entire tapestry of an instrument's history and purpose. Just because the trial court is endowed with plenary powers to modify estate documents under TEDRA does not make it right or prudent to do so. The threads of estate planning are woven between the warp and weft of state laws of contract, property law, banking laws, securities laws, the federal and estate tax code, and the intents of the decedent. It is nearly impossible to retroactively make a single change without affecting the weave of the entire estate plan. Unless those original estate planning documents contain a blatant ambiguity, or mistake of fact or law, the correction of which does not result in the wholesale destruction of purpose of the document, then those documents should remain untouched, unedited, and

free from the tinkering of the court and perturbed parties.

A joint estate plan is the very essence of a couple's wishes. Unlike a contract, it is not just business - it is deeply personal. Where the couple clearly make it irrevocable on death of the first grantor, it should be assumed that the this term was incorporated for a purpose, and that the document was not to be subject to the caprice of the surviving grantor or those who may unduly influence the surviving grantor. And, it should be the ultimate duty of the court to ensure that the instrument(s) jointly executed by the couple are carried out according to the terms in those instruments.

Appellants respectfully request that this Court grant the following relief:

1. To reverse the final order and judgment entered by the trial court;
2. To approve the original trust as the sole governing instrument in for the estate; and,
3. To assess the costs and attorney fees incurred as a result of litigating this action against the Respondent.

Respectfully Submitted this 4th
day of August, 2017.

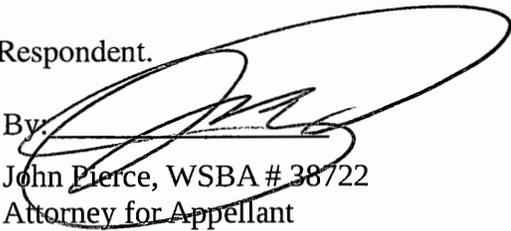
By: 
John Pierce, WSBA # 38722
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EXHIBIT 1. - TIMELINE

1994

March 2, 1994 - L/M Meeks No. 1 Trust executed by Lloyd M Meeks and Mable Meeks

Trust originally set up to take care of:

1. Surviving Spouse §4.C.1.
2. Mary Ann Crouse (adopted child) §4.D.2.2
3. Ruth Crouse (Sister of Lloyd Meeks) §4.D.3.(a)
4. Residue §4.D.3.(b)

1995 No Changes to trust.

1996 No Changes to trust.

1997 No Changes to trust.

1998 No Changes to trust.

1999 No Changes to trust.

2000 No Changes to trust.

2001

April 20, 2001 - Ruth M. Crouse Dies (Sister of Lloyd Meeks, and beneficiary). Section §4.D.3.(a) void. Grantors had approximately 18 months to **jointly** modify the trust and add FHCRC as a beneficiary after R. Crouse passed away of cancer. **No changes were made.**

2002

September 30, 2002 - Lloyd M. Meeks (Grantor) dies. §4.C.1. for surviving spouse Activated.

No bypass trust Created, No Modification of Will to include power of appointment

November 21, 2002 - Ms. Meeks sends letter to attorney to modify trust.

December 6, 2002 - 60 days after Lloyd Meeks passed away, Ms. Meeks executed the First Amendment to L/M Meeks Trust

2003

No Changes to trust.

2004

No Changes to trust.

2005

May 28, 2005 - Mary Ann Crouse Dies (niece of Lloyd Meeks) §4.D.2.2 void.

October 10, 2006 - Second Amendment to L/M Meeks Trust Executed

EXHIBIT 2. - RECORD OF CHANGES IN TRUST DOCUMENTS

Distributions

Distribution Comparison

Original Trust Section		First Amendment	Second Amendment	Comments:
§4.D.2	..."If MARY ANN CROUSE does not \$0.00 survive the Grantors for 30 days..."	Executed December 6, 2002.	Executed October 10, 2005 (after passing of Mary Ann Crouse)	
§4.D.3	..."If MARY ANN CROUSE does not \$1.00 survive the Grantors for 30 days..."	Amendment to Section 4D.	Amendment to Section 4D.	
§4.D.3(b)	Distribution of Trust Estate			
		75.00% MARY ANN CROUSE		Violation of Trust Section 4.C.ii. Which limits distribution to "lineal descendants of marriage", "spouses of lineal descendants", and charities.
§4.D.3(b)(1)	\$10,000.00 Eileen Cobain	\$10,000.00 Eileen Cobain	\$10,000.00 Eileen Cobain	
§4.D.3(b)(1)	\$10,000.00 Lisa Wuerch	\$5,000.00 Lisa Wuerch	\$10,000.00 Lisa Wuerch	Modification of non-charitable beneficiary in First Amendment
§4.D.3(b)(1)	\$10,000.00 James V. Shubert	\$5,000.00 James V. Shubert	\$0.00 James V. Shubert	Modification of non-charitable beneficiary in First Amendment. Removal of beneficiary in Second Amendment. Unlawful Amendment of Trust
		St. Paschal's School (Spokane, WA) \$10,000.00 /OR/ Kathleen Burge and Daniel Doyle	\$5,000.00 St. Paschal's School (Spokane, WA)	Modification/Reduction of Charitable Beneficiary. Violation of Trust Section 4.C.ii. Which limits distribution to "lineal descendants of marriage", "spouses of lineal descendants", and charities.
		\$10,000.00 Morningstar Boy's Ranch	\$5,000.00 Morningstar Boy's Ranch	Modification/Reduction of Charitable Beneficiary
		\$10,000.00 The Jesuits (Portland, OR)	\$5,000.00 The Jesuits (Portland, OR)	Modification/Reduction of Charitable Beneficiary
		\$10,000.00 Larry Groshoff		Violation of Trust Section 4.C.ii. Which limits distribution to "lineal descendants of marriage", "spouses of lineal descendants", and charities.
		\$10,000.00 Susan Sifferman	\$20,000.00 Susan Sifferman	Violation of Trust Section 4.C.ii. Which limits distribution to "lineal descendants of marriage", "spouses of lineal descendants", and charities.
			\$1,000.00 Saint Paschal's Church	Only available with legitimate Power of Appointment
			\$1,000.00 Spokane Humane Society	Only available with legitimate Power of Appointment
			\$1,000.00 KSPS Public Television	Only available with legitimate Power of Appointment
			\$100,000.00 Community Colleges of Spokane	Only available with legitimate Power of Appointment

Distributions

RESIDUE, §4.D.3(b)(1)

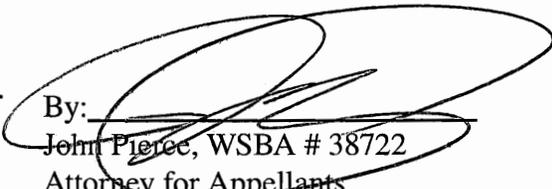
Original Trust	First Amendment	Second Amendment	
§4.D.3(b)(1)(i) 45.00% Saint Paschal's School (Spokane, WA)	Note: Limited to 10,000		Modification/Reduction of Charitable Beneficiary
§4.D.3(b)(1)(ii) ???			
§4.D.3(b)(1)(iii) 10.00% The Jesuits (Portland, OR)	Note: Limited to 10,000		Modification/Reduction of Charitable Beneficiary
§4.D.3(b)(1)(iv) St. Josephs Catholic Church (Spirit Lake, ID) 5.00%	Note: Removed as Beneficiary		Original trust beneficiary removed in amendment.
§4.D.3(b)(1)(v) to such 501(c)(3) organizations, as determined in the sole discretion of the Successor Trustee, including, but not limited to the charities enumerated in (4),(5),(6), and or (7) above. 30.00%			
§4.D.2(b)			
§4.D.2(b)(4) Part of Residue at discretion of Trustee Saint Paschal's School (Spokane, WA)			
§4.D.2(b)(5) Part of Residue at discretion of Trustee Morningstar Boy's Ranch			
§4.D.2(b)(6) Part of Residue at discretion of Trustee The Jesuits (Portland, OR)			
§4.D.2(b)(7) Part of Residue at discretion of Trustee St. Josephs Catholic Church (Spirit Lake, ID)			
	Fred Hutchison Cancer Research Center for the study of a cause, cure, education, and prevention of breast cancer.	Fred Hutchison Cancer Research Center for the study of resaerch, cause, diagnosis, and cure of glioblastoma muliforme cancer;	Only available with legitimate Power of Appointment
		University of Washington for the study of resaerch, cause, diagnosis, and cure of glioblastoma muliforme cancer;	Only available with legitimate Power of Appointment

CERTIFICATE OF MAILING

I certify that a copy of the foregoing was sent by First Class Mail, Postage Pre-paid , and addressed to the following:

Lisa Wuerch 1713 E. Leona Dr. Spokane, WA 99208	Eileen Cobain 14976 Washington St Anacortes, WA 98221
Susan Sifferman 1750 N.W. 193rd St. Shoreline, WA 98177	James Shubert 431 10 th St. Maries, ID 83861
Saint Joseph's Catholic Church Spirit Lake, ID c/o St. George's Catholic Church 2004 N. Lucas St. Post Falls, ID 83854	The Jesuits, Oregon Province Chuck Duffy, Dev. Director 3215 SE 45th Ave. Portland, OR 97206
James A. McPhee Witherspoon Brajcich McPhee, PLLC RE: Morning Star Boys Ranch 601 W. Main Ave., Ste 714 Spokane, WA 99201	Spokane Humane Society Attn. Holly Cochrane 6607 N. Havana St Spokane, WA 99217
Mr. Greg Embrey Witherspoon Kelly RE: Community Colleges of Spokane 608 Northwest Blvd., Ste. 300 Coeur d'Alene, ID 83814	Saint Paschal's Church 2523 N. Park Rd. Spokane Valley, WA 99217
KSPS Sandra Kernerman 3911 S. Regal St. Spokane, WA 99223	UW Foundation 4333 Brooklyn Ave. NE Box 359504 Seattle, WA 98195-9504
Gail E. Mautner Lane Powell PC RE: Fred Hutchison Cancer Research Ctr. 1420 Fifth Ave. Ste. 4200 Seattle, WA 98101-2338	

Dated this 4th day of August, 2017.

By: 
John Pierce, WSBA # 38722
Attorney for Appellants