

No. 352706-III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

In Re:

ESTATE OF MABLE MEEKS
and L/M MEEKS NO. 1 TRUST,

LISA WUERCH, Trustee,
Appellant

v.

FRED HUTCHINSON CANCER RESEARCH CENTER and
COMMUNITY COLLEGES OF SPOKANE,

Respondents.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
(Hon. John O. Cooney)

**BRIEF OF RESPONDENT FRED HUTCHINSON
CANCER RESEARCH CENTER**

Gail E. Mautner
WSBA No. 13161
Jonathon Bashford
WSBA No. 39299
*Attorneys for Respondent Fred
Hutchinson Cancer Research Center*

LANE POWELL PC
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
Telephone: 206.223.7000
Facsimile: 206.223.7107

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I. INTRODUCTION

As part of Mabel and Leonard Meeks's 1994 estate planning, they established a trust (the "Trust") that provided the surviving spouse with the power to name beneficiaries, including charitable beneficiaries, after the death of the first spouse, by identifying them ("exercising a power of appointment") in the surviving spouse's Last Will and Testament (her "Will").

Following her husband's death and before her own death, Mabel Meeks attempted to designate beneficiaries of the Trust. Unfortunately, because of bad advice from the same lawyer who drafted the original Trust, Ms. Meeks did not make her designations in her Will, as provided for by the Trust. Instead, the attorney and Ms. Meeks executed two Trust amendments. Ms. Meeks mistakenly believed for a decade prior to her death in 2015 that, by doing so, she had ensured that the residue of the Trust would go to charitable beneficiaries honoring the memory of her daughter. Recognizing the inequity of allowing a mistake of this sort to frustrate Ms. Meeks's clearly expressed charitable purpose, the trial court gave effect to Ms. Meeks and her deceased husband's intent to allow her to name the ultimate charitable beneficiaries of their Trust, by reforming her Will and carrying out their joint intent that the surviving spouse would choose the beneficiaries of their Trust.

The Trustee, who had petitioned the trial court for instructions as to the identity of the Trust's beneficiaries, now appeals from the court's order providing the very instructions the Trustee had sought, in which the court declared that Respondents Fred Hutchinson Cancer Research Center ("FHCRC"), Community Colleges of Spokane ("Community Colleges") and University of Washington ("UW") are among the beneficiaries of the Trust.

The longstanding rule in Washington is that a trustee has no standing to appeal an order that determines rights as between "competing" beneficiaries. The Trustee has no stake in the outcome, and her appeal violates her duty of loyalty and impartiality. The impropriety of this appeal is highlighted by the fact that *no* charity or individual beneficiary named in the original Trust appeared before the trial court to claim an interest in the Trust. Only the Trustee has attempted to defeat Mr. and Ms. Meeks's clear intent that the survivor designate the ultimate beneficiaries. The Trustee's appeal can and should be dismissed on this basis.

Were the Court to reach the merits, it should affirm. The trial court acted well within its equitable discretion under TEDRA in reforming the Will to reflect Ms. Meeks's clear intent to name these charities as beneficiaries of the Trust. The Trust unambiguously required the creation of a bypass trust to maximize estate tax exemptions after the death of the first spouse, and provided the surviving spouse a power of appointment to change charitable

beneficiaries of the bypass trust assets. Only the mistake of counsel in advising Ms. Meeks prevented her from exercising her power of appointment, as granted to her in the original Trust executed by Mr. and Ms. Meeks. There is no genuine dispute that Ms. Meeks clearly intended to direct the Trust assets toward her chosen charitable purposes.

The Trustee's other arguments are meritless. For the first time on appeal, the Trustee argues that the trial court's order could have unknown future tax implications. This is nonsense and finds no support in the record. The judgment below, including the award of attorneys' fees to FHCRC from the Trust pursuant to RCW 11.96A.150, should be affirmed. In addition, FHCRC should be awarded its attorneys' fees on appeal; the Trustee's attorneys' fees should not be paid from the Trust, as the Trustee has breached her duty of loyalty and impartiality by perpetuating this dispute beyond her original trial court petition for instructions.

II. COUNTERSTATEMENT OF ISSUES

1. Does a trustee lack independent standing to appeal from a trial court order responding to the trustee's own petition for instructions regarding the identification of trust beneficiaries, where no potential beneficiary appeared at the trial court level in support of the trustee's position, no potential beneficiary objected to the trial court's order, and the Trustee's

appeal necessarily violates her duty of loyalty and impartiality to the Trust's beneficiaries?

2. Did the trial court properly conclude that the Meeks Trust expressed the joint intent of Mr. and Ms. Meeks that the Trust asset be held in a bypass trust that provided the surviving spouse with a power of appointment to determine the charitable beneficiaries of those assets?

3. Did the trial court properly rely on the intent of the surviving spouse to alter the originally identified charitable beneficiaries of the Trust, where the Trust provided the surviving spouse a power of appointment to name the charitable beneficiaries of the Trust?

4. Did the trial court properly exercise its discretion under RCW 11.96A.125 by reforming Ms. Meeks's Will to honor her clear intent to alter the charitable beneficiaries of the Trust, where Ms. Meeks mistakenly executed an ineffective trust amendment prepared by her attorney, but could have accomplished her intended and authorized result through exercising the power of appointment explicitly provided to her under the Trust?

5. Did the trial court properly exercise its discretion under RCW 11.96A.150 in awarding attorney fees and costs from the trust to a beneficiary whose efforts ensured the trustor's charitable intent was honored in the distribution of trust assets?

6. Should this Court award attorney fees on appeal to FHCRC and deny attorney fees on appeal to the Trustee?

III. COUNTERSTATEMENT OF FACTS

A. Respondents

Fred Hutchinson Cancer Research Center is a Washington not-for-profit organization whose mission is to eliminate cancer and related diseases as causes of human suffering and death.¹ FHCRC has repeatedly been recognized for its research, and FHCRC's researchers have received numerous awards for their work, including three Nobel Prizes.² FHCRC was the intended beneficiary of 50% of the residue of the Trust. CP 30, 435.³

Community Colleges of Spokane is a community college district providing educational services to over 30,000 students across more than 12,000 square miles in a six county region of Eastern Washington.⁴ Its mission is to develop human potential through quality, relevant and affordable learning opportunities that result in improved social and economic

¹ Fred Hutchinson Cancer Research Center, Mission & Facts, <http://www.fredhutch.org/en/about/mission.html> (visited Oct. 1, 2017).

² Fred Hutchinson Cancer Research Center, Major Honors & Awards, <http://www.fredhutch.org/en/about/honors-awards.html> (visited Oct. 1, 2017).

³ In addition to the two Respondents named in the case caption, the University of Washington has appeared in this action and is the intended beneficiary of the other 50% of the residue of the Trust. CP 30, 111-12, 435.

⁴ Community Colleges of Spokane, CCS Fast Facts, <http://www.ccs.spokane.edu/About-CCS/CCS-Data-Central/CCS-Fast-Facts.aspx> (visited Oct. 1, 2017).

well-being for its students and our state.⁵ Community Colleges was the intended beneficiary of \$100,000 from the Trust. CP 29, 435.

B. Legal Background: Powers Of Appointment.

This case involves the law of wills, trusts, and powers of appointment. While the first two are familiar even to laypersons, the third is less well known, even to many legal practitioners. A power of appointment “is a power of disposition given to a person over property not his own, by someone who directs the mode in which that power shall be exercised by a particular instrument.” *In re Lidston’s Estate*, 32 Wn.2d 408, 419, 202 P.2d 259 (1949). A power holder thus may designate the ultimate grantee of property. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 17.1 (1999). Unlike a power of attorney, a power of appointment does not create an agency relationship; the donee has discretion regarding exercise of the power. *Id.* at cmt. j. When included in a trust, a power of appointment allows the power holder to alter or designate the beneficiary of some or all of the trust property, without amending the trust itself. GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 299 (rev. 2d ed. Supp. 2016). A power of appointment can be inter vivos (i.e., exercisable during the power holder’s lifetime) or testamentary (i.e., exercisable by the power holder’s will

⁵ Community Colleges of Spokane, Mission, Vision and Values, <http://www.ccs.spokane.edu/About-CCS/Mission,-Vision---Values.aspx> (visited Oct. 1, 2017).

upon his or her death). *See* RCW 11.95.060. Formal requirements for powers of appointment are described in chapter 11.95 RCW.

C. The Meeks Trust.

1. Creation and terms of the Trust.

In 1994, Lloyd and Mabel Meeks engaged attorney Charles Cleveland to draft the trust agreement governing the L/M Meeks No. 1 Trust, which they executed on March 2, 1994. CP 8-23, 140. Concurrently, Mr. Cleveland drafted and Ms. Meeks executed her Last Will and Testament. CP 40-43.

The first purpose of the Trust was to support Mr. and Ms. Meeks during their lifetimes. CP 9. The Trust named various family members and charitable organizations as beneficiaries of the remaining Trust assets following the death of both trustors. CP 11-14. Mr. and Ms. Meeks served as initial trustees. CP 21. Certain relatives were nominated as successor trustees, including Appellant Lisa Wuerch (the “Trustee”). CP 19; *see also* CP 142 (Ms. Wuerch is a niece).

By its terms, following the death of the first spouse the Trust was irrevocable and not subject to amendment. CP 8.⁶ Also at the time of the first spouse’s death, the trustee was required to “segregate into a separate By-

⁶ In May 2015, counsel for the Trustee indicated that Mr. Cleveland had called this language the result of a “scrivener’s error.” CP 90. Mr. Cleveland later denied making any such statement. CP 135.

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; and then required to place the remaining assets, if any, “into a separate Marital Deduction Trust” qualifying for the unlimited marital deduction from estate taxation. CP 11.

While the Trust could no longer be amended after the death of the first spouse, the Trust specifically provided that, within certain constraints, the surviving spouse could change the ultimate beneficiaries. The surviving spouse was provided “a limited power of appointment over the By-Pass Trust” to change beneficiaries, provided those beneficiaries were direct lineal descendants “of their marriage,” spouses of such direct lineal descendants, or (as relevant here) organizations “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 (Trust § 4.C.1.ii). The surviving spouse could exercise that power “in a provision specifically describing this power of appointment contained in [his or her] Last Will[.]” *Id.*

2. Ms. Meeks, relying on counsel, fails to fund the bypass trust after Mr. Meeks’s death.

Lloyd Meeks passed away in September 2002. CP 24. According to the Trustee, all of their real and personal property had been transferred to the

Trust prior to his death. CP 259. While there is no evidence in the record regarding the extent of Trust assets, the Trustee now avers on appeal that the assets totaled less than \$1,000,000. Opening Br. at 32. Contrary to the explicit terms of the Trust, CP 9 (bypass trust requirement), Ms. Meeks apparently did not formally retitle the Trust assets in the name of the separate bypass trust at that time or any time thereafter.

3. Ms. Meeks executes the First and Second Amendments to the Trust instead of exercising her power of appointment.

Following the death of her husband, Ms. Meeks desired to designate different charitable beneficiaries of the Trust. CP 141; *see* CP 431 (findings of fact). Among other things, Ms. Meeks “had recently survived breast cancer” and wished to designate FHCRC as one of the Trust beneficiaries. CP 141. She wrote a letter to Mr. Cleveland, the attorney who had prepared the Trust and her Will, indicating among other things that the otherwise undesignated Trust assets “shall be distributed to Fred Hutchinson Cancer Research Center” and designated to fund breast cancer research. CP 127.⁷

Instead of preparing a new will or a codicil to Ms. Meeks’s 1994 Will, in which she would exercise the limited power of appointment granted to her in the original Trust, Mr. Cleveland prepared a trust amendment reflecting

⁷ Ms. Meeks also indicated various other changes she wished to make to the non-charitable disposition of the Trust assets, CP 126-27; those changes are not at issue in this case.

Ms. Meeks's desired changes to the Trust beneficiaries. Ms. Meeks executed that amendment on December 6, 2002, with Mr. Cleveland serving as notary. CP 25-27 ("First Amendment").

Three years later, Mr. and Ms. Meeks's adoptive daughter Mary Crouse (Mr. Meeks's biological niece) died of glioblastoma multiforme cancer. CP 140-41. At the time of her death, Mary was working at Spokane Community College. CP 141.

Following Mary's death, Ms. Meeks again wished to change the charitable beneficiaries of the Trust. CP 141. Again, Mr. Cleveland drafted a trust amendment reflecting the changes Ms. Meeks had indicated; Ms. Meeks executed a version still marked "draft" on September 19, 2005. CP 166-69. In a handwritten letter to her attorney, Ms. Meeks stated:

Because we have not completed the second amendment to the Trust yet and because I am flying to Seattle tomorrow and will be doing a lot of travelling, I have signed before a Notary this second draft so my estate can be distributed according to my wishes, in case of my death. I hope this is binding.

CP 164.

Ms. Meeks executed the finalized trust amendment on October 10, 2005. CP 28-31 ("Second Amendment"). The residual bequest to FHCRC was changed from the First Amendment: the funds would now be split equally between FHCRC and its research partner UW, and redesignated for the purpose of researching glioblastoma multiform cancer rather than breast

cancer. CP 168. Community Colleges was named as a beneficiary and provided a distribution to create a scholarship fund for working single mothers. CP 167. Other new charitable beneficiaries⁸ were added, and others removed. *See* CP 306 (chart comparing charitable beneficiaries in the original Trust versus those named in the Second Amendment).⁹

D. Ms. Meeks’s Intended Beneficiaries.

According to Ms. Meeks’s niece Susan Sifferman, Ms. Meeks “was extremely clear” about her wishes during the last year of her life. CP 142. The most important factor in Ms. Meeks’s estate planning was that “a significant portion” go to FHCRC for research into glioblastoma multiform cancer, CP 141; “to honor Mary,” her deceased daughter. CP 142. That intent was expressed “to multiple witnesses” including Ms. Sifferman and the Trustee. CP 431; *see* CP 142. Ms. Meeks was “meticulous” in her affairs and believed that working with the same attorney who had drafted the original Trust instruments would ensure that the beneficiary amendments were done properly. CP 141. Following her execution of the First and Second

⁸ Like the First Amendment, the Second Amendment also purported to make certain changes to the non-charitable beneficiaries, including removing deceased beneficiaries and adding new family members as beneficiaries. CP 29. The trial court did not give effect to those attempted amendments. CP 435 (“The original Trust controls distribution of Estate assets to all non-charitable beneficiaries.”). That ruling is not at issue on appeal.

⁹ The Trustee also presented the superior court with a chart. CP 264-65. She provides it again on appeal as an exhibit to her brief. *See* Opening Br. at 35, 42. As FHCRC pointed out to the trial court, the Trustee’s chart is inaccurate. *See* CP 307.

Amendments, Ms. Meeks “believed that she had done everything properly” to ensure that her charitable beneficiary designations would be effective. CP 142.

Similarly, the attorney Mr. Cleveland opined that Ms. Meeks’s “wishes are quite evident” from the Amendments and from her correspondence to him, and that those documents “show her intent.” CP 135.

Ms. Meeks passed away on March 19, 2015. CP 38. There is no indication that Ms. Meeks had any knowledge, at any time before her death, that the Amendments might not be the proper mechanism for effecting her changes to the Trust’s charitable beneficiaries.

E. Procedural History.

1. Appointment of successor trustee, discovery, and notice to interested parties.

The original Trust designated three successor trustees to manage the Trust following the death of both trustors: Mary Ann Crouse, who predeceased Ms. Meeks; Eileen Cobain, who resigned as successor trustee, CP 36-37; and Ms. Wuerch, the Petitioner/Trustee in this matter. CP 19. In the Second Amendment, Ms. Meeks had designated Ms. Sifferman as a successor co-trustee, to serve alongside the Trustee Ms. Wuerch. CP 30.

On May 1, 2015, the Trustee petitioned Spokane County Superior Court to open the Meeks Trust for TEDRA review. CP 3-45. Among the issues for resolution was a request “that the court determine the validity

and/or enforceability of the Amendments in light of the language in Section 3 of the Trust.” CP 6.

One week later, the Trustee petitioned for certification of her appointment as sole trustee, based on difficulties accessing bank accounts and concerns about the validity of the Second Amendment designating Ms. Sifferman as co-successor trustee, CP 69; and for payment for her services notwithstanding the Trust Agreement’s prohibition on trustee compensation. CP 70; *see also* CP 63-68 (memorandum). FHCRC responded in support of the Trustee’s petition, with the limitation that the court should not prejudge matters related to the validity of the Second Amendment and that the Trustee’s compensation should be hourly and reasonable. CP 71-75. On July 23, 2015, the court commissioner entered an order certifying the Trustee and setting reasonable compensation. CP 80-81.

Meanwhile, counsel for FHCRC sought information from Mr. Cleveland regarding the intent of Mr. and Ms. Meeks in drafting the Trust and related documents. When those efforts ran aground, Respondents moved for an order authorizing the release of information by Mr. Cleveland, the drafting attorney of the original Trust and both Amendments, to allow the beneficiaries to access otherwise privileged information regarding the trustors’ intent in creating the Trust and Ms. Meeks’s intent in executing the Amendments. CP 83-89 (FHCRC motion); *see also* CP 96 (Community

Colleges joinder). The Trustee objected on the basis that FHCRC was not a beneficiary of the Trust. CP 99-100. On reply, FHCRC emphasized that the identity of the beneficiaries had not yet been determined. CP 102-04. Following argument, CP 110, on April 15, 2016 the court ordered Mr. Cleveland to disclose all relevant information to FHCRC. CP 107-08.

2. FHCRC's motion.

Following discovery, on October 21, 2016, FHCRC moved for an order reforming the Trust to allow the Second Amendment's designation of charitable beneficiaries to take effect, despite the Trust's prohibition on amendments; or, in the alternative, reforming Ms. Meeks's Will to reflect her exercise of the power of appointment designating her intended charitable beneficiaries, as authorized by Section 4.C.1.ii of the Trust. CP 144-160. FHCRC requested that its fees and costs be awarded under RCW 11.96A.150. CP 157.

In addition to the Amendments themselves, FHCRC presented three sources of extrinsic evidence regarding Ms. Meeks's intent with regard to which charities would be beneficiaries of the Trust following her death: First, the letters written by Ms. Meeks to Mr. Cleveland in 2002 and 2005 detailing Ms. Meeks's instructions for designating new beneficiaries and their respective distributions from the Trust. CP 126-27 (2002 letter), 163-69 (2005 letter). Second, Mr. Cleveland's emails to counsel confirming that

those documents reflected Ms. Meeks's intent. CP 135. And third, a declaration from Ms. Sifferman describing Ms. Meeks's motivations for making the charitable designations, which emphasized the clarity of both her intent and her good faith belief that Mr. Cleveland had properly executed that intent. CP 140-42.

The Trustee objected to the validity of the Second Amendment and to any recognition of the charitable beneficiaries designated by Ms. Meeks. CP 170-190. In particular, the Trustee argued that Ms. Meeks failed to properly exercise the power of appointment granted to her under the Trust, CP 175, and no evidence showed that she had intended to take that formal step, CP 183-86; that Ms. Meeks's individual intent was irrelevant, CP 176-77, and no evidence showed that the deceased Mr. Meeks had shared her intent to designate Respondents as beneficiaries, CP 177-183; that the court should defer to the Trustee's discretion in designating charitable beneficiaries, CP 186-87; and that FHCRC should be charged the Trustee's attorney fees for its "frivolous" motion. CP 188-89. The Trustee made no argument regarding any tax implications of granting FHCRC's motion or reforming Ms. Meeks's Will.

3. The trial court ordered reformation of the Will to reflect exercise of Ms. Meeks's power of appointment naming her intended charitable beneficiaries.

FHCRC's motion was heard on January 13, 2017. CP 272-291 (transcript). Ruling from the bench, the court found clear, cogent and convincing evidence that (1) it was the joint intent of Mr. and Ms. Meeks that the surviving spouse have a power of appointment to designate charitable beneficiaries of the Trust; (2) it was the intent of the surviving spouse, Ms. Meeks, to designate charitable beneficiaries as allowed under the Trust; and (3) Ms. Meeks's intent was not correctly carried out by the attorney she hired to prepare that designation. CP 328-330. In making that determination, the court found "somewhat compelling" that the attorney Mr. Cleveland had prepared the prohibited Amendments despite having also drafted the original Trust. CP 328. Accordingly, the court held that it was equitable and appropriate to reform Ms. Meeks's Will to carry out her intent, CP 330; and to "designate the charitable beneficiaries" as Ms. Meeks intended. CP 334.

Following the oral ruling, the Trustee argued that recognizing the new charitable beneficiaries created a conflict as to the distributions to non-charitable beneficiaries named in the original Trust Agreement. CP 331. The court confirmed that it had not intended to alter the rights of non-charitable beneficiaries and ordered supplemental briefing to allow it to determine "which person or which entities are designated which amount" given those

alleged conflicts. CP 334-35. In her supplemental brief, the Trustee repeated her objections to the trial court taking any action to effectuate Ms. Meeks's charitable intent. CP 257-270. Again, the Trustee did not argue or introduce evidence to suggest that reforming the Will would create any tax issues for the Trust.

In a letter ruling, the court reiterated its finding that "Ms. Meeks intended to exercise her power of appointment regarding the designation of charitable beneficiaries but was provided the improper avenue for doing so by her attorney." CP 350-51. Because Ms. Meeks's power of appointment covered only the changes to the charitable beneficiaries, the court held that "[t]he original Trust controls distribution of estate assets to all non-charitable beneficiaries." CP 351. The court listed the amounts it had found Ms. Meeks intended to be distributed to each of the charitable beneficiaries. CP 351. The court further found that FHCRC's efforts in the trial court were necessary "in order for the Grantor's intention on distribution to be realized" and accordingly that those efforts "benefit[ted] the Trust" such that an award of attorney fees to FHCRC was appropriate. CP 351.

On April 26, 2017, the trial court entered an order reforming Ms. Meeks's Will and instructing the Trustee on the identity of the Trust beneficiaries. CP 430-38 (the "Order"). The court found "by clear, cogent and convincing evidence" that:

. . . the intent of both Mr. Meeks and Ms. Meeks was to allow for the power of appointment for the surviving spouse; that Ms. Meeks was the surviving spouse; and that she tried to exercise the power of appointment when she sought the assistance of Mr. Cleveland. Ms. Meeks did not choose the mechanism for that. Rather, Mr. Cleveland did that for her in drafting the amendments which carried out the intent.

CP 434-35. The court further found that a will “that exercised Ms. Meeks’s power of appointment to name different charitable beneficiaries of the Trust” would be proper under the Trust and “reflective of Ms. Meeks’s charitable intent.” CP 431. Accordingly, the court instructed the Trustee regarding the identity of the beneficiaries of the Trust, and the distributions to each. CP 435. The Order awarded reasonable attorney fees and costs to FHCRC, in an amount to be determined in further proceedings. CP 438.

The Trustee timely appealed. CP 446.

4. The trial court awarded attorney fees to FHCRC for efforts benefitting the Trust by identifying its beneficiaries.

Following entry of the Order reserving determination of FHCRC’s reasonable fees, the court issued an initial letter ruling determining that FHCRC should be awarded \$53,400 from the Trust. CP 443-45. FHCRC asked the court to reconsider that award, CP 481-490; which the court did. CP 501-02 (order on reconsideration entered July 18, *nunc pro tunc* June 19); *see* CP 468-69 (June 19 letter ruling). On June 19, 2017, the trial court

entered an order awarding \$78,192.04 in fees and costs to FHCRC and requiring the Trustee to dispense those funds. CP 471-474.

IV. ARGUMENT

A. **The Trustee Lacks Independent Standing To Appeal From A Trial Court’s Determination Of Trust Beneficiaries.**

The Trustee brings this appeal to challenge the trial court’s order—which she herself sought—instructing her as to the proper beneficiaries of the Trust. *None* of the potentially affected Trust beneficiaries (i.e., beneficiaries initially identified in the original Trust, but not in the Second Amendment) objected below, and *none* have joined in the Trustee’s appeal. The Trustee lacks standing to appeal an order identifying the Trust beneficiaries to whom her duties are owed. This appeal can and should be dismissed on this basis alone.

Under Washington law, a trustee must administer a trust solely in the interests of all the beneficiaries. RCW 11.98.078(1); *see also Wilkins v. Lasater*, 46 Wn. App. 766, 774 (1987) (trustee owes beneficiaries “the highest degree of good faith, diligence, fidelity, loyalty, and integrity”); *Matter of Drinkwater’s Estate*, 22 Wn. App. 26, 30, 587 P.2d 606 (1978) (trustee must have “undivided loyalty”). Where the trust has multiple beneficiaries with potentially divergent interests, “the trustee must act impartially in administering the trust and distributing the trust property,

giving due regard to the beneficiaries' respective interests." RCW 11.98.078(8); *see also* RESTATEMENT (THIRD) OF TRUSTS § 79(1)(a) (2007) (trustee "has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust [and] . . . act impartially and with due regard for the diverse beneficial interests created by the terms of the trust.").

Given those duties of loyalty and impartiality, a trustee cannot "litigate the conflicting claims of beneficiaries" by appealing orders "determining which beneficiaries are entitled to share in a particular fund." *In re Estate of Bernard*, 182 Wn. App. 692, 729, 332 P.3d 480, *review denied*, 181 Wn.2d 1027 (2014) (quoting *Estate of Ferrall*, 33 Cal. 2d 202, 204, 200 P.2d 1 (1948)). In *Bernard*, the trial court voided a will codicil and trust amendment. The court held that the trustee had standing to appeal because a trustee "is aggrieved by a judgment which threatens the continuance of the trust in the form directed by the trustor[.]" *Id.* at 728 (quoting *Retail Store Emps. Union, Local 1001 Chartered By Retail Clerks Int'l Ass'n, AFL-CIO v. Wash. Surveying & Rating Bureau, Wash. Bureau*, 87 Wn.2d 887, 893, 558 P.2d 215 (1976)). The court contrasted that special circumstance with the "general rule" that where a court order "determines which beneficiaries are entitled to share in a particular fund," the trustee cannot appeal. *Id.* at 729.

Washington courts have long applied that general rule limiting fiduciary appeals. *See, e.g., In re Maher's Estate*, 195 Wash. 126, 130, 79 P.2d 984 (1938) (“an administrator, as such, cannot appeal from a decree of distribution determining the persons who should receive an estate”); *In re Cannon's Estate*, 18 Wash. 101, 50 Pac. 1021 (1897) (in “a contest between claimants” the fiduciary “may not take sides, for, if so, he might resist the rightful claimant at the expense of the estate, to which he might ultimately be found entitled.”). While the fiduciary has a duty to guard against an improper distribution of the assets under her control, “this duty extends no further than to see that all available evidence is fully and truthfully presented to the superior court[.]” *Maher's Estate*, 195 Wash. at 131. Once the court “has determined the matter and designated the persons who are entitled to receive [distributions], as to that phase of the proceeding the interest of the [fiduciary] ceases.” *Id.* at 132.¹⁰

¹⁰ Washington appears to follow the majority rule in this regard. Courts across the country have long recognize that a trustee lacks standing to appeal an order that is “concerned with the question as to who the beneficiaries are, or in what proportion they benefit.” *Toledo Trust Co. v. Farmer*, 165 Ohio St. 378, 385–86, 135 N.E.2d 356, 361–62 (1956); *see also First Nat. Bank of Dewitt v. Yancey*, 36 Ark. App. 224, 225–26, 826 S.W.2d 287, 288–89 (1991) (“When the decision in the trial court concerns the respective interests of two beneficiaries, the trustee is not an aggrieved party.”); *State ex rel. St. Louis Union Trust Co. v. Sartorius*, 350 Mo. 46, 55-57, 164 S.W.2d 356, 358-59 (1942) (trustee not aggrieved by instructions settling its duty as to which beneficiaries are entitled to share in the fund); *Bryant v. Thompson*, 128 N.Y. 426, 28 N.E. 522 (1891) (where executor-trustee receives direction from the court as to the identity of the beneficiary, it is not a party aggrieved because it is

Here, the trial court determined that the charitable beneficiaries of the Trust were identified in the Second Amendment. The court then exercised its statutory and common law authority to carry out the trustors' intentions by reforming the Will to reflect the proper form of exercise of Ms. Meeks's power of appointment. The Trust itself was not terminated or otherwise threatened. This case thus does not present the situation that worried the *Bernard* court, where an "invasion[] of the corpus . . . might defeat the plan of the trustor or even destroy the trust itself." 182 Wn. App. at 729 (quoting *Ferrall*, 33 Cal. 2d at 206); *see, e.g., First Interstate Bank of Wash. v. Lindberg*, 49 Wn. App. 788, 794, 743 P.2d 333 (1987) (altering distributions is not equivalent "to revest[ing] the trust assets . . . or otherwise . . . destroy[ing] the trust by amending it"). Under the trial court's Order, the Trust remains intact and unamended, with only its ultimate charitable beneficiaries changed—in accordance with the trustors' wishes as expressed by their grant of a limited power of appointment to the surviving spouse.

Having received the Court's instruction as to the identity of the beneficiaries, the Trustee has neither a duty, nor any authority, to contest the issue further. *See generally* RAP 3.1 (only an "aggrieved party" may appeal); *Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 768-67, 189

protected by the court's judgment and direction regarding the proper disposal of the funds).

P.3d 777 (2008) (“aggrieved party” is someone whose proprietary, pecuniary, or personal rights are directly and substantially affected by the final order of the court). Here, the Trustee has no proprietary, pecuniary or personal rights in the corpus of this Trust. To the contrary, the Trustee’s attempt to remove beneficiaries from the Trust as declared by the trial court violates her twin duties of undivided loyalty and impartiality. Her appeal places the Trustee in direct conflict with the beneficiaries identified by Ms. Meeks and confirmed by the trial court, to whom she owes a duty of loyalty. That conflict is precisely what courts have intended to avoid by restricting the standing of trustees to appeal from orders that do not imperil the trust itself.

This appeal should be dismissed for lack of standing.

B. Standard Of Review.

Determining the parties’ intent in regard to a trust is a factual question. *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374-75, 113 P.3d 463 (2005). On appeal, the trial court’s findings will be upheld if supported by substantial evidence. *In re Estate of Barnes*, 185 Wn.2d 1, 9, 367 P.3d 580 (2016); *see also Endicott v. Saul*, 142 Wn. App. 899, 909-10, 176 P.3d 560 (2008) (under the clear, cogent, and convincing standard “the appellate court’s role is limited to determining whether substantial evidence supports the trial court’s findings of fact.”). Substantial evidence is evidence sufficient to persuade a rational fair-minded person that the premise is true.

Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

Questions of law are subject to de novo review. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). Whether equitable relief is appropriate under a given set of facts is a question of law and is reviewed de novo. *Niemann*, 154 Wn.2d at 375.

If equitable relief is appropriate, the trial court's fashioning of that relief is reviewed for abuse of discretion. *SAC Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). TEDRA attorney fee awards are likewise reviewed for abuse of discretion. *In re Guardianship of Lamb*, 173 Wn.2d 173, 198, 265 P.3d 876 (2011) (RCW 11.96A.150 "allows a court considering a fee award to consider any relevant factor."). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

C. The Trust Granted The Surviving Spouse Power To Modify Charitable Beneficiaries Through The Power Of Appointment.

There is no genuine dispute in this case that Ms. Meeks intended to change the charitable beneficiaries of the Trust. Nor is there any genuine dispute that the Trust allowed her to do so, in two straightforward steps. First,

at the time of her husband's death in 2002, Ms. Meeks, as surviving trustee, should have formally segregated the Trust assets into a bypass trust—a mandatory duty imposed upon her by the Trust. CP 9. Second, in her individual capacity, Ms. Meeks should have executed a new will or codicil exercising her limited power of appointment to designate new charitable beneficiaries of the bypass trust assets. *See* CP 10. It would have been a simple matter for Ms. Meeks to get the result to which she was entitled and that she intended, had she been properly advised.

1. The Trust mandated the creation of a bypass trust after Mr. Meeks's death.

The Trust contemplated that after the death of the first spouse, a bypass trust would be created to hold a substantial portion, if not all, of the Trust assets. The trustee (at the time, Ms. Meeks) had a mandatory, non-waivable duty to fund the bypass trust.

Section 4.C.1 of the Trust provides 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 (emphasis added). After doing so, the trustee “shall place the rest, residue and remainder of the Trust Estate into a separate Marital

Deduction Trust, that will qualify for the unlimited Federal Estate Tax Marital Deduction.” CP 11 (emphasis added).

Thus, between the bypass trust (commonly called a credit shelter trust or B trust) and the marital deduction trust (commonly called a marital trust or QTIP trust), the bypass trust was to take priority. *Compare* CP 9 (bypass trust maximized) *with* CP 11 (marital deduction trust receives remainder). Only once the bypass trust was fully funded would any potential marital trust receive any assets.¹¹

This is a common arrangement. A bypass trust is an estate planning device intended to help minimize federal estate taxes. Under 26 U.S.C. § 2010(c), a sizable exclusion amount provides most estates immunity from the federal estate tax by means of a unified credit applied against the taxes owed by the estate. Because Congress regularly alters the estate tax exclusion amount, estate planners often implement a funding formula if they wish their clients to take full advantage of the estate tax exclusion amount in effect at the time of death. A bypass trust is one way of doing so. By funding a segregated trust that is no larger than the maximum exclusion amount still available at the time of the first spouse’s death, those assets are taxable (and thus do not get taxed later, upon the death of the surviving spouse) but no

¹¹ Notably, the Trust directs that the bypass trust be funded in relation to the value of *all* Trust assets, not just the decedent’s share of community and separate property.

taxes are owed (because they are offset by the unified credit). The designated assets thus “bypass” the surviving spouse’s estate at his or her death, and are not subject to estate tax, allowing the second spouse to use his or her own unified credit for a different pool of assets.

As the Trustee notes, the estate tax exclusion limit when Mr. Meeks died in 2002 was \$1,000,000. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, § 521(a), 115 Stat. 38 (2001); *see* Opening Br. at 31. While there is no evidence in the record regarding the extent of the Trust assets in 2002,¹² the Trustee admits on appeal that “the estate did not have assets greater than the tax-credit-sheltered amount [\$1,000,000] upon the death of Lloyd Meeks[.]” Opening Br. at 32.

Because the Trust assets totaled less than the \$1,000,000 then-current 2002 exemption amount, upon Mr. Meeks’s death, *all* of the Trust assets were required to fund the bypass trust to “secure the maximum exemption.” CP 9. Correspondingly, once the bypass trust was funded there would be no remaining Trust assets to fund a separate marital deduction trust.¹³ No

¹² In fact, the record is devoid of any accounting of Trust assets, in 2002 or otherwise; and the Trustee has repeatedly refused to provide Respondents with financial information regarding the Trust. *See* CP 474 (ordering Trustee to file full accounting).

¹³ A marital deduction trust is a common companion to the bypass trust, holding any assets whose value exceeds the bypass trust’s maximum effective amount. Under 26 U.S.C. § 2056, the IRS allows an unlimited deduction from a decedent’s gross estate for property passing to the surviving spouse. Property may pass in trust (rather than to the spouse directly) provided that it meets the qualified terminable

discretion was given to Ms. Meeks, as trustee, as to the manner of segregating and funding the bypass trust. Rather, dividing up Trust assets into the appropriate sub-trusts in a manner prioritizing the bypass trust was a mandatory (“shall”) duty of the trustee. CP 9, CP 11; *see State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (the word “shall” presumptively creates an imperative duty rather than conferring discretion).

2. The surviving spouse had authority to control charitable distributions from the bypass trust through her exercise of the power of appointment granted in the original Trust.

While Mr. and Ms. Meeks may have intended the Trust to be irrevocable and unamendable following the death of the first spouse, CP 8, they nonetheless provided a mechanism—the power of appointment—for the bypass trust’s charitable beneficiaries to be amended at the discretion of the surviving spouse. CP 10. As the surviving trustor, Ms. Meeks was thus granted a testamentary power of appointment over the Trust property, which could be exercised in in favor of, *inter alia*, “[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. To exercise

interest property (“QTIP”) requirements of 26 U.S.C. § 2056(b)(7). Assets in the marital trust are not subject to the estate tax until the death of the second spouse.

this power, all Ms. Meeks had to do was to include a provision in her last will that manifested her intent to exercise it. CP 10; RCW 11.95.060(2).

In short, Ms. Meeks had full legal authority to alter the bypass trust's charitable beneficiaries as she wished, including by assigning distributions to FHCRC, Community Colleges and UW upon her death. Because all of the Trust assets properly belonged in the bypass trust, there is no dispute that Ms. Meeks had full control over the final charitable dispositions of the estate.

D. The Trial Court Properly Exercised Its Power Of Reformation To Accomplish Mr. And Ms. Meeks's Intent

1. Washington courts have broad discretion under both common law and TEDRA to fashion equitable remedies, including to correct a testator's mistake of fact or law.

The Trust and Estate Dispute Resolution Act, chapter 11.96A RCW (TEDRA) has been recognized as providing a "grant of plenary powers to the trial court." *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 343, 183 P.3d 317 (2008); accord *In re Estates of Jones*, 170 Wn. App. 594, 604, 287 P.3d 610 (2012). The statute provides courts with broad authority to craft appropriate resolutions to disputes touching on wills or trusts:

(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 . . . 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.

RCW 11.96A.020; *see also* RCW 11.96A.060 (“The court may make, issue, and cause to be filed or served, any and all manner and kinds of orders . . . that might be considered proper or necessary”).

In addition to those general provisions, the trial court relied on two specific provisions for its authority in this case. CP 434 (COL 4). First, RCW 11.96A.125, adopted in 2011 and amended in 2013, provides in relevant part:

The terms of a will or trust, even if unambiguous, may be reformed by judicial proceedings 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 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.

A mistake of expression occurs when the documents terms misstate the donor’s intention, fail to include a term that was intended to be included, or include an unintended term; while a mistake in the inducement occurs when the terms accurately reflect what the donor intended to be included or excluded but the intention was based on a mistake of fact or law. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS (“RESTATEMENT”) § 12.1 cmt. i (1999).

Washington’s reformation statute is adopted from the Uniform Trust and Probate Codes, *see* UNIF. TRUST CODE § 415 (UNIF. LAW COMM’N 2010); UNIF. PROBATE CODE § 2-805 (UNIF. LAW COMM’N 2010); which in turn are based on the Restatement. UNIF. TRUST CODE § 415 CMT. Will reformation operates on the same principles as the reformation of other instruments such as contracts and deeds. RESTATEMENT § 12.1 rpt. note 3 (citing *Brinker v. Wobaco Trust Ltd.*, 610 S.W.2d 160, 163-64 (Tex.Civ.App. 1980); *see, e.g., also Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 669, 63 P.3d 125 (2003) (“Reformation is an equitable remedy employed to bring a writing that is materially at variance with the parties’ agreement into conformity with that agreement.”). RCW 11.96A.125 departs from the common law: while reformation of other donative documents is longstanding, “[u]ntil recently, courts have not allowed reformation of wills.” RESTATEMENT § 12.1 cmt. c. In permitting will reformation, the Legislature thus joined a “trend away from insisting on strict compliance with statutory formalities” in favor of “the broader principle that mistake . . . should not be allowed to defeat intention.” *Id.*

Second, RCW 11.96A.127(1) provides:

Except as otherwise provided in [provisions that do not apply here], with respect to any charitable disposition made in a will or trust, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

....

(c) The court may modify or terminate the trust by directing that the property be applied or distributed, in whole or in part, in a manner consistent with the testator's or trustor's charitable purposes.

This statute likewise authorizes a court to modify a trust and direct a distribution in a manner consistent with a trustor's charitable purposes. Finding ways to uphold charitable testamentary gifts is deeply rooted in Washington law, where "courts in the administration of their probate powers look with kindness upon legacies and devises made to the use of charity and, rather than allow benevolent intentions to prove abortive, go to the full length of their ability to fulfill them." *In re Wilson's Estate*, 111 Wash. 491, 492, 191 Pac. 615 (1920); *see also De La Pole v. Lindley*, 118 Wash. 398, 399-400, 204 Pac. 15 (1922) ("Our chief concern here is to arrive at the intention of the testatrix . . . and to determine whether the bequest under attack was intended as a charitable bequest, because if it was for charitable purposes the law requires that it be sustained if it reasonably can be.").

2. The trial court properly concluded that equitable relief was appropriate to give effect to Ms. Meeks's attempted designation of charitable beneficiaries.

There is a tension in this case between Ms. Meeks's careful execution of the First and Second Amendments to the Trust as a means of changing charitable beneficiaries, and the Trust's terms forbidding amendment after the death of the first spouse. Without the court's intervention, Ms. Meeks's bequests would have failed despite her reasonable belief (i.e., her "mistake of

fact or law” in expressing her will) that she had properly exercised her power to change the charitable beneficiaries.

The primary duty of a court in interpreting a will is to ascertain the intent of the testator. *E.g., Estate of Bergau*, 103 Wn.2d 431, 435 (1985) (“When called upon to construe a will, the paramount duty of the court is to give effect to the testator’s intent.”). Similarly, in construing the terms of a trust, the settlor’s intent controls. *Eisenbach v. Schneider*, 140 Wn. App. 641, 651 166 P.3d 858 (2007); *see also* RCW 11.97.020 (rules of construction governing wills also apply to interpretation of trusts).

Here, the trial court found “clear, cogent, and convincing evidence that the intent of both Mr. Meeks and Ms. Meeks was to provide a power of appointment to the surviving spouse; that Ms. Meeks was the surviving spouse; and that she tried to exercise the power of appointment when she sought the assistance of Mr. Cleveland.” CP 434. Those findings are supported by substantial evidence in the record including the Trust itself, the plain language of the Amendments, and extrinsic evidence of Ms. Meeks’s intent, including her directions to a close family member indicating she intended to leave a meaningful portion of her estate to FHCRC.

Had Ms. Meeks been properly advised, it would have been a simple matter to draft a new will or codicil in which she referred to her power of appointment and exercised it in favor of the charitable beneficiaries she

mistakenly identified in the Second Amendment. Instead, her attorney sought to amend the Meeks Trust, which he had drafted and which prohibited such amendments. *See* RESTATEMENT § 12.1 cmt. j (reformation will lie where “the donor’s advisor or drafting agent” has “fail[ed] properly to formulate the language necessary to carry out the donor’s intention”). The trial court correctly concluded that equitable relief was appropriate in these circumstances because Ms. Meeks’s “reliance on . . . Mr. Cleveland . . . amounts to a mistake of fact or law supporting reformation of the documents to conform them to the unambiguous intent of Mr. and Ms. Meeks that she should be entitled to direct bequests to the charitable beneficiaries of her choice.” CP 434. Equitable relief serves two core policies of RCW 11.96A.125 and RCW 11.96A.127(1)—honoring intent over formality, and giving effect to intended charitable dispositions wherever possible.

No one seriously disputes Ms. Meeks’s intent to benefit the charities she identified in the Second Amendment. Instead, the Trustee repeatedly attempts to reframe the question as whether Mr. and Ms. Meeks made a *joint* mistake, or *jointly* intended to appoint Respondents as charitable beneficiaries. Opening Br. at 16-25. That argument conflates two distinct questions. First, did the trustors intend for the surviving spouse to have a power of appointment to designate charitable beneficiaries through his or her will? And second, did the surviving spouse intend to designate these

charitable beneficiaries to replace the ones originally designated? Here, both trustors plainly intended the surviving spouse to have the power to change the charitable beneficiaries after the first spouse had died. CP 10. The reservation of this power to the surviving spouse would be meaningless if it required the survivor to form “joint intent” with her now-deceased spouse as to the specific charities so appointed. To give effect to the joint intent of the trustors in providing the surviving spouse with a power of appointment, it is necessary to credit the individual intent of the surviving spouse in exercising that power. And the Trustee does not seriously dispute that Ms. Meeks intended to benefit the charitable organizations she included in her Second Amendment.

Because Ms. Meeks mistakenly attempted to implement her power to change the charitable beneficiaries through an incorrect mechanism authored by her attorney, the courts can and should exercise its equitable powers to ensure her intent, over the objections of the Trustee, carries the day. The trial court recognized the unfairness of allowing Ms. Meeks’s clear charitable intent to fail under these circumstances, and properly determined that equitable relief was appropriate.

3. The trial court did not abuse its discretion in fashioning an equitable remedy that ensures the intended charitable beneficiaries receive Trust distributions without the need for amendments to the Trust agreement.

The trial court had a choice of at least two basic approaches to equitably correct Ms. Meeks's mistake: reform the Trust to permit amendments, thus allowing the Second Amendment to take effect (including its changes to non-charitable beneficiaries); or reform the Will to add an exercise of the power of appointment consistent with the charitable distributions provided in the Second Amendment. It chose the latter, reasoning that activating the existing power of appointment was more appropriate than reforming the unamendable Trust. CP 330. Notably, none of the parties (charitable or individual) whose expectancies were negatively impacted by the court's fashioning of remedies have appeared or objected. *See* CP 141-42 (Sifferman statement that "Whether I receive anything from the estate is not important to me . . . what *is* important to me is that her charitable wishes are carried out").

The Trustee argues that the trial court should not have "created" a power of appointment "where one never existed." *E.g.*, Opening Br. at 3. But this is not a situation where the donor failed to reduce her intent to writing; Ms. Meeks prepared and executed a will, which was available to be reformed. *See* RESTATEMENT § 12.1 cmt. h, illus. 1 (reformation requires a

“document to reform”). She also reduced her intent to writing in the Second Amendment. The Trustee’s analysis misses the forest for the trees: to determine intent, Washington courts focus not on each document taken alone, but on the decedent’s plan as a whole. *See, e.g., In re Estate of Sherry*, 158 Wn. App. 69, 240 P.3d 1182 (2010) (reconciling intent of decedents’ separate wills). Moreover, reformation to support a power of appointment is appropriate under the maxim that “equity will aid the defective execution of a power.” RESTATEMENT § 19.10 cmt. b; *see also id.* cmt. e, illust. 6 (intent to exercise power of appointment may be recognized even without execution of a formal instrument); UNIF. PROBATE CODE § 2-704 CMT. (“a powerholder’s governing instrument mistakenly omitting a sufficiently specific reference to a particular power can be reformed to include the necessary reference.”).

The Trustee cites no authority for the notion that a court lacks authority to reform a will to exercise a power of appointment where the testator plainly would have done so if properly advised, but through a mistake of fact or law executed the wrong document. Reforming a will to give effect to the testator’s clear intent is well within the broad scope of equitable remedies authorized by RCW 11.96A.020, .060, .125, and .127. Indeed, the very nature of reformation as a form of equitable relief is to add to or modify

a document to include a provision that was intended, but mistakenly omitted.

That is precisely what the trial court did here.

E. The Trustee’s Newly-Raised Objections Are Baseless

For the first time on appeal, the Trustee raises a number of arguments never presented to the trial court. It is axiomatic that arguments raised for the first time on appeal are waived. RAP 2.5(a); *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012). This Court does not need to consider them. Were this Court to reach those arguments, it would find them baseless.

1. Ms. Meeks did not “moot” the Trust’s requirement for a bypass trust by failing to implement it before her death.

The Trustee argues that her predecessor trustee’s failure to formally establish the mandated bypass trust renders “moot” Section 4.C.1 of the Trust, which imposed that requirement. Opening Br. at 26. She further argues that “there was no need to create the bypass trust” due to hypothetical potential tax benefits of managing the trust differently than the Trust instructed. Opening Br. at 32. In addition to being raised for the first time on appeal, those arguments fly in the face of the plain language of the Trust.

Again, the trustee was required to fund a bypass trust at the time of Mr. Meeks’s death. CP 9. Assets in the bypass trust were subject to charitable distribution by Ms. Meeks as surviving spouse, through her power of appointment. CP 10-11 (power of appointment associated with bypass trust, not marital deduction trust).

Ignoring the plain language of the Trust instruments, the Trustee asserts that no bypass trust is needed, apparently based on her own hindsight judgment that avoiding “tax on any income generated” by the Trust, Opening Br. at 31, and securing a “step up in basis at the time of Mabel Meeks’ death,” *id.* at 32, was better than maximizing the couple’s estate tax exemption at the time of Lloyd Meeks’s death. But that judgment—that the court and the Trustee should *minimize* rather than *maximize* the funding of the bypass trust—would frustrate the unambiguous directive of the trustors. The trustee was instructed to use a segregated bypass trust to “secure the maximum exemption” upon the death of the first spouse. CP 9. *Only* to the extent the Trust assets exceeded the amount of the maximum exemption (\$1,000,000 in 2002) was the trustee required to fund a separate marital deduction trust. CP 11. Weighing the respective benefits of minimally or maximally funding a bypass trust is the proper domain of the trustors, and one they explicitly resolved in writing. The trustee had no authority to ignore or second-guess those commands.

2. The Trustee’s tax arguments were not preserved below, are factually unsupported, and are legally irrelevant.

The Trustee objects for the first time on appeal, and without evidence, that the trial court’s order may have speculative but “onerous” tax consequences for the Trust. Opening Br. at 25-33. This argument is waived.

Moreover, the Trustee's concerns about retroactive acknowledgement of the bypass trust are, at minimum, overblown. First, whether the Trust was a bypass trust or a QTIP trust is irrelevant. Either way, the Trust is a "simple trust" required to distribute all income to Ms. Meeks during her lifetime. CP 10, 11; *see* 26 U.S.C. § 651 (treatment of simple trust income).¹⁴ Accordingly, during Ms. Meeks's life all trust income would have been reported on her own individual Form 1040 tax return. The income generated from Trust assets after Mr. Meeks's death would be the same regardless of whether the income was reported as belonging to the Trust or to Ms. Meeks. Accordingly, the Trustee's concerns regarding theoretically unpaid income taxes from 2002 to the present, resulting tax penalties, and the three year statute of limitations on Ms. Meeks's Form 1040 is unfounded.

Second, the bulk of the ultimate distributions of the Trust following Ms. Meeks's death that are at issue here are charitable in nature, so the trial court's Order recognizing those beneficiaries will have no net effect on the taxes due from the estate. *See* 26 U.S.C. § 2055 (deduction from gross estate for transfers to non-profit entities). Moreover, any purported concern that assets in the bypass trust will not receive a step-up in basis for income tax

¹⁴ In contrast, a complex trust is a trust that does not meet the requirements for a simple trust. 26 U.S.C. § 643(h)(i)(2)(D). A complex trust can accumulate trust income, and therefore may owe its own income taxes.

purposes is nonsense. Although there is no step-up in basis for assets in a bypass trust, this would only matter if the beneficiary receiving the assets is subject to capital gains tax. The charitable organizations identified by Ms. Meeks are all “501(c)(3)” charities and are exempt from income taxation, including capital gains taxation.¹⁵ See 26 U.S.C. § 501(a).

Third, the form of the Trust determines its tax obligations, not the other way around. State law generally governs the allocation of estate tax burdens. *Riggs v. Del Drago*, 317 U.S. 95, 63 S.Ct. 109, 87 L.Ed. 106 (1942). Because the trustors intended the Trust assets to be funded into a bypass trust following the death of the first spouse (CP 9), that intent controls how the Trust’s taxes should have been paid. There is no evidence that any trustee (Ms. Meeks or Ms. Wuerch) has failed to properly account for the Trust’s tax obligations since 2002.

Finally, the Trustee’s discussion of QTIP and 26 U.S.C. § 2056 is irrelevant. QTIP requires an affirmative election on an estate tax return. 26 C.F.R. § 20.2056(b)-7(b)(4)(i). Here, there is no evidence that such an election was made. Indeed, there is no evidence that an estate tax return was filed or required to be filed. Nor did the Trustee make any argument before

¹⁵ Pursuant to the Trust, three individuals are to receive bequests equal to “the lesser of (i) ten thousand dollars (\$10,000) as adjusted 3% annually from the date herein to the date of distribution, or (ii) Five percent (5%).” Cash, available to pay these cash bequests, is not subject to “basis step-up.”

the trial court that previous tax elections (or the absence thereof) should be taken into account in fashioning an equitable remedy for Ms. Meeks's counsel-induced mistakes of fact and/or law.¹⁶

In short, the Trustee would prefer to ignore the Trust's unambiguous bypass trust requirement for fear that it might get complicated. She needn't worry. Failure to fund a bypass trust is a relatively common mistake made by surviving spouses when administering their deceased spouse's estate and not advised (or improperly advised) by counsel. The issue occurs often enough that articles and seminars frequently address the issue. *See, e.g., Funding Unfunded Testamentary Trusts*, 48-8 Univ. of Miami Law Center on Est. Planning ¶ 809 (Lexis 2014) (discussing "three plausible approaches to the problem of the missing bypass trust"). One option is the "constructive trust" approach, which treats the property that should have been funded into a bypass trust as being held in a "constructive trust" by the surviving spouse. *See Stansbury v. United States*, 543 F. Supp. 154 (N.D. Ill. 1982), *aff'd*, 735 F.2d 1367 (7th Cir. 1984) (constructive trust used to determine estate tax obligation); *see also Baker v. Leonard*, 120 Wn.2d 538, 547, 843 P.2d 1050

¹⁶ Moreover, the Trustee's argument falls victim to a classic logical fallacy. The Trustee is correct that in all QTIP trusts the surviving spouse has an income interest in the trust. 26 U.S.C. § 2056(b)(7)(B)(i)(II). But not all trusts in which the surviving spouse has an income interest are QTIP trusts. *Compare* CP 10 (bypass trust to distribute net income to the surviving spouse quarterly) *with* CP 11 (marital trust to distribute net income to the surviving spouse quarterly).

(1993) (constructive trusts may be imposed “when there is clear, cogent and convincing evidence of the basis for impressing the trust.”).¹⁷ Treating the Trust assets as having been held in a constructive bypass trust since 2002 is a reasonable solution for the Trustee in this case because all of the trust assets should have been funded into a bypass trust at Mr. Meeks’s death.

F. The Trial Court Properly Awarded FHCRC Its Attorney Fees.

1. The trial court appropriately awarded attorney fees and costs from the Trust assets to FHCRC because its efforts ensured the trustors’ intent was carried out.

Trial courts have discretion to award attorneys’ fees and costs from any party to any party in all TEDRA proceedings, based on any “relevant and appropriate” factors including whether the litigation benefits the trust or estate. RCW 11.96A.150; *In re Guardianship of Lamb*, 173 Wn.2d at 198. The trial court determined that “FHCRC’s actions throughout this proceeding benefited the Estate, the Trust and its beneficiaries by ascertaining the Trustors’ intent and by resolving the rights of all beneficiaries.” CP 435.

¹⁷ There are two common alternative approaches to remedying an unfunded bypass trust, neither of which is appropriate here. First, in some situations it is appropriate to treat the property due to the bypass trust as a debt against the estate of the surviving spouse’s estate, owed to the remaindermen of the bypass trust. *See Bailey v. Comm’r*, 741 F.2d 801 (5th Cir. 1984). This approach may be preferable to a constructive trust if only a portion of the assets should have been transferred to the bypass trust, and where allocating an appropriate portion or retroactively determining the appreciation the various assets would be difficult to determine. Second, if the property at issue was never titled into the name of the surviving spouse and the surviving spouse took no actions inconsistent with the ownership of the property, then it may be appropriate to treat the property as having vested directly to the bypass trust rather than held in constructive trust.

Accordingly, the court concluded that fees under RCW 11.96A.150 were “reasonable, necessary, and incurred in the best interests of the Trust, the Estate, and its beneficiaries. CP 437. The court found the hours expended were “reasonable” given that the case was “hard fought by the Trustee”; CP 472; applied the lodestar method, CP 473; and entered detailed findings supporting its award. CP 432-35, 471-72. There was no abuse of discretion.

2. Neither the Trustee’s petition for instructions, nor FHCRC’s motion, constitute a “will contest” limiting FHCRC’s status as a beneficiary under the Trust.

For the first time on appeal, and contrary to her own actions and arguments in the trial court, the Trustee claims that FHCRC’s conduct in the trial court constituted a “will contest” instead of a response to the Trustee’s TEDRA “Petition to Open Trust File” —and that, as such, FHCRC cannot be reimbursed for fees or costs. Opening Br. at 37. This argument is both waived and without merit.

This is not a will contest. “A will contest is a statutory proceeding governed by chapter 11.24 RCW.” *In re Estate of Kordon*, 157 Wn.2d 206, 209, 137 P.3d 16 (2006). A will contest allows a party to contest a will based on competency, undue influence, or similar causes affecting the validity of the will. RCW 11.24.010. In contrast, the Trustee commenced this action under TEDRA, chapter 11.96A RCW, seeking the following relief:

SECOND MATTER . . .

24. Petitioner requests that the court determine the validity and/or enforceability of the Amendments in light of the language in Section 3 of the Trust.

25. This matter is petitioned pursuant to RCW 11.96A.030(a) and (c).¹⁸

CP 6. Throughout the proceedings below, the parties and court treated this matter as an action to determine the Trust's charitable beneficiaries. *See also* CP 158 (FHCRC motion requesting the court to "rule that FHCRC is a proper beneficiary of the Meeks Trust"); CP 436-37 (order instructing Trustee as to identity of Trust beneficiaries). No party contested the validity of Ms. Meeks's Will; and the Trustee cites no authority for the notion that a court order reforming a decedent's will converts a TEDRA proceeding into a will contest.

G. FHCRC Should Be Awarded Attorney Fees On Appeal; The Trustee Should Not Be Allowed To Pay Herself Or Her Counsel From The Trust For This Appeal.

This Court should award Respondents their attorneys' fees on appeal. *See* RAP 18.1(a). TEDRA permits an award of attorneys' fees on appeal "in such amount and in such manner as the court determines to be equitable."

¹⁸ Citation *sic*; presumably Trustee intended to cite RCW 11.96A.030(2)(a) ("The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset") and (2)(c) ("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, community property agreements, and other writings[.]").

RCW 11.96A.150(1). In these circumstances, it would be appropriate and equitable to award FHCRC its fees on appeal and tax them against the Trustee individually to avoid further depleting the Trust. *See In re Howerton's Estate*, 65 Wn.2d 868, 870, 400 P.2d 85 (1965) (executrix was “not a proper party to this appeal” in her representative capacity, so costs “should not be assessed against the estate”; assessing fees against appellants including executrix in their individual capacities). Failing that, because ascertaining and defending Ms. Meeks’s charitable intent serves an important public policy—and for the same reasons the trial court awarded FHCRC fees below, *supra* at 43—this Court should order that FHCRC’s attorney fees be paid from Trust assets.

Moreover, the Trustee should not be awarded any of her own fees, or be permitted to pay her counsel from the Trust, for this appeal. The Trustee’s appeal is without merit, is in violation of its duties of undivided loyalty and impartiality, and further saps the Trust’s assets.¹⁹

The Trustee objects that FHCRC “wrongfully inserted itself” into the proceedings and “was never a qualified beneficiary,” Opening Br. at 38; and thus asks for reimbursement of the Trustee’s fees (both here and below) for

¹⁹ FHCRC advised the Trustee, by letter dated July 28, 2017, that the Trustee had no standing and that this appeal was prohibited under long-standing Washington law. In the letter, FHCRC advised the Trustee that if the Trustee did not withdraw her appeal, FHCRC would “bring this letter to the Court of Appeals’ attention, in support of our request that no fees be awarded or paid to the Trustee or her counsel in connection with her appeal.”

“the frivolous action commenced by [FHCRC].” Opening Br. at 37. But it was the Trustee herself who commenced this action, CP 3-7; who requested instructions as to “the validity and/or enforceability of the Amendments,” CP 6; and who initially identified FHCRC and the other Respondents as “eligible beneficiaries” entitled to participate in the proceedings. CP 47-48, 111-12.²⁰ By answering that invitation, FHCRC was able to propose an equitable solution to the Trustee’s dilemma, allowing both the Trust and Ms. Meeks’s charitable intent to be given full effect. Payment of FHCRC’s costs and denial of the Trustee’s fees and costs is appropriate.

V. CONCLUSION

The Trustee improperly appealed from an order instructing her as to the identity of the Trust’s beneficiaries; she lacks standing and this appeal should be dismissed. In any event, the trial court correctly determined that equitable relief pursuant to longstanding common law and RCW 11.96A.125 to correct a mistake of fact and/or law was necessary to give effect to Ms. Meeks’s clear intent to modify the Trust’s charitable beneficiaries. The trial court’s reformation of Ms. Meeks’s will to reflect an exercise of her power of appointment was not an abuse of discretion. The trial court’s Order and its follow-on award of attorneys’ fees should be affirmed.

²⁰ The TEDRA definition of “parties” includes any “person who has an interest in the subject of the particular proceeding[.]” RCW 11.96A.030(5)(i).

RESPECTFULLY SUBMITTED this 6th day of October 2017.

LANE POWELL PC

By: s/Gail E. Mautner
Gail E. Mautner, WSBA No. 13161
Jonathon Bashford, WSBA No. 39299
LANE POWELL PC
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
Telephone: 206.223.7000
Facsimile: 206.223.7107
Email: mautnerg@lanepowell.com
Email: bashfordj@lanepowell.com
*Attorneys for Respondent Fred Hutchinson
Cancer Research Center*

012742.0548/7082241.5

DECLARATION OF SERVICE

I certify and declare under penalty of perjury under the laws of the State of Washington and the United States as follows:

On October 6, 2017, declarant caused the document to which this Declaration is attached to be delivered to the following persons as indicated:

John Pierce, Esq.
Law Office of John Pierce, P.S.
505 W. Riverside Avenue, Suite 518
Spokane, WA 99201
john@lawps.com

by **Electronic Mail**
 by **Facsimile**
Transmission
 by **First Class Mail**
 by **Overnight**
Delivery

M. Gregory Embrey, Esq.
Witherspoon Kelley
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
mge@witherspoonkelley.com

by **Electronic Mail**
 by **Facsimile**
Transmission
 by **First Class Mail**
 by **Overnight**
Delivery

RoseMary Reed, Esq.
Karolyn Hicks
Stokes Lawrence, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101-2393
RoseMary.Reed@stokeslaw.com
kah@stokeslaw.com

by **Electronic Mail**
 by **Facsimile**
Transmission
 by **First Class Mail**
 by **Hand Delivery**
 by **Overnight**
Delivery

James A. McPhee, Esq.
Witherspoon Brajcich McPhee, PLLC
714 Washington Mutual Financial Center
601 W Main Avenue
Spokane WA 99201-0677
Phone: (509) 455-9077
Fax: (509) 624-6441
jmcphee@workwith.com

by **Electronic Mail**
 by **Facsimile**
Transmission
 by **First Class Mail**
 by **Hand Delivery**
 by **Overnight**
Delivery

Executed at Seattle, Washington, this 6th day of October 2017.

s/Ann Gabu

Ann Gabu
LANE POWELL PC
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
Telephone: 206.223.7000
Facsimile: 206.223.7107
Email: gabua@lanepowell.com

LANE POWELL PC

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- kah@stokeslaw.com
- mge@witherspoonkelley.com
- mpr@stokeslaw.com
- rosemary.reed@stokeslaw.com

Comments:

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No. 352706

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

In Re:

ESTATE OF MABLE MEEKS; and
L/M MEEKS No. 1 TRUST

**COMMUNITY COLLEGES OF SPOKANE'S JOINDER IN FRED
HUTCHINSON CANCER RESEARCH CENTER'S RESPONSE TO
BRIEF OF APPELLANTS**

M. GREGORY EMBREY, WSBA No. 42391
Witherspoon Kelley
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814
Telephone: (208) 667-4000
Facsimile: (208) 667-8470
Email: mge@witherspoonkelley.com
Attorneys for Community Colleges of
Spokane

I. JOINDER AND REQUESTED RELIEF

Community Colleges of Spokane, a community college district, ("CCS"), hereby joins in Fred Hutchinson Cancer Research Center's Response to Brief of Appellants filed with the Court on October 6, 2017.

By this joinder, CCS incorporates Fred Hutchinson Cancer Research Center's arguments and authorities as though fully set forth herein.

DATED this 6th day of October, 2017.

WITHERSPOON KELLEY



M. GREGORY EMBREY, WSBA No. 42391
Attorneys for Respondent Community Colleges of
Spokane

CERTIFICATE OF SERVICE

On the 6th day of October, 2017, I caused a true and correct copy of the foregoing to be served in the manner(s) indicated below to the following:

John Pierce
Law Offices of John Pierce, P.S.
505 West Riverside Avenue, Suite 518
Spokane, WA 99201

Via US Mail
Via Email to:
john@lawps.com

Attorney for Appellant

RoseMary Reed
Stokes Lawrence, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101

Via US Mail
Via Email to:
RoseMary.reed@stokeslaw.com

*Attorney for the University of
Washington*

Gail E. Mautner
Jonathon Bashford
Lane Powell
P.O. Box 91302
1420 Fifth Avenue, Suite 4200
Seattle, WA 98111

Via US Mail
Via Email to:
Mautnerg@lanepowell.com
Bashfordj@lanepowell.com

*Attorneys for Fred Hutchinson Cancer
Research Center*

DATED this 6th day of October, 2017, at Coeur d'Alene, Idaho.



JENNIFER KAY

No. 352706-III

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

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

Appellant,

v.

FRED HUTCHINSON CANCER RESEARCH CENTER and
COMMUNITY COLLEGES OF SPOKANE,

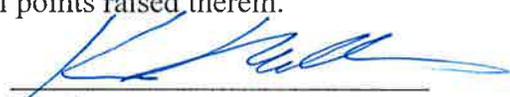
Respondents.

**JOINDER OF UNIVERSITY OF WASHINGTON IN THE BRIEF
OF RESPONDENT FRED HUTCHINSON CANCER RESEARCH
CENTER**

Karolyn Hicks (WSBA #30418)
RoseMary Reed (WSBA #34497)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, Washington 98101-2393
(206) 626-6000
Attorneys for University of
Washington

Pursuant to Rule of Appellate Procedure 10.1(h), the University of Washington (“UW”), who is also a residuary beneficiary in the Mabel and Leonard Meeks 1994 Trust, as Amended, respectfully requests the Court exercise its authorize to accept the UW’s Joinder in the Brief of Respondent Fred Hutchinson Cancer Research Center.

The UW hereby joins in the Brief of Respondent Fred Hutchinson Cancer Research Center, agreeing on all points raised therein.

By: 
Karolyn Hicks (WSBA #30418)
RoseMary Reed (WSBA #34497)
Attorneys for UNIVERSITY OF
WASHINGTON
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
(206) 626-6000

Attorneys for University of Washington

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 6th day of October, 2017, I caused a true and correct copy of the foregoing document, “Joinder of University of Washington in the Brief of Respondent Fred Hutchinson Cancer Research Center,” to be delivered by mail and electronic mail to the following counsel of record:

Counsel for Trustee:

John Pierce
Law Office of John Pierce, PS
505 W Riverside Avenue, Suite 518
Spokane, WA 99201-0500

Counsel for Fred Hutchinson Cancer Research Center:

Gail E. Mautner
Jonathan Bashford
Lane Powell PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101

Counsel for Community Colleges of Spokane:

M. Gregory Embrey
Witherspoon Kelley
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, ID 83814-2146

Dated this 6th of October, 2017, at Seattle, Washington.



Karolyn Hicks (WSBA #30418)
Attorney for
Stokes Lawrence, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
(206) 626-6000
Fax: (206) 464-1496
[Insert Attorney's E-Mail
Address]@stokeslaw.com

STOKES LAWRENCE, P.S.

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- mge@witherspoonkelley.com
- rosemary.reed@stokeslaw.com

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Seattle, WA, 98101
Phone: (206) 626-6000

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