

FILED  
Court of Appeals  
Division III  
State of Washington  
8/7/2018 12:28 PM

No. 35737-6-III

---

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

IN RE THE ESTATE OF  
K. WENDELL REUGH, Deceased

JoLynn Reugh-Kovalsky, Mark Reugh, and Jim Reugh,

Petitioners.

---

REPLY BRIEF OF APPELLANTS REUGH-KOVALSKY AND GILL

---

Amber R. Myrick, WSBA #24576  
Amber R. Myrick, P.A.  
1087 W. River Street, Suite 150  
Boise, ID 83702  
(208) 982-0005

Philip A. Talmadge, WSBA #6973  
Aaron P. Orheim, WSBA #47670  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Appellants Reugh-Kovalsky and Gill

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii-iv
A. INTRODUCTION .....	1
B. REPLY ON STATEMENT OF THE CASE .....	1
C. ARGUMENT .....	2
(1) <u>The Standard of Review Is <i>De Novo</i></u> .....	2
(2) <u>INWCF Lacks Standing to Challenge the Will</u> .....	3
(a) <u>INWCF Fails to Show It Had Standing to Remove Reugh-Kovalsky and Gill</u> .....	5
(b) <u>NWTM is Wrong That a Restatement of the Law Supplants Controlling Statutory Law</u> .....	8
(c) <u>The Parties Cannot and Did Not Consent to Non-Party Standing</u> .....	10
(2) <u>The Personal Representatives Should Not Have Been Removed</u> .....	11
(a) <u>NWTM's Raises Several Arguments for the First Time on Appeal That Should Be Disregarded</u> .....	11
(b) <u>Reugh-Kovalsky and Gill Did Not Breach Their Fiduciary Duties</u> .....	13
(c) <u>There Was No Conflict of Interest Where the Trust Absolved Such Conflicts</u> .....	16
(d) <u>There Was No Basis to Remove Gill as Personal Representative</u> .....	17

(3)	<u>Appointing NWTM as Successor Trustee Was Improper</u> .....	18
(4)	<u>Reugh-Kovalsky and Gill Are Entitled to Fees</u> .....	21
D.	CONCLUSION.....	21

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

*ATU Legislative Council of Washington State v. State*,  
145 Wn.2d 544, 40 P.3d 656 (2002).....8

*Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995).....9, 10

*Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389,  
879 P.2d 276 (1994).....9, 10

*In re Estate of Ardell*, 96 Wn. App. 708, 980 P.2d 771,  
review denied, 139 Wn.2d 1011 (1999).....6, 10, 11

*In re Estate of Becker*, 177 Wn.2d 242, 298 P.3d 720 (2013).....5, 8

*In re Estate of Bobbitt*, 60 Wn. App. 630, 806 P.2d 254 (1991) ..... 9-10

*In re Estate of Bowers*, 132 Wn. App. 334, 131 P.3d 916 (2006) .....3

*In re Estate of Ehlers*, 80 Wn. App. 751, 911 P.2d 1017 (1996).....16

*In re Estate of Griffith*, \_\_ Wn. App. 2d \_\_,  
2018 WL 3629458 (2018).....12, 15

*In re Estate of Hitchcock*, 140 Wn. App. 526,  
167 P.3d 1180 (2007)..... *passim*

*In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004).....6, 7

*In re Estate of Nelson*, 85 Wn.2d 602, 537 P.2d 765 (1975).....3

*In re Peabody’s Estate*, 169 Wash. 65, 13 P.2d 431 (1932).....10

*In re Verah Landon Testamentary Trust*, 3 Wn. App. 2d 1006,  
2018 WL 1611620 (2018).....8

*Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*,  
146 Wn.2d 207, 45 P.3d 186 (2002).....5

*Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011) .....5

*Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536,  
55 P.3d 619 (2002).....9, 10

*Matter of Estate of Meeks*, \_\_ Wn. App. 2d \_\_,  
421 P.3d 963 (2018).....18

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

*Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*,  
172 Wn. App. 799, 292 P.3d 147 (2013).....3

<i>Taylor Pipe Indus. Inc v. State, Dep’t of Rev.</i> , 105 Wn.2d 318, 715 P.2d 123 (1986), <i>judgment vacated by Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Rev.</i> , 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).....	5
<i>Washington Fed. Sav. v. Klein</i> , 177 Wn. App. 22, 311 P.3d 53 (2013), <i>review denied</i> , 179 Wn.2d 1019 (2014).....	12

Other Cases

<i>Clymer v. Mayo</i> , 473 N.E.2d 1084 (Mass. 1985) .....	4
--	---

Statutes

RCW 4.04.010 .....	9
RCW 11.02.005(6).....	4
RCW 11.48.010 .....	15, 17
RCW 11.68.070 .....	<i>passim</i>
RCW 11.96A.080.....	15, 17
RCW 11.96A.125.....	18

Rules and Regulations

CR 2.5(a).....	12
RAP 2.5(a) .....	5
RAP 2.5(a)(1).....	5

Other Authorities

BLACK’S LAW DICTIONARY 484 (8th ed. 2004).....	4
<i>Restatement (Second) of Trusts</i> § 282(2).....	8, 9, 10, 12

A. INTRODUCTION

With the help of Northwest Trustee and Management Services LLC (“NWTM”), Inland Northwest Community Foundation (“INWCF”) executed a hostile takeover of the Estate of the late K. Wendell Reugh (“Estate”).<sup>1</sup> Despite his clear intent by executing a nonintervention will and including multiple provisions leaving his affairs to his family and closest friends, the trial court allowed a remote residuary beneficiary named in the savings clause of an improperly funded Trust Instrument to usurp his wishes and oust JoLynn Reugh-Kovalsky and Steve Gill as his personal representatives.

Through their arguments on appeal, INWCF and NWTM show no respect for Reugh’s clear intent and little understanding of the laws of this state. INWCF lacked standing to seek the removal of Reugh-Kovalsky and Gill as the Estate’s co-personal representatives, and their removal was unjustified, as was the appointment of NWTM in direct contradiction to the successor clause in the Will. Reversal is warranted.

B. REPLY ON STATEMENT OF THE CASE

INWCF and NWTM make several material misrepresentations

---

<sup>1</sup> As will be noted *infra*, NWTM is hardly and impartial personal representative. It merely parrots the arguments of INWCF, ignoring the interests of Reugh’s actual beneficiaries.

regarding the facts, discussed in greater detail below.<sup>2</sup> But there is no debate that the co-personal representatives, Reugh-Kovalsky and Gill, had “unrestricted” nonintervention powers confirmed by the Will and the trial court’s order admitting the Reugh Will to probate. CP 19, 46. These nonintervention powers prevented INWCF and the court from removing Reugh-Kovalsky and Gill as evidenced by recent Supreme Court precedent. There is also no debate that Reugh authorized his personal representatives *in two places* in the Trust Instrument to advance or receive assets from the Estate. CP 58, 60. Thus, any alleged “conflict” that Reugh-Kovalsky had as both a personal representative and beneficiary is immaterial. Indeed, it was Reugh’s wish that his children manage his affairs, as evidenced by the successor clause in the Will which provided that his children choose the personal representatives of his estate by majority vote. CP 337. Despite their best efforts to ignore or obscure them, INWCF and NWTM cannot avoid these facts.

### C. ARGUMENT

#### (1) The Standard of Review Is *De Novo*

---

<sup>2</sup> For example, they repeatedly assert that the residue left by the trust (which is actually the decedent’s residuary estate as the trust held no assets at the decedent’s date of death) is \$16 million. *See, e.g.*, INWCF br. at 19; NWTM br. at 34. Yet, they know full well that residue will be much less because Reugh provided that the residue bears the taxes and expenses owed by the Estate, as well as the costs of administration, and increase and decrease in value of the assets during administration. CP 148, 199-200.

Contrary to INWCF's assertion, there is no "inconsistency in the case law" when it comes to the standard of review in this case. INWCF br. at 11. The applicable standard is clearly *de novo* review by this Court. "Decisions based on declarations, affidavits and written documents are reviewed *de novo*." *In re Estate of Bowers*, 132 Wn. App. 334, 339, 131 P.3d 916 (2006). "[W]here the trial court did not have an 'opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony,' appellate review of factual findings and legal conclusions is *de novo*." *Id.* (quoting *In re Estate of Nelson*, 85 Wn.2d 602, 605-06, 537 P.2d 765 (1975)). Moreover, probate proceedings are generally "reviewed *de novo* on the entire record." *Id.*

Additionally, Reugh's children correctly note that the Court's decision largely turns on questions of statutory interpretation and jurisdictional power to remove the personal representatives, both of which are reviewed *de novo*. Appellant Beneficiaries br. at 12 (citing *Matter of Estate of Rathbone*, 190 Wn.2d 332, 338, 412 P.3d 1283 (2018), and *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147 (2013)). INWCF and NWTM do not refute this point.

(2) INWCF Lacks Standing to Challenge the Will

INWCF and NWTM spend a great deal of effort to escape the clear rule in Washington that "only heirs, devisees, legatees, or creditors of an

estate have the right to file a petition to remove or restrict a personal representative's nonintervention powers." *In re Estate of Hitchcock*, 140 Wn. App. 526, 532, 167 P.3d 1180 (2007) (citing RCW 11.68.070). "Heirs, devisees, and legatees" are not ambiguous terms; they do not require the Court to consider foreign authority or appeals to statutory interpretation. *See* INWCF br. at 16 (citing *Clymer v. Mayo*, 473 N.E.2d 1084, 1092 (Mass. 1985)). Rather, they are defined in statute and by decades of clear common law:

A 'devisee' is defined as '[a] recipient of property *by will*.'... A 'legatee' is '[o]ne who is named *in a will* to take personal property; one who has received a legacy or bequest.'... An heir is any person who is entitled by law to receive the decedent's real or personal property if the decedent died intestate.

*Hitchcock*, 140 Wn. App. 526 (citing BLACK'S LAW DICTIONARY, 484 (8th ed. 2004); RCW 11.02.005(6)).

INWCF is named *nowhere* in the Will and certainly is not entitled to receive property had Reugh died intestate. Rather, it is the remote, residuary beneficiary of an *inter vivos trust* that was never properly funded. Again, INWCF expends great energy to equate its remote interest with that of an heir, devisee, or legatee. But it cannot escape the holding in *Hitchcock* that the "beneficiary of [a] trust...lacks standing to file a petition to remove the Personal Representatives" of a will. *Id.* at 532-33. INWCF's effort to

dodge this rule is telling. *Hitchcock* controls; INWCF lacked standing.

(a) INWCF Fails to Show It Had Standing to Remove Reugh-Kovalsky and Gill

INWCF asserts several baseless arguments to dodge the plain rule that it lacks standing, as a remote contingent beneficiary of an unfunded *inter vivos* trust, to sue to remove the personal representatives of a nonintervention will. First, INWCF argues that Reugh-Kovalsky and Gill cannot make a standing argument because they failed to raise the argument below.<sup>3</sup> INWCF br. at 14-15; *see also*, NWTM br. at 23-25. That is plainly wrong – “standing is a jurisdictional issue and may be raised for the first time on appeal.” *Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213 n.3, 45 P.3d 186 (2002); RAP 2.5(a); *see also, e.g., In re Estate of Becker*, 177 Wn.2d 242, 246, 298 P.3d 720 (2013) (describing standing as a “threshold question”); *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011) (“Standing is jurisdictional.”). It is immaterial whether the issue was explicitly argued below.<sup>4</sup> RAP 2.5(a)(1).

---

<sup>3</sup> NWTM joins in this baseless argument. NWTM br. at 23-25, 38 (asserting that “all questions of a party’s standing are waived on appeal if they are not brought before the trial court.”). The authority NWTM cites for this proposition long predate the recent cases cited here where the Supreme Court held that “standing” is jurisdictional and “can be raised for the first time on appeal.” NWTM br. at 24 (citing *Taylor Pipe Indus. Inc v. State, Dep’t of Rev.*, 105 Wn.2d 318, 715 P.2d 123 (1986), *judgment vacated by Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Rev.*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987)).

<sup>4</sup> As Reugh’s children point out in their brief, jurisdictional issues, including INWCF’s failure to invoke jurisdiction under RCW 11.68.070, were argued below. Appellant Beneficiaries br. at 29-30 (citing CP 109-29).

Second, INWCF tries to distort the issue, claiming that a remote trust beneficiary's lack of jurisdiction to sue under RCW 11.68.070 is somehow different than a lack of standing. See INWCF br. at 12, 14 n.4. INWCF quotes a footnote in *Rathbone* discussing "a court's power to act in nonintervention probates." 190 Wn.2d at 339 n.4. (emphasis added). However, that footnote discussing a court's power does not alter RCW 11.68.070 and *Hitchcock's* clear direction that remote trust beneficiaries lack power to remove personal representatives in nonintervention wills. That is why before allowing an action to remove a personal representative in a nonintervention will, courts must "establish...jurisdiction over the issue" and determine whether the party has "standing to petition" to remove. *In re Estate of Ardell*, 96 Wn. App. 708, 717, 980 P.2d 771, review denied, 139 Wn.2d 1011 (1999). Regardless of INWCF's confusion over jurisdictional terms, its lack of power to sue is a threshold question that should have prevented the removal order below.

Third, INWCF misquotes precedent to support its argument. INWCF quotes *In re Estate of Jones*, 152 Wn.2d 1, 9, 93 P.3d 147 (2004) as follows: "[U]nder RCW 11.68.070, [the beneficiaries] had the statutory authority to invoke jurisdiction and properly did so." INWCF br. at 13 (alterations in br.). Properly quoted, that passage reads: "under RCW 11.68.070, Peter and Jeffery, as heirs of the estate, had the statutory

authority to invoke jurisdiction and properly did so.” *Jones*, 152 Wn.2d at 9 (emphasis added). “Beneficiaries” are not “heirs.” As discussed above, heirs are persons who can inherit intestate and are specifically authorized to invoke the jurisdiction to remove personal representatives under RCW 11.68.070. *Jones* does not stand for the proposition that *all beneficiaries* of an estate, however remote, have standing.<sup>5</sup> INWCF’s deliberate misquotation of that opinion is telling.

Fourth, INWCF attempts to characterize its interest as that of a devisee or legatee because it is the residuary beneficiary of a trust mentioned in a “standard pour-over will.” INWCF br. at 15. But later, INWCF attempts to dodge *Hitchcock*, arguing that the rule against standing for trust beneficiaries does not apply to the “novel circumstance presented here.” INWCF br. at 17. INWCF cannot have it both ways. Either this is a “standard” situation where trust beneficiaries lack standing to intervene in nonintervention wills, or the circumstances are “novel” because Reugh did not follow the proper procedures of creating a valid trust. Either way INWCF lacks standing.

---

<sup>5</sup> Similarly, there is no support for INWCF’s argument that *Hitchcock*’s holding is limited to “testamentary trusts” but not beneficiaries of a trust INWCF br. at 17. The opinion contains no such limitation. The opinion directly holds that “Under RCW 11.68.070, only heirs, devisees, legatees, or creditors of an estate have the right to file a petition to remove or restrict a personal representative’s nonintervention powers.” 140 Wn. App. at 532.

Finally, INWCF argues that the Legislature would not intend exclude trust beneficiaries from suing to remove personal representatives where it has condoned the use of properly executed pour-over wills. INWCF br. at 16-17. But “the legislature is presumed to be aware of judicial interpretations of statutes,” *ATU Legislative Council of Washington State v. State*, 145 Wn.2d 544, 554, 40 P.3d 656 (2002), and it has not overruled *Hitchcock*. Rather, the Legislature chose to uphold the policy behind nonintervention wills by refusing to allow remote trust beneficiaries the power to challenge personal representatives. RCW 11.68.070. This policy was reaffirmed as recently as this March by the Supreme Court in *Rathbone*. 190 Wn.2d at 341 (noting that even in light of TEDRA, courts have very “limited authority” to challenge actions of personal representatives administering non-intervention wills).<sup>6</sup>

(b) NWTM is Wrong That a Restatement of the Law Supplants Controlling Statutory Law

NWTM incorrectly argues that Section 282(2) of the *Restatement (Second) of Trusts* gives INWCF “the right, as a trust beneficiary...to remove [Reugh-Kovalsky and Gill] as co-personal representatives under

---

<sup>6</sup> The key point that TEDRA did not alter the nonintervention powers of non-intervention wills, distinguishes cases that do not involve nonintervention wills. *See, e.g., In re Verah Landon Testamentary Trust*, 3 Wn. App. 2d 1006, 2018 WL 1611620 (2018) (unpublished decision that did not involve a nonintervention will or the removal of personal representatives finding beneficiary had standing but cautioning that standing is “relevant [to the] proceedings, not the estate itself.” *Id.* at \*4 (citing *Becker*, 177 Wn.2d at 247)).

RCW 11.68.070.” NWTM br. at 23. That is plainly wrong. RCW 11.68.070 is unambiguous that only “heirs, devisees, and legatees” may seek to remove the personal representatives of a will. It is the clear law in Washington that a trust beneficiary may not sue to remove a personal representative as explained by the court in *Hitchcock*.

Our Supreme Court has repeatedly held that courts may not apply Restatements over the laws of this State. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 401, 879 P.2d 276 (1994) (reversible error to rely on *Restatement (Second) of Contracts* when the statute of frauds, RCW 19.36.010, applied); *Berg v. Ting*, 125 Wn.2d 544, 562, 886 P.2d 564 (1995) (reversible error to rely on Restatement that “does not reflect Washington law”); *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 550, 55 P.3d 619 (2002) (rejecting the *Restatement (Second) of Torts* contributory negligence bar to recovery because RCW 4.22.005’s comparative fault principles applied). After all, a Restatement is merely a summary of the national common law, and the common law only applies so far as it is consistent with the laws of Washington. RCW 4.04.010.

Here, the *Restatement (Second) of Trusts* does not reflect the law in Washington. Nonintervention wills are creatures of statute, and “the Superior Court’s jurisdiction over nonintervention probate proceedings *depends wholly on the legislative scheme.*” *In re Estate of Bobbitt*, 60 Wn.

App. 630, 632, 806 P.2d 254 (1991) (emphasis added). This was recently reaffirmed by the Court in *Rathbone*, writing, “Once a court declares a nonintervention estate solvent, the court has no role in the administration of the estate *except under narrow, statutorily created exceptions* that give courts limited authority to intervene.” 190 Wn.2d 339 (emphasis added). Section 282(2) of the *Restatement (Second) of Trusts* simply does not reflect the law in Washington, and no Washington decision has cited that section before. Insofar as it allows a remote residuary beneficiary to sue to remove the personal representative of a nonintervention will, the Restatement is inconsistent with RCW 11.68.070, *Hitchcock* and *Rathbone*, and must not be followed per *Greaves, Berg, Baik, supra*.

(c) The Parties Cannot and Did Not Consent to Non-Party Standing

NWTM also argues that because Reugh-Kovalsky and Gill consented to jurisdiction in the TEDRA petition, they “invoked the trial court’s jurisdiction to hear all matters concerning the Estate and Trust under RCW 11.96A.040.” NWTM br. at 13-15 (citing *Ardell*, 96 Wn. App. 708). Not true. The Supreme Court held long ago that when it comes to nonintervention wills, “The jurisdiction of the probate court can only be invoked by others in those cases *where the statute has conferred the right*.” *In re Peabody’s Estate*, 169 Wash. 65, 69, 13 P.2d 431 (1932) (emphasis

added). That is why in *Ardell*, this Court had to determine whether the party seeking to remove the personal representative “had standing to petition for...removal.” 96 Wn. App. at 717. This Court concluded that she did because she met the definition of “heir, devisee or legatee” under RCW 11.68.070. Remote trust beneficiaries, like INWCF, do not.

Moreover, the Supreme Court rejected a similar argument just months ago in *Rathbone*. The Court rejected the argument that TEDRA gives courts authority over “any dispute over the administration of an estate” when the testator intended “that courts not be involved in the administration of [the] estate” by executing a nonintervention will. 190 Wn.2d at 245-46. Because of the policy behind nonintervention wills, RCW 11.68.070 explicitly limits the persons who have standing to remove personal representatives.

INWCF lacks standing to remove Reugh-Kovalsky and Gill. But even if it had standing, INWCF and NWTM fail to show that removal was justified.

(2) The Personal Representatives Should Not Have Been Removed

(a) NWTM’s Raises Several Arguments for the First Time on Appeal That Should Be Disregarded

NWTM appears in this action as the newly-appointed personal representative of the Estate and raises several arguments that were not raised

in the court below. Many of which relate to the validity of the trust, which is not an issue before this court. For example, NWTM argues for the first time that Reugh-Kovalsky and Gill breached a duty owed under the *Restatement (Second) of Trusts*, § 282(2)<sup>7</sup> by allegedly failing to properly answer a trust contest petition in their capacity as co-personal representatives. NWTM br. at 29. It also argues for the first time that Reugh-Kovalsky and Gill had a duty to “raise affirmative defenses” to the trust contest petition. NWTM br. at 35.<sup>8</sup>

These arguments should be disregarded, because they were never raised in the court below. *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013), *review denied*, 179 Wn.2d 1019 (2014) (“[A]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.”); CR 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”). Regardless, Reugh-Kovalsky and Gill breached no duty owed to INWCF

---

<sup>7</sup> Again, this section of the Restatement, *which was not cited below*, has never been cited by a Washington court and does not reflect the law in Washington.

<sup>8</sup> NWTM cites no authority for the proposition that Reugh-Kovalsky and Gill had a duty to assert affirmative defenses. This is a baseless argument which essentially asserts a legal malpractice claim against the co-personal representatives based on a disagreement over litigation choices. *See, e.g., In re Estate of Griffith*, \_\_ Wn. App. 2d \_\_, 2018 WL 3629458 (2018) (no basis to oust personal representatives of an estate where parents of deceased child disagreed with the personal representative’s decision to raise or not raise certain claims and to arbitrate dispute). The argument is especially meritless where the trust was invalid, an issue still pending before the trial court pursuant to a valid TEDRA petition.

where they worked in good faith to administer and settle the Estate.

(b) Reugh-Kovalsky and Gill Did Not Breach Their Fiduciary Duties

Contrary to NWTM's baseless assertions, Reugh-Kovalsky and Gill did not breach any fiduciary duty owed as personal representatives of the Estate. Reugh-Kovalsky and Gill diligently administered the Estate. They arranged for state and federal taxes to be assessed on the sizable and complex estate, notified and paid named beneficiaries (notably the family, Doreen Decker, and several named charities who had been given specific bequests), and warned them when the trust's validity was questioned. *See* CP 263-76; 446-81; Reugh-Kovalsky and Gill br. at 32-35.

Importantly, Reugh-Kovalsky and Gill informed the named beneficiaries who had received distribution that if "the Trust is declared invalid, then Wendell Reugh's children propose to personally reimburse the Trust on behalf of each beneficiary who has received a distribution so that each beneficiary may retain the amount they previously received." CP 263-76. By ensuring in this way that Reugh's named beneficiaries would be paid – including the charitable organizations who were given specific bequests – Reugh-Kovalsky and Gill met their duty to "defend the terms of the trust" in good faith, contrary to NWTM's argument. *See* NWTM br. at

34.<sup>9</sup> They informed the named beneficiaries did not want to “cause any hardship to any individual or charitable organization that received a distribution.” *Id.* They merely carried out their duties to determine the validity of the Trust Instrument.

The only controversy involved the residuary estate, which made INWCF the backup option in the unfunded Trust Instrument because Reugh never set up a foundation during his lifetime. Reugh-Kovalsky and Gill followed the then-acting Estate attorney’s advice not to distribute the residuary immediately, even in the face of INWCF’s repeated demands to distribute the funds. CP 569. The Reugh children did not believe that the Trust Instrument reflected their father’s intent, given that he never set up a charitable foundation or funded the trust during his lifetime. Despite their doubts, Reugh-Kovalsky and Gill engaged with INWCF.<sup>10</sup> The Estate’s CPA offered a sizeable amount to open a dialogue to resolve the issue, CP

---

<sup>9</sup> Reugh-Kovalsky and Gill acted on advice of the then-acting Estate attorney and distributed these amounts listed in the Trust from the Estate, even though no property was ever transferred to the Trust, as though they were bequests made in the Will. They did this out of a good faith intent to follow Reugh’s wishes even though they questioned the validity of the unfunded Trust.

<sup>10</sup> INWCF argues that Reugh-Kovalsky and Gill failed a duty to disclose the exact size of the Estate or possible residuary under the unfunded trust. INWCF br. at 20. Yet they fail to point to a statutory obligation to do so, and Reugh-Kovalsky and Gill were advised not to distribute the residuary or make any promises until all the taxes were accounted for. As discussed *supra*, INWCF and NWTM repeatedly misrepresent the size of the residuary because they fail to account for the fact the it bears the taxes and expenses owed by all other beneficiaries, as well as the costs of administration, and the increase or decrease in value of the assets during administration. CP 148, 199-200.

585, which RCW 11.48.010 specifically allows.

INWCF and NWTM ignore Reugh-Kovalsky and Gill obligations to “settle the estate...in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate and nonprobate estate.” RCW 11.48.010. Division I recently rejected a similar effort to oust a personal representative for attempting to settle an estate’s dispute in *In re Estate of Griffith, supra*. In that case, the parents of a child who was killed in an auto accident sought to oust a personal representative who agreed to arbitration of the wrongful death claim and who threatened them with indemnity claims. The court found that the personal representatives did not breach any fiduciary duty or that he was conflicted. *Id.* at \*8-11. The court determined that pursuant to RCW 11.48.010, the decision to arbitrate a dispute was consistent with a personal representative’s fiduciary duty.

To fulfil the duty to expeditiously settle an estate, TEDRA allows parties to petition a court for a determination of validity in order to obtain clarification as to the proper beneficiaries of the Estate assets. *See* RCW 11.96A.080. This is precisely what Reugh-Kovalsky and Gill did by notifying INWCF of the issue and appearing in the action to determine the validity of the trust. That action is still before the trial court with INWCF appearing to defend the validity of the trust. They have not breached a duty to INWCF, who still has a day in court to defend the unfunded trust. Reugh-

Kovalsky and Gill breached no fiduciary duty, especially to the remote residuary beneficiary of a trust that was never properly funded.

(c) There Was No Conflict of Interest Where the Trust Absolved Such Conflicts

There was no conflict to justify removing Reugh-Kovalsky and Gill as personal representatives of the Estate. Doing so violated Reugh's clear intent that his children and close friends should manage his affairs, regardless of their status as a beneficiary.

INWCF concedes that "personal representatives are entitled to receive gifts of estate assets as beneficiaries." INWCF br. at 23.<sup>11</sup> INWCF must also concede that Reugh absolved personal representatives of conflicts for making payments to themselves. CP 58, 60. This expressly includes "advancements" of estate property. *Id.* Therefore, the mere fact that Reugh-Kovalsky, as a named beneficiary with priority over an alleged residuary beneficiary, asserted her "own interest at INWCF's expense" is insufficient to create a conflict of interest. INWCF br. at 19. Any payment that comes out of Reugh's estate is "at the expense" of the residuary.

INWCF must also concede that Reugh granted the personal representatives "unrestricted" intervention powers, including the power to

---

<sup>11</sup> Indeed, it is clearly the law in Washington that a personal representative may also be a beneficiary of the estate. *See, e.g., In re Estate of Ehlers*, 80 Wn. App. 751, 911 P.2d 1017 (1996).

disclaim any interest of a beneficiary to the extent it was inconsistent with his estate plan. CP 47. But rather than merely disclaim the default residuary – who was inserted as a placeholder by Reugh’s lawyer while he was supposed to fund the trust and set up a charitable foundation – Reugh-Kovalsky and her siblings brought a TEDRA action to clarify the status of the Estate. That was her right as a personal representative pursuant to RCW 11.96A.080 and RCW 11.48.010, *supra*. Additionally, the Reugh-Kovalsky and Gill offered a sizeable sum, \$2.2 million dollars, to INWCF to resolve the issue before resorting to litigation (as was their right under RCW 11.48.010), thus attempting to limit expense to the Estate. Reugh-Kovalsky acted in good faith, and no conflict existed to warrant her forcible ouster.

(d) There Was No Basis to Remove Gill as Personal Representative

Gill is a long-time business partner of Reugh and is neither a beneficiary under Reugh’s Will or the Trust Instrument. The sole basis for removing Gill, according to the trial court was the fact that he “admitted the Petitioners’ allegations about the purported invalidity of the Trust.” CP 834. The best argument that INWCF can make regarding his involvement is that he is “aligned” with Reugh-Kovalsky. INWCF br. at 26. Yet, according to INWCF, Reugh-Kovalsky was properly ousted because she

advanced her “own interest at INWCF’s expense.” INWCF br. at 19. Gill has no interest, other than to see the intent of his friend and long-time business partner carried out. He has nothing to gain if the trust is declared invalid. And it runs contrary to Reugh’s intent that those close to him should run his estate with nonintervention powers. The trial court erred in imputing this “conflict” to Gill where none can exist.

(3) Appointing NWTM as Successor Trustee Was Improper

INWCF and NWTM are wrong that the trial court properly named NWTM as the successor. Doing so was wholly against Wendell Reugh’s intent, as evidenced by the nonintervention will itself and whatever intent can be gleaned from the unfunded *inter vivos* trust.

A trial court hearing an estate matter must not act in a way that “violates...the testator’s expressed intent.” *Rathbone*, 190 Wn.2d at 346. This not only includes the interpretation of a will, but the very decision to become “involve[d]” and “exercise...authority” at all in a dispute involving a nonintervention will.<sup>12</sup> *Id.*

Reugh’s estate plan made it clear that he intended his Estate to be

---

<sup>12</sup> Moreover, although not cited by either INWCF or NWTM, RCW 11.96A.125 gives courts express authority to reform the terms of a will or trust. But in *Matter of Estate of Meeks*, \_\_ Wn. App. 2d \_\_, 421 P.3d 963 (2018), this Court held that a court lacked authority under that statute to import terms into a valid will. It is no different here. In the guise of ousting the Estate’s co-personal representatives, the trial court was not free to alter the will’s clear direction for the selection of their successors.

managed by his family and close personal friends in several respects. First, pursuant to *Rathbone*, the nonintervention clause shows that Reugh clearly intended his chosen representatives to administer his affairs without outside interference.

Second, the Will included a successor clause which provided that in the event a personal representative became unable to serve, Reugh's "children shall, by majority vote, designate" one of three nominated successors to serve. CP 337. Here, the appointment of an outside trustee management company, a stranger to Reugh and his inner circle of friends and family, clearly violates that intent.

Third, even when it comes to the charitable residuary named in the Trust Instrument, the money would have merely been held by INWCF in "donor-advised fund" with Reugh's "three children as its initial advisors...[making] charitable distributions...primarily to the kinds of charitable organizations [Reugh gave] to during his lifetime." CP 56-57. Obviously, Reugh intended his family to be involved in deciding where his money went, not some outside company, forcibly imposed on the Estate, who did not know Reugh "during his lifetime." To that end, Reugh gave his personal representatives the power to disclaim the trust's default residuary entirely if his intent would not be served. CP 47. Surely Reugh would have wanted that clause exercised, had he known that control of his

affairs would be forcibly taken from his family and close personal advisors by INWCF and placed in the hands of a complete stranger like NWTM.

INCWF claims that NWTM is a “neutral party, but NWTM tips its hand, by only advancing arguments on supporting INWCF. Lost in the discussion is any breach of duty owed to Reugh’s longtime partner Doreen Decker – who is specifically named in the Will unlike INWCF. CP 44. Reugh-Kovalsky and Gill did not breach any duty owed to Decker, in fact they made interim payments to her under the trust because they believed, by naming her in the Will, Reugh intended to provide for her during her lifetime. *See* CP 245. Reugh-Kovalsky and Gill also kept Decker informed when the trust was challenged. CP 267-68.<sup>13</sup>

NWTM fails to mention these facts because it is clearly only concerned with INWCF’s remote interest in Reugh’s estate. It prioritizes the remote beneficiary of a savings clause in an improperly funded trust over Reugh’s family and most valued loved ones. Should the Court uphold the wrongful ouster of Reugh-Kovalsky and Gill, the case should be remanded with instructions to appoint a successor pursuant to the terms of the Will, allowing Reugh’s family to administer his affairs, as he intended.

---

<sup>13</sup> As noted *supra* the Reugh children informed Decker that should the trust be declared invalid, they planned to “personally reimburse the Trust on behalf of each beneficiary who has received a distribution so that each beneficiary may retain the amount they previously received.” CP 267.

(4) Reugh-Kovalsky and Gill Are Entitled to Fees

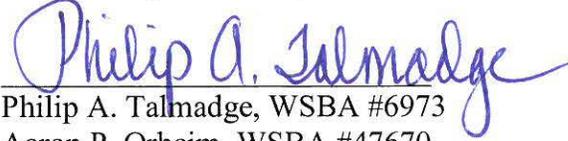
In another clear sign that NWTM misunderstands Reugh's intent, it argues that Reugh-Kovalsky and Gill engaged in "meritless litigation with the intent to override [Reugh's] desired property distribution at death." Not true. Reugh-Kovalsky and Gill were forced to defend their positions against a party who lacked jurisdiction to remove them due to conflicts that are non-existent, in the case of Gill, or specifically waived, in the case of Reugh-Kovalsky. They have encountered great expense to follow Reugh's clear intent in executing a nonintervention will that only his family and closest friends manage his affairs. INWCF's hostile takeover of the Estate is unjustified and warrants fees for the reasons stated in Reugh-Kovalsky and Gill's opening brief. *See* Reugh-Kovalsky and Gill br. at 42-44.

D. CONCLUSION

INWCF and NWTM disregard Reugh's clear intent and reveal their attempt to unjustly seize the bulk of his assets. The trial court erred in removing Reugh-Kovalsky and Gill. This Court should reverse that decision and award the Estate its fees and costs at trial and on appeal.

DATED this 7th day of August, 2018.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Aaron P. Orheim, WSBA #47670

Talmadge/Fitzpatrick/Tribe

2775 Harbor Avenue SW

Third Floor, Suite C

Seattle, WA 98126

(206) 574-6661

Amber R. Myrick, WSBA #24576

Amber R. Myrick, P.A.

1087 W. River Street, Suite 150

Boise, ID 83702

(208) 982-0005

Attorneys for Appellants

Reugh-Kovalsky and Gill

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Reply Brief of Appellants* in Court of Appeals, Division III Cause No. 35737-6 to the following by the method indicated below:

Amber R. Myrick  
Amber R. Myrick, P.A.  
1087 W. River Street, Suite 150  
Boise, ID 83702

Mary Schultz  
Mary Schultz Law, P.S.  
2111 E. Red Barn Lane  
Spangle, WA 99031

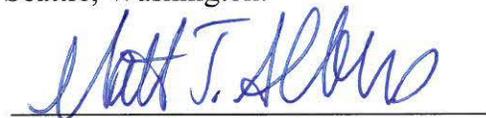
Nicholas S. Marshall  
Maximilian Held  
Ahrens DeAngeli Law Group LLP  
PO Box 9500  
250 S. Fifth Street, Suite 660  
Boise, ID 83707-9500

Peter A. Witherspoon  
James A. McPhee  
Witherspoon Brajcich McPhee, PLLC  
601 W. Main Avenue, Suite 714  
Spokane, WA 99201-0677

Original E-Filed with:  
Court of Appeals, Division III  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 7, 2018, at Seattle, Washington.



---

Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

**August 07, 2018 - 12:28 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35737-6  
**Appellate Court Case Title:** In re the Estate of K. Wendell Reugh  
**Superior Court Case Number:** 15-4-00471-1

**The following documents have been uploaded:**

- 357376\_Briefs\_20180807122618D3420392\_5773.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Reply Brief of Appellants.pdf*

**A copy of the uploaded files will be sent to:**

- Mary@mschultz.com
- amyrick@myricklawoffice.com
- jmcpee@workwith.com
- matt@tal-fitzlaw.com
- mheld@adlawgroup.com
- nmarshall@adlawgroup.com
- pwitherspoon@workwith.com
- rclayton@workwith.com
- tina@mschultz.com
- todonnell@myricklawoffice.com

**Comments:**

Reply Brief of Appellants Reugh-Kovalsky and Gill

---

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

**Note: The Filing Id is 20180807122618D3420392**